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Spoliation of Evidence - An Independent Tort

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SPOLIATION OF EVIDENCE—AN INDEPENDENT TORT?

I. INTRODUCTION

Spoliation of evidence in a prospective civil action occurs when one party destroys evidence and thus interferes with the other party's civil action.[1] Spoliation of evidence, as a new cause of action in tort, has been officially recognized in three states and asserted in several others.[2] Spoliation of evidence has been compared to interference with contractual or advantageous business relationships, causes of action which have long been recognized.[3]

This Note will discuss the tort of interference with prospective civil litigation by spoliation. Both intentional spoliation and negligent spoliation will be addressed. Appropriate sanctions for spoliation and the ramifications of spoliation will also be addressed.

II. DEVELOPMENT OF THE TORT OF SPOLIATION OF EVIDENCE

Historically, spoliation of evidence has not been tolerated. In the 1722 case of *Armory v. Delamirie*,[4] a chimney sweep's boy found a mounted jewel and took it to a goldsmith shop to find out what it was worth.[5] The goldsmith's apprentice kept the stone and returned only the socket to the boy.[6] The boy sued the goldsmith for the apprentice's conversion of the jewel.[7] The relevant question in the case was how the jury should be instructed to assess

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1. *See* Bondu v. Gurvich, 473 So. 2d 1307, 1312 (Fla. Dist. Ct. App. 1984).

2. *See* Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986) (recognizing tort of spoliation of evidence); Smith v. Superior Court, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984) (recognizing tort of spoliation of evidence); Bondu v. Gurvich, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984) (recognizing tort of spoliation of evidence). *See also* Rodgers v. St. Mary's Hosp. of DeCatur, 198 Ill. App. 3d 871, 556 N.E.2d 913 (1990) (raising issue of spoliation of evidence); Koplin v. Rosel Well Perforators, Inc., 241 Kan. 206, 734 P.2d 1177 (1987) (raising issue of spoliation); Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434 (Minn. 1990) (raising issue of spoliation of evidence).

3. *Smith*, 151 Cal. App. 3d at 501, 198 Cal. Rptr. at 836 (intentional interference with prospective business advantage allows recovery "for interference with business relationships or expectations," even if there is no legally binding agreement between the parties).

4. 93 Eng. Rep. 664 (1722).

5. Armory v. Delamirie, 93 Eng. Rep. 664, 664 (1722).

6. *Id.* The suit was brought against the goldsmith as an action in trover, or conversion, with the goldsmith ultimately responsible as the master of his apprentice. *Id.* Under the pretense of weighing the stone, the apprentice removed the stone from the socket and reported the value to the boy. *Id.* The boy refused the amount and insisted on having the jewel returned to him. *Id.* However, the apprentice did not return the stone to the boy, only the empty socket. *Id.*

7. *Id.* The court ruled that the finder of a jewel has superior title against all but the rightful owner and, therefore, may maintain an action in trover. *Id.*

damages in view of the defendant's spoliation of the evidence.[8] Evidence was presented as to the value of a jewel of the finest quality that would fit that particular socket.[9] The Chief Justice instructed the jury that unless the defendant produced the jewel and showed that it was not of the finest quality, the jury should presume the jewel was of the finest quality and determine damages accordingly.[10] Thus, the idea that spoliation of evidence should not be tolerated dates back at least to the early 1700s.[11] The belief that spoliation of evidence deserves status as an independent tort, however, is still relatively new and not widely accepted.

A. SPOLIATION OF EVIDENCE AS A TORT

Courts that have recognized spoliation of evidence as a tort acknowledge that spoliation can occur either intentionally or as a result of negligence.[12] Both variations of this tort seek to grant a remedy to a party prejudiced by the spoliation of evidence; the first where the opponent has deliberately attempted to interfere with evidence in the case, and the latter where a duty to preserve evidence has been breached.[13]

1. *Intentional Spoliation of Evidence*

In 1984, in *Smith v. Superior Court*,[14] California became the first state to recognize the intentional spoliation of evidence as a separate tort.[15] Plaintiff, Phyllis Smith, was injured when a wheel and tire flew off a nearby van and crashed into the windshield of her car.[16] Mrs. Smith's injuries included permanent blindness in

8. *Armory*, 93 Eng Rep. at 664. The defendant goldsmith was seen as the spoliator, since he was answerable for his apprentice's neglect. *Id.*

9. *Id.*

10. *Id.*

11. *See id.* Spoliation of a jewel was not tolerated in *Armory*, since the chimney sweep's boy was allowed to maintain an action in trover against the goldsmith, the apprentice's master. *Id.*

12. *See, e.g.*, County of Solano v. Delancy, 215 Cal. App. 3d 1232, 264 Cal. Rptr. 721 (1989) (recognizing tort of intentional spoliation of evidence); Velasco v. Commercial Bldg. Maintenance Co., 169 Cal. App. 3d 874, 215 Cal. Rptr. 504 (1985) (recognizing tort of negligent spoliation of evidence).

13. *See infra* notes 14-65 and accompanying text (discussing whether deliberate interference has occurred); notes 66-112 and accompanying text (discussing whether a duty to preserve has been breached).

14. 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984).

15. Smith v. Superior Court, 151 Cal. App. 3d 491, 491, 198 Cal Rptr. 829, 832 (1984). The California court identified the tort as " 'Tortious Interference with Prospective Civil Action By Spoliation of Evidence' . . . ." *Id.* at 495, 198 Cal. Rptr. at 831 (quoting the petitioner's complaint).

16. *Id.* The Smith vehicle was southbound on California Avenue while the van was traveling north on California Avenue at approximately the same time. *Id.*

both eyes and an impaired sense of smell.[17] One of the defendants was an auto dealer, Abbott Ford, who had customized the van with "deep dish mag wheels" before selling the van to the other driver involved in the accident.[18] Within weeks of the accident, Abbott Ford agreed with the Smiths' counsel to preserve certain items relevant to the pending investigation, including automotive parts.[19] Later, Abbott Ford lost, transferred, or destroyed the physical evidence, thus depriving the Smiths' experts of an opportunity to evaluate the automotive parts necessary to determine the cause of the wheel assembly failure.[20]

The court was asked by the Smiths to recognize a new tort for the intentional spoliation of evidence.[21] Abbott Ford claimed that the penal statute pertaining to lost or destroyed evidence provided a sufficient deterrent to spoliation of evidence.[22] The court reasoned, however, that if crucial evidence could be destroyed by a party who stands to gain financially by the destruction of that evidence and who will only be punished with a misdemeanor, the effect of the deterrent would be minimal.[23] The deterrent effect that a tort of spoliation of evidence might have was an important policy consideration for allowing the maintenance of the the Smiths' suit, when damages were still uncertain due to lack of litigation of their personal injury claim.[24] Therefore, the court ultimately held for the Smiths and recognized the intentional spoliation of evidence as a new tort.[25]

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17. *Id.* The windshield broke and pieces of glass struck Smith in the eyes and face. *Id.*

18. *Id.* Following the accident, the van was towed to Abbott Ford for necessary repairs. *Id.*

19. *Smith*, 151 Cal. App. 3d at 494, 198 Cal. Rptr. at 831. Fifteen days after the accident, Smiths' counsel asked to have the automotive parts preserved for an investigation. *Id.*

20. *Id.* The Smiths wished to have their expert inspect and test the parts involved in the accident in an attempt to locate the cause of the malfunction of the wheel assembly on the van. *Id.*

21. *Id.* at 495, 198 Cal. Rptr. at 832.

22. *Smith*, 151 Cal. App. 3d at 497, 198 Cal. Rptr. at 833. Arguing that California Penal Statute section 135 preempted the action, Abbott Ford unsuccessfully maintained that a civil action for intentional spoliation was precluded under California statutory and case law. *Id. See* CAL. PENAL CODE § 135 (West 1988).

23. *Smith*, 151 Cal. App. 3d at 499, 198 Cal. Rptr. at 835. Abbott Ford relied on Agnew v. Parks, 172 Cal. App. 2d 756, 343 P.2d 118 (1959), as support for its argument that section 135 of the California Penal Code precluded a civil action. *Id.* at 499, 198 Cal. Rptr. at 835. The court stated that Abbott Ford was mistaken in relying on *Agnew*, due to the fact that when *Agnew* was decided, concealing or withholding documentary evidence was a felony under section 135 of the California Penal Code. *Id.* The California Penal Code has since been changed, making concealing or withholding evidence only a misdemeanor. *Id.*

24. *Smith*, 151 Cal. App. 3d at 501, 198 Cal. Rptr. at 836. In regard to uncertainty of damages, the court noted that in other tort actions such as libel, slander, and invasion of privacy, large damages are awarded without any proof of economic harm. *Id.*

25. *Id.* at 503, 198 Cal. Rptr. at 837. The court stated that public policy dictated that

As support for the holding, the court stated that intentional interference with a prospective civil action is much like the tort of intentional interference with prospective business advantage.[26] The California court focused on the fact that in both situations liability is predicated on the commission of intentional acts designed to disrupt another's potential benefit.[27] The court discussed the elements of intentional interference with prospective business advantage, implying that the elements for intentional spoliation would be much the same.[28]

Five years later, in *County of Solano v. Delancy*,[29] another California court of appeals addressed intentional spoliation.[30] *Delancy* involved a personal injury that resulted when the plaintiff, Faith Owens, was thrown from a car driven by Brian Delancy.[31] Brian, his parents, and the County of Solano, on whose road the accident occurred, were all named as defendants.[32] The Delancys and their insurer destroyed the car approximately six weeks after the accident, making the car unavailable for inspection by the plaintiff.[33] The question arose in this case whether an agreement to preserve evidence was necessary to impose liability on a party for intentional spoliation of evidence.[34] The court held

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the Smiths were entitled to legal protection even though the associated damages were uncertain. *Id.*

26. *Id.* at 501, 198 Cal. Rptr. at 836. Intentional interference with prospective business advantage allows for recovery for interference with business relationships or expectations, even if there is no existing legally binding agreement or there is an unenforceable contract with the expectations of the parties as the only subject. *Id.*

27. *Id.* Abbott Ford allegedly intentionally interfered with the Smiths' opportunity to win the lawsuit by destroying the vehicle involved in the accident. *Id.* at 502, 198 Cal. Rptr. at 837.

