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# Welsh v. United States, The Sixth Circuit Gives a Physics Lesson - For Every Action There is an Equal and Opposite Reaction

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## **WELSH v. UNITED STATES, THE SIXTH CIRCUIT GIVES A PHYSICS LESSON -- FOR EVERY ACTION THERE IS AN EQUAL AND OPPOSITE REACTION**

### INTRODUCTION

For each action, there is an equal and opposite reaction.<sup>1</sup> So it is in the science of physics, and likewise in the law. If a person receives a personal injury, the law of tort provides a remedy. Similarly, a breach of promise is remedied by the law of contracts. The commonality of these situations, analogous to physics, is that an individual's injurious act causes a reaction in the judicial system. In *Welsh v. United States*,<sup>2</sup> the Sixth Circuit Court of Appeals reacted to negligent spoliation<sup>3</sup> of evidence in a medical malpractice case.

In *Welsh*, a plaintiff-executrix filed a medical malpractice action against the United States.<sup>4</sup> As a result of the defendant's negligent disposal of a part of the decedent's skull, the plaintiff was precluded from directly proving several elements of her case.<sup>5</sup> This is the *first* case in which a federal appeals court has attempted to remedy the problem of negligent spoliation of evidence in civil litigation. The court of appeals, sitting in a diversity action, reviewed decisions of the Kentucky courts, analogous federal opinions, and leading opinions from other jurisdictions, in developing its approach to the issue. In drafting the *Welsh* opinion, the sixth circuit joined a growing movement which attempts to protect the judicial process and litigants from the harmful effects of the spoliation of evidence. In adopting this protective stance, the court served notice to potential spoliators that they bear the risk of their own conduct, and will not benefit by destroying evidence.<sup>6</sup>

This casenote will review the facts of *Welsh* and present the current judicial approaches to spoliation of evidence in civil litigation. Second, the note will analyze the *Welsh* court's proposed solution to the spoliation problem. Finally, the note will discuss the use of the *Welsh* approach in litigation and management implications for health care facilities.

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<sup>1</sup> J. THEWLIS, CONCISE DICTIONARY OF PHYSICS (1973).

<sup>2</sup> 844 F.2d 1239 (6th Cir. 1988). This casenote is concerned with Judge Merritt's opinion which focused on the spoliation issue. Although the district court's decision was affirmed, the court of appeals decision was not unanimous. Judge Merritt affirmed on separate grounds; Judge Nelson affirmed the trial court's findings; and Judge Welford reversed the trial court.

<sup>3</sup> Spoliation is the destruction or alteration of evidence. In effect, it is an obstruction of justice BLACK'S LAW DICTIONARY 1257 (5th ed. 1979).

<sup>4</sup> *Welsh*, 844 F.2d at 1240. The United States operates the Veteran's Administration Clinic involved in *Welsh*. *Id.* at 1239.

<sup>5</sup> *Id.* at 1243. The negligence and proximate cause elements lacked direct proof. *Id.*

<sup>6</sup> *Id.* at 1249.

## FACTS

Francis Welsh was admitted to the Veteran's Administration (VA) Medical Center (clinic) in Lexington, Kentucky on May 27, 1980.<sup>7</sup> Welsh complained of various psychological and physical ailments.<sup>8</sup> VA doctors ran tests and discovered a brain tumor.<sup>9</sup> The doctors removed the tumor on June 9, 1980.<sup>10</sup> The procedure required the surgeons to make an incision in the scalp and bore through the skull bone.<sup>11</sup> The procedure created a skull flap where the surgeons entered into the skull cavity.<sup>12</sup> After removing the tumor, the surgeons replaced the skull flap, and concluded the procedure.<sup>13</sup>

Between July and September, Welsh returned to the clinic either two or four times.<sup>14</sup> On August 22, the clinic staff received an unscheduled visit from Welsh.<sup>15</sup> Again Welsh complained of weakness and nausea.<sup>16</sup> The resident surgeon noted a problem and scheduled a diagnostic test for October.<sup>17</sup> Despite all of Welsh's complaints, the staff neglected to take his temperature.<sup>18</sup>

On September 25, Welsh reappeared at the clinic.<sup>19</sup> The record reflects that the clinic's staff again failed to fully investigate Welsh's complaints.<sup>20</sup>

Welsh made his scheduled visit to the clinic on October 10.<sup>21</sup> Once again, he

<sup>7</sup> *Id.* at 1240.

<sup>8</sup> *Id.* The decedent was experiencing depression, loss of appetite and memory, fatigue, and headaches. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* This skull flap is the critical piece of evidence which ultimately became the centerpiece of Judge Merritt's opinion.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* The number of visits was disputed by the VA clinic because there was an absence of records for both the July 9 and September 25 visits. The first visit was on July 9. This visit was disputed by the VA. The second visit was on July 15. Welsh voiced symptoms similar to his pre-operative condition. *See supra* note 8. There was sparse documentation of these complaints in clinic records. Despite these alleged complaints, the attending physician merely scheduled the decedent for a return visit in 3 months. *Id.*

<sup>15</sup> *Id.* This visit is also disputed by the clinic. *See supra* note 14. The district court made a finding of fact that the visit did occur. *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* The district court noted in its findings of fact, based on medical testimony, that the failure to take the decedent's temperature with knowledge of his symptoms was negligent. (District Court Opinion at p.8) This oversight is the focal point of Judge Nelson's concurring opinion. *Id.* at 1249-51. When the basic relationship between a bacterial infection and a high temperature is understood, the role of Welsh's temperature becomes apparent. When the body fights off infection, the internal body temperature rises. Thus, the Court implied that if the temperature had been taken, a high temperature would have been observed, prompted further tests and, ultimately, discovery of the infection before it caused brain damage. *Id.* at 1242.

