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Synthesis of Louisiana Law on Spoliation of Evidence—Compared to the Rest of the Country, Did We Handle It Correctly?

Maria A. Losavio

I. INTRODUCTION

Spoliation of evidence is "the destruction or the significant and meaningful alteration of a document or instrument." It is a dreaded situation where a critical piece of evidence is found to be missing, either as the result of an intentional act or through someone’s negligence. This most commonly occurs in products liability cases and medical malpractice cases, although it can occur in any civil matter. Many courts have held that a plaintiff who alleges such destruction of evidence has stated a cause of action for interference with a civil lawsuit by spoliation of evidence. As stated in La Raia v. Superior Court, one does not state a claim for physical injuries due to the spoliation of evidence, but rather for "damage done to [the] lawsuit by destruction of the evidence."
The spoliation-of-evidence claim may be brought under tort law or contract law.⁷

Spoliation of evidence is a growing concern throughout Louisiana and the nation. This comment is designed to be a brief introduction to the history of spoliation of evidence, so that a more thorough analysis of recent cases may be addressed.⁸ This comment will explore this developing area of the law by discussing how other jurisdictions have handled it and by comparing those approaches to Louisiana jurisprudence. The numerous factors courts have considered in deciding whether to recognize the new tort⁹ will be analyzed to demonstrate why some jurisdictions, including Louisiana, have been reluctant to adopt spoliation of evidence as a separate tort. Once the cause of action is recognized, various procedural hurdles, including statutes of limitation, must be overcome. These procedural issues are also discussed. Finally, this comment will explore other remedies and sanctions as an alternative to recognition of a new tort. The ineffectiveness and inadequacies of such alternative remedies will be discussed throughout the comment, which necessitates in this writer's opinion, the recognition of spoliation of evidence as a separate tort.

II. OTHER JURISDICTIONS

A. History/Development of Spoliation of Evidence as a New Tort

1. Intentional Spoliation of Evidence

One of the first cases to discuss the destruction of evidence was Armory v. Delamirie.¹⁰ Armory is an early English bailment case in which a piece of jewelry was deposited with a jeweler for appraisal. The jeweler had failed to return the jewel to the plaintiff, and since there was no appraisal of its worth, he was unable to prove damages. The court instructed the jury that there was a strong presumption against the jeweler, which allowed the highest award for the

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⁷ (Cal. Ct. App. 1993) (holding that a spoliation-of-evidence cause of action is based upon injury to plaintiff's property interests, not personal injury).


⁹ The scope of this comment will be limited to spoliation of civil evidence, although there will be some reference to approaches taken in criminal cases for purposes of analogy, as well as some guidance from criminal code sanctions. This comment will not discuss court-ordered destructive testing procedures; however, some of the cases examined in the comment involve destructive testing (without a court order) by a party to the suit or by an expert witness.

¹⁰ Those critical factors include: (1) intentional versus negligent spoliation, (2) duty to preserve the evidence, (3) availability of alternative remedies, (4) prejudicial injury, and (5) spoliation by a party to the original lawsuit versus by a third party.

possible value of the jewel. The court in Armory did not recognize a new tort; however, it was willing to impose remedies for the wrong that had occurred—spoliation of evidence. For several decades, such an adverse presumption was one of the only methods the courts utilized to combat the destruction or alteration of evidence in civil litigation.

In 1984, the era of intentional spoliation of evidence truly began. In Smith v. Superior Court, a California court recognized the tort of intentional spoliation of evidence for the first time. In Smith, a foreign object flew off a preceding vehicle and crashed into plaintiff's van as she was driving. Thereafter, plaintiff's van was towed to the dealer for repair where the dealer agreed with plaintiff's counsel to preserve the van parts for physical evidence while further investigation took place. Some time later, however, the dealer lost or destroyed the evidence, which prohibited the plaintiff's expert from examining it. Under the facts, the court felt it was appropriate to recognize the new tort of intentional spoliation of evidence since the spoliator was a third party, and any sanction would be futile. In doing so, the court discussed criminal and other sanctions which might be imposed, finding each a minimal deterrence where the third party intentionally destroyed evidence and thereby stood to gain substantially by that destruction. The court also considered the devastating effect spoliation of evidence has to the opposing party.

Smith was followed in 1986 when Alaska recognized the tort of intentional spoliation of evidence in Hazen v. Municipality of Anchorage. Hazen involved a taped recording between plaintiff and an undercover police officer. The municipal prosecutor in the case promised to preserve the tape in anticipation of a possible civil lawsuit. Later it was discovered that the tape had been tampered with, making critical parts of it inaudible. Thus, the court found that a cause of action in tort existed against the city and the prosecutor for "intentional interference with a prospective civil action by spoliation of evidence."

Since these two threshold cases, courts across the country have been forced to decide whether to recognize the tort. Although it has been a piecemeal process, the cause of action has been recognized in several states as a new tort. Thus far, the following states have specifically recognized the separate tort of intentional spoliation of evidence: California, Alaska, Ohio.

11. Id.
13. Id. at 831.
14. See infra note 138 and accompanying text.
15. Smith, 198 Cal. Rptr. at 834-35.
17. Id. at 458-59.
18. Id. at 463.
Indiana, Kansas, Florida, and New Mexico. The Texas appellate courts are split on this issue. One appellate court in Texas recognized the claim as a new cause of action in Ortega v. Trevino; however, see Malone v. Foster, holding that Texas does not recognize the tort of spoliation of evidence and criticizing Ortega. The Texas Supreme Court has not had the issue before it to decide the fate of this claim in Texas.

The Illinois Supreme Court, in Rodgers v. St. Mary's Hospital of Decatur, recognized "an implied statutory cause of action for spoliation of evidence" where a hospital failed to maintain x-rays in violation of that state's X-Ray Retention Act. Although not called "spoliation of evidence," Michigan recognized the tort of "interference with economic relations" in Jackovich v. General Adjustment Bureau, Inc., and New Jersey recognized the tort of "intentional concealment of evidence" in Viviano v. CBS. Both of these torts deal with the destruction of evidence. There are also several states which have inferred that, should the right case come before the courts, they would recognize it. Only two states have expressly refused to recognize intentional spoliation of evidence as an independent tort. Most states have allowed a jury instruc-

tion that gives an adverse inference against the spoliator without recognizing intentional spoliation of evidence as a separate tort action, while other states have imposed a conclusive presumption of negligence against the spoliator. A New Jersey court in *Viviano v. CBS, Inc.* extended the new tort beyond intentional spoliation of evidence to include the "willful concealment of evidence." To state a claim for intentional or fraudulent concealment of evidence, plaintiff must demonstrate the following elements:

1. defendant had a legal obligation to disclose the evidence;
2. the undisclosed evidence was material to the plaintiff's case;
3. plaintiff could not have readily learned about the evidence without disclosure by the defendant;
4. defendant intentionally failed to disclose the evidence; and
5. reliance on the nondisclosure resulted in harm to the plaintiff.

The facts of *Viviano* involved an employee injured in a work-related accident who brought a products liability suit against the manufacturer. During the course of her employment, a memorandum was inadvertently discovered that indicated the proper manufacturer-defendant. The memo further revealed that her
employer had intended to conceal this information from the employee-plaintiff.\textsuperscript{37} A separate suit was brought against her employer in which the court found that her employer had fraudulently concealed the evidence, and damages were awarded.\textsuperscript{38} The court in Viviano analogized plaintiff’s cause of action to spoliation of evidence.\textsuperscript{39} Both torts are “designed to remediate tortious interference with a prospective economic advantage.”\textsuperscript{40} However, one court has refused to extend the concealment tort to the defendant’s ability to defend a lawsuit, holding instead that it is only applicable to protecting the plaintiff’s prospective claims.\textsuperscript{41}

2. Negligent Spoliation of Evidence

Even prior to the recognition of intentional spoliation of evidence, California recognized negligent spoliation of evidence as a separate tort as early as 1983 in Williams v. State.\textsuperscript{42} Although the court in Williams found that there was no duty to preserve the evidence, the court stated that it would recognize negligent spoliation of evidence if there was a duty to preserve.\textsuperscript{43} In 1985, California confirmed that recognition in Velasco v. Commercial Building Maintenance Co., but again found no duty.\textsuperscript{44} Negligent spoliation of evidence as a separate tort was also recognized by Florida in Bondu v. Gurvich.\textsuperscript{45} The court in Bondu found that a hospital had a duty to preserve the patient’s medical records\textsuperscript{46} and a breach of that duty resulted in the plaintiff’s loss of her medical malpractice claim. Since plaintiff proved prejudicial injury from the failure to preserve the medical records, the court recognized a separate action against the hospital for negligent spoliation of evidence.\textsuperscript{47}

Unlike intentional spoliation of evidence, negligent spoliation of evidence as a separate tort has not been recognized beyond the states of California and Florida. Some states have failed to recognize it because the facts did not support it, but have inferred that the court would recognize the separate tort claim if the proper facts were before it.\textsuperscript{48} Rather than recognizing a separate tort claim,

\begin{itemize}
  \item \textsuperscript{37} Viviano, 597 A.2d at 545-46.
  \item \textsuperscript{38} Id. at 547.
  \item \textsuperscript{39} Id. at 549. See also Hirsch, 628 A.2d at 1115 (stating that the tort of fraudulent concealment of evidence is analogous to the tort of intentional spoliation of evidence).
  \item \textsuperscript{41} Id.
  \item \textsuperscript{42} 664 P.2d 137 (Cal. 1983).
  \item \textsuperscript{43} Id. at 141.
  \item \textsuperscript{44} 215 Cal. Rptr. 504 (Cal. Ct. App. 1985).
  \item \textsuperscript{45} 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984).
  \item \textsuperscript{46} Id. at 1312-13.
  \item \textsuperscript{47} Id. at 1313.
  \item \textsuperscript{48} See generally Estate of Day v. Willis, 897 P.2d 78 (Alaska 1995) (finding that plaintiff could not state a claim for the underlying cause of action; therefore, the spoliation-of-evidence claim must also fail); Sweet v. Sisters of Providence, 895 P.2d 484 (Alaska 1995) (implying that had the
some courts are recognizing a claim for negligent spoliation of evidence under traditional principles of negligence. Other states have chosen to grant a presumption or inference against the spoliator rather than recognizing a separate tort claim. Still other courts have shifted the burden of proof where there is negligent spoliation of evidence.

The above section was an overview of the recognition by various states of both intentional and negligent spoliation of evidence as a separate tort. The next section of this comment will discuss the various factors which the court examines when determining whether to recognize the claim as a viable cause of action. These factors include whether the spoliation was done through intentional acts or negligent acts; whether a duty to preserve the evidence existed; whether alternative remedies are available; whether there is prejudicial injury and damages; and whether the spoliator was a party or a third party.

B. Factors Examined by the Courts in Deciding Whether to Recognize Spoliation of Evidence as a Separate Tort

1. Intentional Spoliation and Bad Faith

One of the key factors a court reviews in determining whether to allow a separate tort claim is whether the spoliation was done intentionally or negligently. The idea of someone intentionally destroying or altering evidence leaves a malicious impression, which usually leads to the imposition by the court of harsher remedies than where someone negligently spoliates evidence. Several states...
have expressly recognized a separate tort for intentional spoliation of evidence. Those states include California, Alaska, Ohio, Indiana, Kansas, Florida, and New Mexico. In addition, Illinois recognized “an implied statutory cause of action for spoliation of evidence;” New Jersey recognized a separate tort for “intentional concealment of evidence”; and Michigan recognized a separate tort for “intentional interference with economic relations.”

The elements of intentional spoliation of evidence are as follows: (1) pending or probable litigation involving the plaintiff; (2) knowledge by the defendant of the existence or likelihood of the litigation; (3) intentional “acts of spoliation” on the part of the defendant designed to disrupt the plaintiff’s case; (4) disruption of the plaintiff’s case; and (5) damages proximately caused by the acts of the defendant. In addition to those elements, the courts that have recognized intentional spoliation of evidence as a tort emphasized that there must be a duty to preserve the evidence.

Another element required is a willful purpose of the spoliator to interfere with the plaintiff’s litigation. The court in Smith v. Howard Johnson held that for the cause of action to exist, there must be a “willful destruction of evidence by defendant designed to disrupt plaintiff’s case.”

Such willful intent may be

64. See Smith v. Superior Court, 198 Cal. Rptr. 829 (Cal. Ct. App. 1984) and Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986) (holding that a duty existed because the spoliator had promised to preserve the evidence); Levinson v. the Citizens Nat’l Bank of Evansville, 644 N.E.2d 1264 (Ind. Ct. App. 1994) (stating that Indiana recognizes the tort of intentional spoliation of evidence, but only where a duty exists and no such duty was found in that case).
65. 615 N.E.2d 1037, 1038 (Ohio 1993).
found when the spoliator had notice or knowledge of the pending or potential litigation.\textsuperscript{66}

Rather than recognizing a new tort, other states have allowed an adverse inference or presumption against the spoliator where there is intentional conduct on the part of the spoliator.\textsuperscript{67} The missing evidence is presumed to be unfavorable to the spoliator. The court in \textit{Sulliyan v. General Motors Corp.} stated that the spoliation of evidence must be "intentional and for the purpose of depriving the opposing party of evidence in order to create an adverse inference..."\textsuperscript{68} Some courts refer to this adverse inference as the "evidentiary spoliation doctrine."\textsuperscript{69}

Of those cases that impose the adverse inference or presumption, many require bad faith on the part of the spoliator.\textsuperscript{70} As stated in \textit{Thurman-Bryant Electric Supply Co. v. Unisys Corp.}, "[s]uch a presumption or inference arises only where the spoliation or destruction was intentional, and indicates fraud and a desire to suppress the truth..."\textsuperscript{71} Even in such a case, the court in \textit{Thurman-Bryant} held that such a presumption was rebuttable.\textsuperscript{72} The most lenient courts have allowed the adverse presumption only if there was no satisfactory explanation offered by the intentional spoliator.\textsuperscript{73}

\textsuperscript{66.} Id.

\textsuperscript{68.} 772 F. Supp. 358, 362 (N.D. Ohio 1991) (quoting Banks v. Canton Hardware Co., 103 N.E.2d 568, 573 (Ohio 1952)).


