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THE FLEXIBLE DOCTRINE OF SPOILIATION OF EVIDENCE: CAUSE OF ACTION, DEFENSE, EVIDENTIARY PRESUMPTION, AND DISCOVERY SANCTION

*Robert L. Tucker**

INTRODUCTION

WITHIN the last decade, an increasing number of courts have begun to recognize and apply the doctrine of spoliation of evidence. Spoliation of evidence is the destruction of relevant evidence by a party or his agent.¹ The doctrine generally imposes some sanction on the party responsible for the destruction of the evidence.

The proof necessary to impose the sanction upon the party responsible for the destruction of the evidence depends on the circumstances under which the doctrine is being applied. The most remarkable aspect of the doctrine of spoliation of evidence is that it has been held to be: (1) a cause of action in tort (for either intentional or negligent spoliation of evidence);² (2) a defense to recovery;³ (3) an evidentiary inference or presumption;⁴ and (4) a discovery sanction.⁵ Furthermore, the doctrine of spoliation of evidence has been held in some jurisdictions to constitute a substantive rule of law, while other courts have held it to be a procedural evidentiary rule.⁶

I. THE SPOILIATION DOCTRINE AS A CAUSE OF ACTION

The doctrine of spoliation of evidence has recently been held to give rise to a cause of action in tort, usually in product liability cases. In this context, the doctrine has been applied in two different ways. First, the doctrine has been invoked by injured plaintiffs against the manufacturer or seller of an allegedly defective product, where the manufacturer or seller has intentionally or negligently caused the product to be lost or destroyed.⁷ Second, the doctrine of spoliation of evidence has been held to give rise to a cause of action in tort or in

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1. *Donohoe v. American Isuzu Motors, Inc.*, 155 F.R.D. 515, 519 (M.D. Pa. 1994).

2. *E.g.*, *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993).

3. *E.g.*, *Donohue v. American Isuzu Motors, Inc.*, 155 F.R.D. 515 (M.D. Penn. 1994).

4. *E.g.*, *Hirsch v. General Motors Corp.*, 628 A.2d 1108 (N.J. Super. Ct. Law Div. 1993).

5. *See* FED. R. CIV. P. 37.

6. *See* *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994); *Donohoe v. American Isuzu Motors, Inc.*, 157 F.R.D. 238, 240 (M.D. Pa. 1994).

7. *E.g.*, *Glover v. Bic Corp.*, 6 F.3d 1318 (9th Cir. 1993).

contract against a third party (such as an expert witness) that has damaged or destroyed the product.⁸

Because of the newness of the tort, it has been recognized that "no general consensus has developed as to the basis, essential elements, or even existence of such a tort."⁹ This is evidenced by the variation from jurisdiction to jurisdiction in identifying the elements of the cause of action. In *Smith v. Howard Johnson Co.*,¹⁰ the Ohio Supreme Court recognized the tort of intentional spoliation of evidence.¹¹ In holding that the tort was applicable not only to potential defendants in the primary action, but also against third parties who may have examined and lost or destroyed material evidence, the Ohio Supreme Court framed the elements of the tort as follows:

- (1) A cause of action exists in tort for interference with or destruction of evidence;
- (2a) the elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts; (2b) such a claim should be recognized between the parties to the primary action and against third parties; and (3) such a claim may be brought at the same time as the primary action.¹²

In *Reed v. Westinghouse Electric Corp.*,¹³ a Kentucky court of appeals also held that spoliation of evidence can constitute an independent cause of action in tort.¹⁴ The Kentucky court of appeals identified six elements of the tort:

The states recognizing spoliation of evidence generally require a determination of whether one party owed a duty to the other to preserve the evidence. The duty may arise in contract, voluntary assumption, or due to a special relationship of the parties.

In our opinion, spoliation of evidence is the intentional failure to preserve property in substantially its original state for another's use as evidence in pending or future litigation.

8. *E.g.*, *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995).

9. *Edwards v. Louisville Ladder Co.*, 796 F. Supp. 966, 968 (W.D. La. 1992) (citing James Thompson, *Spoliation of Evidence: A Troubling New Tort*, 37 KAN. L. REV. 563 (1989); Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085 (1987)).

10. 615 N.E.2d 1037 (Ohio 1993).

11. *Id.* at 1038.

12. *Id.* Interestingly enough, in addition to recognizing the doctrine of spoliation of evidence as a cause of action, Ohio courts have also held that it constitutes a discovery sanction as well. *See Cincinnati Ins. Co. v. General Motors Corp.*, No. 940T017, 1994 Ohio App. LEXIS 4960, at *8-9 (Oct. 28, 1994).

13. No. 93-CA-2125-MR, 1995 Ky. App. LEXIS 44 (Mar. 10, 1995).

14. *Id.* at *20-21.

The elements of spoliation of evidence necessary to prove, in our opinion, are:

- 1) an existing or the foreseeable likelihood of a civil suit;
- 2) a duty, either contractual or legal, to preserve evidence;
- 3) destruction which includes obscuring, in whole or in part, evidence;
- 4) significant impairment in the ability to prove the lawsuit;
- 5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and
- 6) damages.¹⁵

The tort of spoliation of evidence can also be applied against a third party responsible for the destruction of important evidence. In *Miller v. Allstate Insurance Co.*,¹⁶ the plaintiff and her passenger were severely injured when her new car crashed into a wall.¹⁷ While she was in the hospital, her father, an attorney, contacted Allstate and informed its agent that plaintiff "wanted to retain possession of the automobile in order to have it examined by an expert for defects."¹⁸ The insurance company had promised to maintain the car for inspection by the plaintiff's experts.¹⁹ Prior to the expert examination, Allstate breached its agreement by selling the car to a salvage yard, where it was disassembled and rendered unavailable for inspection.²⁰ Miller sued Allstate on the grounds that their breach of the agreement to maintain the car for inspection had precluded any products liability suit against the manufacturer.²¹ The Florida court of appeals held that an action for spoliation of evidence could arise in either contract or tort, noting that it had previously recognized the existence of a tort cause of action for negligent failure to preserve evidence for civil litigation.²² The *Miller* court held that an action could appropriately be commenced both against the product manufacturer and the third party responsible for the spoliation of the evidence simultaneously:

Bondu suggests that the plaintiff must first initiate the underlying lawsuit, and receive an adverse final judgment due to the inability to prove the case, before filing an action for spoliation of evidence. For reasons of judicial economy and to prevent piecemeal litigation, we see no reason to wait for a final judgment in the underlying lawsuit before bringing an action for the destruction claim. We agree with the reasoning in *Smith v. Superior Court*, 151 Cal. App. 3d at 498, 198 Cal. Rptr. 834, that a jury trying the concurrent claims in a single proceeding may be in the best position to determine the issues of causation and damages.²³

....