28. *Smith*, 151 Cal. App. 3d at 501, 198 Cal. Rptr. at 836. The court did not actually list the elements of intentional spoliation and the reason for not listing them was not given.

29. 215 Cal. App. 3d 1232, 264 Cal. Rptr. 721 (1989).

30. County of Solano v. Delancy, 215 Cal. App. 3d 1232, __, 264 Cal. Rptr. 721, 728 (1989). The spoliation issue was raised by the County of Solano, one of the defendants, against Brian Delancy, the other defendant. *Id.* In an amended cross-complaint, the County alleged that both intentional and negligent spoliation had occurred. *Id.* at __, 264 Cal. Rptr. at 722.

31. *Id.* at __, 264 Cal. Rptr. at 723. The accident was caused by mechanical defects in the car along with the negligent driving of Brian Delancy, a minor. *Id.*

32. *Id.* Owens alleged that the County's road was unsafe and, therefore, the County was included in the lawsuit. *Id.* Anticipating that Owens would commence a lawsuit, the Delancys retained legal counsel and hired an accident reconstruction expert, who tested and inspected the car for defects. *Id.*

33. *Delancy*, 215 Cal. App. 3d at __, 264 Cal. Rptr. at 728. The record indicated that the vehicle was destroyed before the County was even aware of the accident. *Id.* The County argued that this situation, where the vehicle was destroyed before the County was even aware of the accident, was a prime example of why liability for spoliation of evidence cannot be limited to cases where the defendant has agreed to preserve the evidence or has been notified to retain it. *Id.* The County maintained that if an agreement to preserve evidence was required, a defendant could avoid liability simply by destroying relevant evidence before those who needed the evidence found out who had it. *Id.*

34. *Id.* The Delancys asserted two theories: 1) the County could not state a claim for

to the contrary, because liability is based on intentional acts "designed to disrupt" a potential benefit.[35] Tort liability is essentially nonconsensual; therefore, any expectations of damages created by tort liability have no relationship to voluntary undertakings.[36]

The court in *Delancy* was the first to identify the five elements of intentional spoliation.[37] The court based the elements on the premise that if the *Smith* court had undertaken to list the elements of intentional spoliation, the elements would have been identified by analogy to intentional interference with prospective business advantage.[38]

The first of the five elements identified was the possibility of litigation involving the plaintiff.[39] The County alleged that litigation was reasonably foreseeable to the Delancys and their insurer, as was the possibility that the County would want to examine the car and could use information obtained from the examination of the wrecked vehicle in litigation against the Delancys and their insurer.[40] The court agreed, acknowledging that if litigation was

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intentional spoliation unless it could show the Delancys had agreed to retain the wrecked car; and 2) the County could not state a claim for negligent spoliation unless it could show the County had notified the Delancys to retain the vehicle. *Id.*

35. *Id.* at __, 264 Cal. Rptr. at 729. The court was not persuaded that an agreement by the defendant to preserve evidence was a prerequisite to finding liability for intentional spoliation of evidence. *Id.* at __, 264 Cal. Rptr. at 728.

36. *Delancy*, 215 Cal. App. 3d at __, 264 Cal. Rptr. at 728 (citing Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J., 1085, 1102 (1987)). In recognizing the tort of intentional spoliation of evidence, the *Smith* court focused on the tort of intentional interference with prospective business advantage, which is very similar to intentional spoliation of evidence. Smith v. Superior Court, 151 Cal. App. 3d 491, __, 198 Cal. Rptr. 829, 836 (1984). The *Delancy* court noted that both torts predicate liability on intentional acts "designed to disrupt" a potential benefit. *Delancy*, 215 Cal. App. 3d at __, 264 Cal. Rptr. at 729.

37. *Delancy*, 215 Cal. App. 3d at __, 264 Cal. Rptr. at 729. The *Delancy* court stated that it did not believe the *Smith* court would have included an agreement on the part of the defendant to preserve the evidence had it undertaken the task of listing the elements of the new tort. *Id.* (discussing Smith v. Superior Court, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984)).

38. *Id.* at __, 264 Cal. Rptr. at 729. The *Delancy* court identified the elements of the tort of intentional spoliation of evidence as:

> (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.

Id. The court then adopted these elements for the purposes of determining the sufficiency of the County's allegations in the case. *Id.*

39. *Id.* The first element was satisfied by the allegation that the Delancys knew the County would probably be sued. *Id.*

40. *Delancy*, 215 Cal. App. 3d at __, 264 Cal. Rptr. at 730. The County noted that Brian Delancy testified that he had driven on the road before the accident and thought it to be unsafe. *Id.* The County felt that it was reasonable to assume Brian would have made

possible, the need for an examination of the vehicle was foreseeable and therefore sufficient to impose a duty on the Delancys to preserve the car for the County's benefit.[41]

The second element was knowledge by the defendant of the litigation or probability thereof.[42] The County suggested that since Brian Delancy had made statements to the effect that the road was unsafe, the prospect of litigation against the County should have been apparent.[43] The court agreed, stating that, under the circumstances, litigation was reasonably foreseeable.[44] Therefore, the second element was satisfied.[45]

The third element was intentional acts of destruction by the defendant for the purpose of disrupting the plaintiff's case.[46] The County alleged that the Delancys destroyed the car to deny the County the benefit of examination of the vehicle because the Delancys feared that such an examination might lead to discovery of evidence that would benefit the County.[47] The court, in regard to this element, stated that "[an] intent to 'affect' the plaintiff may be inferred" and accepted that it was reasonably foreseeable to the Delancys that the wrecked vehicle could have been used as evidence against them.[48] Therefore, the third element was satisfied.[49]

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similar statements to his attorneys and the expert his family hired, and that based on this, the possibility of litigation involving the County should have been apparent. *Id.*

41. *Id.* Foreseeability of harm to the plaintiff is the most important factor in tort litigation, and foreseeability was established as a matter of pleading in the *Delancy* case. *Id.*

42. *Id.* at __, 264 Cal. Rptr. at 729. The court stated that a claim that another's need for evidence is not foreseeable absent some form of notice may or may not be true in a given situation. *Id.* at __, 264 Cal. Rptr. at 730.

43. *Id.* The first element asks whether litigation involving the plaintiff has been commenced or is likely to be commenced. *Id.* The second element asks whether the defendant knew of any existing litigation involving the plaintiff or if the defendant knew litigation involving the plaintiff was likely. *Id.* The County suggested that because Brian made statements to the effect that the County's road was unsafe, litigation involving the County was probable. Therefore, Brian, or at least his attorneys, should have been aware of the likelihood that the County would be named in a lawsuit by Owens and would need to see the vehicle involved in the accident to formulate a defense. *Id.*

44. *Delancy*, 215 Cal. App. 3d at __, 264 Cal. Rptr. at 730. The Delancys reasonably should have been aware that the County would be sued, that the County would seek indemnity from Brian Delancy, and that destruction of the vehicle would prejudice the County's case. *Id.*

45. *Id.* The court found the allegations sufficient to impose a duty on the Delancys to preserve the car for the County's benefit. *Id.*

46. *Id.* The third element was stated by the allegation that the Delancys destroyed the vehicle to deny the County the benefit of the use of the vehicle as evidence. *Id.*

47. *Id.* The County's cross-complaint stated that "the Delancys reasonably should have known that: the County would be sued; the County would seek indemnity; and destruction of the car would prejudice the County's case." *Id.* at __, 264 Cal. Rptr. at 730.

48. *Id.* The court stated that there will usually be doubt about what the missing evidence would have shown, but if uncertainties connected with damages do not rule out recognition of the tort, the court could not see why uncertainties should preclude recognition of a duty. *Id.* at __, 264 Cal. Rptr. at 730-31.

49. *Id.* at __, 264 Cal. Rptr. at 730.