\textsuperscript{71.} \textit{Thurman-Bryant}, 1991 WL 222256, at *5.

\textsuperscript{72.} \textit{Id.} See also Brewer v. Dowling, 862 S.W.2d 156, 159 (Tex. App. 1993) (holding that a rebuttable presumption is appropriate).

\textsuperscript{73.} See, e.g., Stanosev v. Ebasco Servs., Inc., 643 F.2d 914 (2d Cir. 1981); Vick v. Texas
Some courts allow a shift of the burden of proof where the evidence has been intentionally spoliated. Another manner of combating the prejudicial injury resulting from such destruction of evidence is a presumption of liability. Several courts have ruled that the intentional destruction of evidence warrants a presumption of negligence and/or causation against the spoliator.

2. Negligent Spoliation

Negligent spoliation of evidence has been treated with much more kindness by the courts. In general, courts view the negligent act as more benign than that of the intentional wrongdoer. Only two states have recognized the cause of action of negligent spoliation of evidence as an independent tort. Those states are California and Florida. One court has specifically refused to adopt the cause of action as a new tort.

Many courts have refused to recognize a negligent-spoliation-of-evidence claim because the specific facts lacked one or more of the elements required. The elements of negligent spoliation of evidence are as follows: (1) existence of a fact presumed where defendant negligently destroyed medical records; and (2) the trial court failed to maintain medical records. The court only allowed a presumption that the evidence was unfavorable to the spoliator.

Employment Comm., 514 F.2d 734 (5th Cir. 1975); United States v. Coplon, 185 F.2d 629, 637 (2d Cir. 1950) (finding that the spoliator's routine practice of destroying the original records of wiretappings after thirty to sixty days was a satisfactory explanation). See also DeLaughter v. Lawrence County Hosp., 601 So. 2d 818, 821 (Miss. 1992) (each inferring that a routine explanation would make the adverse presumption inapplicable); Brown v. Hamid, 856 W.W.2d 51, 57 (Mo. 1993); and Thurman-Bryant, 1991 WL 222256, at *5.

74. E.g., Amlan, Inc. v. Detroit Diesel Corp., 651 So. 2d 701 (Fla. Dist. Ct. App. 1995). But see DeLaughter v. Lawrence County Hosp., 601 So. 2d 818 (Miss. 1992) (finding that reversible error where the trial court gave an impermissible irrebuttable presumption-of-negligence jury instruction and further holding that there is no shifting of the burden of proof where the hospital negligently failed to maintain medical records. The court only allowed a presumption that the evidence was unfavorable to the spoliator.)


of a potential civil action; (2) a legal or contractual duty to preserve the evidence relevant to the potential civil action; (3) a breach of duty by destruction of the evidence; (4) a prejudicial injury; (5) a causal connection between the destruction of the evidence and the injury; and (6) damages. All of these elements must be satisfied for a court to recognize the tort.

One case that held that there was no existence of a potential civil action was *Burns v. Cannondale Bicycle Co.* The court found that at the time the bicycle repairman discarded the evidence, no lawsuit had been brought against the manufacturer, and the plaintiff had not notified the repairman of the potential lawsuit.

Numerous courts have not recognized negligent spoliation of evidence because on the facts of the case no duty to preserve the evidence existed. Other courts have found that the spoliation of evidence was not a proximate cause of the injury. The court in *Petrik v. Monarch Printing Corp.* concluded that it did not have to “decide whether Illinois law would recognize a spoliation tort because the lack of an indispensable element of the tort [i.e., causation] is fatal to the plaintiff's claim.” Other cases have held that spoliation of evidence resulted in no prejudicial injury. Finally, some courts have refused

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81. In addition, the court found the repairman had no duty to preserve the evidence.
83. See, e.g., Murray v. Farmers Ins. Co., 769 P.2d 101, 107 (Idaho 1990) (holding that the jury found the plaintiffs would not have won their case against the manufacturer and thus the alleged legal malpractice was not a proximate cause of the injury); Chidichimo v. University of Chicago Press, 681 N.E.2d 197 (Ill. App. Ct. 1997) (holding that the destroyed records did not cause plaintiff to be unable to prove the underlying suit); Petrik v. Monarch Printing Corp., 501 N.E.2d 1312, 1321 (Ill. App. Ct. 1986) (holding that the former employee failed to plead a nexus between the destruction of the ledger books and alleged wrongful discharge and, therefore, did not prove any injury as a proximate cause resulting from the destruction of evidence); and Brown v. Hamid, 856 S.W.2d 51, 55-56 (Mo. 1993) (holding that there was no causal connection between the missing medical records and the alleged medical malpractice).
85. Id. (holding that the plaintiff had “no cause of action for destruction of evidence in [the] case because she suffered no significant impairment in an ability to prove the underlying lawsuit”). See also Continental Ins. Co. v. Herman, 576 So. 2d 313, 314-15 (Fla. Dist. Ct. App. 1990) (holding
to recognize spoliation of evidence because of the potential for speculative damages under the facts of the case.\textsuperscript{86}

A majority of the courts that have allowed an action for negligent spoliation of evidence have granted a presumption against the spoliator.\textsuperscript{87} Some courts base their reasoning on "contra spolatorem omnia praesumuntur," which translates to "all things presumed against the destroyer."\textsuperscript{88} Even if the court finds negligent spoliation has occurred, there is no consensus as to whether bad faith must also be found for the presumption to apply. A Massachusetts court, in \textit{Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc.}, held that bad faith was not required for the inference or presumption to be imposed against the spoliator,\textsuperscript{89} but did require proof that the spoliator "had notice that the documents were relevant at the time he failed to produce them or destroyed them."\textsuperscript{90} Other cases, however, have required bad faith for the inference or presumption to be given.\textsuperscript{91}

Once the presumption has been allowed, the courts are split whether this presumption creates a prima facie case in favor of the plaintiff.\textsuperscript{92} The court in \textit{Stanojev v. Ebasco Services, Inc.} held that the adverse presumption was not enough to meet plaintiff's burden of proof that he had been discriminated against on the basis of age.\textsuperscript{93} In contrast, \textit{Public Health Trust of Dade County v. Valcin}, 507 So. 2d 596 (Fla. 1987) (holding that destruction of the evidence did not prejudice plaintiff); \textit{Delaughter v. Lawrence County Hosp.}, 601 So. 2d 818 (Miss. 1992). See also supra notes 67, 70 and accompanying text (discussing bad faith requirement for intentional spoliation of evidence).
Valcin held that the adverse presumption shifts the burden of proof onto the spoliator, but is rebuttable.94

Other courts have found that the adverse presumption is inapplicable where a reasonable explanation for the spoliation of evidence is given;95 where the spoliator had no duty to preserve the evidence;96 or where the party upon whom the inference would be imposed had no control over the spoliator.97

Another basis some courts have stated for not recognizing negligent spoliation of evidence as a separate tort is that the claim can be stated under traditional negligence law.98

3. Duty to Preserve the Evidence

For both intentional spoliation and negligent spoliation, an essential element to the plaintiff's case is a duty to preserve the evidence on the part of the spoliator. Such a duty can be imposed by statute, by contract, or by law. In line with this reasoning, the court in Koplin v. Rosel Well Perforators, Inc. held that Kansas would only recognize the cause of action for a separate tort of "intentional interference with a prospective civil action by spoliation of evidence" where

the court did not find any nexus between the missing personnel records and the allegation of age discrimination, as well as the court stating that the defendant offered a reasonable explanation for the missing records. Id. See also DeLaughter v. Lawrence County Hosp., 601 So. 2d 818 (Miss. 1992) (finding that reversible error existed where the trial court gave an impermissible irrebuttable presumption-of-negligence jury instruction and further holding that there is no shifting of the burden of proof where the hospital negligently failed to maintain medical records. The court only allowed a presumption that the evidence was unfavorable to the spoliator.).

94. 507 So. 2d 596, 599-601 (Fla. 1987) (involving a plaintiff in a medical malpractice claim against a hospital who sought relief from the court for destruction of medical records). See also Welsh v. United States, 844 F.2d 1239, 1248 (6th Cir. 1988) (holding that, "The burden shifts to the defendant-spoliator to rebut the presumption and disprove the inferred element of plaintiff's prima facie case"). The court in Welsh went on to state that the policies underlying the doctrine of res ipsa loquitur support the granting of a rebuttable presumption to the negligent spoliator. Id. at 1248-49.

95. E.g., United States v. Coplon, 185 F.2d 629, 637 (2d Cir. 1950) (finding that the spoliator's routine practice of destroying the original records of wire tapping after thirty to sixty days was a satisfactory explanation); Stanovjev v. Ebasco Servs., Inc., 643 F.2d 914 (2d Cir. 1981); Vick v. Texas Employment Comm., 514 F.2d 734 (5th Cir. 1975). See also Brown v. Harid, 856 S.W.2d 51, 57 (Mo. 1993); Thurman-Bryant Elec. Supp. Co. v. Unisys Corp., No. 03A01-CV00152, 1991 WL 222256, at *5 (Tenn. Ct. App. Nov. 4, 1991); and Delaughter, 601 So. 2d at 821 (each inferring that a routine explanation would make the adverse presumption inapplicable).


97. Sec. e.g., Townsend v. American Insulated Panel Co., Inc., 174 F.R.D. 1 (D. Mass. 1997) (holding that plaintiff was not subject to sanction for spoliation of evidence where plaintiff did not have any control over the evidence); Transamerica Ins. Group v. Maytag, Inc., 650 N.E.2d 169 (Ohio Ct. App. 1994) (reversing the trial court's dismissal where the evidence was not under the insurance company's control at the time the destruction occurred; rather, a less severe sanction was appropriate under the facts of the case).

the facts of the case indicated there was a "contract, agreement, voluntary assumption of duty, or special relationship of the parties." 99

State statutes that require the retention of patients' medical records and x-rays for a specified period of time have been at issue in many medical malpractice cases. It has been successfully argued that those statutes impose a duty upon the health care providers to preserve the medical records and x-rays. Rodgers v. St. Mary's Hospital of Decatur involved an Illinois statute that mandated that hospitals retain x-rays for at least five years. When a patient's x-rays were found to be missing, the court recognized that the plaintiff had a cause of action against the hospital for breach of that duty. 100 The court in Rodgers, however, chose to decide the case on statutory grounds instead of basing its decision on a separate tort. 101 Thus, the Illinois Supreme Court in Rodgers "recognized an implied statutory cause of action for spoliation of evidence under the X-Ray Retention Act..." 102

Bondu v. Gurvich was a case that did recognize the separate tort of negligent spoliation of evidence when there was a breach of a statutory duty to preserve medical records. 103 Rather than recognizing a separate tort action, the court in Delaughter v. Lawrence County Hospital granted an adverse inference against the spoliator when the medical records were only negligently destroyed. 104 Brewer v. Dowling allowed a rebuttable adverse presumption, 105 but limited that adverse presumption to intentional spoliation of evidence, and refused to extend such a presumption under the facts because the medical records were merely missing and not intentionally destroyed. 106 It is interesting to note that the court in Brewer never discussed any statutory duty to retain the medical records; therefore, assuming such a statute had existed in Texas, the court might have held differently. 107

Another statutory duty was imposed by a court in General Cinema Beverages of Miami, Inc. v. Mortimer under Florida's workers' compensation laws which required the employer to "cooperate with an employee in investigat-

100. 597 N.E.2d 616, 620 (Ill. 1992).
101. Id. See also, Harrison v. Davis, 478 S.E.2d 104 (W. Va. 1996) (declining to determine whether the defendant hospital had a duty to preserve the medical records since the claim was time barred; therefore the court did not have to reach the determination as to the recognition of spoliation of evidence as a separate claim).
104. 601 So. 2d 818, 821 (Miss. 1992).
105. 862 S.W.2d 156, 159 (Tex. App. 1993).
106. Id. at 160. To a certain extent, this case can be criticized for encouraging "missing" documents.
107. See also Brown v. Hamid, 856 S.W.2d 51 (Mo. 1993) (en banc) (involving medical records that were missing before the medical records retention statute went into effect). The court in Brown did not find any independent duty to maintain medical records. Instead, the court stated that under the facts of this case "[a] medical malpractice action [was] an adequate remedy." Id. at 57.
ing and prosecuting claims against a third-party tortfeasor.\textsuperscript{108} Although only an adverse inference was applied in Estate of LeMay v. Eli Lilly & Co., the court found a statutory duty existed under the Code of Federal Rules, requiring the manufacturer to preserve a medical device.\textsuperscript{109} The court further noted that the adverse inference could be sufficient to infer liability, thereby precluding summary judgment for the manufacturer.\textsuperscript{110}

Besides duties imposed by statutes, contractual or legal duties may be imposed. A legal duty may also be imposed as a result of an attorney/client relationship.\textsuperscript{111} One such duty was found in Murray v. Farmers Ins. Co.,\textsuperscript{112} where plaintiff instituted a legal malpractice claim against his former attorney for failure to have an automobile examined prior to its destruction. The plaintiff contended that once the car was destroyed before examination by his expert, the plaintiff’s products liability claim against the manufacturer was precluded.\textsuperscript{113} The court found that there was a duty to preserve the evidence, but no causation element was lacking as plaintiff failed to prove he probably would have won his lawsuit against the automobile manufacturer.\textsuperscript{114} The approach in Murray is consistent with the approach in most states.\textsuperscript{115} In a legal malpractice claim, the plaintiff must first prove he would have won the underlying lawsuit to show any prejudicial injury as a result of the legal malpractice.

A contractual duty was found in Miller v. Allstate Ins. Co.\textsuperscript{116} Miller involved an automobile accident which resulted in a potential products liability claim against the automobile manufacturer. A verbal agreement was reached between plaintiff’s father and the insurance agent whereby the agent promised to preserve the car and make it available for plaintiff’s expert to inspect. However, before the inspection could take place, the insurance company sold the car to a salvage yard where it was destroyed.\textsuperscript{117} Thus, the court held that the insurance company breached its contractual agreement and, therefore, the plaintiff


\textsuperscript{109} 960 F. Supp. 183 (E.D. Wis. 1997). Note: Plaintiff did not plead the separate tort of spoliation of evidence.