<sup>19</sup> *Id.* at 1240.

<sup>20</sup> *Id.*

expressed his ailments to the staff.<sup>22</sup> The staff repeated its prior conduct and failed to take Welsh's temperature.<sup>23</sup> The VA doctor ran several tests and the results of each were within normal limits.<sup>24</sup> Welsh left the clinic after those tests.<sup>25</sup> However, his condition worsened before the day was over.<sup>26</sup> His family brought him back to the clinic that night.<sup>27</sup> At that time, the staff finally took Welsh's temperature.<sup>28</sup>

On October 11, the doctors investigated the area under the original surgical incision.<sup>29</sup> The investigation revealed bacterial infection (i.e., pus).<sup>30</sup> The VA's infectious disease consultants recommended a deeper exploration to search for infection near the brain surface.<sup>31</sup> Despite Welsh's condition, the recommendation was put off until October 15.<sup>32</sup>

On October 14, the doctor's repeated a test originally given on October 10.<sup>33</sup> That procedure revealed a "crescent."<sup>34</sup> This result, combined with the consultant's recommendation, spurred the exploration of the brain surface for infection on October 15.<sup>35</sup> This procedure required the surgeons to proceed through the original incision into the skull and, consequently, remove the skull flap.<sup>36</sup> Then, in direct contradiction of clinic regulations, the surgeons threw the flap away,<sup>37</sup> making pathological analysis of the skull flap impossible.<sup>38</sup>

The October 15th procedure led to the discovery of a subdural empyema.<sup>39</sup> Subsequently, Welsh received an antibiotic treatment which cured the infection.<sup>40</sup> Nonetheless, the infection had already caused permanent brain damage.<sup>41</sup> Welsh remained in a semi-coma from October 1980 until his death in May 1985.<sup>42</sup>

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* The geometric progression of the infection makes the relation of high temperature (e.g., fever) to infection critical at this time. The longer it takes to discover the infection, the greater its growth. *Id.* at 1250 (Nelson, J., concurring).

<sup>24</sup> *Id.* at 1240.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* The first reading showed a temperature of 102 degrees; the second, 104.6 degrees. *Id.*

<sup>29</sup> *Id.* Doctors took a needle tap of the area directly beneath the original incision. *Id.*

<sup>30</sup> *Id.* at 1240-41. The formation of pus is a byproduct of bacterial infection. *STEDMAN'S MEDICAL DICTIONARY* 1047 (3rd ed. 1972).

<sup>31</sup> *Id.* at 1240. A localized collection of pus near the brain surface is a subdural empyema. *Id.*

<sup>32</sup> *Id.* at 1241.

<sup>33</sup> *Id.* The doctor ordered a computed tomography (CT) study of the head. *Id.*

<sup>34</sup> *Id.* This "crescent" is symptomatic of the presence of a subdural empyema. *See supra* note 31.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* This precluded plaintiff from presenting direct proof of the infection's cause and duration. *Id.* at 1243.

<sup>38</sup> *Id.* Pathological analysis would have provided conclusive proof of both the duration and cause of the infection. *Id.* at 1242.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

In 1982, Nellie Welsh, the decedent's wife, filed an administrative claim with the VA.<sup>43</sup> The VA denied her claim.<sup>44</sup> Subsequently, Nellie Welsh filed a wrongful death action under the Federal Tort Claims Act,<sup>45</sup> in United States District Court (Eastern District of Kentucky).<sup>46</sup> In a bench trial, the district court awarded damages to her.<sup>47</sup> In reaching its decision, the district court drew a host of adverse inferences against the VA.<sup>48</sup> The court drew the inferences because the VA misplaced medical records, deviated from standard procedures, failed to analyze the skull flap, and failed to present any unbiased expert witnesses.<sup>49</sup>

The failure to diagnose and treat the infection on September 25 and October 10 were found to be negligent acts and the proximate cause of Welsh's death.<sup>50</sup>

The court of appeals affirmed.<sup>51</sup> The appellate court opinion was based on grounds not found in the district court's opinion.<sup>52</sup> The appellate court decided that in light of Nellie Welsh's missing proof (the skull flap), a rebuttable presumption should be utilized.<sup>53</sup> In doing so, the court shifted the burden of proof (i.e., persuasion), which the plaintiff normally carries, to the defendant.<sup>54</sup> The court relied on Federal Rule of Evidence 302<sup>55</sup> to link Nellie Welsh's missing proof with the need for a presumption.<sup>56</sup> In effect, the court has created a new approach to resolving problems in negligent spoliation cases.

The court developed the rebuttable presumption based not only on the facts presented, but on a survey of approaches to the spoliation issue.<sup>57</sup> *Public Health Trust of Dade County v. Valcin*<sup>58</sup> is the leading case dealing with negligent spoliation in malpractice suits. In *Valcin*, the plaintiff filed a malpractice action against the hospital.<sup>59</sup> The plaintiff was unable to prove negligence because her medical file did not contain the operative notes of a sterilization procedure.<sup>60</sup> The *Valcin* court

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* Federal Tort Claims Act, 28 U.S.C.S. 2671 (Law. Co-op 1977).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1239.

<sup>48</sup> *Id.* at 1242.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See *supra* note 2.

<sup>52</sup> *Welsh*, 844 F.2d at 1249.

<sup>53</sup> *Id.* at 1248.

<sup>54</sup> *Id.* at 1249.

<sup>55</sup> FED. R. EVID. 302 reads in relevant part: Applicability of State Law in Civil Actions and Proceedings - In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which state law supplies the rule of decision is determined in accordance with State law.

Thus, the rule provides a need to predict the Kentucky courts' position on the use of presumptions in a spoliation case.

<sup>56</sup> *Welsh*, 844 F.2d at 1243.

<sup>57</sup> *Id.* at 1246-49. See *infra* notes 66-160.