The fourth element was whether actual disruption of the case resulted.[50] The vehicle involved in the accident was not available for inspection by the County and, therefore, the County was deprived of valuable evidence possibly leading to a defense.[51] In addition, the fact that a disruption occurred was not disputed in this case.[52] Therefore, the fourth element was satisfied.[53]

Finally, the fifth element was that damages resulted from the defendant's actions.[54] The damage in this case was the loss of the use of the car by the County as evidence to defeat the plaintiff's claim against the County.[55] The court noted that this element was also undisputed in the case.[56] Therefore, the fifth element was satisfied.[57]

Based on an examination of the five elements identified, the court concluded that the County's allegations were sufficient to state a cause of action for intentional spoliation.[58] This, combined with a determination that a cause of action also existed for negligent spoliation, led the court to reverse the trial court's dismissal of the County's first amended cross-complaint against the Delancys.[59]

In 1986, in *Hazen v. Municipality of Anchorage*,[60] Alaska recognized "a common-law cause of action in tort for intentional interference with [a] prospective civil action by spoliation of evi-

50. *Delancy*, 215 Cal. App. 3d at __, 264 Cal. Rptr. at 729. The fourth and fifth elements of negligent spoliation were "stated by the allegation that if the County had been able to examine the car, it would have 'summarily defeated' the plaintiff's claim." *Id.*

51. *Id.* The County alleged that it could have defeated the plaintiff's claim by showing that the cause of the accident was a problem associated with faulty parts on the car or negligence on the part of the driver. *Id.*

52. *Id.* at __, 264 Cal. Rptr. at 731. An area of dispute in the *Delancy* case was whether or not liability for intentional spoliation of evidence depends on an agreement on the part of the defendant to preserve the evidence. *Id.* at __, 264 Cal. Rptr. at 728-29. The court, however, stated that an agreement on the part of the defendant to preserve evidence was not a necessary element of intentional spoliation. *Id.* at __, 264 Cal. Rptr. at 729. The true elements of intentional spoliation, breach of duty, proximate cause, and damages, were not disputed in *Delancy*. *Id.* at __, 264 Cal. Rptr. at 731.

53. *Id.* The fact that the County's case was disrupted as a result of the destruction of the vehicle was not in dispute. *Id.*

54. *Id.* at __, 264 Cal. Rptr. at 729.

55. *Delancy*, 215 Cal. App. 3d at __, 264 Cal. Rptr. at 729.

56. *Id.* at __, 264 Cal. Rptr. at 731. The element of damages was not disputed in *Delancy*. *Id.*

57. *Id.*

58. *Id.* at __, 264 Cal. Rptr. at 729. The court next went on to determine that elements of negligent spoliation were also satisfied in the County's first amended cross-complaint. *Id.* at __, 264 Cal. Rptr. at 729-31.

59. *Id.* at __, 264 Cal. Rptr. at 731. Presiding Justice Anderson respectfully dissented, stating among other things that he was concerned that the majority decision would lead to wrecked cars cluttering up the California countryside. *Id.* at __, 264 Cal. Rptr. at 736 (Anderson, J., dissenting). Justice Anderson stated this belief was based on the fact that virtually every accident involves the possibility of litigation. *Id.*

60. 718 P.2d 456 (Alaska 1986).

dence."[61] The case involved the owner of a massage parlor who sought to recover against the municipality, the city prosecutor, and police officers for false arrest, malicious prosecution, and violations of civil rights arising from the alleged alteration of an arrest tape.[62] In recognizing the intentional spoliation tort, the court found the reasoning in *Smith v. Superior Court* to be persuasive.[63] In *Smith*, the California court had stated that intentional interference with prospective civil actions was an unreasonable interference with the interests of others and that a prospective civil action carries with it a "probable expectancy" that the court must protect from interference.[64] The Alaska Supreme Court determined that Hazen's prospective legal actions were valuable probable expectancies and that any intentional alterations would be unreasonable interference with those expectancies.[65] Therefore, by adopting intentional spoliation as a new tort, the court sought to provide a remedy for such wrongs.

2. *Negligent Spoliation of Evidence*

The California Court of Appeals first recognized the tort of negligent spoliation of evidence in *Velasco v. Commercial Building Maintenance Co.*[66] *Velasco* involved an action brought by an attorney's clients against the maintenance company that cleaned the attorney's office.[67] The plaintiffs, Pedro Velasco and his son,

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61. Hazen v. Municipality of Anchorage, 718 P.2d 456, 463 (Alaska 1986). Penny Hazen, the owner of a massage parlor in Anchorage, Alaska, brought suit following her arrest for prostitution. *Id.* at 458.

62. *Id.* at 459. An officer with a hidden recorder entered Penny Hazen's massage parlor and discussed the services that were available, including whether or not sex was available. *Id.* at 458. On the original tape, Hazen could be heard denying the availability of sex. *Id.* Later, the tape was requested during discovery for the civil suit brought by Hazen. *Id.* at 459. The tape was then found to be generally inaudible; however, evidence pointing to tampering could be heard on the tape. *Id.* It was obvious that this important item of evidence had been altered, and Hazen added a claim of destruction of evidence to her complaint. *Id.*

63. *Id.* at 463. *See supra* notes 14-28 and accompanying text (discussing the reasoning of the *Smith* court).

64. *Id.* at 464 (citing Smith v. Superior Court, 151 Cal. App. 3d 491, 502, 198 Cal. Rptr. 829, 836-37 (1984)). The court in *Smith* analogized intentional spoliation to the tort of intentional interference with prospective business advantage. *Smith*, 151 Cal. App. 3d at 501, 198 Cal. Rptr. at 836.

65. *Hazen*, 718 P.2d at 464. If the arrest tape was intentionally altered, resulting in an unreasonable interference with Hazen's prospective legal actions, then tort law can provide a remedy. *Id.* Hazen's prospective false arrest and malicious prosecution actions were valuable probable expectancies, and tort law provides a remedy by allowing an action for interference with those expectancies. *Id.*

66. 169 Cal. App. 3d 874, 215 Cal. Rptr. 504 (1985).

67. Velasco v. Commercial Bldg. Maintenance Co., 169 Cal. App. 3d 874, 876, 215 Cal. Rptr. 504, 505 (1985). The plaintiffs alleged that the agents of the owner of the building in which the plaintiffs' attorney worked negligently destroyed the remnants of the exploded bottle while cleaning the office of the plaintiffs' attorney. *Id.*

sustained personal injuries when a bottle exploded.[68] The Velascos took the remains of the bottle to an attorney in the hopes of bringing a lawsuit for the injuries caused by the bottle.[69] The attorney left the remains of the bottle on his desk, and the cleaning person later disposed of it while cleaning the attorney's office.[70] The court, relying on *Smith*, held that a cause of action may be stated for negligent destruction of evidence that is needed for prospective civil litigation.[71] The court then looked to negligent interference with prospective economic advantage to formulate the elements for negligent spoliation.[72] These factors included: (1) the degree that the transaction was meant to affect the plaintiff; (2) the likelihood of harm to the plaintiff; (3) the degree of certainty that the plaintiff actually was injured; (4) the degree of certainty that the plaintiff's injury was the result of defendant's conduct; (5) the moral blame associated with defendant's conduct; and (6) the desire to prevent future harm.[73] The court focused primarily on the second factor, the likelihood of harm to the plaintiff.[74] The court stated that a reasonable maintenance person should not have been expected to be aware that he or she was destroying valuable evidence by disposing of a broken bottle in an unlabeled bag.[75] A reasonable person, the court stated, is entitled to assume that if an item is valuable evidence, it would be appropriately marked and not left lying around.[76] The court, therefore, concluded that no important policy would be furthered by holding maintenance persons to have a duty not to throw away items that appear to be trash, simply because the

68. *Velasco*, 169 Cal. App. 3d at 870, 215 Cal. Rptr. at 505.

69. *Id.* The remains of the bottle the Velascos brought to the attorney's office were placed in a paper bag by the attorney. *Id.* It was not alleged that the paper bag was in any way marked to identify its contents. *Id.*

70. *Id.* Commercial Building Maintenance Company, the defendant, was served and filed a demurrer to the first amended complaint, which alleged that the maintenance person negligently destroyed the paper bag containing the remains of the bottle. *Id.*

71. *Id.* at 877, 215 Cal. Rptr. at 506.

72. *Id.* (citing J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979)).

73. *Velasco*, 169 Cal. App. 3d at 878, 215 Cal. Rptr. at 506. The *J'Aire* court relied on these elements in determining whether a cause of action had been stated. *J'Aire*, 24 Cal. 3d at 804-05, 598 P.2d at 63-64, 157 Cal. Rptr. at 410-11.

74. *Velasco*, 169 Cal. App. 3d at 878, 215 Cal. Rptr. at 506. The Velascos' case against Commercial Building Maintenance Company rested entirely on the fact that the bag containing the bottle fragments had been deposited in the trash by someone other than the attorney. *Id.*

75. *Id.* When "there can be no reasonable difference of opinion," the question of foreseeability is a question of law, a discussion properly left to the court. *Id.*

76. *Id.* at 878, 215 Cal. Rptr. at 506-07. An unlabeled bag containing a broken bottle on an attorney's desk is not something that would be expected to alert a reasonable and thoughtful maintenance person to the fact he or she would be destroying valuable evidence by discarding it. *Id.* at 878, 215 Cal. Rptr. at 506.

items are in an attorney's office.[77]

In *County of Solano v. Delancy*,[78] a California court of appeals addressed negligent spoliation and, relying on *Velasco*, explained the concept more thoroughly.[79] The court stated that the main question was "whether a duty to preserve evidence may arise in the absence of actual notice of another's need for it," and observed that for purposes of negligence, the existence of a duty "is entirely a question of law."[80] In determining whether a duty existed, the *Delancy* court relied on six factors mentioned in *Velasco* and stated that foreseeability of harm to the plaintiff was the most important.[81] The underlying premise is that a party who is aware of potential litigation will most likely know what evidence may be beneficial to the adverse party.[82] Whether potential litigation involving the County was foreseeable to the Delancys was found to depend on the evidence.[83] However, evidentiary matters were not before the court on this appeal, but rather were established as a matter of pleading.[84] This resulted in the court's acknowledgment that the need to eventually examine the car was reasonably foreseeable to the Delancys.[85] The court found it also reasonably foreseeable that an examination of the car could have led to the County's discovery of evidence that could have been used against the Delancys.[86] Given the circumstances, the court found the allegations by the County sufficient to impose a duty on the Delancys

77. *Id.* at 879, 215 Cal. Rptr. at 507. The court concluded with a statement indicating that if the loss of evidence in this case was foreseeable, the attorney was the person who should have foreseen the loss, not the maintenance person. *Id.*

78. 215 Cal. App. 3d 1232, 264 Cal. Rptr. 721 (1989).