\textsuperscript{110} Id. at 186.


\textsuperscript{112} Id.

\textsuperscript{113} Id. at 103.

\textsuperscript{114} Id. at 107.


\textsuperscript{116} 573 So. 2d 24 (Fla. Dist. Ct. App. 1990).

\textsuperscript{117} Id. at 25-26.
was entitled to the legal protection of a separate breach-of-contract claim. The court compared this case to *Bondu* and the contractual duty imposed by agreement in that case. Under either a duty imposed by agreement or a duty imposed by law, the court concluded that "the plaintiff's interests are entitled to legal protection against defendant's conduct"; "That the duty arises from a valid contract, rather than a statute or administrative regulation, is no basis for a different result." Besides a statutory, legal, or contractual duty, a duty may be created through a special relationship or a voluntary assumption. That is, if a party promised to preserve evidence which is later destroyed, courts have held that a duty was created by the parties' promissory relationship. 

While the above-mentioned cases held that a duty existed, *Walsh v. Caidin* found no duty to preserve the evidence on the part of the spoliator. *Walsh* involved a surviving spouse who cremated her deceased husband's remains despite requests from medical malpractice defendants for an autopsy. The court stated that the wife had sole authority over the disposition of the body, and thus she owed no legal duty to have an autopsy performed "because the law does not treat a human dead body as merely another form of physical evidence." Another line of cases which has routinely held that no duty exists is those involving worker's compensation and spoliation by a third party. Numerous courts have held that neither ordinary tort law nor a state's workers' compensation act imposes a duty on the employer to preserve evidence that might be used in an employee's third-party claim. The reasoning used by the courts in these cases is based on the premise that a third-party spoliator (i.e., the employer) usually does not have any interest in the outcome of the original lawsuit and often is unaware of the possibility of a potential lawsuit. However, the court in *Weigl v. Quincy Specialties Co.* implied that an employer would have a duty to preserve the evidence if he had been informed of the pending lawsuit and was given notice to preserve the evidence. The court in *General Cinema**
Beverages of Miami, Inc. v. Mortimer found that a statutory duty existed under Florida state law, requiring the employer to cooperate in the employee's investigation and prosecution of claims against a third party. The court in Viviano v. CBS, Inc. went even further, imposing an affirmative duty upon the employer to not conceal evidence relevant to a third-party action.

4. Availability of Alternative Remedies

Another factor that plays an important role in the court's decision of whether to recognize the separate tort of spoliation of evidence is the availability of alternative remedies. The court in La Raia v. Superior Court of Maricopa held that available tort law was sufficient to remedy the wrong. However, in La Raia, plaintiff sued for physical injury resulting from the spraying of outdoor roach spray inside her apartment and the subsequent intentional destruction of the can of roach spray by the defendant. The court noted that spoliation of evidence has only been recognized where plaintiff is suing for interference with an ongoing or potential lawsuit, not physical damages. Thus, the court was correct when it stated that a traditional tort claim is an appropriate remedy for personal injury damages because a spoliation-of-evidence claim does not compensate for damages to the person whereas a traditional tort claim does. The plaintiff in La Raia did not allege any interference with ongoing litigation as the result of the destruction of the evidence.

The court in Brown v. Hamid stated that the appropriate remedy for the negligent spoliation of medical records in that case was a medical malpractice action against the defendant physician. One explanation for the court's opinion may be that the Missouri statute which required retention of the medical records had not been in effect at the time the spoliation occurred. Thus, the court found no duty existed for the physician to preserve the medical records. Also, the court in Brown found no causal connection between the missing medical records and the medical malpractice claim. The courts have consistently held that where no duty is found, they will not recognize spoliation of evidence as a separate tort.

Miller v. Montgomery County is another case that refused to recognize intentional spoliation of evidence as a separate tort because there was an alternative remedy available; i.e., a jury instruction of an adverse presumption...
or inference against the spoliator.\textsuperscript{131} For this reason, several courts have allowed the adverse presumption rather than recognizing negligent and intentional spoliation of evidence as independent torts.\textsuperscript{132}

Another alternative remedy some courts have allowed is a shifting of the burden of proof.\textsuperscript{133} Such a shifting of the burden of proof is obviously more onerous on the spoliator than a simple rebuttable presumption. In fact, several courts have held that the adverse presumption is enough to prove plaintiff's prima facie case.\textsuperscript{134}

Where there is an alternative remedy, some courts have held that the recognition of spoliation of evidence as a separate tort is unnecessary.\textsuperscript{135} However, one court emphasized that the fact that "other remedies exist does not necessarily preclude [the court] from creating a new tort for further redress."\textsuperscript{136} The court in \textit{Federated Mutual} further stated that the "rationale for this new tort is that a potential civil action is deemed an interest worthy of legal protection from undue interference."\textsuperscript{137} Thus, since a potential civil action is worthy of legal protection, other available remedies should not hinder the courts from recognizing the separate tort of spoliation of evidence under the rationale of \textit{Federated Mutual}. Furthermore, those courts embracing this new tort recognized the shortcomings of the traditional remedies.\textsuperscript{138} For example, discovery sanctions are not available where the spoliator is a third party and sanctions do not compensate the plaintiff for the prejudicial injury he has lost as a result of the spoliation.

5. Prejudicial Injury/Causation

Before a court will recognize spoliation of evidence, grant the evidentiary spoliation doctrine of adverse presumption, or allow an alternative remedy, it must find that the plaintiff was prejudiced by the defendant's conduct. Unfortunately, prejudicial injury is often difficult to prove.\textsuperscript{139}

\begin{flushleft}
\textsuperscript{132} See Welsh v. United States, 844 F.2d 1239 (6th Cir. 1988); Nation-Wide Check Corp. v. Forest Hills Distr. Inc., 692 F.2d 214 (1st Cir. 1982); Public Health Trust of Dade County v. Valcin, 507 So. 2d 596 (Fla. 1987); DeLaughter v. Lawrence County Hosp., 601 So. 2d 818 (Miss. 1992); Brown v. Hamid, 856 S.W.2d 51 (Mo. 1993); Brewer v. Dowling, 862 S.W.2d 156 (Tex. App. 1993).
\textsuperscript{133} See \textit{supra} notes 34, 51, 75 and infra note 173 and accompanying text.
\textsuperscript{134} See \textit{supra} notes 34, 51, 75 and infra note 174 and accompanying text.
\textsuperscript{137} Id. See also Coleman v. Eddy Potash, Inc., 905 P.2d 185 (N.M. 1995).
\textsuperscript{139} See, e.g., Sussman v. American Broadcasting Co., Inc., 971 F. Supp. 432 (C.D. Cal. 1997) (holding no underlying cause of action remained to which a claim for spoliation of evidence could
In *Mayfield v. Acme Barrel Co.*, the court stated that "an indispensable prerequisite to the maintenance of [a spoliation-of-evidence] action . . . is a showing of an actual injury proximately caused by the loss or destruction of the evidence in question . . . ." 140 "The threat of some future harm that has not yet been realized is insufficient to satisfy this element . . . ." 141 In fact, speculative injury was the basis for denying the plaintiff a spoliation-of-evidence claim in *Williams v. Dunagan*. 142 The court in *Williams* stated that the plaintiff only showed a "‘possibility’ that further inspection of the ladder might have revealed a defect which caused the accident." 143 *Williams* may be explained by the fact that Ohio required a high level of proof; i.e., the plaintiff must prove that the destroyed evidence would have allowed him to win the underlying suit. 144

As the *Williams* case illustrates, there may be different levels of proof required by the courts in order for prejudicial injury to be found. The court in *Williams* required the following elements to be proved by the plaintiff in a negligent-spoliation-of-evidence claim: "1) the absence of the destroyed evidence or the destruction of the evidence made it impossible for plaintiff to pursue the separate civil action; and 2) plaintiff could prove that the destroyed evidence was of such a nature as to enable successful pursuit of the civil action." 145 This is a very high level of proof. The Supreme Court of Illinois rejected such a stringent standard, and instead required a showing that plaintiff had "a reasonable probability of succeeding in the underlying action." 146

A slightly different level of proof was required by the court in *Continental Ins. Co. v. Herman*. 147 There the plaintiff had to prove that the negligent destruction of evidence significantly impaired plaintiff's ability to prove the underlying lawsuit. 148 Since the plaintiff won at an arbitration hearing, the

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141. *Id.*
142. *Id.*
143. *Id.* at *2.
144. *Id.*
145. *Id.* (emphasis added). *See also* Ortega v. Trevino, 938 S.W. 2d 219, 222 (Tex. App. 1997) (requiring plaintiff to show that "absent the [spoliation], he would have been entitled to judgment in the underlying action and the amount he would have recovered under the judgment.").
148. *Id.* at 315.
court concluded that the spoliation of evidence did not significantly impair plaintiff's underlying personal injury claim.\textsuperscript{149}

The lowest level of proof required by a court to prove prejudicial injury was found in \textit{Miller v. Allstate Ins. Co.}\textsuperscript{150} In that case, the plaintiff was only required "to show that defendant's interference cost her an opportunity to prove her [underlying] lawsuit."\textsuperscript{151} In contrast to \textit{Williams}, the court concluded that the plaintiff did \textit{not} have to prove "but for the destruction of evidence, [s]he would have prevailed in the underlying action."\textsuperscript{152}

One way courts have tried to define prejudicial injury is by requiring the plaintiff to first litigate the underlying lawsuit prior to bringing the spoliation-of-evidence tort claim. If the plaintiff lost at the first trial or was forced to take a settlement, then the plaintiff had proved prejudicial injury as a result of the spoliation of evidence.\textsuperscript{153} However, other courts have not required such a showing because two separate trials are a waste of judicial resources.\textsuperscript{154}

6. Damages

A factor courts have looked at when determining if there was prejudicial injury is whether there were any actual damages. The first case to recognize

\begin{itemize}
  \item \textsuperscript{149} Id.
  \item \textsuperscript{150} 573 So. 2d 24 (Fla. Dist. Ct. App. 1990).
  \item \textsuperscript{151} Id. at 31 (emphasis added). \textit{See also} Smith v. Superior Court, 198 Cal. Rptr. 829 (Cal. Ct. App. 1984).
  \item \textsuperscript{152} Id. at 31 n.12. \textit{See also} Smith v. Superior Court, 198 Cal. Rptr. 829, 837 (Cal. Ct. App. 1984).
  \item \textsuperscript{153} \textit{See, e.g.,} Mohawk Mfg. & Supply Co. v. Lakes Tool Die & Eng'g, Inc., No. 92C1315, 1994 WL 85979, at *2 (N.D. Ill. March 12, 1994) (dismissing plaintiff's spoliation-of-evidence claim as premature since plaintiff had not yet lost the underlying claim); Continental Ins. Co. v. Herman, 576 So. 2d 313, 314-15 (Fla. Dist. Ct. App. 1990) (holding that since the plaintiffs won the underlying lawsuit at an arbitration hearing, there was no prejudicial injury as a result of the destroyed evidence); Bondu v. Gurvich, 473 So. 2d 1307, 1311 n.2 (Fla. Dist. Ct. App. 1984) (holding that plaintiff's claim for negligent spoliation of evidence did not arise until summary judgment was rendered against her in the underlying lawsuit); Mayfield v. Acme Barrel Co., 629 N.E.2d 690, 695-96 (Ill. App. Ct. 1994) (holding that spoliation claim was premature because the plaintiffs had not lost the underlying lawsuit prior to bringing their claim); Federated Mut. Ins. Co. v. Litchfield Precision Components, 456 N.W.2d 434, 439 (Minn. 1990) (holding that the plaintiff must first resolve the subrogation claim before bringing the spoliation-of-evidence claim); Baugher v. Gates Rubber Co., 863 S.W.2d. 905, 914 (Mo. Ct. App. 1993) (holding that the plaintiff must prove injury by receiving settlement or judgment of the underlying claim before bringing negligent-spoliation-of-evidence claim); Viviano v. CBS, Inc., 597 A.2d 543, 551 (N.J. Super. Ct. App. Div. 1991) (holding that plaintiff's claim did not arise until after she settled the underlying lawsuit).
  \item \textsuperscript{154} \textit{See, e.g.,} \textit{Smith}, 198 Cal. Rptr. at 837; \textit{Miller v. Allstate Ins. Co.}, 573 So. 2d 24, 28 n.7 (Fla. Dist. Ct. App. 1990); Boyd v. Travelers Ins. Co., 652 N.E.2d 267 (Ill. 1995); Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1038 (Ohio 1993). \textit{See also} Rodgers v. St. Mary's Hosp. of Decatur, 556 N.E.2d 913, 918-19 (Ill. App. Ct. 1990) (holding that the appeals process did not have to be exhausted before bringing a spoliation-of-evidence claim since "this requirement would result in a needless waste of judicial resources. . . ").
\end{itemize}
spoliation of evidence as a separate tort, Smith v. Superior Court, acknowledged that "the most troubling aspect of allowing a cause of action for intentional spoliation of evidence is the requisite tort element of damages proximately resulting from defendant's alleged act."155 The court went on to hold, however, that the uncertainty of the plaintiff's damages did not bar the cause of action since it was certain that at least some damages were incurred as a result of the intentional spoliation.156 Following the reasoning of Smith, the court in Miller v. Allstate Insurance Co. stated that difficulty in proving damages would not preclude the plaintiff from bringing a spoliation-of-evidence claim against the defendant for breach of promise to preserve the evidence.157 As stated by the court in Ortega v. Trevino, "[r]elaxing the standard of proof from reasonable certainty to a just and reasonable inference regarding the amount of damages is consistent with the elementary tenants of justice and public policy that would require the spoliator to bear the risk of the uncertainty of the ensuing wrong."158 In contrast, some courts have found that the damages were too speculative, and therefore no cause of action existed.159