15. *Id.*

16. 573 So. 2d 24 (Fla. Dist. Ct. App. 1990).

17. *Id.* at 25.

18. *Id.*

19. *Id.* at 26.

20. *Id.*

21. *Id.*

22. *Id.* (citing *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984)).

23. *Miller*, 573 So. 2d at 28 n.7.

In the more efficient trial of both the product liability claim and the destruction of evidence in a single action, . . . the jury will decide at the outset whether the plaintiff proved by the greater weight of the evidence that the product was defective when it left the hands of the seller. If the answer to that question is no, the jury will next decide whether the failure to prove that issue was a result of the destruction of the evidence by Allstate.²⁴

Other courts have also held that plaintiff's product liability claim against the manufacturer and spoliation of evidence claim against a third party can proceed at the same time, in the same trial. In *Smith v. Superior Court*,²⁵ the plaintiff, driving southbound, was involved in an accident precipitated by a northbound van. The left rear wheel and tire flew off of the van and crashed into the plaintiff's windshield, resulting in serious personal injury.²⁶ The van was towed to Abbott Ford for repairs after the accident.²⁷ Abbott Ford consented to the request of plaintiff's counsel to maintain certain automotive parts as physical evidence, pending further investigation.²⁸ Despite this agreement, however, Abbott Ford later either lost or destroyed the evidence, rendering the plaintiff's claim impossible to prove, as no expert would be able to inspect the wheel assembly on the van.²⁹ The California court of appeals held that a simultaneously-filed action against both the manufacturer of the wheel and against Abbott Ford for spoliation of evidence was permissible:

Further, we are cognizant of all of the obvious and the sound practical reasons for allowing the Smiths' cause of action for intentional spoliation of evidence to be heard at the same time as their cause of action for personal injury—needless duplication of effort, two trials involving much the same evidence, time and expense imposed on litigants and the judicial system, and a jury uniquely equipped to determine how the Smiths were harmed.³⁰

The Ohio Supreme Court, in *Smith v. Howard Johnson Co.*,³¹ also recognized that simultaneous actions could be brought against the product liability tortfeasor and the third party responsible for the destruction of relevant evidence.³² Only

24. *Id.* at 31 n.13.

25. 198 Cal. Rptr. 829 (Cal. Ct. App. 1984).

26. *Id.* at 831.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 837.

31. 615 N.E.2d 1037 (Ohio 1993).

32. *Id.* at 1038.

Minnesota,³³ and arguably Florida,³⁴ require resolution of the underlying claim before a spoliation claim will be recognized.

Damages may be difficult to prove in spoliation cases. The California court of appeals, in *Smith v. Superior Court*, observed that: "The most troubling aspect in allowing a cause of action for intentional spoliation of evidence is the requisite tort element of damages proximately resulting from the defendant's alleged act."³⁵ The damage issue also troubled the Illinois court of appeals, in *Petrik v. Monarch Printing Corp.*³⁶ In *Petrik*, the court acknowledged that "[t]he most difficult aspect of a spoliation of evidence tort is the calculation of damages."³⁷ Acknowledging that it "would probably be unwise to hold that a cause of action exists where there is no conceivable remedy,"³⁸ the *Petrik* court went on to state that the plaintiff could either "be awarded the full measure of damages that he would have obtained had he won the underlying law suit" or, in the alternative, be awarded "the costs and attorneys fees incurred in the prior suit in which the evidence was spoliated."³⁹ However, the *Petrik* court left the damage issue unresolved, and concluded that it need not decide whether Illinois law would recognize a spoliation tort because the plaintiff had failed to prove an indispensable element of the claim.⁴⁰

In *Reed v. Westinghouse Electric Corp.*,⁴¹ the Kentucky court of appeals held that where compensatory damages could not be proven, nominal and punitive damages could be awarded.⁴² In other cases, the court observed, the evidence may justify an award of all costs associated with proving the spoliation of the evidence, plus attorney fees:

We now address the issue of damages. In some instances where compensatory damages cannot be proven to legal probability, then only nominal and punitive damages would be considered; in other instances, recovery of the costs proving the spoliation, with attorneys' fees. It could also mean that a party may have to prove

33. *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 439 (Minn. 1990) ("[W]e believe resolution of a plaintiff's underlying claim is necessary to demonstrate actual harm and prevent speculative recovery in a spoliation action.").

34. See *Bondu*, 473 So. 2d at 1311. There, the Florida court of appeals held that the cause of action for negligent loss of hospital records did not arise until adverse judgment had been rendered against the plaintiff on her claim for medical malpractice. *Id.* As noted above, another panel in the same appellate district subsequently held that it was unnecessary to await termination of the underlying claim before proceeding with a spoliation action. *Miller*, 573 So. 2d at 28 n.7.

35. 198 Cal. Rptr. at 835. However, that uncertainty did not prevent the *Smith* court from recognizing the cause of action.

36. 501 N.E.2d 1312 (Ill. App. Ct. 1986).

37. *Id.* at 1320.

38. *Id.*

39. *Id.* at 1320-21.

40. *Id.* at 1321.