79. County of Solano v. Delancy, 215 Cal. App. 3d 1232, __, 264 Cal. Rptr. 721, 729 (1989). *See supra* notes 29-34 and accompanying text (discussing facts of *Delancy*).

80. *Delancy*, 215 Cal. App. 3d at __, 264 Cal. Rptr. at 729 (quoting PROSSER & KEETON, TORTS § 37 (5th ed. 1985)).

81. *Id.* at __, 264 Cal. Rptr. at 729. *See* Velasco v. Commercial Bldg. Maintenance Co., 169 Cal. App. 3d 874, __, 215 Cal. Rptr. 504, 506 (1985) (listing the six elements to rely on when assessing whether or not a cause of action for negligent spoliation has been stated). While foreseeability of harm is the most important factor, the other elements remain relevant and must be examined. *Delancy*, 215 Cal. App. 3d at __, 264 Cal. Rptr. at 729.

82. *Delancy*, 215 Cal. App. 3d at __, 264 Cal. Rptr. at 729. The Delancys were alleged to have known that the car they destroyed would be evidence favorable to the County, the cross-complainant in the case. *Id.*

83. *Id.* at __, 264 Cal. Rptr. at 730. Evidentiary matters were not before the *Delancy* court on the appeal brought by the County for dismissal of their intentional spoliation claim against the Delancys. *Id.*

84. *Id.* Foreseeability of harm to the plaintiff, the most important element, was among those established as a matter of pleading in the *Owens* case. *Id.*

85. *Id.* The Delancys evidently foresaw that Owens would bring a lawsuit and went so far as to retain an attorney and an accident reconstruction expert. *Id.* at __, 264 Cal. Rptr. 723.

86. *Delancy*, 215 Cal. App. 3d at __, 264 Cal. Rptr. at 730. If the County, upon examining the car, would have been able to find evidence that a defect in the car caused the accident, the plaintiff's claim against the County would probably have failed.

to preserve the car.[87] The court concluded that where destruction of evidence enables the spoliator to benefit from his wrongful conduct, "a duty to preserve evidence arises solely from foreseeability of harm to the plaintiff."[88]

While the first factor was the most important of the six, the others are still a part of the determination of a duty to preserve evidence.[89] As for the remainder of the factors, the court determined that a second consideration when evaluating negligent spoliation is the effect the transaction can be expected to have on the plaintiff.[90] The court stated that spoliation may be inferred to have a detrimental effect on the plaintiff.[91]

The third factor dealt with how certain it appears the plaintiff has been injured.[92] The court found this factor to be problematic, stating that in most instances involving destruction of evidence, "there will be doubt about what the evidence would have shown."[93] However, since uncertainties associated with damages will not keep a court from recognizing a tort itself, the *Delancy* court could see no reason for precluding recognition of a duty in this case.[94]

The fourth factor concerned the "closeness of the connection between the defendant's conduct and the injury suffered."[95] In response to this, the court stated that if the County's allegations that the Delancys and their insurer knowingly destroyed the vehicle in question to the detriment of the County were correct, then the relation between the conduct and the resulting injury was a "close" one.[96]

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87. *Id.*

88. *Id.* The court noted, in regard to duty, "where the evidence is relevant solely to a third party suit . . . there is no duty [to preserve the evidence] absent actual notice of the plaintiff's need for the evidence." *Id.*

89. *Id.* at __, 264 Cal. Rptr. at 729.

90. *Delancy*, 215 Cal. App. 3d at __, 264 Cal. Rptr. at 729. The effect the transaction was expected to have on the plaintiff was included in the court's decision, among "[o]ther relevant factors." *Id.*

91. *Id.* at __, 264 Cal. Rptr. at 730. The court did not explain why spoliation may be inferred to have a detrimental effect on the plaintiff.

92. *Id.* at __, 264 Cal. Rptr. at 729. Uncertainties associated with damages are not fatal to a spoliation claim. *Id.* at __, 264 Cal. Rptr. at 730-31.

93. *Id.* at __, 264 Cal. Rptr. at 730. Even though doubt may exist, it does not preclude a claim for intentional spoliation of evidence. *Id.* at __, 264 Cal. Rptr. at 730-31.

94. *Id.* Tort actions for libel, slander, and invasion of privacy allow damages to be awarded without proof of economic harm or emotional distress. Smith v. Superior Court, 151 Cal. App. 3d 491, __, 198 Cal. Rptr. 829, 836 (1984).

95. *Delancy*, 215 Cal. App. 3d at __, 264 Cal. Rptr. at 729. This fourth element was among those listed under "[o]ther relevant factors." *Id.*

96. *Id.* at __, 264 Cal. Rptr. at 730. Evidentiary matters, such as whether or not the insurer knowingly destroyed the vehicle in question to the detriment of the County, were not before the court on this appeal. *Id.*

The fifth factor to consider was "the moral blame attached to the defendant's conduct."[97] The *Delancy* interpretation regarding this factor was that "the potential spoliator need only do what is reasonable under the circumstances."[98] The court stated that reasonableness would have called for the Delancys to contact the County, impose a deadline for inspection, and insist that the County pay for the preservation of the vehicle if they needed it beyond the imposed deadline.[99] The court realized that this was, in effect, requiring the party to notify a potential adversary of the existence of potential evidence.[100] Yet, the court believed that this was preferable to condoning spoliation of evidence in situations where spoliation should be deterred.[101]

The final factor for consideration was "the policy of preventing future harm."[102] The court stated that if destruction of evidence is worth deterring, "then 'the policy of preventing future harm' militates in favor of recognizing a duty."[103] After considering of all these relevant factors, the *Delancy* court determined that the County had a cause of action for negligent spoliation.[104]

In June of 1984, Florida recognized a cause of action for negligent spoliation in the case of *Bondu v. Gurvich*.[105] This case involved a woman, Mayme Bondu, whose husband died during surgery.[106] As personal representative of her husband's estate, Mrs. Bondu had brought a medical malpractice action against an

97. *Id.* at __, 264 Cal. Rptr. at 731. The court noted that the cost associated with preserving the evidence is relevant to the fifth element, "moral blame." *Id.*

98. *Delancy*, 215 Cal. App. 3d at __, 264 Cal. Rptr. at 731. The court considered the fact that the cost of preserving evidence may be high. *Id.* The court also gave consideration to the clutter that might result from preserving all the wrecked cars in the state. *Id.*

99. *Id.* The court stated a potential spoliator should have no greater duty than a "good Samaritan" who is not required to do more than is reasonable. *Id.*

100. *Id.* The court's solution to the problem of costs associated with preserving evidence was the notification of potential adversaries regarding the existence of potential evidence. *Id.*

101. *Id.* at __, 264 Cal. Rptr. at 730. The dissent reasoned, however, that the majority was placing an "intolerable burden" on defendants by requiring them to notify potential adversaries before destroying evidence. *Id.* at __, 264 Cal. Rptr. at 735 (Anderson, J., dissenting).

102. *Delancy*, 215 Cal. App. 3d at __, 264 Cal. Rptr. at 729.

103. *Id.* at __, 264 Cal. Rptr. at 730. The court in *Delancy* recognized a duty on the part of a potential spoliator to do what is "reasonable under the circumstances." *Id.* at __, 264 Cal. Rptr. at 731.

104. *Id.* at __, 264 Cal. Rptr. at 731. The order dismissing the County's first amended cross-complaint against the Delancys was reversed, thereby granting the County a cause of action for negligent spoliation. *Id.*

105. 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984).