There are only a few spoliation-of-evidence cases in which compensatory damages are discussed by the court in any detail.160 In Viviano, the plaintiff proved that the employer's fraudulent concealment of evidence caused her to lose interest on her personal injury settlement with the manufacturer as well as to incur additional expenses. The jury awarded $65,000 for loss of interest on the settlement and $7,351.71 for the additional expenses. Viviano was not a spoliation-of-evidence claim, rather an intentional-concealment-of-evidence lawsuit. Rodgers v. St. Mary's Hospital of Decatur was a spoliation-of-evidence claim, but the case was remanded for further action without deciding the issue of damages.161

156. Id. at 835-37.
158. 938 S.W. 2d 219, 222 (Tex. App. 1997).
161. 556 N.E.2d 913 (Ill. App. Ct. 1990). In Rodgers, the plaintiff alleged that the hospital's failure to preserve the x-rays caused him to lose his case against the radiologist and forced him to settle with the hospital for less than the judgment amount pending appeal. The plaintiff contended he should be awarded $400,000—the difference between the judgment award of $1,200,000 and the settlement amount of $800,000. The basis of his claim was that had the x-rays been preserved, he would have won against the radiologist and hospital jointly and would have been paid by the defendants, rather than appealed. Id. at 915.
In addition to damages resulting from the lost or settled underlying lawsuit, prejudicial injury can also entail damages such as expenses and delays that result from the significant interference with the underlying lawsuit.162

The court in *Telectron v. Overhead Door Corp.* awarded attorney fees in addition to compensatory damages.163 Although *Telectron* involved sanctions under the Federal Rules of Civil Procedure rather than a spoliation-of-evidence tort, the court’s reasoning is applicable to spoliation-of-evidence tort claims. As stated by the court, the award of attorney fees is an appropriate “incentive to parties to investigate and expose misconduct which threatens the integrity of the discovery process.”164

Punitive damages were awarded in two spoliation-of-evidence cases.165 The court in *Viviano* stated it was “an apt case for the award of punitive damages which are intended to punish a tortfeasor and deter him and others from similar conduct.” In *Moskovitz*, the court noted a separate cause of action for spoliation of evidence was not the only remedy. Since the alteration was intentional on the part of the physician to try to avoid liability in a medical malpractice claim, the court held punitive damages would be an appropriate remedy under the circumstances of the case. The court reasoned that if the

162. *See Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 132 (S.D. Fla. 1987) (stating the prejudicial injury “derive[d] both from the irretrievable loss of materials relevant to Telectron’s claims and from the delay, inconvenience and expense suffered by Telectron in investigating the sources and impact of [the defendant’s] document destruction scheme.”). *Mohawk Mfg. & Supply Co. v. Lakes Tool Die & Eng’g, Inc.*, No. 92C1315, 1994 WL 85979 (N.D. Ill. March 14, 1994). *Cf. Pharr v. Cortese*, 559 N.Y.S. 2d 780 (N.Y. Sup. Ct. 1990). In *Pharr*, the court was not persuaded by the plaintiff’s argument that she had incurred additional damages because defendant’s actions made her medical malpractice case more difficult to prove. The court reasoned the plaintiff would have spent approximately the same amount of resources regardless of the falsification of medical records. *Pharr*, 559 N.Y.S.2d at 781. *See also General Envl. Science Corp.*, 141 F.R.D. at 454-55 and *Capello*, 126 F.R.D. at 553 (both awarding damages for additional expenses incurred as the result of having to seek sanctions for spoliation of evidence).


164. Id. at 135.


166. *Viviano*, 597 A.2d at 552.
plaintiff was limited to an action for spoliation of evidence, then she would not be entitled to any award because no actual damages were caused by the altered medical records (since the plaintiff was able to finally obtain an unaltered copy). Likewise, if the injury is limited to the difference between what would have been won with the evidence and what was won without the evidence, there is no deterrent to a defendant. It puts the defendant-spoliator in a no-net-loss situation. If the spoliator destroys the evidence, the most he could be liable for is the amount he would have been liable for had he not destroyed it. As such, punitive damages are appropriate in spoliation-of-evidence claims.

7. Spoliation of Evidence by Party to the Lawsuit Versus by Third Party

A final factor the court must consider is whether the spoliator is a party to the underlying lawsuit or a third party. A party defendant is not obligated to preserve every document, but he does have a duty to preserve evidence which is likely to be relevant to a potential lawsuit. The biggest obstacle to overcome when bringing an action for spoliation of evidence by a third party is proving the spoliator had a duty to preserve the evidence. As stated in Koplin v. Rosel Well Perforators, Inc., "absent some special relationship or duty rising by reason of an agreement, contract, statute, or other special circumstance, the general rule is that there is no duty to preserve evidence for another to aid that other party in some future legal action."

a. Party Spoliator

Consistent with the harsher approach courts have taken with intentional spoliation of evidence, the courts have also looked with disfavor at parties to the original lawsuit who destroy or alter the evidence for their benefit. Some courts have imposed harsh sanctions, while others have recognized a spoliation-of-evidence claim as a viable cause of action. In other cases, the awarding of damages was used by the courts as a means of deterring the conduct of the party defendant and compensating the plaintiffs. Some courts allow a shift of the burden of proof where the evidence has been intentionally spoliated. Another remedy imposed by some courts for the intentional destruction of evidence...
evidence is a presumption of negligence sufficient to establish plaintiff's prima facie case.\textsuperscript{174}

All the above cases involved intentional spoliation, but even negligent spoliation by a party defendant can result in serious consequences.\textsuperscript{175} Other courts have recognized the claim for negligent spoliation of evidence under traditional principles of negligence.\textsuperscript{176}

\textit{b. Third Party Spoliator}

When a third party is involved in the spoliation, several factors are considered by the courts in determining whether the third-party spoliator had a duty to preserve the evidence.\textsuperscript{177} One such factor is whether the third party had notice of the pending litigation or the potential for litigation.\textsuperscript{178} For instance, the court in \textit{Burns v. Cannondale Bicycle Co.} found a bicycle repairman who discarded a defective part had no duty to preserve the part because he had not been notified that the plaintiff was considering bringing a products liability action against the manufacturer.\textsuperscript{179}

Another factor in determining whether a duty exists is the foreseeability of the harm caused to the plaintiff as a result of the spoliation.\textsuperscript{180} A case which found the third-party spoliator did not foresee the potential harm caused by the discarded evidence was \textit{Velasco v. Commercial Building Maintenance Co.}\textsuperscript{181} While \textit{Velasco} involved a negligent spoliation-of-evidence claim, \textit{Smith v. Superior Court}\textsuperscript{182} involved an intentional spoliation of evidence by a third party. The court in \textit{Smith} concluded that since the third-party spoliator had promised to preserve the evidence, he had both knowledge of the pending lawsuit and had foreseeability of the harm. Thus, the third-party spoliator in that case had a duty to preserve the evidence.\textsuperscript{183} However, even where the third party spoliator had both notice of a pending lawsuit and foreseeability of the harm,

\textsuperscript{174} See supra notes 34, 51, 75, 92 and infra note 197 and accompanying text.


\textsuperscript{176} See supra notes 49, 98 and accompanying text.

\textsuperscript{177} See County of Solano v. Delaney, 264 Cal. Rptr. 721, 729 (Cal Ct. App. 1989).

\textsuperscript{178} Id. at 729.

\textsuperscript{179} 876 P.2d 415 (Utah Ct. App. 1994).

\textsuperscript{180} County of Solano, 264 Cal. Rptr. at 729.

\textsuperscript{181} 215 Cal. Rptr. 504 (Cal. Ct. App. 1985). The janitor of an office building cleaned off the plaintiff's attorney's desk, and in the process, threw away a critical piece of evidence. The court concluded the janitor had no knowledge of the pending lawsuit or of the foreseeability of harm caused by the destruction of the evidence. Thus, the spoliation-of-evidence claim against the third party janitor was dismissed because he owed no duty to preserve the evidence under the circumstances.

\textsuperscript{182} 198 Cal. Rptr. 829 (Cal. Ct. App. 1984).

\textsuperscript{183} Id. See also Miller v. Allstate Ins. Co., 573 So. 2d 24 (Fla. Dist. Ct. App. 1990) (holding that the third party spoliator, an insurance company, had a contractual duty to preserve the evidence since it had promised to do so).
courts may find that a duty to preserve the evidence had ended under the facts. 184

One type of third-party spoliator who has been the subject of much litigation is the employer. Most of the cases on point have held an employer does not have a duty to preserve evidence for use by an employee against a third-party litigant absent an independent tort, statute, contract, agreement, or special relationship. 185 As with any third-party spoliator, the court examines whether the employer had notice of the potential lawsuit at the time the evidence was destroyed. The employer will have a duty to preserve the evidence if he had knowledge of the pending or potential lawsuit. 186 In Weigle, the court recognized a common-law cause of action against the employer for intentionally or negligently impairing an employee's third-party action. However, the plaintiff must prove that the employer intended to and did impair the underlying lawsuit. 187 And, where there is willful concealment of evidence by the employer, the court in Viviano v. CBS, Inc. recognized a separate cause of action for such fraudulent concealment. 188 Additionally, several courts held a claim for spoliation of evidence against an employer is not barred under the workers' compensation exclusivity rule. 189

The courts have been hesitant to impose harsh remedies against a third-party spoliator, especially if the spoliator had no interest in the underlying lawsuit. 190 However, the cases that have found a duty on the part of the third party to preserve the evidence, and then recognized the separate tort of spoliation of evidence, did so because no other sanction would have been sufficient. 191 If

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184. Murray v. Farmers Insurance Co., 796 P.2d 101 (Ind. 1990). In Murray, the salvage yard operator's duty to preserve the evidence ended when a year had passed since he had promised to preserve the automobile and plaintiff's attorney did not respond to salvage yard's notification that the automobile would be destroyed unless it received a request for an extension. Id. at 103.


186. See Weigle, 601 N.Y.S.2d 774.

187. Id. at 777.


191. See, e.g., Smith v. Superior Court, 198 Cal. Rptr. 829 (Cal. Ct. App. 1984) (involving an intentional spoliation by a third party who had no interest in the original lawsuit; the court recognized a separate cause of action against the third party for intentional spoliation of evidence); Williams v.
the court were to sanction the wrongdoer by dismissing the underlying claim or excluding expert testimony, no deterrent would be imposed since the third-party spoliator has nothing at stake in the lawsuit. Thus, such sanctions would be inadequate to compensate the injured party. 192

Even though the inadequacies of various sanctions are acknowledged, as demonstrated with the third-party spoliator, not all courts are embracing the recognition of this new tort. Therefore, the next section of this comment will explore other remedies available as an alternative to the recognition of an independent tort of spoliation of evidence. Those remedies range from the least severe sanction, an adverse inference that the evidence would have been unfavorable to the spoliator, to the most severe sanction, dismissal or summary judgment.

C. Other Remedies Available as an Alternative to Recognition of a Separate Tort of Spoliation of Evidence

1. Adverse Presumption or Inference and Jury Instruction

As previously discussed throughout this comment, the most common sanction imposed for both negligent and intentional spoliation-of-evidence claims is an adverse inference against the spoliator. 193 The jury is instructed that the evidence destroyed would have been unfavorable to the spoliator. This remedy is often inadequate since many courts allow any reasonable explanation to rebut the inference. 194 Such an inference has very little deterrent effect in light of the tremendous benefit a spoliator can obtain by such destruction, concealment, or alteration of evidence. To counter the ineffectiveness and inadequacies of the adverse inference rule, many courts began imposing severe sanctions such as default or exclusion of expert testimony, 195 and


192. For further discussion on the inadequacy of other remedies as a deterrent for third party spoliators, see Maurice L. Kervin, Comment, Spoliation of Evidence: Why Mississippi Should Adopt The Tort, 63 Miss. St. L.J. 227 (1993).


194. See supra note 73 and infra notes 236, 242 and accompanying text.

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others recognized spoliation of evidence as an independent cause of action. 196

2. Shifting of Burden of Proof/Presumption of Liability

Another alternative method of addressing spoliation of evidence is the shifting of the burden of proof. The shifting of the burden of proof may result in proving plaintiff's prima facie case or a presumption of liability against the defendant. 197

3. Rules of Civil Procedure 198

Although there is no specific federal statute that governs spoliation of evidence, many courts have found a remedy in the federal discovery sanctions under Rules 37(b) and 37(d). One critical limitation to Rule 37, however, is that it only allows discovery sanctions where there is a violation of a court order. 199

Since Rule 37 would have a limited application upon spoliation-of-evidence claims, as most do not involve a violation of a court order or the destruction occurs before a court order can be issued, courts have had to look elsewhere for the power to impose such sanctions. That power has been found in the court's "inherent powers doctrine," which permits the court to impose sanctions even though no court order has been issued. 200 As stated in Unigard Security Insurance Co. v. Lakewood Engineering & Manufacturing Corp., "[c]ourts are invested with inherent powers that are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." 201 The court further stated that it had "recognized as part of a district court's inherent powers the 'broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial'..." 202

presumption which the court might have ordered as a sanction for the spoliation of evidence would have paled next to the testimony of the expert witness.").

197. See supra notes 34, 51, 67, 70, 75, 87, 91, 92, 173, 174 and accompanying text.
199. See, e.g., Uniguard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 367-68 (9th Cir. 1992) (holding that the application of Rule 37 is prohibited where the misconduct does not result from the violation of a court order).
202. Id. at 368 (quoting Campbell Indus. v. M/V Gemini, 619 F.2d 24, 27 (9th Cir. 1980)).
Corresponding state rules of civil procedure provide for sanctions that are as effective as Federal Rule 37. State courts also have inherent powers similar to federal courts, and thus can apply sanctions through their "inherent powers doctrine."

Since the court has broad discretion in imposing sanctions, several factors are considered in determining the appropriate sanction. The following factors should be examined to determine if a sanction is appropriate and what type of sanction is warranted:

1. The degree of fault of the party who altered or destroyed the evidence;
2. The degree of prejudice suffered by the opposing party;
3. Whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

Where the sanctions are imposed under the court's inherent powers doctrine, the "standard by which to test the impact of the spoliation [is] the prejudice to the opposing party." Implicit in that standard is the need to examine the nature of the item lost in the context of the claims asserted and the potential for remediation of the prejudice." Once a sanction is imposed by the court, it will be overturned on appeal only upon a showing of abuse of discretion.

