The Necessity of Redefining Spoliation of Evidence Remedies in Florida

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Robert D. Peltz

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ROBERT D. PELTZ*

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I. INTRODUCTION

From its rather humble beginnings as a limited evidentiary presumption designed merely to shift the burden of proof in medical negligence actions and place the parties on an equal footing where a health care provider had failed to keep statutorily required records,1

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1. See, e.g., Valcin v. Pub. Health Trust, 473 So. 2d 1297 (Fla. 3d DCA 1984), aff’d in part, 507 So. 2d 596 (Fla. 1987).
the doctrine of spoliation\textsuperscript{2} of evidence in Florida has rapidly grown into a separate cause of action. Although experience has clearly shown the need for remedies to combat the spoliation of evidence under certain well-defined circumstances, the unchecked progression of spoliation remedies potentially threatens litigants’ constitutional rights to due process, trial by jury, and the lawful use of their property. A number of recent cases in Florida have appeared on their faces to further expand this doctrine to situations where there is no statutory, contractual, or other specific legal duty to preserve the evidence, and where the destruction or loss occurs without intent, ill will, or bad faith.\textsuperscript{3} Ironically, the California courts, which gave birth to the spoliation principles in the mid-1980s, have now withdrawn recognition of a separate cause of action after carefully reexamining both its necessity and its effects.\textsuperscript{4}

While early experience in this field has generally centered around claims of spoliation of evidence asserted by plaintiffs, more recent decisions have applied its principles equally to defendants, particularly in cases involving claims of defective or malfunctioning products.\textsuperscript{5} Therefore, both plaintiffs and defendants have an interest in ensuring that spoliation of evidence rules are not misused or misapplied by the removal of the limitations and safeguards originally imposed by the Florida Supreme Court,\textsuperscript{6} thereby resulting in an unintended abrogation of the fundamental constitutional rights of trial by jury and due process of law.

II. ORIGINS OF FLORIDA’S SPOILATION OF EVIDENCE RULES

A. Early Cases

Although courts have traditionally had the power to punish parties who have violated their discovery orders,\textsuperscript{7} the origin of modern spoliation of evidence principles in Florida dates back only to the early 1980s. In \textit{DePuy, Inc. v. Eckes},\textsuperscript{8} the Third District Court of Appeal upheld the entry of a default judgment against a manufacturer of a hip prosthesis that allegedly had failed. After the plaintiff

\begin{itemize}
\item \textsuperscript{2} Practitioners and judges often spell the word incorrectly. Although “spoliation” seems intuitively correct, it is spelled “spoliation.” BLACK’S LAW DICTIONARY 1409 (7th ed. 1999).
\item \textsuperscript{3} See, e.g., Hagopian v. Publix Supermarkets, Inc., 788 So. 2d 1088 (Fla. 4th DCA 2001); St. Mary’s Hosp., Inc. v. Brinson, 685 So. 2d 33 (Fla. 4th DCA 1996); Sponco Mfg. v. Alcover, 656 So. 2d 629 (Fla. 3d DCA 1995).
\item \textsuperscript{4} See Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511 (Cal. 1998).
\item \textsuperscript{5} See, e.g., Sipe v. Ford Motor Co., 837 F. Supp. 660 (M.D. Pa. 1993); Torres v. Matsushita Elec. Corp., 762 So. 2d 1014 (Fla. 5th DCA 2000); DeLong v. A-Top Air Conditioning Co., 710 So. 2d 706 (Fla. 3d DCA 1998); see also infra Part II.D.
\item \textsuperscript{6} Valcin, 473 So. 2d at 1365-06 (citing Mercer v. Raine, 443 So. 2d 944 (Fla. 1983)).
\item \textsuperscript{7} See, e.g., Fed. R. Civ. P. 37; FLA. R. CIV. P. 1.380.
\item \textsuperscript{8} 427 So. 2d 306 (Fla. 3d DCA 1983).
\end{itemize}
transferred the hip prosthesis to the manufacturer’s attorneys for inspection (pursuant to a court order directing them to preserve the evidence intact), the defendant’s expert lost a critical portion of the prosthesis.9

Because the plaintiff’s experts testified that they were unable to render an opinion without actually inspecting the missing piece of the prosthesis, the court concluded that the plaintiff had been irreparably prejudiced and entered an order of default. The order was based on the provisions of Florida Rule of Civil Procedure 1.380(b)(2)(C), which provides:

(2) If a party or an officer, director, or managing agent of a party or a person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or rule 1.360, the court in which the action is pending may make any of the following orders:

. . .

(c) An order striking out pleadings or parts of them or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part of it, or rendering a judgment by default against the disobedient party.