106. Bondu v. Gurvich, 473 So. 2d 1307, 1309 (Fla. Dist. Ct. App. 1984). In 1979, Dave Bondu entered Cedars of Lebanon Hospital for an evaluation of his coronary arteries. *Id.* It was determined, after several days of testing, that a triple bypass operation was needed. *Id.* During the surgery, anesthesia was administered, and Mr. Bondu suffered a cardiac arrest and died. *Id.*

anesthesiologist and the hospital.[107] The hospital failed to provide Mrs. Bondu with requested medical records.[108] As a result, Mrs. Bondu was unable to obtain an expert witness to testify during her medical malpractice action, ultimately leading to the defeat of her claim.[109] Mrs. Bondu next pursued an intentional spoliation claim, asserting that in failing to provide her with the requested medical records, the hospital had intentionally and negligently interfered with Mrs. Bondu's cause of action.[110] The court of appeals found that the hospital had a statutory duty to the patient and the patient's personal representative to maintain and furnish medical records, including medical and surgical treatment notes and reports.[111] The court then recognized a cause of action for negligent spoliation, based on Mrs. Bondu's allegations of breach of duty and the fact that the breach resulted in damage to Mrs. Bondu.[112]

B. STATES DECLINING TO RECOGNIZE THE TORT

In *Federated Mutual Insurance Co. v. Litchfield Precision Components, Inc.*,[113] Minnesota was asked to recognize the tort of spoliation of evidence and declined to do so.[114] The case involved

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107. *Id.* Mrs. Bondu's multi-count complaint charged that the anesthesiologist's negligence caused her husband's cardiac arrest, that the hospital was negligent in its selection and supervision of these doctors, and that the hospital was negligent per se by failing to provide Mrs. Bondu with the requested medical records. *Id.* at 1309-10.

108. *Id.* at 1309-10. Mrs. Bondu claimed that the failure to provide her with the requested medical records was a violation of Florida Statute § 395.202. *Id.* at 1309. *See* FLA. STAT. § 395.202 (1979). This statute, which provided that a hospital has a duty to maintain and furnish records to a patient or a patient's representative upon request, was repealed in 1981. *See* FLA. STAT. § 395.202 (1986).

109. *Bondu*, 473 So. 2d at 1313. Count VIII of Mrs. Bondu's complaint asserted negligence in that the hospital failed to provide Mrs. Bondu with requested medical records, thus "[frusturating] the plaintiff's ability to pursue certain proof which may be necessary to establish her case." *Id.* at 1309.

110. *Id.* at 1310. Count IX of Mrs. Bondu's complaint alleged that the hospital had intentionally interfered with Mrs. Bondu's case by purposely destroying or losing the anesthesiology records, which again resulted in "[frusturating] the plaintiff's ability to pursue certain proof which may be necessary to establish her case." *Id.* at 1309-10.

111. *Id.* at 1312. The duty to maintain and furnish medical records to a patient or a patient's personal representative was determined by the court to exist in Florida Statute section 395.202 . *Id.* at 1313 (citing FLA. STAT. section 395.202 (1979)).

112. *Id.* Chief Judge Schwartz dissented in part. *Id.* at 1313 (Schwartz, C.J., dissenting). The new tort recognized by the majority in Chief Judge Schwarz's view "runs counter to the basic principal that there is *no* cognizable independent action for perjury, or for any improper conduct even by a witness, much less by a party in an existing lawsuit." *Id.* at 1314.

113. 456 N.W.2d 434 (Minn. 1990).

114. Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 439 (Minn. 1990). The court noted that "only Alaska and California had specifically recognized an independent spoliation tort, aside from ordinary negligence claims," and that several jurisdictions have declined to adopt the tort either as a matter of law or on the facts of the case. *Id.* at 437.

a fire insurer, Federated Mutual, who brought an action against Litchfield Precision Components, Inc., the owner of a facility in which the insured's property was destroyed by fire. *Federated Mutual* also brought an action against Litchfield Precision's legal counsel for negligence, intentional or negligent spoliation of evidence, and intentional interference with prospective business advantage.[115] The Minnesota Supreme Court found that Federated Mutual's causes of action were premature since they were based on speculative harm to Federated Mutual's prospective subrogation action for the alleged negligent or intentional destruction of evidence by fire.[116]

In reaching this conclusion, the *Federated Mutual* court noted that "[c]ourts have long afforded redress for the destruction of evidence."[117] In the court's opinion, existing remedies adequately address the problem.[118] For example, the jury may infer that the missing evidence would have been unfavorable to the party failing to produce it, discovery and criminal sanctions may be applied, and knowing involvement by an attorney could subject that attorney to professional discipline.[119] The court then suggested that future actions for "negligent spoliation [of evidence] could be stated under existing negligence law without creating a new tort."[120] In spite of this suggestion, the court went on to state that the mere fact that other remedies exist does not necessarily preclude the court from creating a new tort for further redress.[121]

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115. *Id.* at 435-36. A fire occurred on January 25, 1986 at a building owned by Litchfield Precision Components (LPC), resulting in destruction of property owned by Infinite Graphics (IG). *Id.* Federated Mutual was IG's insurer and paid IG $48,685 for the property destroyed. *Id.* Federated Mutual hired an investigator to determine the cause of the fire. *Id.* The investigator was denied entrance to the site of the fire by LPC employees. *Id.* LPC's insurer, Sentry Insurance Company, retained Robins, Zelle, Larson & Kaplan, a law firm, to determine potential liability. *Id.* The Robins firm assigned investigators to investigate the cause of the fire. *Id.* As a result, an exhaust motor and fan were sent to Georgia, and approximately half of the remaining evidence was stored in a rental storehouse. *Id.* The items stored in the rental warehouse were eventually destroyed. *Id.* The parties disputed the circumstances surrounding the destruction, and Federated Mutual filed a civil suit against the Robins firm and LPC on several grounds, including negligent or intentional spoliation of evidence. *Id.* at 435-36.

116. *Id.* at 439. Federated had not pursued its subrogation claim at the time the case was brought. *Id.* at 436.

117. *Id.*

118. *Federated Mutual*, 456 N.W.2d at 436. The court stated that "an action for negligent spoliation could be stated under existing negligence law without creating a new tort." *Id.*

119. *Id.* at 436-37. *See* MINN. R. CIV. P. 37.01 and 37.02 (failure to comply with order compelling discovery); MINN. STAT. § 609.63, subd. 1(7) (1988) (intentional destruction of evidence); MINN. R. PROF. CONDUCT 3.4(a) (professional discipline may be appropriate).

120. *Federated Mutual*, 456 N.W.2d at 436. The court noted that Federated Mutual had, in fact, framed one of its causes of action as a negligence claim. *Id.*

121. *Id.* at 437. *See* Christianson v. Olson, 191 Minn. 166, 168, 253 N.W. 661, 662 (1934) (statutory remedy not exclusive, new tort may be created for further compensation).

The *Federated Mutual* court appeared troubled by the speculative nature of the case at the time the action was brought, noting that the possibility of future harm was not adequate to satisfy the third element of spoliation of evidence; namely, the requirement that damage to the plaintiff be shown.[122] In addition, the court stated that the presence or possibility of mere negligence is not a tort and does not become actionable until the wrongful conduct has an impact on a person.[123] In the future, should facts present themselves in such a way that a party could show that harm was actually suffered, the Minnesota Supreme Court's comments and reasoning suggest that the court might consider creating a new tort that would permit further redress.[124]

In *Rodgers v. St. Mary's Hospital of Decatur*,[125] an Illinois court was asked to recognize the tort of spoliation of evidence.[126] In *Rodgers*, the spouse of a deceased patient filed a medical malpractice suit as administrator of his deceased wife's estate against St. Mary's Hospital and the obstetricians and radiologists responsible for his wife's care immediately prior to her death.[127] Rodgers alleged and established that his wife died as a result of complications that arose after the cesarean section delivery of their son.[128] Due to lack of x-ray evidence, Rodgers was unsuccessful in his medical malpractice claim against the radiologist.[129] As a result, he instituted a second suit alleging damages resulting from St. Mary's alleged loss of all abdominal x-rays of his wife within five

122. *Federated Mutual*, 456 N.W.2d at 437. *See* Reliance Ins. Co. v. Arneson, 322 N.W.2d 604, 607 (Minn. 1982) (discussing the idea that "the threat of future harm, not yet realized, will not satisfy the damage requirement").

123. *Federated Mutual*, 456 N.W.2d at 437. *See, e.g.*, Uppgren v. Executive Aviation Services, Inc., 304 F. Supp. 165, 167 (D. Minn. 1969) (mere negligence "in the air" is not enough for a tort action, rather no action arises until the wrongful conduct impinges on a person).

124. *Federated Mutual*, 456 N.W.2d at 437. Based on the court's comments and reasoning, the key factor for declining to recognize spoliation of evidence as a tort seems to be the lack of proof with regard to damages. *Id.*

125. 198 Ill. App. 3d 871, 556 N.E.2d 913 (1990).

126. Rodgers v. St. Mary's Hosp. of Decatur, 198 Ill. App. 3d 871, __, 556 N.E.2d 913, 914 (1990).

127. *Id.* at __, 556 N.E.2d at 914. The trial court entered judgment in favor of the hospital and Mr. Rodgers appealed. *Id.* The appellate court ultimately reversed and remanded the case. *Id.* at __, 556 N.E.2d at 919. Ultimately, summary judgment was entered in favor of St. Mary's Hospital; a jury returned a verdict in favor of the radiologists and against Mr. Rodgers; the jury decided in favor of Mr. Rodgers with regard to his claims against the obstetricians and awarded damages. *Id.* at __, 556 N.E.2d at 914. The obstetricians filed for an appeal from the judgment and Mr. Rodgers settled with them for $400,000 less than the jury award. *Id.*

128. *Id.* Rodgers alleged a sigmoid colonic volvulus was or should have been depicted on certain x-rays taken of his wife. *Id.* at __, 556 N.E.2d at 915.

