

Examining The Duty To Preserve Evidence

By JOHN LOGAN

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A client asks you to investigate a potential medical malpractice matter. You immediately seek all the relevant medical records only to discover that a portion of the records, vital to the determination of the matter, no longer exist. The physician contends the missing records were inadvertently lost during a conversion of written office notes to an electronic format. Can you still make a case for your client?

Welcome to the law of spoliation of evidence.

Spoliation is defined as the "intentional destruction, mutilation, or significant alteration of potential evidence..." *Rizzuto v. Davidson Ladders Inc.*, 280 Conn. 225 (2006). "Evidence spoliation is not a new concept. For years courts have struggled with the problem and devised possible solutions. Probably the earliest and most enduring solution was the spoliation inference or *omnia praesumuntur contra spoliatores*: all things are presumed against a wrongdoer." *Trevino v. Ortega*, 969 S.W.2d 950, 952 (Tex. 1998).

Two experts on the subject wrote: "There is a straightforward rationale for requiring parties to preserve relevant evidence before a lawsuit is filed: Absent such a pre-litigation duty, a party might be able to 'subvert the discovery process and the fair administration of justice' by destroying evidence before a potential litigant actually files a claim." Margaret M. Koesel & Tracey

L. Turnbull, *Spoliation of Evidence: Sanctions and Remedies for Destruction of Evidence in Civil Litigation* (2d Ed. 2006).

In the *Rizzuto* case, the Connecticut Supreme Court recognized the tort of intentional spoliation of evidence. In this cause of action, a plaintiff is entitled to recover compensatory, and possibly punitive, damages for the loss of a prospective lawsuit. "The cause of action for spoliation is a substitute for the underlying cause of action, which the plaintiff can no longer successfully pursue because of the defendant's wrongful destruction of evidence." *Amica Mutual Insurance Co. v. Fassarella Pro Painting and Design LLC*, CV116132 (Connecticut Superior Court Judge David R. Tobin, 2011).

To prove the tort a plaintiff needs to show: (1) the defendant's knowledge of a pending or impending civil action involving the plaintiff; (2) the defendant's destruction of evidence; (3) in bad faith, that is, with intent to deprive the plaintiff of his cause of action; (4) the plaintiff's inability to establish a prima facie case without the spoliated evidence; and (5) damages. Satisfactory proof of these elements creates "a rebuttable presumption that but for the fact of the spoliation of evidence the plaintiff would have recovered in the pending or potential litigation..."

Aside from a direct tort action, the spoliation of evidence can give rise to an adverse inference.

Three-Step Test

In *Beers v. Bayliner Marine Corp.*, 236 Conn. 769 (1996), the Connecticut Supreme Court created a three-step test to use in determining whether an adverse inference is permitted.

First, the spoliation must have been intentional. Second, the destroyed evidence must be relevant to the issue or matter for which the party seeks the inference. Third, the party that seeks the inference must have acted with due diligence with respect to the spoliated evidence. The *Beers* court made it quite clear that there are limitations to this adverse inference emphasizing that the inference does not "supply the place of evidence of material facts and does not shift the burden of proof so as to relieve the party upon whom it rests of the necessity of establishing a prima facie case, although it may turn the scale when the evidence is closely balanced."

Thus, when evidence has been spoliated, the first determination is whether the defendant's spoliation actually deprives your client of the ability to establish a prima facie case. If so, you need to pursue an independent cause of action under *Rizzuto*. Conversely, if your client still possesses a viable cause of action, the independent tort is not available to you. Rather, your remedy will be seeking an adverse inference under *Beers*.

The underlying elements in spoliation cases pose a host of other issues, a few of which will be discussed here. For instance, when does the duty to preserve evidence arise? In *Surrells v. Belinkie*, 95 Conn. App. 764 (2006), the Appellate Court found a defendant doctor's disposal of breast tissue did not support an adverse inference because any "spoliation ...occurred before [the defendant] had any reason to believe that the tissue would be the subject of litigation."

In making this determination, the *Surrells* court used a familiar touchstone, namely; the duty to preserve arises whenever a defendant has knowledge

that "litigation exists or is probable." A duty to preserve may arise independent of litigation. For instance, a duty may arise from a contract, a statute or regulation, a document retention policy, or, in the case of attorneys, ethical rules. "In these cases, the duty to preserve evidence may exist before litigation is contemplated," Koesel and Turnbull wrote in their book on spoliation.

Indeed, in the above hypothetical, other state courts have found a duty to preserve medical records independent of the probability of litigation. This duty was based on statutes requiring medical providers to preserve medical records for a certain period of time. See, e.g., *DeLaughter v. Lawrence County Hospital*, 601 So.2d 818 (Miss. 1992) and *Keene v. Brigham and Woman's Hospital*, 439 Mass. 223, 786 N.E.2d 824 (2003).

Any failure to perform the necessary due diligence required to preserve the evidence may result in a refusal to permit the adverse inference. In *D'Agostino v. Easton Sports Inc.*, CVO85026631S (Connecticut Superior Court Judge Robert B. Shapiro, 2010), no adverse inference was permitted because the plaintiff provided "no formal notice" requesting the preservation of a baseball bat. The court in *D'Agostino* specifically found the plaintiff presented "no evidence of an attempt to obtain a court-ordered inspection."

Intentional Or Bad Faith?

Another key distinction is used to determine whether a spoliation claim is best presented as a request for an adverse inference or as an independent intentional tort. This distinction goes to the defendant's *mensrea*.

The "intentional" spoliation required by *Beers* is quite different from the "bad

faith" spoliation with the "intent to deprive" called for in *Rizzuto*. While the "bad faith" requirement leaves little room for misunderstanding, the exact nature of the "intentional" conduct required to satisfy *Beers* is less than clear. The *Beers* court stated "we do not mean that there must have been an intent to perpetrate a fraud by the party or his agent who destroyed the evidence but, rather, that the evidence had been disposed of intentionally and not merely destroyed inadvertently."

In *Paylan v. St. Mary's Hospital Corp.*, 118 Conn. App. 258 (2009), the court held that the absence of evidence that the defendant intentionally destroyed the computer hard drive that she sought to examine precluded an adverse inference charge. Presumably, *Beers* at a minimum requires proof that the act of destruction or mutilation was intentional, e.g. purposely deleting a computer file as opposed to knocking over a cup of coffee onto a laptop. The question remains as to whether a purposeful act, when completely absent of any bad faith or ill intent on the part of the actor, should provide a basis for an adverse inference.

This uncertainty would disappear if Connecticut recognized spoliation based upon a party's negligent destruction of evidence. It is hard to rationalize why a defendant whose negligence results in the destruction of evidence should suffer no adverse consequences. No court in this state has yet to address the matter. Similarly, Connecticut has not recognized a cause of action for "third-party" spoliation. In a footnote, however, the *Rizzuto* court clearly left open the possibility of such a cause of action.

In sum, practitioners should make every effort to preserve important evidence as soon as practicably possible (including the request for court orders if necessary) whenever there is the possibility of destruction, alteration or mutilation of evidence. When spoliation has occurred, extensive discovery is required in order to satisfy the elements required under the case law.

John Logan is a partner at Logan & Mencuccini in Torrington, where his practice includes personal injury, medical malpractice, product liability and criminal law.