Sanctions imposed under Rule 37 (and analogous state rules) and the inherent powers doctrine can range in severity from granting an adverse presumption to excluding expert testimony. The most severe sanctions,
however, have been imposed where there was intentional spoliation of evidence by a party to the original suit. In such a situation, dismissal of the lawsuit, default judgment, or summary judgment may be granted. Some courts have

Mfg. Corp., 982 F.2d 363 (9th Cir. 1992) (holding that the court's inherent powers were properly used to exclude the testimony of plaintiff's expert where plaintiff destroyed the evidence but did not do so in bad faith); Northern Assurance Co. v. Ware, 145 F.R.D. 281 (D. Maine 1993); Chapman v. Auto Owners Ins. Co., 469 S.E.2d 783 (Ga. Ct. App. 1996) (reversing the trial court's jury instruction on rebuttable presumption and remanding for the trial court to determine whether dismissal of the case or the exclusion of expert testimony is warranted); Carbone v. Checker Taxi Co., No. 90-7707E, 1994 WL 878883 (Mass. Super. Ct. Dec. 30, 1994); Hamann v. Ridge Tool Co., 539 N.W.2d 753 (Mich. Ct. App. 1995) (limiting a plaintiff's expert testimony where another plaintiff's expert inadvertently lost evidence); Patton v. Newmar Corp., 538 N.W.2d 116 (Minn. 1995) (reversing the appellate court and reinstating the trial court's exclusion of plaintiff's expert witness, which resulted in summary judgment being granted in favor of defendant); Himes v. Woodkins-Verona Tool Works, Inc., 565 N.W.2d 469 (Minn. Ct. App. 1997) (excluding expert testimony where evidence was accidently lost); Fire Ins. Exchange v. Zenith Radio Corp., 747 F.2d 911, 914 (Ne. 1987) (holding that under Rule 37 the court properly excluded the testimony of plaintiff's expert witness where the plaintiff destroyed evidence with knowledge of potential litigation. The court stated "[a]ny adverse presumption which the court might have ordered as a sanction for the spoliation of evidence would have paled next to the testimony of the expert witness."). Cf. Schmidt v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 80-81 (3d Cir. 1994) (reversing the district court's exclusion of expert testimony where plaintiff's expert unintentionally altered the defective product during testing procedures. The court held the plaintiff's expert did not have "an affirmative duty not to conduct an investigation without affording all potential defendants an opportunity to have an expert present" prior to any suit having been filed.); Mayes v. Black & Decker, 931 F. Supp. 80 (D.N.H. 1996) (denying manufacturer's motion for exclusion of expert testimony as a sanction where the destroyed evidence did not significantly prejudice the defendant).

held that default judgment, summary judgment, or dismissal of the lawsuit is inappropriate where the party spoliator only negligently destroys or fails to preserve the evidence. No per-se rule exists granting dismissal, default, or summary judgment; rather, the sanction imposed must correlate to the culpability of the party against whom the sanction is being imposed and the prejudice resulting to the opposing party.

In addition to discovery sanctions, some courts have also awarded damages for reasonable expenses in litigating the spoliation-of-evidence claim under Rule 37. See also Townsend v. American Insulated Panel Co., Inc., 174 F.R.D. 1 (D. Mass. 1997) (denying motion for summary judgment where plaintiff did not possess control over evidence); Mayes v. Black & Decker, 931 F. Supp. 80 (D.N.H. 1996) (denying manufacturer's motion to dismiss where no willfulness or malicious spoliation was shown); Santarelli v. BP America, 913 F. Supp. 324 (M.D. Pa. 1996); Gordan v. Dynetics Corp., 862 F. Supp. 1303 (M.D. Pa. 1994) (holding summary judgment inappropriate as sanction where plaintiff's conduct did not cause the destruction of evidence); Martin v. Intex Recreational Corp., 858 F. Supp. 161 (D. Kan. 1994); Cassity v. Atchison, Topeka & Sante Fe Railway Co., No. 91-2153-0, 1992 WL 88018 (D. Kan. March 18, 1992); Cole v. Metro-North Commuter R.R. Co., No. CV93-0344232, 1994 WL 728636 (Conn. Super. Ct. Dec. 28, 1994) (holding summary judgment is an inappropriate sanction for spoliation of evidence); Patton v. Newmar Corp., 520 N.E.2d 4 (Minn. Ct. App. 1994); Transamerica Ins. Group v. Maytag, Inc., 650 N.E.2d 169 (Ohio Ct. App. 1994) (reversing the trial court's dismissal where the evidence was not under the insurance company's control at the time the destruction occurred; rather, a less severe sanction was appropriate under the facts of the case); Sampson v. Marshall Brass Co., 661 A.2d 971 (R.I. 1995) (remanding the case for determination as to reason plaintiff could not produce the missing evidence; without such a determination, drastic sanction of dismissal is inappropriate); and Thurman-Bryant Electric Supply Co. v. Unisys Corp., No. 03A01-CV00152, 1991 WL 222526 (Tenn. Ct. App. Nov. 4, 1991) (each holding that the trial court abused its discretion in granting summary judgment as a sanction for negligent spoliation of evidence). See also Telecron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 131 (S.D. Fla. 1987) (holding that before a default judgment may be entered, the court must find that the defendant acted "willfully or in bad faith" and that "[n]o lesser sanctions would not serve the punishment-and-deterrence goals. . ."). Shultz v. Barko Hydraulics, Inc., 832 F. Supp. 142, 146 (W.D. Pa. 1993) (holding that before a summary judgment should be granted against the party who lost the evidence, "the moving party must first show either that the party who lost the evidence did so fraudulently or intentionally, or that the absence of the evidence unduly prejudices the moving party to such an extent that preparation of its case is rendered impossible.").


None of the cases discussing federal and state discovery sanctions have adopted a separate tort of spoliation of evidence. This may be because the injured party chose to seek such sanctions rather than to seek a separate spoliation-of-evidence tort cause of action.\textsuperscript{214} In the end, such sanctions can be very severe and crippling to the spoliator. If the court imposes such severe sanctions, those sanctions have a greater deterrent effect and more justly compensate the injured party than an adverse presumption against the spoliator.

4. Criminal Statutes

The primary criminal statutes that can be used to remedy spoliation-of-evidence claims are the federal and state obstruction-of-justice statutes.\textsuperscript{215} Such statutes, however, are severely limited in practical application for civil lawsuits since most obstruction-of-justice statutes require the destroyed evidence to be relevant to a "criminal proceeding or investigation."\textsuperscript{216} Also, negligent spoliation of evidence "falls outside the scope of such statutes" because the statutes require an intentional act.\textsuperscript{217}

Another criminal statute that may be useful in limited circumstances is contempt-of-court statutes. However, usually there must be some type of violation of a court order for the court to hold the spoliator in contempt.\textsuperscript{218}

5. Code of Professional Responsibility for Attorneys

Attorneys have been the spoliator in several cases discussed in this comment.\textsuperscript{219} Those cases focused on finding a remedy that should be imposed to compensate the injured party, specifically the recognition of spoliation of evidence as a separate tort or discovery sanctions. However, the court in \textit{Federated Mutual Insurance Co. v. Litchfield Precision Components, Inc.} did allude to the fact that attorneys may also be subject to state professional disciplinary action.\textsuperscript{220}

\textsuperscript{1992); Capelluo v. FMC Corp., 126 F.R.D. 545, 553 (D. Minn. 1989).
\textsuperscript{214}. The only case where a separate cause of action was plead, but expressly rejected by the court in favor of sanctions, is Boyd v. Travelers Ins. Co., 652 N.E.2d 267 (Ill. 1995).
\textsuperscript{215}. \textit{See, e.g.,} Smith v. Superior Court, 198 Cal. Rptr. 829, 834-45 (Cal. Ct. App. 1984) (rejecting the argument that obstruction-of-justice statutes preempted the cause of action for spoliation of evidence); \textit{Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.}, 456 N.W.2d 434, 437 (Minn. 1990); \textit{Patton}, 520 N.W.2d at 7 n.1.
\textsuperscript{216}. \textit{See Smith}, 198 Cal. Rptr. at 835. \textit{See also Solum and Marzen, supra} note 198, at 1106-13.
\textsuperscript{217}. \textit{See Kerkorian, supra} note 115, at 1090.
\textsuperscript{218}. For more discussion on applicable criminal statutes, see Solum and Marzen, \textit{supra} note 198, at 1113-24.
\textsuperscript{220}. \textit{Federated Mut. Ins. Co.}, 456 N.W.2d at 437. For a more thorough discussion of legal malpractice and disciplinary sanctions, see, Solum and Marzen, \textit{supra} note 198, at 1124-37 and
D. Statute of Limitations and Other Procedural Issues

Procedural requirements for a spoliation-of-evidence cause of action are not well-defined in the jurisprudence since it is a developing area of law. One procedural issue which has been addressed by the courts is whether a spoliation-of-evidence claim arises out of, or is directly related to, the underlying area of law. The courts have routinely held it does not. For instance, where the spoliator is the plaintiff's employer, the spoliation-of-evidence claim is not barred by the workers' compensation exclusivity rule since the prejudicial injury does not proximately arise out of plaintiff's employment. Likewise, a healthcare provider who destroys or alters medical evidence is not protected under the medical malpractice or professional negligence statutes since the spoliation claim is not directly related to the professional services.

Another procedural issue in this developing area of law is what statute of limitations governs a spoliation-of-evidence claim. The few courts which have visited the issue of statute of limitations have given various rulings. One of the first courts to recognize the cause of action as a separate tort also had to address the issue of a statute of limitations for a spoliation-of-evidence claim. In Hazen v. Municipality of Anchorage, the Supreme Court of Alaska affirmed the trial court's application of the "discovery rule." The court rejected defendants' argument that the "statute of limitations began to run when the tort was completed"; i.e., when the spoliation was completed. Rather, the difficulty in discovering the destruction or alteration of evidence warranted the application of the discovery rule.

Kerkorian, supra note 115.


222. Temple Community Hosp. v. Superior Court, 51 Cal. Rptr. 2d 57 (Cal. Ct. App. 1996) and Cedars-Sinai Med. Ctr. v. Superior Court, 50 Cal. Rptr. 2d 831 (Cal. Ct. App. 1996) (each holding that the claim for intentional spoliation of evidence is not directly related to the medical services provided; i.e., it does not arise out of the professional negligence).

223. See Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986) (affirming the trial court's application of the "discovery rule"); Augusta v. United Service Auto. Assn., 16 Cal. Rptr. 2d 400 (Cal. Ct. App. 1993) (holding that the cause of action for spoliation of evidence was subject to the two-year statute of limitations under California law because it involved an infringement of a "property right," not a "personal right"); Weigl v. Quincy Specialties Co., 601 N.Y.S.2d 774, 778 (N.Y. Sup. Ct. 1993) (stating in dicta "if plaintiff asserts a claim grounded in negligence, the statute of limitations of three years" under the law of New York and holding that the statute of limitations do not require plaintiff to assert a cause of action prior to plaintiff having knowledge of the spoliation); Harrison v. Davis, 478 S.E.2d 104 (W. Va. 1996) (holding the spoliation-of-evidence claim is barred by the two-year statute of limitations for personal injury and wrongful death claims under the laws of West Virginia).

of the discovery rule. The statute of limitations did not begin to run until the aggrieved party discovered or reasonably should have discovered the spoliation of the evidence. Under Hazen, the plaintiff must bring the claim within two years of discovery of the spoliation. Thus, the court applied the two year statute of limitations under Alaska law for an injury to "person or rights". Those courts which view the claim as one for infringement of, or interference with, a property right logically follow that the statute of limitations governing property rights also governs a claim for spoliation of evidence. In contrast, the court in Harrison v. Davis held the spoliation-of-evidence claim was barred by the state's two-year statute of limitations for personal injury and wrongful death claims. The court's somewhat flawed opinion might be explained by the court's finding that plaintiff suffered no prejudicial injury. Since plaintiff was able to bring her medical malpractice and wrongful death claims, the court opined that the defendant's non-production of the fetal monitor strips did not impair plaintiff's underlying cause of action. What the court failed to consider is that the ability to file a lawsuit and to win a lawsuit are two entirely different matters. Plaintiff's spoliation-of-evidence claim was based on the premise of interference with her right to have an opportunity to win the underlying claim, not on her ability to merely file the personal injury and wrongful death claims.

III. APPLICABILITY OF LOUISIANA LAW

A. History of Louisiana Law on Spoliation of Evidence

1. Adverse Presumption For Failure to Produce Evidence

Louisiana has a long legal history of allowing an adverse presumption against the party who fails to produce evidence which it has in its control. The adverse presumption doctrine began with Navarette v. Laughlin, a 1946 Louisiana Supreme Court decision, where an intervenor failed to produce a hotel register it contended would rebut testimony as to decedent's residence. Since the intervenor did not prove the register was lost or destroyed, a presumption was

225. Id. at 464. See also infra notes 312-314 and accompanying text.
227. Id. (affirming the trial court's application of the two-year statute of limitations and the "discovery rule" under the statute governing injury to property rights); Augusta, 16 Cal. Rptr. 2d 400 (holding that the cause of action for spoliation of evidence was subject to the two-year statute of limitations under California law because it involved an infringement of a "property right", not a "personal right"). Cf. Harrison v. Davis, 478 S.E.2d 104 (W. Va. 1996) (holding the spoliation-of-evidence claim is barred by the two-year statute of limitations for personal injury and wrongful death claims under the laws of West Virginia).
229. Id. at 117.
230. 209 La. 417, 24 So. 2d 672 (La. 1946).
held against the intervenor that the decedent's testimony was correct.\(^{231}\)

Following *Navarette*, numerous Louisiana courts applied the adverse presumption rule against the party who failed to produce evidence within its control.\(^{232}\)

2. **Adverse Presumption Against Spoliator**

   In 1975, Louisiana extended the adverse presumption rule to apply to a party who had spoliated evidence.\(^{233}\) In one of the first cases to discuss destruction of evidence by a party defendant, *Miller v. Montgomery Ward & Co.*, the court held an adverse inference against the spoliator was not applicable under the facts since the defendant did not have a duty to preserve the evidence.\(^{234}\) Since *Miller*, Louisiana courts have applied the adverse inference or presumption against a spoliator in only three cases.\(^{235}\)

3. **Adverse Presumption Not Applicable if Reasonable Explanation Given**

   Not long after the courts allowed an adverse presumption, they reduced its effectiveness by allowing a reasonable explanation of the failure to produce

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231. *Id.*


233. *See* *Miller v. Montgomery Ward & Co.*, 317 So. 2d 278 (La. App. 1st Cir. 1975). *See also* *Vick v. Texas Employment Commission*, 514 F.2d 734 (5th Cir. 1975) (holding an adverse inference applicable only where destruction of evidence was done in bad faith); and *Kammerer v. Sewerage and Water Bd. of New Orleans*, 633 So. 2d 1337, 1365 (La. App. 4th Cir. 1994) (concurs with opinion stating that the adverse inference rule is both compensatory and punitive).