<sup>58</sup> 507 So. 2d 596 (Fla. 1987).

<sup>59</sup> *Id.* at 596.

adopted the use of a rebuttable presumption against the negligent spoliator.<sup>61</sup> That presumption, based on social policy, shifted both the burden of production and the burden of persuasion to the spoliator.<sup>62</sup>

The *Welsh* court adopted an approach identical to that in *Valcin*.<sup>63</sup> Reviewing the facts presented and Kentucky's substantive law on *res ipsa loquitor* and presumptions,<sup>64</sup> the court found that the use of a rebuttable presumption against the VA was warranted. The court cautioned that: "the strength of the inference allowable will vary according to the facts and evidentiary posture of a given case. Whether the defendant's actions may result or must result in an inference that the missing evidence would be unfavorable to the spoliator or result merely in a burden shifting presumption, will depend upon a case by case analysis."<sup>65</sup>

### BACKGROUND

Spoilation of evidence in civil litigation has been the subject of judicial scrutiny in recent years.<sup>66</sup> The destruction of evidence has adverse consequences on both the judicial system and the opposing party.<sup>67</sup> The courts have attempted to curb this growing problem through a variety of methods.<sup>68</sup>

#### *Tort Remedies*

The principle underlying the development of torts to remedy spoliation is that "a prospective civil action ...is a valuable probable expectancy' that the court must protect from... interference...."<sup>69</sup> Regardless of whether the destructive act is intentional or negligent, it is the protection of the opposing party's interest in their cause of action that is the centerpiece of the tort. Currently, two spoliation torts are recognized in civil litigation: intentional<sup>70</sup> and negligent<sup>71</sup> spoliation of evidence.

<sup>61</sup> *Id.* at 599.

<sup>62</sup> *Id.* at 599-601.

<sup>63</sup> *Welsh*, 844 F.2d at 1248-49.

<sup>64</sup> *Id.* at 1248.

<sup>65</sup> *Id.* at 1247.

<sup>66</sup> See Comment, *Spoilation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191 (1985) (hereinafter, *Civil Liability*); Note, *Smith v. Superior Court: A New Tort of Intentional Spoilation of Evidence*, 69 MINN. L. REV. 961 (1985); Note, *Evidence: Intentionally Destroyed Medical Records Give Rise to an Irrebuttable Presumption of Malpractice*, 37 U. FLA. L. REV. 197 (1985); Note, *Torts - Arizona Should Adopt the Tort of Intentional Spoilation of Evidence - LaRaia v. Superior Court*, 150 ARIZ. 118, 722 P. 2d 286 (1986), 19 ARIZ. ST. L.J. 371 (1987) (hereinafter, *Torts*); Comment, *Spoilation of Evidence - Recognition for a New Tort*, 15 WEST. ST. L. REV. 359 (1987). See *infra* notes 69-160.

<sup>67</sup> *Civil Liability*, *supra* note 66, at 191.

<sup>68</sup> Note, *Torts*, *supra* note 66, at 191.

<sup>69</sup> *Smith v. Superior Court*, 151 Cal. App. 3d 491, 502, 198 Cal. Rptr. 829, 837 (1984).

<sup>70</sup> See *infra* notes 72-87.

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<sup>71</sup> See *infra* notes 88-97.

## 1) Interference with Civil Litigation by Intentional Spoliation of Evidence

This tort of intentional spoliation owes its existence to the California Court system. In *Smith v. Superior Court*,<sup>72</sup> the California Court of Appeals analogized the spoliator's effect on litigation to a person's tortious interference with a business relationship.<sup>73</sup>

The elements of a cause of action for intentional interference with prospective litigation by spoliation of evidence are:<sup>74</sup>(1) the existence of a potentially successful lawsuit, (2) the spoliator's knowledge of the potential lawsuit, (3) the spoliator's intentional actions to destroy or alter evidence necessary to the lawsuit, (4) the spoliation of evidence, and (5) the impairment of the plaintiff's ability to proceed in the litigation because of the spoliation.

All of these elements were present in *Smith*. The plaintiff, Phyllis Smith, was permanently blinded when the wheel flew off of an on-coming van and shattered her windshield.<sup>75</sup> The company that customized the van's wheels, Abbott Ford, towed the van to its dealership.<sup>76</sup> Smith's attorney made an agreement with Abbott Ford.<sup>77</sup> Abbott Ford agreed to keep certain van parts for evidence while Smith's attorney investigated incidental matters.<sup>78</sup> Subsequently, Abbott Ford destroyed, lost, or transferred the van parts which made it impossible for Smith's experts to inspect those parts.<sup>79</sup> That loss of evidence substantially impaired Smith's ability to prove her cause of action against Abbott Ford and several co-defendants.<sup>80</sup> Consequently, Smith brought suit against Abbott Ford for "tortious interference with prospective civil action by spoliation of evidence."<sup>81</sup> The California Court of Appeals emphasized that a person's prospective civil action is a "probable expectancy"<sup>82</sup> entitled to legal protection from a spoliator's interference.

California<sup>83</sup> and Alaska<sup>84</sup> have accepted the tort of intentional spoliation. Kansas,<sup>85</sup> Arizona<sup>86</sup> and Illinois<sup>87</sup> have addressed the tort, but have neither accepted

<sup>72</sup> See *supra* note 69.

<sup>73</sup> *Smith*, 151 Cal. App. 3d at 501-02, 198 Cal. Rptr. at 836. The court equated the spoliator's effect on the probable success of a lawsuit with the intentional interference with prospective business relationships. *Id.*

<sup>74</sup> See, e.g., Comment, *Civil Liability*, *supra* note 66, at 200-01; Note, *Torts*, *supra* note 66, at 375.