129. *Id.* at __, 556 N.E.2d at 919. A jury found in favor of Rodgers on his claim against the obstetricians and assessed damages at $1,200,000. *Id.* at __, 556 N.E.2d at 914.

years after the x-rays were taken.[130] Rodgers based his spoliation claim on the fact that the missing x-rays were crucial for proving his case against the doctors who were responsible for his wife's treatment.[131] The court found a violation of an Illinois statute requiring hospitals to retain x-rays for five years or for a longer period of time if notified that there is litigation pending in court involving a particular x-ray.[132] The statute creates a cause of action for improper destruction of x-rays which would have been used as evidence in litigation.[133] Having determined that Rodgers' complaint of failure to retain x-rays properly stated a statutory cause of action, the court found it unnecessary to decide whether a wide-ranging common-law spoliation of evidence tort should be recognized.[134] While the court declined to create a new tort based on the specific facts of this case, it gave no indication that the proper circumstances would not lead to the creation of such a tort.[135]

Koplin v. Rosel Well Perforators, Inc.[136] presented a certified question to the Kansas Supreme Court for determination of whether Kansas would recognize a common-law tort action for spoliation of evidence.[137] The case originated as a result of injuries suffered on the job by Mr. Koplin when a piece of equipment known as a T-clamp failed as a result of an alleged defect.[138] One

130. *Id.* at __, 556 N.E.2d at 914. The hospital had taken x-rays of various portions of Mrs. Rodgers' body during her hospitalization for the birth of her child. *Id.* at __, 556 N.E.2d at 915.

131. *Rodgers*, 198 Ill. App. 3d at __, 556 N.E.2d at 915. Mr. Rodgers sought $400,000 in damages. *Id.* He maintained that with the x-ray evidence, the jury would have found the obstetricians and radiologists jointly and severally liable, and an appeal would not have been filed by the doctors. *Id.* Requested damages were the difference between the jury award and the settlement that was ultimately reached. *Id.* at __, 556 N.E.2d at 915.

132. *Id.* at __, 556 N.E.2d at 916. Illinois Revised Statutes Chapter 111.5 provides for retention for use in litigation of x-ray or roentgen films of human anatomy. *Id.* (citing ILL. REV. STAT. ch. 111.5, para. 157-11 (1987)).

133. *Id.* at __, 556 N.E.2d at 916. The "statute seeks to protect the property rights of persons involved in litigation." *Id.* Violation of the statute is prima facie evidence of negligence. *Id.*

134. *Rodgers*, 198 Ill. App. 3d at __, 556 N.E.2d at 916. The court noted that the tort of spoliation of evidence had been discussed in two prior Illinois decisions. *Id.* at __, 556 N.E.2d at 915 (citing Fox v. Cohen, 84 Ill. App. 3d 744, 406 N.E.2d 178 (1980); Petrik v. Monarch Printing Corp., 150 Ill. App. 3d 248, 501 N.E.2d 1312 (1986)). The first Illinois case addressing spoliation held that the action was premature, and in the second case, the plaintiff discarded the theory of liability. *Id.* Abandoning the liability claim eliminated the need for the missing evidence and also the need to decide whether or not to recognize spoliation as a tort. *Id.* at __, 556 N.E.2d at 915-16.

135. *Id.* at __, 556 N.E.2d at 915-16.

136. 241 Kan. 206, 734 P.2d 1177 (1987).

137. Koplin v. Rosel Well Perforators, Inc., 241 Kan. 206, __, 734 P.2d 1177, 1178 (1987). The case was originally filed in the United States District Court for the District of Kansas. *Id.*

138. *Id.* at __, 734 P.2d at 1178. Mr. Koplin recovered worker's compensation benefits for his injuries. *Id.*

of the defendants, Rosel Well Perforators, Inc., was Koplin's employer.[139] Rosel Well Perforators had purchased the T-clamp from the other defendants, Gearhart Industries, Inc., Pengo Industries, and Geosource, Inc.[140] Koplin alleged that after the accident, Rosel Well Perforators' agent intentionally destroyed the T-clamp so Koplin would not be able to use it in potential litigation.[141] Koplin wanted to bring an action against Rosel Well Perforators for interference with a prospective civil action by spoliation of evidence.[142] Koplin contended that he was deprived of the valuable possibility of recovering product liability and breach of warranty claims.[143] He claimed that the destruction of the T-clamp would prevent him from showing how it failed and caused his injuries.[144]

The court acknowledged that two other courts have recognized the tort of intentional interference with a prospective civil action by spoliation of evidence: the California Court of Appeals in *Smith v. Superior Court for County of Los Angeles*,[145] and the Alaska Supreme Court in *Hazen v. Municipality of Anchorage*.[146] However, the *Koplin* court went on to note that in both of these cases, the evidence was destroyed by the adverse party in a pending litigation, which resulted in a direct benefit to the adverse party.[147] This was not the case in *Koplin*.[148] In fact, the destruction by Rosel Well Perforators' agent actually worked to Rosel Well Perforators' disadvantage, because Rosel Well Perforators would have been subrogated to any recovery Koplin might have obtained to the extent of the worker's compensation payments

139. *Id.*

140. *Id.* Defendants Gearhart Industries, Inc., Pengo Industries, and Geosource, Inc. had manufactured and sold T-clamps, including the T-clamp involved in Koplin's accident. *Id.*

141. *Koplin*, 241 Kan. at __, 734 P.2d at 1178.

142. *Id.* Koplin's prospective civil action was to be an action against Gearhart Industries, Inc., Pengo Industries, and Geosource, Inc., for breach of warranty and product liability. *Id.*

143. *Id.* The defendant argued that Koplin had already recovered for his injury under the Worker's Compensation Act and that the Act provides his sole remedy. *Id.* at __, 734 P.2d at 1178-79.

144. *Id.* at __, 734 P.2d at 1178. The court accepted Koplin's allegations that an agent of his employer intentionally destroyed the T-clamp for the purpose of denying Koplin access to evidence to be used against the manufacturers and distributors of the T-clamp. *Id.* at __, 734 P.2d at 1179.

145. *Id.* at __, 734 P.2d at 1180 (recognizing Smith v. Superior Court, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984), as a case adopting the new tort).

146. *Koplin*, 241 Kan. at __, 734 P.2d at 1181 (recognizing Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986), as a case adopting the new tort).

147. *Id.*

148. *Id.*

made to Koplin.[149] Also, Rosel Well Perforators was not an adverse party in any pending or probable litigation with Koplin when the destruction occurred.[150] The court noted that before there can be recovery in tort, there must be a violation of a duty owed by one party to the party seeking recovery.[151] Therefore, absent a duty to preserve the T-clamp, Rosel Well Perforators was not a wrongdoer and had an absolute right to preserve or destroy its property.[152] The court declined, on the basis of undue burden, to adopt a tort which would put a duty on an employer to preserve all evidence that might possibly be used by an employee in a third party claim.[153] The court again noted that *Smith* and *Hazen* involved destruction by a party for that party's own benefit, and stated that the court would not determine at that time if Kansas would recognize the new tort under similar circumstances.[154] The *Koplin* court answered the certified question in the negative, concluding that "absent some independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties, the new tort of 'the intentional interference with a prospective civil action by spoliation of evidence' should not be recognized in Kansas."[155]

III. SANCTIONS

Courts that have found a cause of action for spoliation of evidence have imposed primarily two sanctions: preclusion of evidence,[156] and default judgment.[157] Rule 37 of the Federal Rules of Civil Procedure grants courts the inherent authority to impose these sanctions.[158]

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149. *Id. See also* KAN. STAT. ANN. § 44-504 (1986) (discussing subrogation rights of an employer).

150. *Koplin*, 241 Kan. at __, 734 P.2d at 1181.

151. *Id.* Koplin argued that even though his employer, Rosel Well Perforators, had not breached a duty to Koplin, the court should not hesitate to adopt a new tort when a party has been injured by a "wrongdoer." *Id.*

152. *Id.* at __, 734 P.2d at 1181-82. The court noted that there were no special circumstances or relationships in this case which created any duty for Rosel Well Perforators to preserve the T-clamp. *Id.* at __, 734 P.2d at 1182.

153. *Id.*

154. *Koplin*, 241 Kan. at __, 734 P.2d at 1182.

155. *Id.* at __, 734 P.2d at 1183.

156. *See, e.g.*, Nally v. Volkswagon of America, Inc., 405 Mass. 191, 539 N.E.2d 1017 (1989). *See infra* notes 159-171 and accompanying text (discussing the *Nally* case wherein the court imposed preclusion of evidence as a sanction).

157. *See, e.g.*, Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107 (S.D. Fla. 1987) (imposing default judgment as a sanction); William T. Thompson Co. v. General Nutrition Corp., Inc., 593 F. Supp. 1443 (C.D. Cal. 1984) (imposing default judgment as a sanction). For a discussion of the *Telectron* case see *infra* notes 175-187 and accompanying text. For a discussion of the *Thompson* case see *infra* notes 188-201 and accompanying text.