234. *Id.*

235. *See* *Rodriguez v. Northwestern Nat'l Ins. Co.*, 358 So. 2d 1237 (La. 1978) (holding that an adverse presumption is applicable since there was a lack of explanation on the part of the spoliator); *Salone v. Jefferson Parish Dept. of Water*, 645 So. 2d 747 (La. App. 5th Cir. 1994) (applying the adverse presumption where no reasonable explanation was offered on the part of the spoliator; defendant merely stated he did not know where the evidence was and could not find it); *McElroy v. Allstate Ins. Co.*, 420 So. 2d 214 (La. App. 4th Cir. 1982) (holding that an adverse presumption would be allowed where the spoliator’s explanation was unsatisfactory). *See also* *Gordon v. State Farm Ins. Co.*, 700 So. 2d 1117 (La. App. 5th Cir. 1997) (affirming that plaintiff's explanation for failing to produce evidence was insufficient to overcome adverse presumption); *Williams v. Golden*, 699 So. 2d 102 (La. App. 4th Cir. 1997) (holding that lack of explanation for failing to produce medical records within defendant's control resulted in imposition of adverse inference); *Cooper v. Diamond Offshore Drilling, Inc.*, 692 So. 2d 1213 (La. App. 5th Cir. 1997) (finding an unexplained failure to produce evidence within defendant's control resulted in imposition of adverse inference).
evidence or of the spoliation of the evidence to make the presumption inapplicable.\textsuperscript{236} The court in \textit{Rodriguez v. Northwestern National Insurance Co.} stated that the "the trial judge reasonably could have inferred that the insurer's \textit{unexplained} failure to present evidence on this issue was due to the fact that it would have been harmful to its defense."\textsuperscript{237}

The seminal case in Louisiana that allowed a reasonable explanation to make the adverse presumption against a spoliator inapplicable is \textit{Babineaux v. Black}.\textsuperscript{238} The case involved a "marsh buggy" with mechanical problems. The defendant installed a new engine in the buggy and discarded the old engine. The third-party manufacturer alleged that destruction of the original engine prohibited it from proving the engine was not defective when it left its control, and therefore, an adverse presumption against the spoliator should have been imposed. The defendant claimed it did not have any notice of potential litigation when it discarded the engine, and it had discarded the engine because it assumed the problem was resolved when the second engine was installed. The court found the defendant's explanation satisfactory and no presumption was imposed.\textsuperscript{239}

Until recently, Louisiana courts had found a "reasonable" explanation for every spoliation-of-evidence claim except one.\textsuperscript{240} The court in \textit{McElroy v. Allstate Ins. Co.} sympathized with the plaintiff, a widow, for selling the vehicle in which her husband died, but found her explanation unsatisfactory to rebut the adverse presumption.\textsuperscript{241} Then in 1994, the tide began to turn and a number of recent cases involving spoliation of evidence or failure to produce evidence within a party's control affirmed the imposition of the adverse inference rule and tightened the definition of "reasonable explanation."\textsuperscript{242}

\begin{verbatim}
237. 358 So. 2d 1237, 1242 (La. 1978) (emphasis added).
238. 396 So. 2d 584 (La. App. 3d Cir. 1981).
239. id. at 585-86.
240. For cases which found an explanation made the adverse presumption inapplicable to a spoliator of evidence, see Johnson v. Dept. of Public Safety, 627 So. 2d 732 (La. App. 2d Cir. 1993); Boh Bros. Constr. Co., Inc. v. Luber-Finer, Inc., 612 So. 2d 270 (La. App. 4th Cir. 1993); Bourgeois, 458 So. 2d 167; Beaucoudray v. Hirsch, 49 So. 2d 770 (La. App. Orl. 1951).
241. 420 So. 2d 214 (La. App. 4th Cir. 1982). The court affirmed the trial court's jury charge regarding the adverse presumption that the evidence would have been disfavorable to the widow-spoliator. In doing so, the court considered the fact that the jury instruction was not unduly influential because the plaintiff had explained her reason for destruction of the car and because the presumption did not result in "prima facie evidence of no negligence on the part of [the manufacturer]." id. at 216.
242. See Gordon v. State Farm Ins. Co., 700 So. 2d 1117 (La. App. 5th Cir. 1997) (finding plaintiff's explanation insufficient to overcome adverse presumption); Salone v. Jefferson Parish Dept. of Water, 645 So. 2d 747 (La. App. 5th Cir. 1994) (finding that the defendant did not offer a reasonable explanation for the missing evidence). See also Williams v. Golden, 699 So. 2d 102 (La. App. 4th Cir. 1997) (holding that lack of explanation for failing to produce medical records
\end{verbatim}
Thus, the threat of an adverse inference against the spoliator under Louisiana law is hardly a threat at all. The courts have been very lenient in the past as to what is a "reasonable" explanation for the missing evidence. Moreover, no Louisiana court has held that spoliation of evidence results in a shifting of the burden of proof or a presumption of negligence against the spoliator. In fact, the court in McElroy implied that a jury instruction that spoliation of evidence by plaintiff results in a prima facie case of no liability for defendants would have been unduly influential, and thus reversible error.243 Also, where no intentional destruction of evidence was shown, two Louisiana courts refused to impose a presumption of liability against the spoliator.244 Likewise, in Williams v. Golden, only an adverse inference was imposed, rather than a presumption of negligence.245 The only recent Louisiana court that did impose a harsh remedy for failing to produce evidence was Williams v. General Motors Corp. (Williams II).246 In its opinion on a grant of rehearing, the court held that the failure to produce evidence "reflects on the quality of the expert testimony."247 Under the facts of the case, the court found plaintiff's expert's testimony inadmissible.248

within defendant's control resulted in imposition of adverse inference); Cooper v. Diamond Offshore Drilling, Inc., 692 So. 2d 1213 (La. App. 5th Cir. 1997) (finding an unexplained failure to produce evidence within defendant's control resulted in imposition of adverse inference). But see Constans v. Chotaw Transport, Inc., Nos. 97-CA-0863, 97-CA-0864, 1997 WL 790514 (La. App. 4th Cir. Dec. 23, 1997) (unpublished opinion) and Morehead v. Ford Motor Co., 694 So. 2d 650 (La. App. 2d Cir. 1997) (both finding a reasonable explanation existed for failure to preserve evidence); Nicoli v. LoCoco, 701 So. 2d 1062 (La. App. 5th Cir. 1997) (dismissing spoliation-of-evidence claim where defendant denied that the evidence ever existed); Randolph v. General Motors Corp., 646 So. 2d 1019 (La. App. 1st Cir. 1994) (reversing the trial court and finding the defendant's explanation was sufficient even though no precise explanation could be given). See also In re Hopson Marine Transport, Inc., 168 F.R.D. 560 (E.D. La. 1996) (holding adverse inference inapplicable where there was no wrongful discovery denial).

243. McElroy, 420 So. 2d at 216.

244. Gordon, 700 So. 2d 1117; Randolph, 646 So. 2d 1019 (reversing the trial court's imposition of liability where there was no intentional spoliation of evidence).

245. 699 So. 2d 102, 108 (La. App. 4th Cir. 1997). Cf. Welsh v. U.S., 844 F.2d 1239 (6th Cir. 1988) (ruling that negligent destruction of evidence in medical malpractice claim warrants rebuttable presumption of negligence and causation); May v. Moore, 424 So. 2d 596, 603 (Ala. 1982) (holding that spoliation or suppression of medical records results is "sufficient foundation for an inference of his guilt or negligence"); Public Health Trust of Dade County v. Valcin, 507 So. 2d 596, 599 (Fla. 1987) (holding that destruction of medical records results in a rebuttable presumption of negligence even though no bad faith or deliberate acts were shown).

246. 639 So. 2d 275 (La. App. 4th Cir. 1994).

247. Id. at 290.

248. Id. Note: This opinion may be explained by the court's finding that the expert's testimony was not admissible under the standard set forth by the Supreme Court for expert testimony in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993).
4. Bad Faith Requirement for Adverse Presumption

In all of the adverse presumption cases discussed, no requirement of bad faith on the part of the spoliator is mentioned. However, a recent decision, Kammerer v. Sewerage and Water Board of New Orleans, held that since there was no bad faith on the part of the defendant spoliator, no adverse presumption should apply. Although there is little support for that proposition in the Louisiana jurisprudence, many other states do require a fraudulent, willful, or bad faith element before an adverse presumption will be given in an intentional spoliation-of-evidence cause of action. On the other hand, common law states are divided as to whether bad faith is required for a negligent spoliation-of-evidence cause of action to be recognized.

B. Growing Recognition of Spoliation of Evidence in Louisiana

1. Cases Finding an Impairment of a Civil Claim

Louisiana has recognized a cause of action for "impairment of a civil claim." One could argue that spoliation of evidence is one such form of impairment, and thus should also be recognized as a separate tort in Louisiana. There are similarities between the two causes of action. Both causes of action are based on the premise that a plaintiff has the right to be free from interference in pursuing his or her lawsuit.

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249. 633 So. 2d 1357 (La. App. 4th Cir. 1994).
250. Id. See also Randolph v. General Motors, Inc., 646 So. 2d 1019, 1027 (La. App. 1st Cir. 1994) (citing Kammerer). But see infra notes 299, 300 and accompanying text (criticizing the bad faith requirement).
251. The only Louisiana case which might be cited as supporting the proposition that bad faith is required would be Lewis v. Darce Towing Co., 94 F.R.D. 262 (W.D. La. 1982). But even Lewis is limited in its holding since bad faith was merely one of several factors the court examined when determining whether to exclude evidence. Id. at 267. In addition, there was a United States Court of Appeals for the Fifth Circuit case, Vick v. Texas Employment Comm’n, 514 F.2d 734 (5th Cir. 1975), which held bad faith was required for the adverse presumption to be applicable.
252. See supra note 65, 70 and accompanying text.
253. See supra notes 89, 90 and accompanying text.
255. See, e.g., Bethea, 1997 WL 728565, at *1 (unpublished opinion) where the plaintiff pled both spoliation of evidence and an impairment of a civil claim in her amending and supplemental petitions for damages.
256. See Federated Mut. Ins. Co. v. Litchfield Precision Components, 456 N.W.2d 434, 437 (Minn. 1990) (stating that "[t]he rationale for this new tort (spoliation of evidence) is that a potential civil action is deemed an interest worthy of legal protection from undue interference").
As with a spoliation-of-evidence claim, a plaintiff in an impairment-of-a-civil-action claim must prove the defendant had a duty to preserve the evidence.\(^{257}\) *Fischer v. Travelers Insurance Co.*\(^{258}\) involved a department policy that required the investigating police officer to complete a written report for each automobile accident. The failure of the police officer to complete such a report was a breach of duty which caused the plaintiff to "lose the opportunity to pursue the claim against the other driver."\(^{259}\) Thus, the court granted recovery against the defendant for the stipulated amount of $35,000.\(^{260}\)

*Duhe v. Delta Air Lines*\(^{261}\) also involved a breach of a statutory duty. The court in *Duhe* found an airline had breached its duty when it obstructed the arrest of a passenger. Since the obstruction may have caused the plaintiff to "lose the opportunity to pursue her claim against her assailant," the court denied defendant's motion dismissing the case for failure to state a cause of action.\(^{262}\)

In contrast, the court in *Morgan v. ABC Manufacturer*\(^{263}\) found plaintiff's petition failed to adequately state a claim against the employer's workers' compensation insurance adjuster for impairment of a civil claim where no duty was alleged on the face of the petition for damages. However, the court allowed plaintiff an opportunity to amend his petition to set forth more definitive allegations of a duty on the part of the adjuster to preserve the evidence.\(^{264}\) In *Morgan*, no workers' compensation benefits had been sought. The court implied that had such benefits been sought, the workers' compensation adjuster would have had a duty to investigate the accident and preserve the evidence.\(^{265}\) Otherwise, plaintiff must show the claims adjuster assumed the duty.\(^{266}\)


\(^{258}\) *Id.* at 540.

\(^{259}\) *Id.* at 541.

\(^{260}\) *Id.* at 540.

\(^{261}\) *Id.* at 1416-17.

\(^{262}\) *Id.* at 1078.

\(^{263}\) *Id.* at 1078. This reasoning is in line with General Cinema Beverages of Miami, Inc. v. Mortimer, 689 So. 2d 276 (Fla. Dist. Ct. App. 1995) finding a statutory duty under Florida's workers' compensation laws. *See supra note 185 and infra note 308 and accompanying text.* But see *Randolph v. General Motors, Inc.*, 646 So. 2d 1019 (La. App. 1st Cir. 1994), where no actual payment of workers' compensation benefits or assumption of duty was required by the court. Although the appellate court disagreed with the trial court's finding of foreseeability of a lawsuit, it did not reverse on the basis of no duty on the part of the employer to preserve the evidence. Rather, it only reversed the trial court's imposition of liability on the parish because there was no intentional destruction.

\(^{264}\) *Id.* at 1079.