<sup>75</sup> *Smith*, 151 Cal. App. 3d at 494, 198 Cal. Rptr. at 831.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See *Abbott Ford, Inc. v. Superior Court*, 181 Cal. App. 3d 1205, 228 Cal. Rptr. 250 (1985). The case names potential defendants to the Smith's suit (Sears, Roebuck & Co., Ford Motor Co., and the van driver). *Id.*

<sup>81</sup> *Smith*, 151 Cal. App. 3d at 495, 198 Cal. Rptr. at 831.

<sup>82</sup> *Id.* at 502, 198 Cal. Rptr. at 837.

<sup>83</sup> See *supra* notes 69-82.

<sup>84</sup> *Hazen v. Anchorage*, 718 P.2d 456 (Alaska 1986).

<sup>85</sup> *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177 (Kan. 1987).

<sup>86</sup> *LaRaia v. Superior Court*, 150 Ariz. 118, 722 P.2d 286 (1986).

<sup>87</sup> *Petrik v. Monarch Printing Corp.*, 150 Ill. App. 3d 248, 501 N.E.2d 1312 (1986).

nor rejected it.

## 2) Negligent Interference with Civil Litigation by Spoliation of Evidence

The elements of the negligent spoliation tort follow the traditional negligence pattern:<sup>88</sup> (1) duty, (2) breach of duty, and (3) damages proximately caused by the breach of duty.

In *Fox v. Cohen*,<sup>89</sup> the administrator of an estate filed a wrongful death action. The plaintiff alleged three counts in his complaint:<sup>90</sup> (1) medical malpractice; (2) negligence in losing, destroying, or misplacing the decedent's medical records, and (3) conspiracy to destroy the records. The court held that pleading a negligence cause of action mandated a showing of the defendant's duty owed to the plaintiff, breach of that duty, and an injury proximately caused by that breach.<sup>91</sup>

The *Fox* decision implicated Illinois Statutes, Illinois Department of Public Health Regulations, and American Hospital Regulation standards in the creation of a duty to maintain medical records.<sup>92</sup> In spite of the presence of a duty and a corresponding breach, the court dismissed counts two and three because the plaintiff had not yet suffered damages.<sup>93</sup> The court explained that there were no damages because the plaintiff had not lost his malpractice suit.<sup>94</sup>

California,<sup>95</sup> Florida,<sup>96</sup> and Illinois<sup>97</sup> currently recognize the negligent spoliation tort.

### *Non-Tort Remedies*

Spoliation can also be attacked through various non-tort means.<sup>98</sup> These are utilized primarily to protect the injured party's cause of action or defense.<sup>99</sup> Rules of civil procedure,<sup>100</sup> criminal sanctions,<sup>101</sup> and the use of adverse inferences and presumptions<sup>102</sup> are common methods of addressing spoliation.

<sup>88</sup> Note, *Torts*, *supra* note 66, at 379 & nn. 113-148.

<sup>89</sup> 84 Ill. App. 3d 744, 406 N.E.2d 178 (1980).

<sup>90</sup> *Id.* at 745, 406 N.E.2d at 179.

<sup>91</sup> *Id.* at 746, 406 N.E.2d at 179.

<sup>92</sup> *Id.* at 749-50, 406 N.E.2d at 181.

<sup>93</sup> *Id.* at 751, 406 N.E.2d at 183.

<sup>94</sup> *Id.*

<sup>95</sup> *Velasco v. Commercial Building Maintenance, Co.*, 169 Cal. App. 3d 874, 215 Cal. Rptr. 504 (1985).

<sup>96</sup> *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984).

<sup>97</sup> See *supra* notes 89-94.

<sup>98</sup> See *infra* notes 103-160.

<sup>99</sup> See Note, *Torts*, *supra* note 66, at 66 & n. 154.

<sup>100</sup> See *infra* notes 103-107.

<sup>101</sup> See *infra* notes 108, 109.

<sup>102</sup> See *infra* notes 110-160.



## 1) Rules of Civil Procedure and Criminal Sanctions<sup>103</sup>

When a litigant hides, loses, or otherwise destroys evidence *after beginning discovery*, Federal Rule of Civil Procedure 37(b)<sup>104</sup> authorizes a judge to invoke a hierarchy of sanctions against the non-compliant discovery party.<sup>105</sup> Possible sanctions include, but are not limited to, barring the introduction of specific matters into evidence, ordering facts established against the spoliator, barring claims or defenses, and entering judgment against the spoliator.<sup>106</sup> The severity of these sanctions is generally predicated upon the culpability level of the spoliator.<sup>107</sup>

Alternatively, the destruction of evidence will generally be covered in a jurisdiction's "obstruction of justice" or "interference" statutes concerning the spoliation of evidence.<sup>108</sup> Other statutes prohibiting destruction of evidence are contingent upon the spoliator's culpability and the time of destruction relevant to the onset of litigation.<sup>109</sup>

## 2) Inferences or Presumptions

A separate approach utilizes adverse inferences or presumptions. This method provides a practical solution to the problems that arise with separate civil actions.<sup>110</sup> In a typical spoliation case, the spoliator destroys or alters evidence which he knows or foresees is critical to the case. The judge and jury receive evidence on the spoliation. From this evidence, it is decided what evidentiary effect, if any, will be given to the spoliation. The primary factor assessed in making that determination is the motivation or intent of the spoliator.<sup>111</sup>

### a) intentional spoliation

The common law doctrine, "*omnia praesumuntur contra spoliatorem*" is commonly used when a party intentionally destroys or alters evidence.<sup>112</sup> The

<sup>103</sup> Note, *Torts, supra* note 66, nn. 160-171 (Rules of Civil Procedure) and nn. 184-191 (criminal sanctions). The reader is referred to that casenote for expanded review of these topics.

<sup>104</sup> FED. R. CIV. P. 37(b).