41. No. 93-CA-2125-MR, 1995 Ky. App. LEXIS 44 (Mar. 10, 1995).

42. *Id.* at *19-20.

a lawsuit within a lawsuit to establish what the verdict would be had the evidence been preserved.⁴³

Two separate torts for spoliation of evidence have been recognized, depending on the mental state of the actor. Some states recognize a tort known as "intentional spoliation of evidence," which was first recognized in *Smith v. Superior Court*.⁴⁴ New Jersey has held that it has a tort "analogous" to intentional spoliation of evidence,⁴⁵ and Ohio's cause of action for spoliation appears to require a showing of intentional conduct on the part of defendant.⁴⁶ To date, a cause of action in tort for intentional spoliation of evidence has been recognized in Ohio,⁴⁷ Kentucky,⁴⁸ California,⁴⁹ New Jersey,⁵⁰ and Alaska.⁵¹

Two jurisdictions have held that actual intent is not a mandatory element of the tort of spoliation of evidence, and that mere negligence is a sufficient mental state upon which to base tort liability. Such a cause of action in tort for negligent spoliation of evidence has been recognized by the courts in Florida⁵² and California.⁵³

Other jurisdictions have, to date, declined to recognize the tort of spoliation, if intentional or negligent. The courts of Alabama,⁵⁴ Arizona,⁵⁵ Arkansas,⁵⁶ Georgia,⁵⁷ Idaho,⁵⁸ Illinois,⁵⁹ Indiana,⁶⁰ Kansas,⁶¹ Louisiana,⁶²

43. *Id.*

44. 198 Cal. Rptr. 829, 831 (Cal. Ct. App. 1984).

45. *Hirsch v. General Motors Corp.*, 628 A.2d 1108, 1115 (N.J. Super. Ct. Law Div. 1993).

46. *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037, 1038 (Ohio 1993) (requiring "willful destruction of evidence by defendant designed to disrupt the plaintiff's case").

47. *Id.*

48. *Reed v. Westinghouse Elec. Corp.*, No. 93-CA-2125-MR, 1995 Ky. App. LEXIS 44 (Mar. 10, 1995).

49. *Smith v. Superior Court*, 198 Cal. Rptr. 829 (Cal. Ct. App. 1984).

50. *Hirsch*, 628 A.2d at 1115.

51. *Hazen v. Anchorage*, 718 P.2d 456 (Alaska 1986).

52. *Continental Ins. Co. v. Herman*, 576 So. 2d 313, 315 (Fla. Dist. Ct. App. 1990).

53. *Velasco v. Commercial Bldg. Maintenance Co.*, 215 Cal. Rptr. 504, 505 (1985).

54. *Christian v. Kenneth Chandler Constr. Co.*, No. 1930517, 1995 Ala. LEXIS 103, at *16 (Mar. 3, 1995) ("[T]he particular facts of this case make it inappropriate for us to consider recognizing a new cause of action at this time.").

55. *La Raia v. Superior Court*, 722 P.2d 286, 289 (Ariz. 1986) ("There is no need to invoke esoteric theories or recognize some new tort.").

56. *Wilson v. Beloit Corp.*, 921 F.2d 765, 766 (8th Cir. 1990) (applying Arkansas law and finding no basis for imposing tort liability, at least in the absence of special circumstances).

57. *Gardner v. Blackston*, 365 S.E.2d 545, 546 (Ga. Ct. App. 1988) ("Neither does Georgia law recognize spoliation of evidence as a separate tort . . .").

58. *Murray v. Farmers Ins. Co.*, 796 P.2d 101, 107 (Idaho 1990) (declining to reach the issue because of the absence of proximate cause).

59. *Boyd v. Travelers' Ins. Co.*, 652 N.E.2d 267, 269 (Ill. 1995) ("The question as certified by the trial court assumes that Illinois courts recognize 'spoliation of evidence' as an independent cause of action. On the contrary, this court, consistent with a majority of jurisdictions, has never done so."). However, Illinois holds that: "An action for negligent spoliation can be stated under

Maryland,⁶³ Michigan,⁶⁴ Minnesota,⁶⁵ Missouri,⁶⁶ New Mexico,⁶⁷ New York,⁶⁸ Pennsylvania,⁶⁹ and West Virginia⁷⁰ have all had the opportunity to review the issue, and have either expressly rejected the recognition of a cause of action in tort for spoliation of evidence, or have held that the issue was not properly before them for consideration.⁷¹ As the New Mexico court of appeals observed in *Bush v. Thomas*, the various reasons given by the courts rejecting the tort include lack of an agreement or any other duty on the part of the spoliator to preserve the evidence; the availability of alternative remedies (such as sanctions or ordinary actions sounding in negligence); uncertainty as to the extent or existence of damages; and the fact that the spoliation was done by a third-party

existing negligence law without creating a new tort." *Id.* at 270.

60. *Murphy v. Target Prods.*, 580 N.E.2d 687, 690 (Ind. Ct. App. 1991) (noting that absent some special circumstances creating a duty, "the claim of negligent or intentional interference with a person's prospective or actual civil litigation by the spoliation of evidence is not and ought not be recognized in Indiana").

61. *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177, 1183 (Kan. 1987) ("[A]bsent some independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties, the tort of 'the intentional interference with a prospective civil action by spoliation of evidence' should not be recognized in Kansas.").

62. *Edwards v. Louisville Ladder Co.*, 796 F. Supp. 966, 971 (W.D. La. 1992) ("[T]his court concludes that the Louisiana Supreme Court would not recognize a cause of action . . . under the circumstances of this case.").

63. *Miller v. Montgomery County*, 494 A.2d 761, 768 (Md. Ct. Spec. App. 1985) ("[T]here is no separate cause of action [for spoliation of evidence by a party] because there is no basis or need for one."), *cert. denied*, 498 A.2d 1185 (Md. 1985).

64. *Panich v. Iron Wood Prods. Corp.*, 445 N.W.2d 795, 799 (Mich. Ct. App. 1989) ("Under the facts of the instant case, we decline to create such a tort in Michigan.").

65. *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 439 (Minn. 1990) (holding that the matter was "prematurely" before the supreme court of the state).

66. *Baughner v. Gates Rubber Co.*, 863 S.W.2d 905, 910 (Mo. Ct. App. 1993) ("[T]his case presents no basis to recognize a tort of intentional spoliation in Missouri.").

67. *Bush v. Thomas*, 888 P.2d 936, 939 (N.M. Ct. App. 1994) ("New Mexico has not recognized either negligent or intentional spoliation of evidence as a tort.").

