

Spoliation Of Evidence In Virginia

Spoliation has been defined as the willful destruction of evidence or the failure to preserve potential evidence for another's use in pending or future litigation. Currently, in Virginia, there is no independent cause of action for spoliation of evidence. However, Virginia courts will impose civil and evidentiary sanctions when a party or his counsel destroys or fails to preserve evidence. This issue has the potential for application in a number of situations from the moment a loss occurs through the conclusion of litigation.

The types of sanctions for spoliation of evidence that the Virginia state courts will impose include dismissal of the case, discovery sanctions, exclusion of favorable evidence or expert testimony, an adverse-inference jury instruction, monetary penalties against parties and/or disciplinary sanctions against offending attorneys. Dismissal of the case or default judgment is the most severe penalty available in Virginia, but it is only appropriate when the court finds evidence of bad faith on the part of the party or counsel. In *Gentry v. Toyota Motor Co.*, 252 Va. 30 (1996), a product

liability case, the defendant moved to dismiss because the plaintiff's expert destroyed a portion of a car that was the subject of the lawsuit. The lower court granted the defendant's Motion to Dismiss, but the Virginia Supreme Court reversed, finding that there was no evidence that the expert acted in bad faith. Further, the Court held that the purpose of a sanction is to punish the offending party and to deter others from acting similarly. In this instance, the expert had acted independently and did not have the permission of the plaintiff or plaintiff's counsel to destroy the evidence. The Court held, therefore, that imposing a sanction on the plaintiff would be inappropriate under the circumstances.

Virginia Supreme Court Rule 4:12 gives a trial court wide discretion in determining the type of sanction to be imposed. In instances where bad faith is not clear, courts have long favored imposing a negative inference on spoliators through a jury instruction. In *Neece v. Neece*, 104 Va. 343 (1905), the Virginia Supreme Court held that concealing or destroying material evidence is admissible as evidence of an admission that such evidence, if produced, would have been adverse to the plaintiff. The courts have indicated that in concealing or destroying evidence, a party reveals his

own belief in the weakness of his case. This conduct may be used against him as an admission. However, because the spoliation sanction is only an inference, the spoliator will be given the opportunity to explain his conduct to the jury in an attempt to remove the significance from his actions. See *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, 40 Va. App. 565 (2003).

The courts will only impose the spoliation inference if the lost or destroyed evidence would have been relevant to issues in the case. Even if it is clear that evidence has been lost or destroyed by a party or counsel, jurors are not required to accept the spoliation inference. They are merely required to consider it along with all other facts in evidence. Finally, it is important to remember that in Virginia, you do not have to prove that the spoliator's conduct in losing or destroying evidence was intentional. Virginia law allows for the spoliation inference when conduct is either intentional or negligent. To determine if the inference should apply, the court will consider whether "at the time the evidence was lost or destroyed, a reasonable person in the [spoliator's] position should have foreseen that the evidence was material to a potential civil action." *Id.*



In *McDonald v. Wal-Mart*, a case decided in January 2008 by the United States District Court for the Eastern District of Virginia, the plaintiff requested an adverse inference instruction because a Wal-Mart employee discarded a three foot long piece of plastic wrap shortly after the plaintiff fell on it. Immediately after the fall, an employee, who had been unwrapping plastic from pallets, notified her supervisor of the fall. The supervisor prepared an incident report and took a statement from a witness. The employee advised the supervisor that the woman had tripped on a piece of plastic wrap. She then confirmed with the manager that everything

was ok, and then discarded the plastic wrap. The court noted that although it did not appear that Wal-Mart acted in bad faith in disposing of the plastic wrap, it had acted intentionally. The plaintiff had not given Wal-Mart notice that she wanted them to preserve the plastic wrap, but, the court found that Wal-Mart could not be allowed to dispose of evidence without consequences. The court specifically noted that it was not requiring all store owners to preserve every object on which a customer slips. However, when shortly after an accident, an employee knowingly disposes of an item that she was working with just prior to the accident, and when that object later becomes the subject of

litigation, an adverse inference jury instruction is appropriate.

The issue of lost or destroyed evidence can arise in cases ranging from the simple, single-plaintiff personal injury case to a products liability case to complex business tort cases. Thus, consideration of spoliation and evidence preservation issues should begin from the moment a loss occurs and continue through the conclusion of litigation.



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