<sup>105</sup> These rules have been adopted virtually unchanged in the majority of states. C. Wright, *Law of Federal Courts* Section 406 (4th Ed. 1983).

<sup>106</sup> FED. R. CIV. P. 37(b)(2).

<sup>107</sup> Note, *Torts, supra* note 66, nn. 167-172.

<sup>108</sup> *Id.* & n. 184.

<sup>109</sup> *Id.* See also Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665 (1979).

<sup>110</sup> See *Smith*, 151 Cal. App. 3d at 503, 198 Cal. Rptr. at 83 (duplicative efforts - two trials with same evidence; time and expense imposed on litigants and judicial system); *Fox*, 85 Ill. App. 3d at 198, 406 N.E.2d at 183 (proof of damages).

<sup>111</sup> See *Miller v. Montgomery County*, 64 Md. App. 202, 494 A.2d 761 (1985).

<sup>112</sup> See Note, *Evidence - Omnia Praesumuntur Contra Spoliatorem*, 1 ADEL. L. REV. 344 (1962). This doctrine is aimed at intentional spoliation and does not extend to negligent spoliation cases. See *infra* notes 127-132.

common law doctrine is premised upon several progressive inferences: (1) the spoliator had control of the evidence; (2) the spoliator intentionally, or fraudulently, destroyed or altered the evidence; (3) no reasonable person would destroy or alter evidence that was favorable to their case; and (4) because the party did alter or destroy the evidence, that evidence must have been unfavorable to their case.<sup>113</sup>

The doctrine's practical application was illustrated in *S.C. Johnson v. Louisville & Nashville R. Co.*<sup>114</sup> The plaintiff, a manufacturer, contracted with the defendant, a railroad company, to deliver goods to the plaintiff's customer.<sup>115</sup> Upon delivery at the customer's store, the goods were claimed to be damaged.<sup>116</sup> The plaintiff requested that the goods be returned to test them for the alleged damages.<sup>117</sup> Subsequently, the plaintiff's quality control expert tested the goods.<sup>118</sup> He recorded the results in written notes.<sup>119</sup> The notes were used to create a memo and then thrown away.<sup>120</sup>

A suit was filed to recover the invoice price of the damaged goods.<sup>121</sup> The plaintiff used the memo as proof of damages.<sup>122</sup> The trial court, after hearing the rationale for the missing notes, inferred that the notes would have revealed a faulty testing of the goods.<sup>123</sup> That adverse inference was based on the common law doctrine.<sup>124</sup> Applying the common law doctrine, the trial court used a two step process which required the court to: (1) find that the evidence was destroyed in bad faith; and 2) conclude that the evidence, if introduced, would have been unfavorable to that party.<sup>125</sup> "The critical element is not that the evidence was destroyed but rather the reason for the destruction."<sup>126</sup>

In summary, if the facts and circumstances presented lead to the conclusion that the spoliator intentionally or fraudulently destroyed or altered the evidence, it is acceptable to use an inference or presumption against the spoliator. Whether the court chooses to enlist the aid of an inference or presumption hinges on the facts and evidentiary setting of the case.

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<sup>113</sup> See, e.g., *S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R. Co.*, 695 F.2d 253 (7th Cir. 1981); 29 Am. Jur. 2d *Evidence* §177 (1967).

<sup>114</sup> 695 F.2d 253 (7th Cir. 1981).

<sup>115</sup> *Id.* at 256.

<sup>116</sup> *Id.* at 255.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 256.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 258.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* See also additional Circuit court cases cited therein. *Id.* at 259.

*b) negligent spoliation*

The adoption of inferences and presumptions in negligent spoliation cases is a relatively new concept, and raises quite a different problem than intentional spoliation cases.<sup>127</sup> In negligent spoliation cases the knowledge underlying the common law doctrine - consciousness of the unfavorable nature of the evidence - is conspicuously absent. The very nature of the term “*negligent*” connotes an absence of intent or bad faith in the actor.<sup>128</sup> As a result, this state of mind does not meet the bad faith prerequisite for application of the common law doctrine.

This significant distinction has been the subject of judicial comment. In *Vick v. Texas Employment Commission*,<sup>129</sup> the defendant-Commission lost the plaintiff’s unemployment file.<sup>130</sup> The plaintiff argued that an adverse inference should be drawn against the Commission based on the lost evidence.<sup>131</sup> The court, denied the argument, stating: “Moreover, the circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case.”<sup>132</sup> Thus, the common law spoliation doctrine cannot logically extend to encompass negligent spoliation.

The leading state case in the negligent spoliation context used public policy to support its adverse presumption.<sup>133</sup> In *Public Health Trust of Dade County v. Valcin*, the plaintiff suffered a ruptured tubal pregnancy, which nearly caused her death.<sup>134</sup> The plaintiff sued the hospital.<sup>135</sup> She alleged that the negligent performance of a sterilization procedure caused her pregnancy.<sup>136</sup> However, the plaintiff could not prove her case because the operative notes from the surgery were missing.<sup>137</sup>

The trial court granted the defendant a summary judgment.<sup>138</sup> The court of appeals affirmed in part and reversed in part.<sup>139</sup> The appeals court adopted a presumption scheme.<sup>140</sup> Under that scheme, the use of presumptions was contingent upon the jury’s finding of whether the loss of notes was intentional or accidental.<sup>141</sup>

<sup>127</sup> See *supra* notes 58-65.

<sup>128</sup> PROSSER & KEETON, LAW OF TORTS, § 28 (5th Ed. 1984) (hereinafter Prosser).

<sup>129</sup> 514 F.2d 734 (5th Cir. 1975).

<sup>130</sup> *Id.* at 737.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See *supra* notes 58-62.

<sup>134</sup> *Id.* at 596.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 599.