\(^{265}\) *Id.* at 1078. This reasoning is in line with General Cinema Beverages of Miami, Inc. v. Mortimer, 689 So. 2d 276 (Fla. Dist. Ct. App. 1995) finding a statutory duty under Florida's workers' compensation laws. *See supra note 185 and infra note 308 and accompanying text.* But see *Randolph v. General Motors, Inc.*, 646 So. 2d 1019 (La. App. 1st Cir. 1994), where no actual payment of workers' compensation benefits or assumption of duty was required by the court. Although the appellate court disagreed with the trial court's finding of foreseeability of a lawsuit, it did not reverse on the basis of no duty on the part of the employer to preserve the evidence. Rather, it only reversed the trial court's imposition of liability on the parish because there was no intentional destruction.

\(^{266}\) *Morgan*, 637 So. 2d at 1078-79. *See also Carter v. Exide Corp.*, 661 So. 2d 698, 705 (La. App. 2d Cir. 1995) (allowing plaintiff to amend his petition for damages to particularly plead allegations of employer's duty to preserve the evidence); *Randolph*, 646 So. 2d at 1027 (discussing the foreseeability or expectation of an employer that an employee would bring a lawsuit which would impose a duty on the employer to preserve the evidence).
In an impairment-of-a-civil-claim action, the plaintiff must prove "the loss of plaintiff’s opportunity to pursue the claim." This level of proof can be compared to that required by a Florida court in *Miller v. Allstate Ins. Co.* for a spoliation-of-evidence cause of action. In *Miller*, the court only required the plaintiff to "show that defendant's interference cost her an opportunity to prove her [underlying] lawsuit."

2. Recent Cases Involving Spoliation of Evidence

In 1982, the United States District Court for the Western District of Louisiana was confronted with the issue of concealment of evidence under the federal rules of discovery in *Lewis v. Darce Towing Co.* *Lewis* involved the intentional concealment of evidence by plaintiff and her attorney regarding an autopsy that was performed on her deceased spouse. The court sanctioned the plaintiff under Federal Rules of Civil Procedure 26 and 37 by excluding plaintiff’s expert's testimony. The court stated bad faith and the potential for abuse on the part of the plaintiff warranted such a sanction. It should be noted, however, the court did not state bad faith was required for the sanction to be applied. Rather, the court took into consideration bad faith as one of several factors in deciding whether to exclude the evidence.

The first case applying Louisiana law to discuss spoliation of evidence was *Edwards v. Louisville Ladder Co.* In *Edwards*, the plaintiff brought a spoliation-of-evidence claim against his employer for failure to preserve a ladder, which was a critical piece of evidence in a products liability lawsuit against the manufacturer. The court held the employer did not have a duty to preserve the evidence since there was no agreement, special relationship, or statutory “duty.” *Edwards* is consistent with other cases involving spoliation by a third party; i.e., generally there is no duty on the part of an employer to preserve evidence for an employee’s third-party action unless the employer had notice of the potential lawsuit.

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269. *Id.* at 31 (emphasis added). *See also supra* notes 150-152 and accompanying text.
270. 94 F.R.D. 262 (W.D. La. 1982).
271. *Id.* at 269-70.
272. *Id.* at 266-67. The factors looked at by the court in *Lewis* were stated as follows: "(1) whether the defendant was prejudiced as a result of the ex parte autopsy; (2) whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether the plaintiff was in good or bad faith; and (5) the potential for abuse if the evidence is not excluded."
274. *Id.* at 969-71.
275. *See supra* notes 185-187 and accompanying text.
At the time Edwards was decided, there was no Louisiana jurisprudence on this issue; therefore, the court looked to common law cases as well as policy considerations. The court concluded: "it is not necessary for this court to determine whether the Louisiana Supreme Court would recognize a claim for spoliation of evidence under any circumstances. This court concludes that [plaintiff's] claim would not be recognized under the circumstances of this case." Thus, no spoliation-of-evidence claim was recognized under the facts of Edwards, although the court implied Louisiana may recognize spoliation of evidence as a separate tort under different circumstances.

Shortly after the decision in Edwards, the Louisiana Fourth Circuit Court of Appeal was faced with the issue of spoliation of evidence in Williams v. General Motors Corp. (Williams I). The underlying lawsuit in Williams I was a products liability claim against an automobile manufacturer. The manufacturer, General Motors, later brought a spoliation-of-evidence claim against the plaintiff's attorney for failure to preserve the automobile.

The facts in Williams I reveal the automobile was repaired and, thereafter, the alleged defective parts were stored at the repair shop for more than two years before they were "inadvertently lost." The court held that the plaintiff's attorney did not have a duty to preserve the evidence since the evidence was not in his custody at the time of the spoliation. The court, therefore, affirmed the granting of the third-party defendant's motion for summary judgment and exception of no cause of action.

General Motors also brought a spoliation-of-evidence claim against Prudential, the automobile insurance company. General Motors contended that the automobile insurance company owed a duty to preserve the photographs of the parts of the vehicle. On that issue, the court stated that even if a duty to preserve such photographs existed, there was an alternative piece of evidence available; i.e., photocopies of the photographs. Therefore, General Motors was not prejudiced by the destruction of the photographs. The granting of Prudential's exception of no cause of action was affirmed.

It should be noted that, although Williams I technically involved negligent spoliation of evidence, the court never used that term in its decision, and none of the parties involved ever cited any spoliation-of-evidence cases as authority. However, the approach taken by the court in Williams I is consistent with the approach taken by other courts which held that where there is no duty

277. Id.
278. 607 So. 2d 695 (La. App. 4th Cir. 1992).
279. Id. at 696.
280. Id. at 697.
281. Id. at 696.
282. Id. at 698.
283. General Motors did convey to the court that other jurisdictions had recognized "a cause of action for the wrongful disposition of evidence." Id. at 697 (emphasis added).
to preserve the evidence, there is no negligence. What is disputable in *Williams*
*I* is the court's statement that the third-party defendant (plaintiff's attorney) had
no duty to preserve the evidence. General Motors argued the attorney had
a duty because he instructed the repairman on how to store the evidence. If
such an instruction was given, then the attorney arguably did have a duty to
preserve the evidence either as a result of his relationship or his assumption of
a duty to preserve the evidence through a third-party repairman. The court,
however, held no material issue of fact existed as to whether the attorney
instructed the repairman, and thus affirmed the granting of a summary judgment
since no duty existed under the facts of the case.

In *Kammerer v. Sewerage and Water Board of New Orleans*, the Louisiana
Fourth Circuit Court of Appeal finally analyzed a case as a "spoliation of
evidence" cause of action. The plaintiff in *Kammerer* brought a claim
against the defendant for damages resulting from an automobile collision with
a manhole cover. In addition to alleging a defect in the manhole cover, the
plaintiff sought a remedy for the defendant's destruction of the manhole cover.
The injured party argued that the court should apply the evidentiary spoliation
d doctrine; i.e., an adverse presumption against the spoliator. The court
summarily rejected the plaintiff's arguments by holding that "[t]he doctrine of
spoliation is not applicable in the instant case because there was no *intentional*
destruction of evidence for the purpose of depriving the plaintiff of its use." The
court further stated that the defendant had no notice of the potential or
pending litigation involving the manhole cover, and thus had no foreseeability
of the harm caused by the destruction of evidence.

The majority opinion is concise, with little elaboration. On the other hand,
the two concurring opinions, which although are only dicta, reveal much about
the court's reasoning. Judge Jones, in his concurring opinion, sided with the
majority based on the court finding that the plaintiff could not have won his
underlying lawsuit, and thus suffered no prejudicial injury as a result of the
spoliation of the evidence. The plaintiff's expert opined he would have had
to examine the manhole cover shortly after the collision to determine any defect
in the metal. Judge Jones in his concurrence thus concluded that since the
plaintiff did not file his lawsuit until one year after the accident, the plaintiff's

284. *Id.* at 697.
285. *Id.* at 698.
286. *Id.*
287. 633 So. 2d 1357 (La. App. 4th Cir.), *writ denied*, 639 So. 2d 1163 (1994). In particular,
see Judge Waltzer's concurring opinion.
288. *Id.* at 1357-58.
289. *Id.* at 1358 (emphasis added).
290. *Id.* But see the dissenting opinion which states "the custodian of any type of evidence
which is obviously or potentially relevant to a pending or possible litigation should be burdened with
the responsibility of preserving that evidence." *Id.* at 1368.
291. *Id.* at 1359.
expert would not have been able to make a determination of defect even had the defendant preserved the evidence.  

Judge Waltzer's concurring opinion discussed the history of evidentiary spoliation doctrine in detail, but skirted around any discussion of spoliation of evidence as a separate tort. His analysis of the adverse presumption doctrine in Louisiana accurately stated the rule that a presumption will be applied against a party who destroys evidence unless a reasonable explanation is given. Thus, in Louisiana, it is a rebuttable presumption against the spoliator. In Kammerer, the defendant overcame the presumption, according to Judge Waltzer, when it explained that the manhole cover was destroyed as part of a routine destruction. The concurring opinion also reasoned the "information contained in the destroyed evidence was available through alternative evidence discoverable to the plaintiff."  

While the majority opinion in Kammerer does not discuss the recognition of spoliation of evidence as a separate tort, the concurring opinion does analyze this issue. Judge Waltzer in his concurring opinion stated that Louisiana does not "pigeon hole" delictual concepts; rather, Louisiana "defines our concept of tort as one of civil wrong." He further stated that "Louisiana's civil law recognizes [plaintiff's] interest in preservation of the SWB's manhole cover under the related concepts of access to the courts and the litigant's right to prove the elements of his claim." However, Judge Waltzer found that the "destruction of the manhole cover [was], under the facts of this case, irrelevant to the ultimate resolution of the issue of SWB's liability, and has not eliminated [plaintiff's] 'right to prove' his case."  

The dissenting opinion in Kammerer criticized the majority for holding that the adverse presumption did not apply because there was no intentional destruction of the evidence. As pointed out by Judge Plotkin in his dissenting opinion, the majority's reliance on Williams v. General Motors Corp. (Williams I) was in error. Williams I does not hold that an intentional destruction is required for the adverse presumption to apply. Such a proposition was only mentioned in the concurring opinion of Williams I. Thus, the court in

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292. Id.  
293. Id. at 1365.  
294. Id.  
295. Id. at 1362.  
296. Id.  
297. Id. at 1366. Judge Waltzer reasoned that the plaintiff could still prove the defendant had actual or constructive knowledge of the defect through other available evidence. See also Salone v. Jefferson Parish Dept. of Water, 645 So. 2d 747 (La. App. 5th Cir. 1994) (holding that even though adverse presumption was applicable, plaintiff still had to prove actual or constructive knowledge, on the part of the defendant, of the defect in the manhole cover).  
299. Kammerer, 633 So. 2d at 1367.  
Kammerer should have allowed the adverse presumption for the destruction of the evidence even if done negligently rather than intentionally. Of course, the presumption may have been inapplicable had the court found the routine destruction a reasonable explanation. Such an explanation, however, was criticized by both Judge Jones in his concurring opinion and by the dissenting opinion.

The next case to come along is Randolph v. General Motors Corp. in which a parish employee was injured due to a defective part on a dragline manufactured by General Motors. The trial court in a JNOV assessed fifty percent liability to the parish on the basis of spoliation of evidence because the parish threw away the original defective part. Finding that there was no "intentional destruction of the evidence by the Parish for the purpose of depriving opposing parties of its use," the First Circuit Court of Appeal reversed the trial court's imposition of liability on the parish under the theory of spoliation of evidence. The court found the parish gave a sufficient explanation for destruction of the evidence despite the parish's inability to explain exactly why the defective part was discarded. The appellate court disagreed with the lower court's finding of foreseeability of a lawsuit, but did not reverse on the basis of no duty on the part of the spoliator. And finally, the court noted that the discarded part did not prevent the experts from rendering an opinion as to the most probable cause of the accident. That is, plaintiff suffered no prejudicial injury as the result of the spoliation of the evidence.

The court in Carter v. Exide Corp. was faced with the specific issue of whether an employer has a duty to preserve evidence for a third-party lawsuit and, if so, the extent to which an employer may be liable under Louisiana law. A mechanic who was injured on the job while repairing an automobile battery brought a claim against his employer for failure to preserve the battery, a vital piece of evidence in his claim against the owner of the vehicle. After determining that the workers' compensation immunity did not bar the employee from bringing a claim against the employer for post-accident destruction of evidence, the court in Exide looked at the issue of whether the employer had a duty to preserve the evidence. The court stated that the duty must arise from

301. Kammerer, 633 So. 2d at 1359 (stating that a "professional defendant . . . cannot with impunity continue a policy of recognizing that property may be involved in litigation, and then maintain the policy of immediately destroying that property.").

302. Id. at 1368 (stating that allowing such an explanation to overcome the presumption "provides a disincentive to the defendant to preserve important evidence and thereby should not be sanctioned because it is against public policy.").

303. 646 So. 2d 1019 (La. App. 2d Cir. 1994).

304. Id. at 1027 (citing Kammerer). But see criticisms of that part of the decision in Kammerer, supra notes 298-300 and accompanying text.

305. Id.

306. 661 So. 2d 698 (La. App. 2d Cir. 1995).

307. Id. at 704. This decision is consistent with other states addressing this issue. See supra notes 189, 221 and accompanying text.
"a statute, a contract, a special relationship between the parties, or an affirmative agreement or undertaking to preserve the evidence." The court further stated that plaintiff must specifically plead such a duty and "require[d] a showing of something more than the general tort duty to act reasonably under the circumstances." Without a specific duty and breach of that duty alleged, the court refused to recognize a cause of action for spoliation of evidence. The plaintiff was allowed to amend his petition for damages to plead particular allegations of the source of employer's duty to preserve evidence.

The reasoning of Carter was rejected by the Louisiana Third Circuit Court of Appeal in Bethea v. Modern Biomedical Services, Inc. Defendant filed an exception of no cause of action after plaintiff alleged an impairment-of-a-civil-action claim as well as negligent and intentional spoliation of evidence. The court in Bethea analyzed the claim under Louisiana Civil Code article 2315, noting that fault under Article 2315 is to be broadly interpreted. Even though no statutory duty existed, the court held "a duty exists under La. Civ. Code art. 2315. The absence of a statutory duty is not tantamount to no duty." At least in the third circuit, impairment of a civil claim and spoliation of evidence are viable causes of action in Louisiana under general tort precepts.

