Litigation: When a party's chances at trial are hurt by lost evidence

By Jeff Shapiro and Neville Leslie
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All too often, a party's position in litigation is impaired by the destruction, alteration or loss of crucial evidence during — and sometimes even before — litigation has begun. This is commonly referred to as "spoliation" of evidence.

Under Florida law, spoliation of evidence can lead to: 1) a cause of action in tort for either the intentional or negligent loss of evidence; 2) a defense to recovery; 3) the basis for a negative evidentiary inference or presumption; and 4) sanctions.

From a defense perspective, spoliation is a rapidly growing area of the law because if the defendant did not spoliate the evidence, it can act as a complete bar to a recovery by the plaintiff. In that regard, the court may dismiss the case on the grounds that the defendant is deprived of the opportunity to adequately defend itself absent the evidence. Alternatively, it may strike the plaintiff's pleadings as a sanction if he/she is the spoliating party.

From the plaintiff's perspective, if the defendant or a third-party is the spoliating party, it can lead to a simple cause of action — or to the imposition of sanctions so severe that it can obviate the need for the trial of a complex product liability lawsuit.

A spoliation cause of action arises when it is alleged that a crucial piece of evidence is unavailable at the time of trial due to action or inaction by one or the other of the parties.

In this context, the doctrine of spoliation has been invoked by injured plaintiffs against: 1) the manufacturer and/or seller of an allegedly defective product, and/or 2) a third party when that third party has destroyed the subject product. Florida courts generally have ruled that the issue of bad faith is irrelevant to this cause of action.

For example, in Miller v. Allstate Ins. Co., a 1990 3rd DCA case, and Continental Ins. Co. v. Herman, a 1991 3rd DCA case, the courts defined the elements for a cause of action for spoliation as follows: 1) the existence of a potential civil action; 2) a legal or contractual duty to preserve evidence that is relevant to the potential civil action; 3) destruction of that evidence; 4) significant impairment of the ability to prove the lawsuit; 5) a causal relationship between the evidence's destruction and the inability to prove the lawsuit; and 6) damages.

Is bad faith necessary?

Other courts have held that bad faith on the part of the spoliating party is a necessary inquiry.

Recently, there has been a limitation placed on the spoliation claim. In Martino v. Walmart Stores Inc., a 2003 4th DCA case, the court restricted the ability to maintain spoliation as a separate cause of action. The court held that "an independent cause of action for spoliation of evidence is unnecessary and will not lie where the alleged spoliator and the defendant in the underlying litigation are one and the same."

More recently, in 2004 the 4th DCA in Safeguard Mgmnt. Inc. v. Pinedo addressed spoliation and negligence claims. The case involved an injured party who sued the management company and owner of an apartment complex for the defendant's alleged lack of maintenance of apartment bathroom facilities.

The jury rendered a defense verdict on the negligence claim but a plaintiff verdict on the alternative spoliation claim. The appellate court overturned the verdict for plaintiff and held that "it was improper for the plaintiff to maintain a cause of action predicated upon negligence and an independent cause of action for spoliation where the defendants in each claim were the same."

Types of sanctions

Florida courts consistently have imposed sanctions when it is determined that spoliation has occurred. Sanctions include the striking of pleadings, entering of a default on the issue of liability, imposition of a negative evidentiary presumption, and the dismissal of a claim.

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The sanction imposed typically depends on a wide variety of circumstances, ultimately found to justify the selection of the sanction imposed. Courts have dismissed actions with prejudice where the plaintiff inadvertently lost essential evidence in a personal injury suit, because the defendants were denied the opportunity to examine and test the lost evidence and therefore could not adequately present their defense.

Conversely, prior to dismissing an action for spoliation of evidence, other courts have required a showing that the party violated an order not to alter or destroy critical physical evidence and/or altered or destroyed the evidence in bad faith. Going further, some courts have held that the sanction of dismissal is not warranted so long as the respective parties involved can adequately present their positions.

This broad range of treatment is aptly illustrated in Fleury v. Biomet, a 2003 2nd DCA case. The plaintiff, a patient who received a second artificial knee implant, sued the manufacturer and seller of the knee. The trial court entered sanctions against the plaintiff because the artificial knee at issue had been lost by a third party. On review, the appellate court held that neither party was at fault because, within hours of the plaintiff's surgery, the device had been discarded not by the plaintiff but by the hospital pursuant to its biohazard protocols.

The appellate court stated that "even when it is clear that evidence has been lost while in the custody of a party, the appropriate sanction varies according to the willfulness and bad faith, if any, of the party who lost the evidence, the extent of the prejudice suffered by the other party, and what is required to cure the prejudice.

In determining whether to impose sanctions or negative evidentiary presumptions for spoliation of evidence, Florida courts typically will assess whether the alleged spoliation impairs the party from presenting or defending their case, and whether the spoliation was committed willfully or inadvertently.

Although there are many variables to be considered, the ultimate question seems to be whether the evidence that has been altered and/or destroyed is so essential that the party cannot proceed without it.

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