<sup>137</sup> *Id.* at 596.

<sup>138</sup> *Id.*

<sup>139</sup> See *Valcin v. Public Health Trust*, 473 So. 2d 1297 (Fla. Dist. Ct. App. 1984).

<sup>140</sup> *Id.* at 1307.

The Florida Supreme Court modified the appeals court's approach and developed its answer to the spoliation issue.<sup>142</sup> The supreme court concluded that the plaintiff was entitled to the aid of a rebuttable presumption that the notes would have indicated negligence.<sup>143</sup> This presumption had two procedural effects: (1) a shift in the burden of production,<sup>144</sup> and (2) a shift in the burden of persuasion.<sup>145</sup>

*i) shift in the burden of production*

The *Valcin* court used the policies underlying the tort doctrine of *res ipsa loquitor*<sup>146</sup> to shape its decision.<sup>147</sup> *Res ipsa loquitor* was developed to aid a plaintiff in proving their case because a defendant has superior knowledge of the facts and exclusive control of relevant evidence while the plaintiff has an unequal awareness of relevant information.<sup>148</sup> Analogous factors are present in a spoliation case. The *Valcin* court explained that the doctor's exclusive knowledge of the procedures used, the relative ignorance of the plaintiff, and a lack of direct evidence of negligence due to incomplete medical records compelled the burden shift as a matter of public policy.<sup>149</sup>

*ii) shift in the burden of persuasion*

The *Valcin* court also shifted the burden of persuasion.<sup>150</sup> The court reasoned that if only the burden of production shifted, it would be too easy for the defendant to rebut the presumption with contrary evidence and, as a result, the jury would never receive the presumption.<sup>151</sup> This would undermine the purpose of the presumption's existence - to aid the plaintiff in proving his case.<sup>152</sup>

A vanishing presumption will not assist the plaintiff in proving his case. If the plaintiff is in fact sufficiently "hindered" by the absence of an operative note, odds are that the defendant's production of some evidence of nonnegligence will not place the plaintiff in a better position. Testimony based on the selective recollection of the surgeon and his staff would be considered 'substantial' enough to "burst the bubble," thus keeping the presumption from the jury. Plaintiff could rarely prove negligence by a preponderance of the evidence when the presumption has given him

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 599.

<sup>145</sup> *Id.* at 600-01.

<sup>146</sup> PROSSER, *supra* note 128, at § 39.

<sup>147</sup> *Valcin*, 507 So. 2d at 600.

<sup>148</sup> Prosser, *supra* note 146.

<sup>149</sup> *Valcin*, 507 So. 2d at 600.

<sup>150</sup> *Id.* The Florida court had its choice of two statutory presumptions. The first shifts the burden of production. FLA. STAT. ANN. § 90.302(1); the second shifts the burden of persuasion pursuant to social policy. FLA. STAT. ANN. § 90.302(2). See *Insurance Co. of State of Pa. v. Guzman's Estate*, 421 So. 2d 597 (Fla. Dist. Ct. App. 1984). There is no similar codification under Kentucky law.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

nothing more than the self-serving testimony of the defendant.<sup>153</sup>

The court explained that if the presumption were to “burst,” the facts underlying the presumption (i.e., the missing notes) would have too tenuous a relationship to the presumed fact (i.e., negligence) to create a logical inference of negligence.<sup>154</sup> Thus, if the plaintiff had little or no other evidence of negligence, the defendant’s rebuttal evidence would, in all likelihood, result in a directed verdict for the defendant.<sup>155</sup>

Based on these practical concerns, the court concluded that the best means to ensure that the presumption would retain force in the case was to shift the burden of persuasion.<sup>156</sup> The burden shifted to the spoliator to prove the non-existence of the presumed fact (i.e., negligence).<sup>157</sup> The level of evidence needed to carry this burden is determined by the substantive law of the case.<sup>158</sup>

The court was quick to state that the shifting of the burden, was an “expression of social policy” rather than a simple procedural aid in the determination of the case.<sup>159</sup> Thus, the effect of the presumption is to compel hospitals to maintain adequate records in patient files.<sup>160</sup>

## ANALYSIS

The logic and policy adopted in *Valcin* were a principle source of support for the sixth circuit. The *Welsh* court held that the negligent spoliation of evidence could prompt the use of an adverse presumption against the spoliator if the spoliation precluded proof of the plaintiff’s case.<sup>161</sup>

### *The Decision*

The opinion concentrated on one issue: Under Kentucky law, what evidentiary role would pre-litigation spoliation of ultimately critical evidence have on the plaintiff’s burden of proof?<sup>162</sup>

The answer to this question turned on the answer to two sub-issues: (1) Is it

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* The court believed this would ensure that the jury received the negligence issue in addition to evidence of the spoliation. *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 600-01.

<sup>159</sup> *Id.* at 601.

<sup>160</sup> *Id.*

<sup>161</sup> *Welsh*, 844 F.2d at 1248.

<sup>162</sup> *Id.* at 1245.

proper, under Kentucky law, to create a rebuttable presumption of negligence against a negligent spoliator;<sup>163</sup> and (2) What effect will that presumption have on the parties' burdens of proof.<sup>164</sup>

### 1) Was the Presumption Proper?

The court's fundamental support for use of a rebuttable presumption was the tort doctrine of *res ipsa loquitur*.<sup>165</sup> Kentucky courts approach the concept similarly to the majority of states.<sup>166</sup> Whether an inference or a presumption was used in those cases was a function of the facts in evidence.<sup>167</sup> Under Kentucky law, the difference between an inference and a presumption is one of degree.<sup>168</sup> The distinction between the two concepts was articulated in *Lee v. Tucker*.<sup>169</sup> In *Lee*, a *res ipsa loquitur* case, the court stated: "The terms 'inference' and 'presumption' are merely descriptive of the weight given to circumstantial evidence as a matter of law in particular instances... If it is accorded the dignity of a presumption, it should not be because a wooden rule puts it in that category, but only because it is that persuasive."<sup>170</sup>

Thus, the use of a presumption or inference in a case is merely a matter of the strength of the evidence presented. If it is very persuasive, a presumption will issue; if it merely satisfies the burden of production, an inference will arise.