In awarding these sanctions, the court further concluded that it was irrelevant whether the prosthesis had been lost intentionally or accidentally, since the defendant’s loss of the device violated the trial court’s order and resulted in irreparable prejudice to the plaintiff.10

B. Valcin and Bondu: Missing Records

The following year, the Third District dealt with another type of “missing” evidence in Valcin v. Public Health Trust,11 which involved a medical malpractice action against a county-owned hospital for the alleged negligent performance of surgery. There, the surgeon failed to prepare an operative note describing the surgery in question, despite a statutory duty to maintain such a record. As a result of the absence of the required record, the plaintiff’s experts testified that they were unable to conclude whether the surgeon violated the appropriate standard of care during the performance of the surgery. Accordingly, the trial court granted the defendant’s motion for summary judgment.12

In an effort to level the playing field between the parties, the Third District held that where a health care provider failed to pre-

9. Id. at 307.
10. Id. at 308.
11. 473 So. 2d 1297.
12. Id.
pare or maintain a record required by statute or administrative rule, thereby hindering the plaintiff’s ability to prove its case, the trial court should utilize one of two evidentiary presumptions. If the failure on the health care provider’s part was intentional, the district court held that this would create an irrebuttable presumption of the defendant’s negligence. If, however, the failure was due to negligence or inadvertence, the court should instead use a rebuttable presumption of negligence.

Subsequently, the Florida Supreme Court modified the rule set down by the Third District, concluding that the use of an irrebuttable presumption, even where the failure to keep or maintain the records was intentional, would constitute a violation of the defendant’s right to due process as well as an improper abrogation of the jury’s function. Nevertheless, the court concluded that the use of a rebuttable presumption was not only constitutionally proper but also consistent with the provisions of the Florida Evidence Code.

For this rebuttable presumption to arise, the Supreme Court held that the following conditions must first exist: (1) the health care provider must fail to prepare records required by statute or administrative code; (2) the absence of the records must prevent the plaintiff from establishing a prima facie case; and (3) the information contained in the records must be peculiarly within the knowledge of the health care provider. This is the only opinion to date rendered by the Florida Supreme Court directly addressing the legal requirements for spoliation of evidence claims.

Shortly after its decision in Valcin, the Third District was once again faced with the issue of “missing” hospital records in Bondu v. Gurvich. Although this case involved a similar failure to prepare records required to be maintained by statute, it arrived at the court in a much different procedural posture. Valcin involved the granting of a motion for summary judgment in favor of the health care provider based upon the inability of the plaintiff’s expert to render an opinion on the issue of negligence due to the lost records. However, in Bondu, the plaintiff had actually included two counts in her complaint seeking to recover damages for a cause of action based upon the spoliation of evidence. After these counts had been dismissed with preju-

13. Id. at 1306.
14. Id. at 1307.
15. Id.
18. Valcin, 507 So. 2d at 599-600.
19. 473 So. 2d 1307 (Fla. 3d DCA 1984).
20. Id. at 1310.
dice, the plaintiff filed a separate action, once again asserting her spoliation-based claims, which were also dismissed.21

In analyzing the trial court’s dismissal of the plaintiff’s complaint, a divided panel of the Third District concluded that the three essential elements of any tort action were present: “(1) the existence of a duty recognized by law requiring the defendant to conform to a certain standard of conduct . . . ; (2) a[n] [alleged] failure on the part of the defendant to perform that duty; and (3) an injury or damage to the plaintiff proximately [resulting from] such failure.”22 The existence of a legal duty—in this case supplied by an administrative regulation, coupled with a Florida Statute requiring the creation and maintenance of the records—was emphasized by the court: “We recognize, of course, no such action can lie unless, in Prosser’s words, it is ‘clear that the plaintiff’s interests are entitled to legal protection against the conduct of the defendant[s],’ that is, there is a [legal] duty owed to the plaintiff by the defendant which the law recognizes.”23 While noting that such a tort was “not a familiar one,”24 the majority quoted Professor Prosser’s prior observation:

New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none has been recognized before . . . . The law of torts is anything but static, and the limits of its development are never set.25

The majority also relied on the decisions of several California intermediate appellate courts, which had previously recognized a cause of action based upon the spoliation of evidence involving nonparties.26 The Third District concluded that if such a cause of action existed against a third party who had no connection to the lost prospective litigation, then such an action should even more logically lie against a defendant who stood to benefit by the fact that the “prospect of successful litigation against it has disappeared along with the crucial evidence.”27

Chief Justice Schwartz, in an often cited dissent, argued against the recognition of this new tort on the grounds that:

21. Id.
22. Id. at 1312.
23. Id.
24. Id.
25. Id.
26. See, e.g., Smith v. Superior Court, 198 Cal. Rptr. 829 (Cal. Ct. App. 1984) (holding automobile dealer liable for subsequent destruction of van entrusted to it by plaintiff’s counsel, thereby preventing suit against dealer for plaintiff’s personal injuries following accident).
27. Bondu, 473 So. 2d at 1312.
Such a rule runs counter to the basic principle 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. Were the rule otherwise, every case would be subject to constant retrials in the guise of independent actions. Thus, what the court characterizes . . . as an “a fortiori” situation is instead a complete non-sequitur.28