158. *See Telectron*, 116 F.R.D. at 128 (imposing default judgment as a sanction). Rule

A. PRECLUSION OF EVIDENCE

Recently, the Supreme Judicial Court of Massachusetts addressed the topic of sanctions for spoliation of evidence in *Nally v. Volkswagon of America, Inc.*,[159] a case involving a products liability claim for wrongful death.[160] The plaintiff, Gerald Nally, was the administrator of the estate of his son, Brian Nally, who was killed when the Volkswagon in which he was a passenger struck a guard rail.[161] Gerald Nally alleged that defects in the rear seat and hatchback latching system of the Volkswagon caused the parts to give way on impact, resulting in Brian being ejected from the vehicle onto the pavement and ultimately causing Brian's death.[162] Nally hired an accident reconstruction expert to evaluate the allegedly defective parts.[163] The evidence was destroyed during the testing by the expert, and Volkswagon contended that they had no direct evidence to present to a jury as a result.[164] Volkswagon asserted that the resulting prejudice should have precluded Nally from offering any testimony from the expert concerning the destroyed items.[165]

Justice O'Connor, writing for the court, concluded that when an expert destroys or alters an item that the expert should have known may be important to litigation, the judge should, if asked by the potentially prejudiced party, preclude the expert from testifying as to what was observed before or after the alteration and as to any opinion he might have based on the evidence.[166] The rationale for such a rule is to eliminate any unfair prejudice that

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27(d) provides that where a party fails to "serve a written response to a request for inspection submitted under Rule 34, after proper service of the request," the court may enter "such orders in regard to the failure as are just," including those actions authorized by Rule 37(b)(2)(A), (B) and (C). For the text of these sections see *infra* text accompanying note 212.

159. 405 Mass. 191, 539 N.E.2d 1017 (1989).

160. Nally v. Volkswagon of America, Inc., 405 Mass. 191, __, 539 N.E.2d 1017, 1018 (1989). Originally a Massachusetts Court of Appeals case, *Nally* was transferred from the Appeals Court on the initiative of the Supreme Judicial Court. *Id.*

161. *Id.* Mr. Nally alleged that the 1978 Volkswagon Rabbit in which his son was killed was designed, manufactured, and sold by Volkswagon of America, Inc., and Volkswagenwerk A.G., the defendants in this case. *Id.*

162. *Id.* When the automobile struck the guard rail, the rear seat frame supports and the hatchback door latch gave way. *Id.*

163. *Id.* Brian Schofield, an investigating engineer, was hired by Mr. Nally to evaluate the rear seat frame supports and the hatchback door latch. *Id.*

164. *Nally*, 405 Mass. at __, 539 N.E.2d at 1018. Volkswagon maintained that preserving the evidence should have been a high priority for a reconstruction expert. *Id.*

165. *Id.* The case was ultimately vacated and remanded. *Id.* at __, 539 N.E.2d at 1022.

166. *Id.* at __, 539 N.E.2d at 1021. In *Nally*, Volkswagon, the potentially prejudiced party, requested the preclusion of the expert testimony regarding what was observed before the alleged alteration of the evidence. *Id.* at __, 539 N.E.2d at 1018.

may result from the expert's testimony.[167] The purpose of an expert is to give an opinion as to defects and causation, and if only one party's expert has first-hand knowledge of the altered evidence, unfair prejudice may very well occur.[168] In addition, Justice O'Connor noted that the physical items themselves, when they are in the exact condition they were in immediately after an accident, are often far more enlightening and instructive to a jury than oral or photographic descriptions of the same evidence.[169] Essentially, the court stated that if destruction of items occurs, and an expert has had an opportunity to examine the items prior to the destruction, the expert's description of the items should not be allowed.[170] Thus, preclusion of evidence is a recognized sanction for spoliation of evidence.[171]

B. DEFAULT JUDGMENT

The ultimate sanction under Rule 37 of the Federal Rules of Civil Procedure is default judgment.[172] Two cases in which courts have imposed this harsh sanction are *Telectron, Inc. v. Overhead Door Corp.*[173] and *William T. Thompson Co. v. General Nutrition Corp.*[174]

Telectron involved a complex antitrust issue in which the plaintiff, Telectron, Inc., moved for default judgment and sanctions against the defendant, Overhead Door, for destruction of discovery documents.[175] The corporate legal counsel for Overhead Door had ordered the immediate destruction of documents

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167. *Id.* at __, 539 N.E.2d at 1021. The rule for dealing with an expert who spoils evidence should be applied regardless of whether the expert's conduct occurred before or after the expert was retained by a party to the litigation. *Id.*

168. *Nally*, 405 Mass. at __, 539 N.E.2d at 1021. Volkswagon maintained that it was prejudiced because the destruction of the parts in question deprived Volkswagon of presenting these parts as direct evidence to a jury. *Id.* at __, 539 N.E.2d at 1018. Evidently, Volkswagon had not had the opportunity to have their experts examine the parts in question so as to be able to testify as to the condition of the parts immediately following the accident. *Id.*

169. *Id.* at __, 539 N.E.2d at 1021.

170. *Id.* Whether the expert deliberately or negligently spoiled the evidence is a question of fact which must be resolved prior to a ruling on the admissibility of the expert's testimony. *Id.*

171. *Id.* Justice O'Connor cited sound public policy as the basis for allowing the sanction of preclusion of evidence in a case involving spoliation. *Id.*

172. *See* Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 128-31 (S.D. Fla. 1987).

173. 116 F.R.D. 107 (S.D. Fla. 1987).

174. 593 F. Supp. 1443 (C.D. Cal. 1984). *See also* DePuy Inc. v. Eckes, 427 So. 2d 306 (Fla. Dist. Ct. App. 1983) (default judgment imposed).

175. Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 109-10 (S.D. Fla. 1987). The motion for default judgment was ultimately granted based on the flagrant and willful destruction of documents which were requested in a production request served upon Overhead Door Corporation. *Id.*

directly pertaining to Telectron's complaint and request for production.[176] Overhead Door's attorney ordered the destruction in a willful and intentional attempt to place documentation, which was anticipated to be damaging to Overhead Door, beyond the reach of Telectron's counsel.[177]

Rule 37 of the Federal Rules of Civil Procedure provides that a defendant's willful disruption of the discovery process fully warrants entry of default judgment on the issue of liability.[178] Default judgment under Rule 37 may be imposed to prevent unfair prejudice and also to preserve the integrity of the discovery process.[179] However, before imposing the ultimate sanction of default judgment, the court must determine "(1) that Defendant acted willfully or in bad faith; (2) that Plaintiff was prejudiced by Defendant's conduct; and (3) that lesser sanctions would not serve the punishment-and-deterrence goals . . . ."[180] In *Telectron*, the court stated it had no doubt as to the defendant's willfulness in destroying pertinent documents.[181] Among other things, the court noted that the corporate legal counsel to Overhead Door ordered the immediate destruction of documents directly pertaining to Telectron's request for production on the very day these papers were served.[182] This reflected a calculated effort by a key corporate officer to obstruct Telectron's discovery of relevant records.[183]

The court also discussed prejudice to the plaintiff as a result of the defendant's conduct and determined that the loss of the documents in question had decidedly prejudiced Telectron's ability to adjudicate its claims fully and fairly.[184] The resulting prejudice

176. *Id.* In particular, Overhead Door's counsel called for the immediate destruction of all sales correspondence over two years old generated by the company's Advance radio control division. *Id.* at 110.

177. *Id.* The court said it could not escape the conclusion that the directive from Overhead Door's counsel was specifically intended to hide Overhead Door's history of anticompetitive endeavors and to infringe upon and obstruct Telectron's right to open discovery. *Id.*

178. *Id.* at 128. *See also* FED. R. CIV. P. 37(b)(2)(C).

179. *Telectron*, 116 F.R.D. at 129 (citing Aztec Steel Co. v. Florida Steel Corp., 691 F.2d 480, 482 (11th Cir. 1982)).

180. *Id.* at 131. The prerequisites to default judgment ensure a proper balance between the need for good faith adherence to the rules of discovery and a commitment to protecting the parties' constitutional and policy interests in adjudication of their claims. *Id.*

181. *Id.* The court also stated that Overhead Door's contention that no significant prejudice resulted from the document destruction was "wholly unconvincing." *Id.* at 110.

182. *Id.* at 109. Mr. Arnold ordered the immediate destruction of all sales correspondence over two years old that had been generated by the division whose conduct was the object of the lawsuit. *Id.* at 110.

183. *Telectron*, 116 F.R.D. at 131. The court did not seem to like Overhead Door's counsel, especially his attitude during questioning. *Id.* at 131-32.

184. *Id.* at 132.

stemmed from both the unrecoverable loss of documents relevant to Telectron's claims and from the delay, inconvenience, and expense suffered by Telectron in investigating the document destruction scheme.[185]

After considering the inadequacy of lesser sanctions, the court concluded that no sanction short of default judgment, alone or in concert, would adequately punish and deter similar willful acts in the future.[186] Therefore, based on the flagrant dishonesty of Overhead Door's counsel, the willful destruction of information, and the resulting prejudice, the court found sufficient misconduct to warrant the entry of default judgment, noting this to be an appropriate sanction when litigants consciously undermine the foundation of the discovery process.[187]

William T. Thompson Co. v. General Nutrition Corp,[188] is another antitrust case involving a plaintiff seeking sanctions against a defendant corporation for discovery abuse.[189] Thompson was a vitamin manufacturer who sold vitamins to the defendant, General Nutrition Corporation (GNC).[190] After years of doing business, Thompson concluded GNC's advertisements were false and misleading on several grounds; primarily, Thompson charged that many GNC stores stocked inadequate quantities of Thompson products to meet expected consumer demands.[191] This, Thompson alleged, was a form of "bait and switch" advertising, using Thompson's product as the "bait."[192] During preparation for litigation, GNC destroyed documents and violated court orders and duties, which amounted to bad faith.[193] The court noted that this misconduct was demonstrated when GNC neglected to preserve

185. *Id.*

186. *Telectron*, 116 F.R.D. at 134-35. Having found all the necessary elements to impose default judgment, the court was compelled to conclude that default judgment, as to the defendant's liability, was the only sanction "fully commensurate" with the wrongdoing which had occurred. *Id.* at 131.