With the third circuit in Bethea acknowledging a viable cause of action under Louisiana Civil Code article 2315, along with the concurring opinion of the fourth circuit in Kammerer, perhaps the path has been laid for recognition of spoliation of evidence as a separate tort under Louisiana. We must await the next case to see what action the Louisiana courts will take with this new cause of action and how the Louisiana Supreme Court will decide its fate.

C. Procedural Factors

1. Prescription

Whether a cause of action for spoliation of evidence has prescribed is an essential concern to all involved in a spoliation-of-evidence claim. In Louisiana, most claims must be asserted within one year of the injury. Louisiana allows an extended period of time to file suit if the circumstances fall under one of the factors listed for contra non valentum. Commonly known as the

308. Id. at 705. This decision is in line of jurisprudence across the country. See supra notes 185, 265 and accompanying text.
310. Id. at *10. See also White v. Montsanto Co., 585 So. 2d 1205 (La. 1991) (stating that fault principles under Louisiana Civil Code article 2315 are broad, and recognizing intentional infliction of emotional distress as a viable cause of action in Louisiana).
313. See Corsey v. Department of Corrections, 375 So. 2d 1319 (La. 1979).
discovery rule, *contra non valentum* prevents the prescription period from running until the plaintiff discovers, or should have discovered, the cause of action. Since spoliation of evidence is often difficult to discover, *contra non valentum* should extend the prescriptive periods of those cases where the plaintiff reasonably did not discover the cause of action until after the one-year prescriptive period had expired.314

The only Louisiana court faced with prescription as an issue in a spoliation-of-evidence case is the Louisiana Third Circuit Court of Appeal in *Bethea.*315 During the course of discovery, information revealed the failure of the defendant to preserve critical evidence. Thereafter, plaintiff filed amended and supplemental petitions which were the subject of an exception of prescription filed by defendant. Although *contra non valentum* was not addressed in *Bethea,* the court found the spoliation-of-evidence claim and impairment-of-a-civil-claim action factually related back to the original cause of action. Reversing the trial court, the appellate court held the claim was not prescribed.316

2. Burden of Proof and Suit-Within-the-Suit Requirement

As previously discussed, common law states are divided on whether the spoliation-of-evidence cause of action can only be brought after the resolution of the underlying lawsuit. Some courts have held the prejudicial injury does not occur until after the injured party receives an unfavorable resolution of the original claim.317 Others have allowed the spoliation-of-evidence cause of action to be litigated alongside the underlying claim.318 However, most courts have held that when a legal malpractice action is involved, the plaintiff must first prove that he would have won the underlying lawsuit to show any prejudicial injury as a result of the legal malpractice.319 This has been termed the “suit within the suit” requirement.

After years of following the suit-within-the-suit requirement, the Louisiana Supreme Court in *Jenkins v. St. Paul Fire & Marine Insurance Co.* modified that theory for legal malpractice cases.320 The Court in *Jenkins* held that plaintiff proves his prima facie case upon showing that the former attorney agreed to handle the case and failed to timely file the claim. The burden then shifts to the
former attorney to overcome plaintiff's prima facie case by proving that the plaintiff would not have won the original claim. Thus, in Louisiana there is no requirement that the plaintiff must first show the spoliated evidence would have allowed the plaintiff to successfully prove the underlying lawsuit when bringing a cause of action against his attorney for spoliation of evidence. The same argument can be made under Louisiana law no matter who is the spoliator. Modification of the suit-within-the-suit requirement in Louisiana cases eases the opposing party's burden in proving damages as the result of the spoliation of evidence. To require otherwise would reward the spoliator for his conduct.

Another procedural issue in this developing area of law is determining the applicable burden of proof in a spoliation-of-evidence claim. Although no Louisiana court has addressed this issue, the burden of proof for a spoliation claim should be analogous to that required in an impairment-of-a-civil-claim action. That is, the plaintiff must prove "the loss of plaintiff's opportunity to pursue the claim."\(^{321}\)

D. Other Sanctions Available Under Louisiana Law


As previously discussed, Federal Rules of Civil Procedure 37 can be an effective remedy for spoliation of evidence where there is a violation of a court order.\(^{322}\) In cases where there is no violation of a court order, the court has broad discretionary power to impose sanctions under the court's inherent powers doctrine.\(^{323}\)

One Louisiana case that applied federal discovery sanctions was Lewis v. Darce Towing Co.\(^{324}\) In Lewis, the court stated that it had broad discretion to impose discovery sanctions under Rule 26 and the court's inherent powers doctrine.\(^{325}\) Exclusion of plaintiff's expert's testimony was held an appropriate sanction under the facts.\(^{326}\) The court looked at the following five factors in determining whether the evidence should be excluded: "(1) whether the defendant was prejudiced as a result of the ex parte autopsy; (2) whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether


\(^{322}\) See supra note 199 and accompanying text.

\(^{323}\) See supra note 200 and accompanying text.

\(^{324}\) 94 F.R.D. 262 (W.D. La. 1982).

\(^{325}\) Id. at 265-66.

\(^{326}\) Id. at 272. See also Williams v. General Motors Corp. (Williams II), 639 So. 2d 275, 290 (La. App. 4th Cir. 1994) (on opinion for grant of rehearing stating that the failure to produce the evidence "reflects on the quality of the expert testimony." The court under the facts of the case found plaintiff's expert's testimony inadmissible.).
the plaintiff was in good or bad faith; and (5) the potential for abuse if the evidence is not excluded.\textsuperscript{327}

State rules of civil procedure also provide sanctions. Louisiana Code of Civil Procedure article 1471 is the comparable state rule to federal Rule 37.\textsuperscript{328} In addition, Louisiana Code of Civil Procedure article 191 provides the state courts with inherent powers to impose appropriate sanctions.\textsuperscript{329}

2. Criminal Code

Louisiana’s Criminal Code may also provide some remedy when evidence is spoliated. One criminal statute that may be applicable is Louisiana Revised Statutes 14:130.1, which prohibits obstruction of justice.\textsuperscript{330} Louisiana’s

\textsuperscript{327} Lewis v. Darce Towing Co., 94 F.R.D. 262, 266-67 (W.D. La. 1982).
\textsuperscript{328} La. Code Civ. P. art. 1471 provides:

- If a party or an officer, director, or managing agent of a party or a person designated under Articles 1442 or 1448 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Article 1469 or Article 1464, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
  1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.
  2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.
  3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.
  4. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.
  5. Where a party has failed to comply with an order under Article 1464, requiring him to produce another for examination, such orders as are listed in Paragraphs (1), (2), and (3) of this Article, unless the party failing to comply shows that he is unable to produce such a person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the court finds that the failure was substantially justified or that the other circumstances make an award of expenses unjust.

\textsuperscript{329} La. Code Civ. P. art. 191 provides: “A court possesses inherently all of the power necessary for the exercise of its jurisdiction even though not granted expressly by law.”

\textsuperscript{330} The relevant part of La. R.S. 14:130.1 (1986) provides:

A. The crime of obstruction of justice is any of the following when committed with the knowledge that such act has, reasonably may, or will affect an actual or potential present, past, or future criminal proceeding as hereinafter described:

1. Tampering with evidence with the specific intent of distorting the results of any criminal investigation or proceeding which may reasonably prove relevant to a criminal investigation or proceeding. Tampering with evidence shall include the intentional alteration, movement, removal, or addition to any object or substance. . . . (emphasis
obstruction-of-justice statute, however, is limited in its applicability to spoliation-of-evidence claims because it only applies to a "criminal investigation or proceeding." The plaintiff in one Louisiana case argued that spoliation of evidence "constitutes an obstruction of justice." The court in Williams I, however, did not comment on that argument.

3. Code of Professional Responsibility

The Louisiana Supreme Court adopted Code of Professional Responsibility Rule 3.4 for attorneys in 1987. Rule 3.4A provides for sanctions where an attorney obstructs an opposing party's access to evidence. This may provide an effective deterrent to attorneys from spoliating evidence or advising their clients to do so.

E. Recognition of Other New Torts in Louisiana

Louisiana courts have shown a willingness to adopt new torts when necessary. Louisiana adopted "intentional interference with a business contract" in 9 to 5 Fashions, Inc. v. Spurney, which went against a long line of jurisprudence failing to recognize this cause of action.

Louisiana also recognized negligent infliction of emotional distress in Lejeune v. Rayne Branch Hospital. Again, the court rejected prior Louisiana jurisprudence and allowed this new cause of action to exist despite the lack of any physical injury. Shortly thereafter, negligent infliction of emotional distress was legislatively adopted in Louisiana Civil Code article 2315.6.

331. Id.
333. Rule 3.4 provides in part:
A lawyer shall not:
(a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do such an act;
(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
(d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party; and
(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
(1) The person is a relative or an employee or other agent of a client, and
(2) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.
334. 538 So. 2d 228 (La. 1989).
335. 556 So. 2d 559 (La. 1990).
Within a year of Lejeune, the Louisiana Supreme Court, in White v. Monsanto Co., held that intentional infliction of emotional distress is a viable cause of action in Louisiana. The court based its recognition of this cause of action on Louisiana Civil Code “article 2315 and duty-risk principles.” The court analyzed the claim for intentional infliction of emotional distress under general tort precepts similar to what the Louisiana Third Circuit Court of Appeal did in Bethea when it discussed the recognition of spoliation of evidence as a cause of action. Article 2315 is the cornerstone for recognition of spoliation of evidence, as well as other new torts, in Louisiana.

IV. CONCLUSION

In conclusion, prior to 1997 the only remedy Louisiana courts have granted for spoliation-of-evidence claims has been the application of an evidentiary spoliation doctrine (i.e., adverse presumption). The adverse presumption is rebuttable and has been easily overcome by a “reasonable” explanation. However, a federal district court in Edwards v. Louisville Ladder Co. inferred that Louisiana may recognize spoliation of evidence as a separate tort if the right facts were presented. In Bethea v. Modern Biomedical Services, Inc., the third circuit recognized the cause of action under Louisiana Civil Code article 2315, the general article which governs delictual torts. If the Louisiana Supreme Court were to recognize a new tort for the spoliation of evidence, the factors examined by the common law jurisprudence would serve as a guide in determining when a separate tort should be recognized under the facts of each case. As additional guidance, the court can look to such cases as Solano v. Delancy for the elements required for an intentional-spoliation-of-evidence claim, and Continental Insurance Co. v. Herman for the elements required for a negligent-spoliation-of-evidence claim.

If, however, Louisiana refused to recognize the cause of action as a separate tort, the courts should shift the burden of proof onto the intentional spoliator. Shifting the burden of proof would allow the plaintiff to prove his prima facie case once it is shown that the evidence was intentionally destroyed. Such a shifting of the burden of proof would be a harsher consequence on an intentional spoliator than a mere rebuttable presumption. The jurisprudence of other states

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336. 585 So. 2d 1205 (La. 1991).
337. Id. at 1209.
338. See supra notes 309-311 and accompanying text.
340. The factors include: (1) intentional versus negligent spoliation; (2) duty to preserve the evidence; (3) availability of alternative remedies; (4) prejudicial injury; and (5) spoliation by a party to the original lawsuit versus by a third party.
allowing such a conclusive presumption of liability would serve as a guide for the Louisiana courts.\textsuperscript{343}

Several specific Louisiana statutes create a duty to preserve evidence. In particular, Louisiana has a statute that requires the retention of medical records, thus imposing a statutory duty to preserve the records.\textsuperscript{344} Since spoliation of evidence occurs frequently in medical malpractice actions, the legislature should specifically remedy such spoliation of evidence by enacting sanctions for breach of that duty.

Discovery sanctions, such as those utilized by the court in \textit{Lewis},\textsuperscript{345} or sanctions imposed under the court's inherent power, is an alternative remedy to the recognition of a new tort. The sanctions range from exclusion of expert testimony to dismissal or summary judgment. A concern with applying those sanctions is the broad discretion a judge has in determining the severity of the sanction. There must be a consistent application of the sanctions in order for them to act as an effective deterrent. One way to accomplish this would be the enactment of a new statute in the Louisiana Code of Civil Procedure which would provide for explicit sanctions.

Currently, the rebuttable adverse inference does not adequately deter spoliation of evidence. Besides such an adverse inference, the court has several options available to remedy a spoliation-of-evidence claim. It can recognize the cause of action as a separate new tort in Louisiana. Alternatively, it can shift the burden of proof or impose sanctions. Finally, our legislature can enact specific remedies for statutorily-created duties to preserve evidence.

Louisiana Civil Code article 2315 encompasses the fault-based tort of spoliation of evidence. For authority, see \textit{White v. Monsanto Co.} in which the Louisiana Supreme Court broadly construed article 2315 and recognized the tort of intentional infliction of emotional distress.\textsuperscript{346} Louisiana is in line with the majority of the rest of the country in its slow recognition of spoliation of evidence as a separate tort. However, with the Louisiana Third Circuit Court of Appeal's decision in \textit{Bethea},\textsuperscript{347} more Louisiana courts may be willing to analyze spoliation of evidence as a cause of action under the general tort precepts. It is time for Louisiana to take a firm stand against the destruction or alteration of evidence. Recognition of a spoliation-of-evidence claim as a viable cause of action is the most effective method to do so.

\footnotesize{\textsuperscript{343} See supra notes 34, 51, 75, 92, 173, 174, 197 and accompanying text.}
\footnotesize{\textsuperscript{344} La. R.S. 40:1299.96 (___). See also La. R.S. 33:1562 (1988) (imposing a duty on health-care providers to preserve evidence surrounding deaths which are sudden, accidental, violent or which occur under suspicious circumstances.).}
\footnotesize{\textsuperscript{345} 94 F.R.D. 262 (W.D. La. 1982).}
\footnotesize{\textsuperscript{346} White v. Monsanto, 585 So. 2d 1205 (La. 1991).}
\footnotesize{\textsuperscript{347} Bethea, No. 97-332, 1997 WL 728565 (La. App. 3d Cir. Nov. 19, 1997) (unpublished opinion).}