68. *Weigl v. Quincy Specialties Co.*, 601 N.Y.S.2d 774, 776 (N.Y. Sup. Ct. 1993) ("The courts of New York follow the majority view and do not recognize spoliation of evidence as a cognizable tort action.").

69. *Olson v. Grutza*, 631 A.2d 191, 195 (Pa. Super. Ct. 1993) ("Without deciding whether spoliation of evidence is a viable cause of action in Pennsylvania, we find that a claim of this nature fails to satisfy the joinder conditions.").

70. *Taylor v. Ford Motor Corp.*, 408 S.E.2d 270, 271 n.2 (W. Va. 1991) ("We express no view on the merits of this cause of action.").

71. The federal courts have not, independently of applicable state law, recognized spoliation as a tort, although, they have applied it as an evidentiary inference or presumption and as a discovery sanction. *See, e.g.,* *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995); *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216 (9th Cir. 1995); *Glover v. Bic Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) ("A federal trial court has the inherent discretionary power to make appropriate evidentiary rulings in response to the destruction or spoliation of relevant evidence.").

rather than one of the parties to the underlying case.⁷² Courts have often directed parties desiring the recognition of the tort of spoliation towards other, more traditional, causes of action.⁷³

II. THE SPOILIATION DOCTRINE AS A DEFENSE

The doctrine of spoliation of evidence can also be raised as a defense to product liability claims where the plaintiff or its expert has lost or destroyed important evidence. The issue of whether spoliation of evidence constitutes an affirmative defense—which must be specifically pled in the answer—or a general defense—which may be raised even in the absence of any pleading—has been directly addressed on only one occasion. In *Donohoe v. American Isuzu Motors, Inc.*,⁷⁴ the court held that it was unnecessary for the defendant to amend its answer to raise the defense of spoliation, because the defense was a general defense that could be raised even where not explicitly pled in the answer.⁷⁵ The court stated:

It remains, then, to consider the spoliation rule in the context of the definition of an affirmative defense. Unlike an affirmative defense, the spoliation rule does not prevent recovery by the plaintiff despite the plaintiff's presentation of a *prima facie* case; it only leads to the exclusion of evidence or the admission of negative evidence. In this sense, the spoliation rule is not a defense at all, because it does not bar recovery.

Even in its most extreme form, when judgment is entered in favor of the defendant because evidence critical to the plaintiff's cause of action is excluded, judgment in favor of the defendant is appropriate only because the plaintiff is unable to establish a *prima facie* case due to the exclusion of evidence. The matter therefore is not extrinsic to plaintiff's cause of action, but directly negates the cause of action. At best, then, the spoliation rule is a general defense, not an affirmative defense.⁷⁶

The *Donohoe* court observed that there are two views as to a court's source of authority to sanction the plaintiff for destruction of evidence, those being: (1) the

72. *Bush*, 888 P.2d at 939. See John F. Medler, Jr., *Spoliation of Evidence in Civil Cases*, 39 ST. LOUIS B.J. 14, 20-21 (1993); Philip A. Lionberger, Comment, *Interference With Perspective Civil Litigation by Spoliation of Evidence and Should Texas Adopt a New Tort?*, 21 ST. MARY'S L.J. 209, 213 (1989); Thomas G. Fischer, Annotation, *Intentional Spoliation of Evidence, Interfering With Perspective Civil Action, As Actionable*, 70 A.L.R.4TH 984, 988 (1989).

73. See, e.g., *Federated Mut. Ins. Co.*, 456 N.W.2d at 437-38; *La Raia v. Superior Court*, 722 P.2d 286, 289 (Ariz. 1986); *Miller v. Montgomery County*, 494 A.2d 761, 767-68 (Md. Ct. Spec. App. 1985).

74. 155 F.R.D. 515 (M.D. Pa. 1994).

75. *Id.* at 520.

76. *Id.*

"court's inherent authority to sanction parties"; and (2) the state's substantive law.⁷⁷

Whether it is raised in the answer as an affirmative defense, in a motion for summary judgment, in a motion to dismiss, or in a Rule 37 motion for sanctions, the effect of the doctrine of spoliation, when applied in a defensive manner, is to allow a defendant to exculpate itself from liability because the plaintiff has barred it from obtaining evidence necessary to prove the existence or absence of a product defect. In *Roselli v. General Electric Co.*,⁷⁸ the plaintiff wife was a waitress who had been injured when a coffee carafe shattered. The plaintiffs had the fragments of the broken carafe, but lost them before the defendant could inspect them.⁷⁹ The defendant sought and obtained summary judgment because, as the trial court held, the plaintiffs had deprived the defendant of "the most direct means of countering their allegations of a defect via expert testing and analysis."⁸⁰ On appeal, the superior court affirmed the grant of summary judgment, holding that, as a policy matter, permitting claims for defective products where the product has been disposed of before defendant was given the opportunity to examine it would "encourage false claims and make [the] legitimate defense of valid claims more difficult."⁸¹

The most comprehensive decision addressing the spoliation doctrine is *Hirsch v. General Motors Corp.*⁸² In *Hirsch*, the court exhaustively reviewed the various authorities supporting and rejecting the use of the doctrine by plaintiffs and defendants alike. The *Hirsch* court found that the parties had a duty to preserve relevant evidence.⁸³ Because the plaintiffs allowed the automobile that was the subject of their lawsuit to be destroyed, the court entered an order precluding any use by the plaintiff of evidence regarding the plaintiffs' inspection of the car for purposes of both ruling on motions for summary judgment and also at trial. The court stated:

Accordingly, a duty to preserve evidence, independent from a court order to preserve evidence, arises where there is: (1) pending or probable litigation involving the defendants; (2) knowledge by the plaintiff of the existence or likelihood of litigation; (3) foreseeability of harm to the defendants, or in other words, discarding the evidence would be prejudicial to defendants; and (4) evidence relevant to the litigation.

In this case, plaintiffs' discarding of the Cadillac has frustrated any possibility for a Request for Inspection. A duty to preserve evidence independent of a court order may not exist in every case, however, under the circumstances of this case, plaintiffs had a duty to preserve evidence.

....

77. *Id.* at 519-20.

78. 599 A.2d 685 (Pa. Super. Ct. 1991).

