

Trial Practice

by Ralph F. Holmes

Trial Practice is a continuing feature of *Trial Bar News*, focusing on trial strategies and issues of particular interest to the trial bar.

LOSS, ALTERATION, OR DESTRUCTION OF EVIDENCE: THE SPOILIATION PROBLEM*

On March 14, 1991, our client suffered second- and third-degree burns over a third of his body in a hospital shower when a valve controlling the flow of hot water to this and other showers malfunctioned. We filed suit against the hospital, asserting claims of negligent nursing supervision and negligent maintenance and operation of the plumbing system.¹ The hospital urged us to bring a products liability action against the manufacturer of the valve, which we agreed to do if engineers, upon examination and testing of the valve, verified that its failure had been caused by a design or manufacturing defect. The hospital and we each retained a professor from the Materials Engineering Department of the Massachusetts Institute of Technology to establish the protocol for and conduct the tests. Because the tests would involve permanent disassembly of the bellows mechanism of the valve, all aspects of the tests were professionally videotaped to ensure that there was a complete record of this important evidence, and the valve assembly parts were carefully preserved upon conclusion of the tests. The tests confirmed that the improper use of corrosive solder flux in the construction of the bellows had caused it to fail prematurely. Suit was then commenced against the manufacturer in addition to the hospital.²

The case recently settled, one month before trial. An issue never adjudicated, but that might have been raised by the manufacturer by an *in limine* or other motion at trial, was whether the hospital and the plaintiffs should be penalized for conducting destructive testing on the valve without giving the manufacturer an opportunity to participate. No sanction

would have been appropriate, as the manufacturer never claimed or suggested through its experts or otherwise that the tests were faulty, invalid, or had impaired its ability to prepare and present a defense.³ Nevertheless, this "spoliation of evidence" issue merits careful consideration by counsel, as there is a rapidly growing body of case law that imposes significant duties upon litigants to preserve the integrity of potential evidence.

According to Black's Law Dictionary, "spoliation" is "[t]he destruction of evidence...[t]he destruction or the significant meaningful alteration of a document or instrument."⁴ As one court has held: "Spoliation of evidence in a prospective civil action occurs when evidence pertinent to the action is destroyed thereby interfering with the action's proper administration and disposition."⁵ At least four states now recognize spoliation of evidence as an independent tort in some



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context,⁶ while at least four others⁷ and the federal courts⁸ have rejected it as a cause of action.

In *Hirsch v. General Motors Corp.*,⁹ the Superior Court of New Jersey described the context in which a plaintiff must act to preserve evidence as follows:

Accordingly, a duty to preserve evidence, independent from a court order to preserve evidence, arises where there is: (1) pending or probable litigation involving the defendants; (2) knowledge by the plaintiff of the existence or

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³ Prejudice to the other side generally is required before any relief for alteration or destruction of evidence will be granted. See *infra* notes 12-14 and accompanying text. At least one court, however, has held that alteration or destruction of evidence by an expert that results in only that expert being able to testify to the evidence's original condition is in and of itself so prejudicial as to merit exclusion of the expert's testimony concerning the evidence. See *Nally v. Volkswagen of America, Inc.*, 405 Mass. 191, 539 N.E.2d 1017 (1989), discussed *infra* at notes 24-29 and accompanying text.

⁴ BLACK'S LAW DICTIONARY 1257 (5th ed. 1979).

⁵ *Hirsch v. General Motors Corp.*, 628 A.2d 1108, 1113 (N.J. Super. L. 1993).

⁶ *Id.* at 1114-15 (citing *Smith v. Superior Court*, 151 Cal. App.3d 491, 198 Cal. Rptr. 829 (1984) (intentional spoliation); *Bondu v. Gurvich*, 473 So.2d 1307, 1312 (Fla. Dist. Ct. App. 1984) (negligent spoliation); *Hazen v. Municipality of Anchorage*, 718 P.2d 456 (Alaska 1986) (intentional spoliation); *Viviano v. CBS, Inc.*, 251 N.J. Super. 113, 597 A.2d 543 (App. Div. 1991) (fraudulent concealment of evidence), *cert. denied*, 127 N.J. 565, 606 A.2d 375 (1992)).

⁷ *Id.* at 1114 (citing *Murphy v. Target Products*, 580 N.E.2d 687 (Ind. 1991); *Dunlap v. City of Phoenix*, 169 Ariz. 63, 817 P.2d 8 (1990); *Koplin v. Rosel Well Perforators, Inc.*, 241 Kan. 206, 734 P.2d 1177 (1987); *Phair v. Cortese*, 147 Misc.2d 1078, 559 N.Y.S.2d 780 (1990)).

⁸ *Id.* (citing *Wilson v. Beloit Corp.*, 921 F.2d 765 (8th Cir. 1990); *Headley v. Chrysler Motor Corp.*, 141 F.R.D. 362 (D. Mass. 1991) (subject matter jurisdiction based on diversity of citizenship); *Computer Assoc. Int'l v. American Fundware*, 133 F.R.D. 166 (D. Colo. 1990); *Akiona v. United States*, 938 F.2d 158 (9th Cir. 1991); *Austerberry v. United States*, 169 F.2d 583 (6th Cir. 1948); *Wong v. Swier*, 267 F.2d 749 (9th Cir. 1959); *Vick v. Texas Employment Comm'n*, 514 F.2d 734 (5th Cir. 1975); *Boyd v. Ozark Airlines, Inc.*, 568 F.2d 50 (8th Cir. 1977); *S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R. Co.*, 695 F.2d 253 (7th Cir. 1982); *Coates v. Johnson & Johnson*, 756 F.2d 524 (7th Cir. 1985); *Nation-Wide Check v. Forest Hills Distrib.*, 692 F.2d 214 (1st Cir. 1982)).

⁹ 628 A.2d 1108 (N.J. Super. L. 1993).

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¹ *Prunierv. Elliot Hosp.*, No. 93-C-390 (Hillsborough Cnty. Super. Ct. 1993).

² *Prunierv. Elliot Hosp.*, No. C-93-619 (Hillsborough Cnty. Super. Ct. 1993).