As the court correctly noted, Kentucky law does allow the use of a rebuttable presumption of negligence if the facts presented are persuasive enough.<sup>171</sup> In *Sadr v. Hager Beauty*,<sup>172</sup> the court addressed the nature and application of *res ipsa loquitur*. The court stated: "This is an evidentiary doctrine which allows a jury to infer negligence on the part of the defendant. If the inference is forceful enough it can create a rebuttable presumption of negligence, possibly resulting in a directed verdict."<sup>173</sup> This is a strong use of the *res ipsa* doctrine, and lends convincing support to the court's use of a rebuttable presumption in its opinion.

### 2) Does the Burden of Persuasion Shift?

The questionable part of the *Welsh* decision concerns the shift of the burden of persuasion.<sup>174</sup> The VA argued that Kentucky law does not shift the burden of

<sup>163</sup> *Id.* at 1246-48.

<sup>164</sup> *Id.* at 1248-49.

<sup>165</sup> *Id.* at 1248-49. See *supra* notes 127-160.

<sup>166</sup> See *Sadr v. Hager Beauty*, 723 S.W.2d 886 (Ky. Ct. App. 1987); *Lee v. Tucker*, 365 S.W.2d 849 (Ky. 1963); *Bell & Koch, Inc. v. Stanley*, 375 S.W.2d 696 (Ky. 1964).

<sup>167</sup> *Lee*, 365 S.W.2d at 851.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Welsh*, 844 F.2d at 1248.

<sup>172</sup> 723 S.W.2d 886 (Ky. Ct. App. 1987).

<sup>173</sup> *Id.* at 887.

<sup>174</sup> *Welsh*, 844 F.2d at 1248-49. It is submitted that the court was faced with a conflict between the sound logic

persuasion in malpractice cases.<sup>175</sup> This was premised on Kentucky's use of the Thayer approach to presumptions.<sup>176</sup> The court answered this argument with a broad statement concerning Kentucky courts' case by case approach to the effect of inferences and presumptions.<sup>177</sup>

While it is true that the burden shifts in many jurisdictions, it is also true that the burden of persuasion would not shift under *Kentucky* law.<sup>178</sup> The presumption's existence is predicated on the *res ipsa loquitor* doctrine and the policies it embodies. It is logical that in extrapolating a state law position, the court should examine how Kentucky law deals with the burden of persuasion in *res ipsa* cases.<sup>179</sup> However, that principle was not explicitly analyzed in the court's opinion.<sup>180</sup>

#### a) *Kentucky res ipsa cases and the burden of persuasion*

Kentucky law does not shift the burden of persuasion in *res ipsa loquitor* cases.<sup>181</sup> In earlier decisions, Kentucky courts did shift the burden of persuasion, but later decisions clearly reversed that position.<sup>182</sup> In fact, in *Lee v. Tucker*,<sup>183</sup> cited by the *Welsh* court to uphold its burden shift, the opinion expressly stated that although the burden of production shifts to the defendant, the burden of persuasion remains on the plaintiff. The court's general statement of Kentucky law in support of this burden shift is not persuasive in the face of contradictory precedent in analogous cases.<sup>184</sup>

#### b) *Kentucky Rules of Civil Procedure*

Kentucky Rule of Civil Procedure 43.01(2) states that: "The burden of proof

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and policy of the *Valcin* decision, and existing Kentucky law on shifting the burden of persuasion. The court chose to adopt the result of *Valcin* and to support it with relevant Kentucky law. In doing so, the court overlooked case law which, at a minimum, should have been assessed in stating a diversity opinion. See *infra* notes 181-184.

<sup>175</sup> *Welsh*, 844 F.2d at 1248. Appellant-VA argued that in malpractice cases the burden of proof (e.g., persuasion) does not shift from the plaintiff. Appellant's Brief at p. 8.

<sup>176</sup> *Id.* The Thayer approach asserts that the only effect of a presumption is to shift the burden of production to the adverse party, not the burden of persuasion. Once that presumption is rebutted, the trier of fact chooses whether to infer, or not to infer, the existence of the presumed fact (e.g., negligence).

<sup>177</sup> *Id.* The court stated: "This approach is not inflexible. In fact, the Kentucky approach to inferences, presumptions, and burdens of proof pays maximum heed to the strength of the underlying proof and the facts of a particular case." *Id.*

<sup>178</sup> See Lawson, *The Law of Presumptions: A Look at Confusion*, Kentucky Style, 57 Ky. L.J. 7 (1968-69).

<sup>179</sup> In diversity cases, courts are expected to be prudent in their exercise of discretion in predicting state law decisions.

<sup>180</sup> *Welsh*, 844 F.2d at 1248.

<sup>181</sup> See Lawson, *supra* note 178; *Lee*, 365 S.W. 2d at 849.

<sup>182</sup> Lawson, *supra* note 178, at 30-34.

<sup>183</sup> *Lee*, 365 S.W. 2d at 852 (a wrongful death action in which the main fact question concerned which of two drivers was operating a vehicle when it was involved in a fatal accident). See also, *Bowers v. Schenley Distillers, Inc.*, 469 S.W.2d 565 (Ky. 1971) (the burden of persuasion does not shift from plaintiff).