79. *Id.* at 687.

80. *Id.*

81. *Id.*

82. 628 A.2d 1108 (N.J. Super. Ct. Law Div. 1993).

83. *Id.* at 1122.

Defendants' motion for dismissal of plaintiff's complaint based on spoliation of evidence is denied. However, the circumstances of this case dictate preclusion of all evidence regarding plaintiffs' inspection of the Cadillac for the purposes of trial and summary judgment.⁸⁴

Other courts have also held that a grant of summary judgment or dismissal against the party destroying evidence is appropriate,⁸⁵ and is essential as a matter of public policy to discourage plaintiffs from filing false claims or intentionally discarding evidence that they feel may hurt their case.⁸⁶ One court held that: "Where producing the product for defense inspection would weaken rather than strengthen the case, we unfortunately are obliged to conclude that some plaintiffs and attorneys would be unable to resist the temptation to have the product disappear."⁸⁷

Public policy has also been invoked to exclude evidence offered by a plaintiff where the plaintiff's expert has caused the loss or destruction of the item in question. In *Nally v. Volkswagen of America, Inc.*,⁸⁸ the Massachusetts Supreme Court held that:

We conclude that, in a civil case, where an expert has removed an item of physical evidence and the item has disappeared, or the expert has caused a change in the substance or appearance of such an item in such circumstances that the expert knows or reasonably should know that that item in its original form may be material to litigation, the judge, at the request of a potentially prejudiced litigant, should preclude the expert from testifying as to his or her observations of such items before he or she altered them and as to any opinion based thereon. The rule should be applied without regard for whether the expert's conduct occurred before or after the expert was retained by a party to the litigation. The reason for the rule is the unfair prejudice that may result from allowing an expert deliberately or negligently to put

84. *Id.* at 1122, 1131.

85. *Schwartz v. Subaru of Am., Inc.*, 851 F. Supp. 191, 193 (E.D. Pa. 1994); *Lee v. Boyle-Midway Household Prods., Inc.*, 792 F. Supp. 1001, 1005 (W.D. Pa. 1992) ("Under Pennsylvania law, in a case in which plaintiff does not allege a defect present in all of defendant's products, a defendant in a products liability case is entitled to summary judgment when loss or destruction of evidence deprives the defense of the most direct means of countering plaintiff's allegations."); *Cincinnati Ins. Co. v. General Motors Corp.*, No. 940T017, 1994 Ohio App. LEXIS 4960 (Oct. 28, 1994); *Cole v. Metro-North Commuter R.R. Co.*, No. CV93-0344232, 1994 Conn. Super. LEXIS 3359, at *6 n.3 (Dec. 28, 1994). See Jennifer J. Johnson & Theresa M. Freeman, *How to Destroy the Plaintiff's Case Where the Plaintiff Has Destroyed the Evidence: A Primer For Succeeding On Summary Judgment Motions Based On Spoliation of Evidence*, 4 IDC QUARTERLY at ii (No. 3, 1994).

86. *Smith v. American Honda Motor Co.*, 846 F. Supp. 1217, 1222 (M.D. Pa. 1994); *Sipe v. Ford Motor Co.*, 837 F. Supp. 660, 661 (M.D. Pa. 1993); *Martin v. Volkswagen of Am., Inc.*, No. 88-8261, 1989 U.S. Dist. LEXIS 8087 (E.D. Pa. July 13, 1989).

87. *Friend v. The Pep Boys*, 3 Phila. 363, 372 (1979), *aff'd*, 433 A.2d 539 (Pa. Super. Ct. 1981).

88. 539 N.E.2d 1017 (Mass. 1989).

himself or herself in the position of being the only expert with first-hand knowledge of the physical evidence on which expert opinions as to defects and causation may be grounded. Furthermore, as is possible in this case, the physical items themselves, in the precise condition they were in immediately after an accident, may be far more instructive and persuasive to a jury than oral or photographic descriptions of them. As a matter of sound policy, an expert should not be permitted to intentionally or negligently destroy or dispose of such evidence, and then to substitute his or her own description of it.⁸⁹

Accordingly, the spoliation doctrine can be invoked as a defense to obtain the dismissal of, or summary judgment on, the plaintiff's claims, or to exclude the testimony of the plaintiff's witnesses with respect to the condition of the spoliated item.

III. THE SPOILIATION DOCTRINE AS AN EVIDENTIARY INFERENCE OR PRESUMPTION

As pointed out in *Hirsch v. General Motors Corp.*,⁹⁰ the spoliation doctrine has also been used as an evidentiary inference or presumption:

The spoliation inference is a product of the legal maxim *omnia praesumuntur contra spoliatorem* (all things are presumed against the destroyer). The spoliation inference allows the fact finder to draw an unfavorable inference against the spoliating party.

....

To draw a spoliation inference, prerequisites of intentionality, party limitation and victim behavior must be met. Commentators disagree about the nature of the intentionality requirement. "Many courts have held that spoliation requires an intentional act of destruction and that mere negligence is insufficient. Some courts impose a more stringent intentionality element by requiring proof of fault or 'bad faith.'"

....

Along the same vein, federal courts allow a rebuttable presumption to arise against the spoliator. The jury is instructed to find a presumption or inference adverse to the spoliator. For example, in *Welsh v. U.S.*, 844 F.2d 1239 (6th Cir. 1988), the court held: When [the] plaintiff is unable to prove an essential element of her case due to the negligent loss or destruction of evidence by an opposing party, and the proof would otherwise be sufficient to survive a directed verdict, it is proper for the trial court to create a rebuttable presumption that establishes the missing elements of the plaintiff's case that could have only been proved by the availability of the missing evidence⁹¹

89. *Id.* at 1021.

90. 628 A.2d 1108 (N.J. Super. Ct. Law Div. 1993).

91. *Id.* at 1126-27 (citations omitted).