187. *Id.* at 132.

188. 593 F. Supp. 1443 (C.D. Cal. 1984).

189. William T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1444 (C.D. Cal. 1984).

190. *Id.* GNC sold vitamins manufactured by Thompson as well as competing "national brand" vitamins and GNC's own private label vitamins. *Id.*

191. *Id.*

192. *Id.* Thompson maintained that GNC advertised Thompson vitamins and stocked them in inadequate quantities; then when customers would come in looking to purchase Thompson vitamins, the customers would end up purchasing another brand instead, because the Thompson products were out of stock. *Id.*

193. *Thompson*, 593 F. Supp. at 1454. Documents which were destroyed included: "(a) Store Order Books . . . (b) Store Order Strips . . . (c) Store Invoices . . . (d) Fiscal year-end inventory count sheets . . . (e) Quarterly inventory count sheets . . . (f) Daily Inventory Status Reports . . . (g) Daily and Weekly Ship/Non-Ship Reports . . . (h) Lost Sales Reports . . . and (i) Retail Level Summary Reports . . . ." *Id.* at 1445-46.

critical documents after commencement of the action, failed to implement procedures to monitor or control document destruction after commencement of the lawsuit, and made misleading or incorrect representations to the court and counsel.[194] GNC's destruction of relevant records resulted in Thompson having to spend large sums of money in an attempt to discover and obtain the destroyed records of GNC.[195]

The issue before the court was whether sanctions should be imposed against GNC.[196] The court determined that under Rule 37 of the Federal Rules of Civil Procedure, the sanctions should be imposed for knowingly and purposefully allowing employees to destroy important documents.[197] Thompson was prejudiced by the destruction of relevant records because access to objective evidence was blocked.[198] Conduct that interferes with another's ability to build a case creates a presumption that the missing information would have permitted the prejudiced party to prove the claim alleged in the prejudiced party's complaint.[199] The ultimate sanction of default judgment was determined to be appropriate in this action, given the willful destruction by GNC and the resulting prejudice to Thompson.[200] The court concluded that imposition of severe sanctions was required by the severity of the abuses that occurred, stating that imposition of lesser sanctions would only reward a spoliator for misconduct.[201]

Default judgment is the ultimate sanction under Rule 37 of the Federal Rules of Civil Procedure.[202] Rule 37 provides that a defendant's willful disruption of the discovery process fully warrants entry of default judgment on the issue of liability.[203] Default judgment may be imposed to prevent unfair prejudice and also to preserve the integrity of the discovery process.[204] If a court finds the defendant to have acted willfully or in bad faith, resulting in

194. *Id.* at 1445-48.

195. *Id.* at 1456. Among the findings of fact was that the documents and other evidence destroyed by GNC were not capable of reconstruction or replication. *Id.* at 1449.

196. *Id.* at 1444.

197. *Thompson*, 593 F. Supp. at 1455. GNC was also subject to sanctions under Rule 37 of the Federal Rules of Civil Procedure for not complying with a Special Master's order to produce supplier's documents. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* Monetary sanctions were also imposed as being necessary to fully compensate Thompson for the costs made necessary by General Nutrition's conduct. *Id.*

201. *Thompson*, 593 F. Supp. at 1456. The destruction of critical documents by GNC constituted severe misconduct that deprived Thompson of access to the critical evidence needed to build its case against GNC. *Id.*

202. Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 128-29 (S.D. Fla. 1987).

203. *Id.* at 131.

204. *Id.* at 129.

prejudice to the plaintiff, and finds that lesser sanctions would not suffice, it may impose default judgment.[205]

IV. RAMIFICATIONS

If a party in North Dakota believes it has been prejudiced by spoliation of evidence, that party may currently be able to seek relief under Rule 37 of the North Dakota Rules of Civil Procedure.[206] Rule 37 pertains to sanctions that may be imposed when problems arise during discovery.[207] Spoliation is generally uncovered at the discovery stage in a lawsuit, because that is when the parties are requesting production of the evidence they will rely on to prove their allegations or to form their defenses.[208] It is for this reason that Rule 37 is examined.[209] Rule 37(b)(2), in particular, deals with sanctions a court may impose when an action is pending and a party fails to comply with an order.[210] This section is pertinent in that a party who has destroyed key evidence will ultimately be unable to produce it when requested to do so.[211] According to Rule 37(b)(2), if a party fails to obey an order or permit discovery, the court in which the action is pending may make the following orders:

> (A) 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;
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed,

205. *Id.* at 131. Rule 37 deals with sanctions that are available when, for some reason, there is failure to make discovery. *Id.* at 128. Lesser sanctions include an order stating the designated facts to be taken as established in the claim of the party obtaining the order or refusing to allow the disobedient party to assert claims or defenses, or to introduce evidence regarding the designated matter. N.D.R. CIV. P. 37(b)(2)(A), (B).

206. N.D.R. CIV. P. 37. Rule 37(b)(2) deals specifically with sanctions that are appropriate when there is failure to comply with an order in a pending action. *Id.*

207. *Id.*

208. *See generally id.* (discussing sanctions available for discovery abuse).

209. *See generally id.* at (b)(2)(A)-(D).

210. N.D.R. CIV. P. 37(b)(2). If a party is unable to produce requested evidence after being ordered to do so, the party will be in violation of the order to comply, and Rule 37(b)(2) sanctions will be available. *Id.*

211. *See* N.D.R. CIV. P. 37 (discussing sanctions available for discovery abuse).

> or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.][212]

Default judgment is the ultimate sanction a court may impose.[213] This ultimate sanction should only be imposed when lesser sanctions have been considered and would not serve punishment and deterrence goals.[214]

The North Dakota Supreme Court has not yet been asked to address the issue of whether spoliation of evidence is recognized as a new cause of action in tort in North Dakota. As was discussed earlier in this note, several states that have been faced with the issue have declined to recognize the tort.[215] However, most states have suggested that, under the appropriate circumstances, the tort of spoliation could be recognized.[216] Given the position of these other state courts, it is not unlikely that North Dakota would choose to adopt spoliation of evidence as a new tort if the court felt the circumstances were such that existing remedies were not adequate to redress the injury.

V. CONCLUSION

Spoliation of evidence occurs when one party in a civil action destroys evidence, resulting in interference with the other party's prospective action.[217] While spoliation of evidence as a cause of action in tort has been officially recognized in only California, Alaska, and Florida, it has been asserted in several other states, including Minnesota, Illinois, and Kansas.[218] The states that have declined to recognize the tort of spoliation of evidence have either stated or suggested that under appropriate circumstances the tort might be recognized.[219]

Spoliation can occur intentionally or as a result of negligence

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212. N.D.R. Civ. P. 37(b)(2)(A)-(C).

213. William T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1456 (C.D. Cal. 1984). *See* N.D.R. Civ. P. 37(b)(2)(A), (C) (listing lesser sanctions which may be imposed).

214. *See* Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 131 (S.D. Fla. 1987).

215. *See supra* notes 113-155 and accompanying text (states declining to recognize tort of spoliation of evidence).

216. *Id.*

217. *See* Bondu v. Gurvich, 473 So. 2d 1307, 1312 (Fla. Dist. Ct. App. 1984).

218. *See supra* note 2 and accompanying text (cases recognizing cause of action for spoliation and cases declining to recognize tort for spoliation).

219. *See* Federated Mutual v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 439 (Minn. 1990) (court intimated that under appropriate circumstances spoliation of evidence might be recognized).

by a party.[220] Both variations of this tort seek to grant a remedy to a party prejudiced by the spoliation of evidence; the first where the opponent has deliberately attempted to interfere with evidence in the case, and the latter where a duty to preserve evidence has been breached.[221]

When a court determines that spoliation has occurred, appropriate sanctions are either the preclusion of evidence by the disobedient party regarding the destroyed evidence or, ultimately, default judgment.[222] For a court to impose default judgment, however, it must first consider the appropriateness of lesser sanctions, such as preclusion of evidence.

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220. *See, e.g.*, County of Solano v. Delancy, 215 Cal. App. 3d 1232, 264 Cal. Rptr. 721 (1989) (recognizing tort of intentional spoliation of evidence); Velasco v. Commercial Bldg. Maintenance Co., 169 Cal. App. 3d 874, 215 Cal. Rptr. 504 (1985) (recognizing tort of negligent spoliation of evidence).

221. *See supra* notes 14-65 and accompanying text (citing cases where deliberate interference has occurred and a duty to preserve evidence has been breached).

222. *See supra* notes 159-171 and accompanying text (citing cases where preclusion of evidence was discussed); and notes 172-205 and accompanying text (citing cases where default judgment was imposed after considering preclusion of evidence).