<sup>184</sup> As in *Valcin*, the *Welsh* court should have relied on social policy to shift the burden of persuasion. However, its diversity status may have prohibited it from making such a policy statement.

in the *whole action* lies on the party who would be defeated if *no evidence* were given on either side.’’<sup>185</sup> The *Welsh* court stated that its presumption would not operate unless the evidence presented in its absence would survive a directed verdict motion.<sup>186</sup> Logically, that means that if no evidence was produced by the plaintiff, the presumption would not be operable, and the court would direct a verdict for the defendant. The plaintiff in *Welsh* had the initial burden of production. Under the rule cited, the failure to carry that burden would result in a directed verdict for the defendant. Thus, under the Kentucky rule the plaintiff should retain the burden of persuasion throughout the case.

### *Future Effects of Welsh*

#### 1) Remarks on the Practical Operation of the Presumption

It is clear that the *Welsh* decision is not a haven for poorly prepared plaintiffs. The judicial use of an inference or presumption will be determined on the facts and evidentiary setting surrounding the spoliation. A presumption will only be necessary in limited circumstances.

First, the plaintiff must show that the absence of the evidence impedes the ability to prove his cause of action.<sup>187</sup> Second, a presumption will only operate on those issues which are placed in doubt because of the absence of the evidence.<sup>188</sup> The plaintiff will not be afforded an overall presumption against the spoliator. Third, the plaintiff will have the burden of showing that the missing evidence has impeded his case. The burden includes an explication of what the spoliated evidence would have shown, and the relevance of that evidence to the issues in the case.<sup>189</sup> In malpractice cases, such proof will undoubtedly require the use of expert testimony. A threshold evidentiary showing will promote detailed case preparation and limit arguments for use of a presumption.

The use of a presumption should follow the following pattern: (1) The plaintiff bears the initial burden of production; (2) The plaintiff should put on all direct proof of the cause of action and the spoliation;<sup>190</sup> (3) At the close of the plaintiff’s evidence, if there is any question as to the sufficiency of the evidence, the defendant/spoliator

<sup>185</sup> Ky. R. Civ. P. 43.01(2).

<sup>186</sup> *Welsh*, 844 F.2d at 1248.

<sup>187</sup> *Valcin*, 597 So. 2d at 599. Note that this showing may result in collateral litigation because of problems concerning the level of evidence needed to establish that a cause of action was impaired.

<sup>188</sup> The plaintiff must make a very clear showing that the spoliated evidence: (1) could have produced probative evidence and (2) that evidence is probative of those issues lacking sufficient evidence.

<sup>189</sup> See generally, *Valcin*, 597 So. 2d at 599.

<sup>190</sup> The question prompted is whether evidence of the spoliation is relevant to the action. Evidence of spoliation ‘‘[s]atisfies the minimum requirement of relevance [under Fed. R. Evid. 401]; it has some tendency, however small, to make the existence of a fact at issue more probable than it would otherwise be...’’ *Welsh*, 844 F.2d at 1246 (citing *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214 (1st Cir. 1982)).



will move for a directed verdict; (4) The issue is then ripe for decision - the judge has received evidence on the spoliation and has all the plaintiff's substantive evidence. The judge may come to one of three conclusions: (1) the plaintiff has carried its burden of production and deny the defendant's motion; (2) the plaintiff has failed to carry its burden of production but the absence of the spoliated evidence is the cause of the deficiency (the judge will then weigh the circumstances surrounding the spoliation and the alleged probity of the missing evidence to determine what decision to render); or (3) the plaintiff has failed to carry the burden of production but the missing evidence would not be sufficient to create a question of fact and grant the directed verdict.

## 2) Hospital Administration

The effects of several holdings involving negligent spoliation have had their impact on hospitals.<sup>191</sup> It is apparent that hospital administrators should review their administrative and personnel procedures related to recordkeeping, patient care, and surgical procedures in light of these decisions. The amount of information that is present in health care facilities is enormous, making the potential impact of these decisions very burdensome. Therefore, constructive management of health care facilities requires affirmative steps to eliminate the incidental sources of litigation problems. The following suggestions focus attention on information processing functions. The objective is to efficiently record, access, and store information that is potentially determinative in a malpractice action.

First, hospital administrators should review recordkeeping procedures on all levels, including office administration, patient charts and operative notes. The key is to ensure that all information is recorded, placed in the appropriate location and held for future reference. The promulgation of regulations concerning the type of records needed in particular situations, who is responsible for making them, and where they are to be kept is imperative.

Second, all employees and health care practitioners must be made aware of all relevant regulations concerning recordkeeping and their responsibilities. The focus is awareness of potentially useful information. It is the administration's responsibility to inform employees and practitioners of their obligations under the law and under facility procedures.

Finally, establish an internal check system that will allow early detection of information loss in the facility. Such a system will ensure the safety of documents and allow resolution of information processing problems before large amounts of information are misplaced, lost, or destroyed.

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<sup>191</sup> See *Welsh*, 844 F.2d at 1239; *Valcittu*, 507 So. 2d at 596; *Fox*, 84 Ill. App. 3d at 744, 406 N.E. 2d at 178. 16  
<http://ideaexchange.uakron.edu/akronlawreview/vol22/iss3/8>

## CONCLUSION

The spoliation of evidence is not a problem that will go away on its own. Courts must decide whether to act affirmatively against the problem or watch it grow. Many jurisdictions are taking affirmative positions.

The positions taken in *Valcin* and *Welsh* are illustrations of a strong, but not oppressive, position against spoliation. The use of a rebuttable presumption "occupies a middle ground - it neither simply condones the defendant's negligent spoliation of evidence at the plaintiff's expense nor imposes an unduly harsh and absolute liability upon a merely negligent party."<sup>192</sup>

In the future, each state court will take a position in reaction to the spoliation that occurs in its forum. When this occurs, the legal system will have supported Newton's theory: for each action, there is indeed an equal and opposite reaction.

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