Almost every state has held that the finder of fact may—but is usually not required to—infer or presume that the evidence destroyed by a spoliating party would have been adverse to that party.⁹² This is the position taken by all of the leading commentators.⁹³ Wigmore states that:

It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.⁹⁴

Similar statements are made in the treatise authored by McCormick.⁹⁵

In addition to allowing an inference or presumption to be drawn against the spoliating party, courts applying the spoliation doctrine as an evidentiary rule have also used it to exclude evidence offered by the spoliating party,⁹⁶ and have

92. See, e.g., *McCool v. Gehret*, 657 A.2d 269, 271 (Del. 1995); *Prost v. Greene*, 652 A.2d 621, 633 (D.C. 1995); *Stuart v. State*, 907 P.2d 783 (Idaho 1995); *Brown v. Hamid*, 856 S.W.2d 51, 57 (Mo. 1993); *De Laughter v. Lawrence County Hosp.*, 601 So. 2d 818, 821-22 (Miss. 1992); *Colfer v. Harmon*, 832 P.2d 383, 385 (Nev. 1992); *Cox v. State*, 808 S.W.2d 306, 312 (Ark. 1991); *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990); *State v. Ueding*, 400 N.W.2d 550, 552 (Iowa 1987); *State v. Kietzke*, 186 N.W.2d 551, 558 (Mich. 1971); *Pratt v. Bishop*, 126 S.E.2d 597, 611 (N.C. 1962); *State v. Paquin*, 368 P.2d 85, 89 (Or. 1962); *Trupiano v. Cully*, 84 N.W.2d 747, 748 (Mich. 1957); *Walker v. Herke*, 147 P.2d 255, 260 (Wash. 1944); *In re Holmes' Estate*, 56 P.2d 1333, 1335 (Colo. 1936); *McHugh v. McHugh*, 40 A. 410, 411 (Pa. 1898); *Randolph v. General Motors Corp.*, 646 So. 2d 1019, 1027 (La. Ct. App. 1994); *Brewer v. Dowling*, 862 S.W.2d 156, 159 (Tex. Ct. App. 1993); *American Casualty Co. v. Schafer*, 420 S.E.2d 820, 822 (Ga. Ct. App. 1992); *Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 30 (Fla. Dist. Ct. App. 1990).

93. Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085 (1987); Note, *Should Iowa Adopt the Tort of Intentional Spoliation of Evidence in Civil Litigation?*, 41 DRAKE L. REV. 179 (1982); John M. Maguire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 YALE L.J. 226 (1935).

94. 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 278(2) (Chadbourn Rev. 1979).

95. See CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 265 (John W. Strong ed., 4th ed. 1992) ("Wrongdoing by the party in connection with its case amounting to an obstruction of justice is also commonly regarded as an admission by conduct.").

96. *Donohoe v. American Isuzu Motors, Inc.*, 155 F.R.D. 515, 520 (M.D. Pa. 1994). The Massachusetts Supreme Court has held that where an expert has misplaced or made a material alteration to an item of physical evidence, the judge, at the request of a potentially prejudiced litigant, should preclude the expert from testifying because, as a matter of sound public policy, an expert should not be permitted to intentionally or negligently destroy or dispose of such evidence,

even used it as an evidentiary rule to order an outright dismissal of the plaintiff's complaint.⁹⁷

In order to qualify for the inference or presumption, the party requesting that the adverse inference be drawn against the spoliating party must ordinarily show that the spoliator was on notice of the claim or potential claim at the time of the destruction. In *Burns v. Cannondale Bicycle Co.*,⁹⁸ the plaintiff was involved in a bicycle accident in which his bike came to an abrupt halt and threw him over the handlebars.⁹⁹ The bike was taken to a bicycle shop to determine the cause of the sudden stop.¹⁰⁰ There was conflicting testimony about what was said and done at the bicycle shop with respect to any potential problems with the bike.¹⁰¹ The plaintiff claimed that the bike shop disposed of a key piece of the bicycle after the inspection of the bike.¹⁰² The plaintiff brought suit against the bicycle manufacturer and the bike shop, admitting that he could not prove a defect, but claiming that the existence of a defect could be inferred if the fact finder determined that the bike shop disposed of a part while it had the bicycle in for repair.¹⁰³ The Utah court of appeals discussed the evidentiary presumption recognized by many courts where the spoliation doctrine had been invoked.¹⁰⁴ However, the court did not decide whether it would recognize the tort, because the plaintiff failed to establish the requirements necessary to invoke the evidentiary inference based upon the spoliation.¹⁰⁵ First, the court said that the doctrine was inapplicable because the plaintiff had neither brought suit for his injuries nor notified the defendants that he was considering such an action, at the time that the part was allegedly discarded.¹⁰⁶ Second, the court held that the defendants were not under any "general duty" to retain the discarded part in the absence of such notice.¹⁰⁷

Obviously, where the spoliator is the plaintiff or his representative, there is no requirement that litigation be pending or contemplated at the time the evidence is destroyed. In *Cincinnati Ins. Co. v. General Motors*,¹⁰⁸ an Ohio court of appeals held that exclusion of evidence as a sanction against the plaintiff was permissible even though no litigation had been commenced when the evidence was destroyed, stating:

and then to substitute his or her own description of it together with his conclusions drawn from such examination. *Nally v. Volkswagen of Am., Inc.*, 539 N.E.2d 1017, 1021 (Mass. 1989).

97. *Mensch v. Bic Corp.*, No. 90-6002, 1992 U.S. Dist. LEXIS 14318 (E.D. Pa. 1992).

98. 876 P.2d 415 (Utah Ct. App. 1994).

99. *Id.* at 416.

100. *Id.*

101. *Id.* at 417.

102. *Id.*

103. *Id.*

104. *Id.* at 419.

105. *Id.*

106. *Id.*

107. *Id.*

108. No. 940T017, 1994 Ohio App. LEXIS 4960 (Oct. 28, 1994).

In product liability cases where evidence is intentionally or negligently "spoiled" or destroyed by a plaintiff or his expert before the defense has an opportunity to examine that evidence for alleged defects, a court may preclude any and all expert testimony as a sanction for "spoliation of evidence." In such cases, the intent of the spoliator in destroying or altering evidence can be inferred from the surrounding circumstances. In other words, intent can be inferred from the fact that the evidence was destroyed prior to the commencement of any litigation against the defendant and there is only a potential for litigation. Therefore, the plaintiff is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.¹⁰⁹

Accordingly, where the evidence is in the hands of the plaintiff, the plaintiff may be sanctioned for destroying the evidence notwithstanding the fact that no litigation was either commenced or contemplated at the time.

Perhaps the more interesting question is when the duty to preserve evidence arises on the part of a potential defendant. Certainly, there are countless businesses that for many years have routinely destroyed documents pursuant to long-standing document retention policies.¹¹⁰ These businesses may be surprised to find that, because of the spoliation doctrine, they may be sued for spoliation of evidence or otherwise penalized as a consequence of their actions. There has been virtually no discussion in the cases about when, and under what circumstances, a potential defendant is under a duty not to destroy materials pertinent to a potential claim that is not only not yet filed, but which may not yet have accrued. Most of the decisions have generally acknowledged that:

*The general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute or another special circumstance. Moreover, a defendant may voluntarily assume a duty by affirmative conduct. In any of the foregoing instances, a defendant owes a duty of care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.*¹¹¹

The few decisions on point have generally concluded that some kind of notice to the potential defendant in a civil suit is necessary before a duty to preserve

109. *Id.* at *8-9 (citation omitted).

110. See, e.g., Kirby J. Iler, *Business Records—Retention or Destruction: That is the Question*, CORP. COUNS. SEC. NEWSL. (Corporate Counsel Section, Ohio State Bar, Columbus, Ohio), April 1989, at 3 ("In today's cost conscious and litigious society, many companies are raising the question of whether records should be maintained or destroyed."). Law journals are replete with advice to corporations with respect to their document retention or destruction policies. See, e.g., DONALD S. SKUPSKY, *RECORDKEEPING REQUIREMENTS* (2d ed. 1989); Thomas J. Dwyer, *What To Save, What To Throw Away*, A.B.A. J., June 1994, at 69; Brian W. Curtis, II & Joseph L. Page, *A Record-Keeping Checklist for Document Control*, ENVTL. CORP. COUNS. REP., Dec. 1994, at 9.

111. *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267 (Ill. 1995) (emphasis added) (citations omitted).

evidence will arise.¹¹² In holding that the spoliation doctrine would not apply to the facts in the *Burns* decision even if the tort was recognized, the Utah court held that:

[E]ven if such a defective part existed and was discarded, the requirements for establishing an evidentiary inference based on spoliation have not been met. First, Burns had not brought suit for his injuries, nor even notified defendants that he was considering such action, at the time the part was allegedly discarded. . . . Thus, defendants were not parties to a lawsuit brought by Burns, nor even on notice of the impending filing of such an action, at the time the part was supposedly discarded. Second, we are not aware of any general duty requiring defendants to retain the allegedly discarded part. Accordingly, defendants did not act wrongfully even if they did discard the part.¹¹³

In *Turner v. Hudson Transit Lines, Inc.*,¹¹⁴ the United States District Court for the Southern District of New York also held that some sort of notice must be given to the defendant before the obligation to preserve evidence will arise, stating that: "[t]he obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced."¹¹⁵

At least one court has suggested that something more than actual or constructive notice of the mere potentiality of a claim should be required before a duty not to destroy potentially relevant evidence arises. In *Edwards v. Louisville Ladder Co.*,¹¹⁶ the court held that:

The courts must also be concerned with interference with a person's right to dispose of his own property as he chooses. This is particularly true where the evidence is in the hands of the third party. Should an auto salvage yard become responsible for another's tortious act because it destroys a wrecked vehicle that may constitute relevant evidence in a suit against either the vehicle's manufacturer or the other driver? Actual or constructive knowledge would not seem to establish a reasonable limitation on such liability.¹¹⁷

In *Hirsch v. General Motors Corp.*,¹¹⁸ the New Jersey court held that once the duty to preserve evidence arises, "[t]he scope of the duty to preserve evidence

112. *Toste v. Lewis Controls, Inc.*, No. C-95-01366-MHP, 1996 U.S. Dist. LEXIS 2359, at *6-7 (N.D. Cal. Feb. 27, 1996); *Allstate Ins. Co. v. Creative Envtl. Corp.*, No. 92-0467T, 1994 U.S. Dist. LEXIS 13307, at *12 (D.R.I. Apr. 1, 1994).

113. *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 419 (Utah App. 1994).

114. 142 F.R.D. 68 (S.D.N.Y. 1991).

115. *Id.* at 73 (citing *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 550-51 & n.14 (D. Minn. 1989); *Alliance to End Repression v. Rochford*, 75 F.R.D. 438, 440 (N.D. Ill. 1976)).

116. 796 F. Supp. 966 (W.D. La. 1992).

117. *Id.* at 970 (citations omitted).

118. 628 A.2d 1108 (N.J. Super. Ct. Law Div. 1993).

is not boundless."¹¹⁹ The court further noted that, a "potential spoliator need only do what is reasonable under the circumstances."¹²⁰ Once a party has been placed on notice that a suit is being considered, an obligation may arise which mandates that the party's counsel advise his client regarding the type of information potentially relevant to the lawsuit, and of the necessity of preventing its destruction.¹²¹ Accordingly, under the analysis provided by most courts, the general rule is that there is no duty to preserve evidence for the benefit of another in the absence of an independent contract, agreement, or special relationship imposing a duty to the particular claimant or voluntary assumption of a duty to retain the evidence.¹²²

IV. THE SPOILIATION DOCTRINE AS A DISCOVERY SANCTION

The spoliation doctrine has sometimes been applied in the context of a Rule 37 discovery sanction.¹²³ In fact, one Ohio court has gone so far as to say that "the better method to raise 'spoliation of evidence' within the context of a civil case is [to impose] sanctions under Civ. R. 37."¹²⁴

The federal courts have not hesitated to apply the spoliation doctrine as a discovery sanction. It has been held that whenever non-compliance with discovery results from a party's spoliation of evidence, the discovery sanctions under Rule 37(b) come into play.¹²⁵ This is true even where the party destroys the evidence prior to the issuance of a discovery order.¹²⁶

There have been a few cases where the federal courts were reluctant to rely on Rule 37 in sanctioning parties for spoliation.¹²⁷ However, even in these instances, the courts still found that they had the power to impose sanctions on parties for abusive practices wholly apart from Rule 37.¹²⁸

One recent court that applied Rule 37 to an instance of spoliation concluded that courts have the power under both Rule 37 and their inherent powers to

119. *Id.* at 1122.

120. *Id.* (quoting *County of Solano v. Delancy*, 215 Cal. App. 3d 1232 (Cal. 1989)).

121. *Turner*, 142 F.R.D. at 73 (citing *Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12, 18 (D. Neb. 1985)).

122. *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177, 1183 (Kan. 1987); *Edwards v. Louisville Ladder Co.*, 796 F. Supp. 966, 969 (W.D. La. 1992).

123. FED. R. CIV. P. 37 ("If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.").

124. *Cincinnati Ins. Co. v. General Motors Corp.*, No. 940T017, 1994 Ohio App. LEXIS 4960, at *9 (Oct. 28, 1994).

125. *Marketing Specialists, Inc. v. Bruni*, 129 F.R.D. 35, 53 (W.D. N.Y. 1989).

126. *In re Air Crash Disaster*, 90 F.R.D. 613, 620-21 (N.D. Ill. 1981).

127. *Capellupo v. F.M.C. Corp.*, 126 F.R.D. 545, 550-51 (D. Minn. 1989); *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68 (S.D.N.Y. 1991); *Balotis v. McNeil*, 870 F. Supp. 1285 (M.D. Penn. 1994).

128. *Id.*; *National Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556 (N.D. Cal. 1987).

impose sanctions for spoliation of evidence. In *Turner v. Hudson Transit Lines, Inc.*,¹²⁹ the court held that:

Where a party has destroyed evidence, the court's authority to impose sanctions derives from two sources. First, Rule 37(b) of the Federal Rules of Civil Procedure provides that a party that fails to comply with a discovery order is subject to sanctions. Thus, when non-compliance results from the spoliation of evidence, Rule 37(b) comes into play. Even though a party may have destroyed evidence prior to issuance of the discovery order and thus be unable to obey, sanctions are still appropriate under Rule 37(b) because this inability was self-inflicted.

Occasionally, courts are hesitant to rely on Rule 37, believing that it does not deal specifically with the issue of spoliation. . . . Yet in such cases, courts may still impose sanctions, relying on their "inherent power to regulate litigation, preserve and protect the integrity of proceedings before [them], and sanction parties for abuse of practices."

Courts thus have the power to sanction the destruction of evidence, whether that authority is derived from Rule 37 or from their inherent powers.¹³⁰

The United States Court of Appeals for the Third Circuit, in *Schmid v. Milwaukee Tool Corp.*,¹³¹ recently pointed out that federal courts can utilize a sliding scale of sanctions, depending on factors such as the egregiousness of the conduct, the impact it will have on the opposing party, and the intent of the party destroying the evidence.¹³² The sanctions range from a "spoliation inference" that the party destroying the evidence did so because it would have been unfavorable, to and including the total preclusion of any evidence on the issue, with the result that the party cannot prevail as a matter of law.¹³³

In *Shimanovsky v. General Motors Corp.*,¹³⁴ an Illinois appeals court held that the spoliation doctrine could be invoked as a discovery sanction, notwithstanding the fact that the Illinois courts had refused to recognize spoliation as an independent cause of action in tort.¹³⁵ In *Shimanovsky*, the court held that under the Illinois Supreme Court rule authorizing the trial court to enter such orders as are "just" as a sanction for a party's unreasonable refusal to comply with requests for discovery, sanctions could be imposed against a party that has destroyed evidence, stating:

129. 142 F.R.D. 68 (S.D.N.Y. 1991).

130. *Id.* at 72 (citations omitted).

131. 13 F.3d 76, 79 (3rd Cir. 1994).

132. *Id.* at 79.

133. *Id.* at 78-79.

134. 648 N.E.2d 91, 95 (Ill. App. 1994).

135. *Boyd v. Travelers Inc.*, 652 N.E.2d 267, 270 (Ill. 1995) ("[T]raditional remedies adequately address the problem presented in this case. An action for negligent spoliation can be stated under existing negligence law without creating a new tort.").

Consequently, Illinois courts have upheld sanctions for destruction of evidence in violation of a protective order and for failure to comply with discovery orders after evidence was inadvertently lost.

.....

Indeed, sanctions have been upheld even where no prior court order protecting the information existed.

.....

In this case, the record shows that plaintiffs, through their experts, performed destructive testing on components of the steering gear which they claim is defective, thereby depriving GM of any opportunity to conduct an independent investigation or examination of the steering gear or its components. . . . Given the record on appeal, the trial court did not err in imposing a sanction on plaintiffs for their destructive testing of the steering gear components.¹³⁶

Finally, in *Hirsch v. General Motors Corp.*,¹³⁷ the New Jersey superior court held that the discovery rules and the court's inherent powers permit the entry of default judgment or dismissal of an action as a discovery sanction:

Default or dismissal of an action, as a discovery sanction, requires findings 1) that the spoliator acted willfully or in bad faith, 2) that the victim was seriously prejudiced by the spoliator's actions; and 3) that the alternative sanctions would not adequately punish the spoliator and deter future discovery violations.

.....

A trial court has the "inherent discretionary power to impose sanctions for failure to make discovery. . . ." ¹³⁸

CONCLUSION

The vast majority of courts that have considered the issue recognize the spoliation doctrine in one or more of its manifestations. The extent to which this will impact ordinary business practices, such as the routine destruction of unnecessary documents pursuant to a long-standing document retention policy, is not yet clear. Common sense and fundamental fairness suggest that a business should be free to dispose of its property as it chooses, at least until it is on notice that a claim has been filed or is being considered, as to which certain information or other materials may be relevant. In any event, the cases cited above forewarn plaintiffs and defendants alike that, in the event of an occurrence likely to give rise to litigation, destruction of relevant evidence pertaining to the incident could well result in the imposition of liability or a complete loss of an otherwise viable cause of action.

136. *Shimanovsky*, 648 N.E.2d at 95-96 (citations omitted).

137. 628 A.2d 1108 (N.J. Super. Ct. Law Div. 1993).

138. *Id.* at 1127.