Accordingly, Chief Justice Schwartz concluded that any action necessary to remedy a spoliation of evidence should be limited to the taking of appropriate remedial measures in the underlying main action, to cases in which a judgment has already been entered in a Rule 1.540 motion, or to an action to set aside the judgment consistent with the limitations inherent in such remedies.29

Despite the recognition of a separate cause of action for spoliation of evidence in Bondu, Florida appellate decisions throughout the remainder of the 1980s largely relied upon the remedies provided by the Florida Rules of Civil Procedure or the Florida Evidence Code to deal with issues involving lost or missing evidence. Typical of these cases was the Third District’s opinion in Rockwell International Corp. v. Menzies.30 In Rockwell, the court upheld the striking of a manufacturer’s pleadings and the entry of a default judgment against the manufacturer in a products liability action, where the manufacturer had inadvertently lost a portion of the product after it had been turned over to it for inspection pursuant to a trial court order and a written agreement prohibiting its alteration or destruction.31 In upholding the sanctions, the Third District relied upon the existence of the trial court order and a written agreement to find a duty to preserve the evidence, so that the fact that it was lost made the manufacturer’s lack of bad faith irrelevant.32

A resort to Rule 1.380 of the Florida Rules of Civil Procedure was also utilized in the highly unusual case of Hammer v. Rosenthal Jewelers Supply Corp.,33 which demonstrates the unpredictable situations in which spoliation of evidence principles can arise. In Hammer, the court held that the plaintiff’s lawsuit arising out of his alleged contraction of lung cancer could be dismissed as a sanction for failure to comply with discovery where the decedent’s surviving wife

28. Id. at 1314 (citation omitted). Chief Justice Schwartz’s rationale subsequently formed a substantial portion of the reasoning adopted by the California Supreme Court fourteen years later in overruling the numerous California intermediate appellate decisions, which had continued to recognize the new tort of spoliation of evidence. See Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511 (Cal. 1998).
29. Bondu, 473 So. 2d at 1314.
30. 561 So. 2d 677 (Fla. 3d DCA 1990).
31. Id. at 679.
32. Id.
33. 558 So. 2d 460 (Fla. 4th DCA 1990).
refused to give permission to the defendant to exhume her husband’s body because of her religious objections.\textsuperscript{34} Despite the validity of the objections, the Fourth District upheld the lower court’s action because of the defendant’s need to perform an autopsy in order to respond to the plaintiff’s allegations of negligence.\textsuperscript{35}

C. The 1990s

After nearly a decade of dormancy following its recognition in Valcin, the cause of action for spoliation of evidence began to receive renewed attention in 1990. The Third District Court of Appeal was faced with two suits seeking recovery against uninsured motorist carriers that had lost damaged vehicles entrusted to them by their insureds. The plaintiffs contended that the vehicles were necessary to prosecute subsequent tort actions arising out of the underlying accidents.

In Miller \textit{v. Allstate Insurance Co.},\textsuperscript{36} the basis of the plaintiff’s suit was an oral agreement by the uninsured motorist insurer to preserve the vehicle following the conclusion of the uninsured motorist claim, so that the plaintiff could pursue a products liability suit against its manufacturer for a claimed defect that had contributed to causing the accident. As a result of the accidental destruction of the vehicle, the plaintiff’s expert testified that while he “believed” a defect had caused the accident, he would be unable to actually testify at trial on this issue because he had been deprived of the opportunity to inspect the vehicle.\textsuperscript{37}

The trial judge directed a verdict in the insurer’s favor on the separate grounds that: (1) “Florida law does not recognize a cause of action [for breach of contract] based on the denial of an opportunity to prove a products liability case” and (2) because Florida products liability law gives rise to a presumption that a product is defective where it subsequently destroyed itself by a malfunction, the plaintiff would be unable to establish that she had suffered irreparable harm by the insurer’s actions in losing the vehicle.\textsuperscript{38} In reversing the trial court’s action, the Third District quickly disposed of the second ground of the lower court’s decision by noting that the presumption of a defect only applies where the product destroys itself, not where it is destroyed by a third party.\textsuperscript{39} The Third District next turned its attention to the more difficult issue of whether a cause of action for spoliation of evidence could be based upon contract. First, the court

\textsuperscript{34} Id. at 461.
\textsuperscript{35} Id.
\textsuperscript{36} 573 So. 2d 24 (Fla. 3d DCA 1990).
\textsuperscript{37} Id. at 26.
\textsuperscript{38} Id.
\textsuperscript{39} Id. at 30.
noted that a number of courts in other jurisdictions had recognized such a cause of action based upon negligence where all of the traditional tort elements were present. Concluding that there was no legal difference between whether the duty to preserve the evidence arose by contract or by operation of law, the Third District went on to hold that there was therefore no reason to limit claims for spoliation of evidence to tort actions.

In reaching this conclusion, the Third District focused on the similarities between the duty to preserve evidence and whether the duty arises in the tort or the contract context, while discounting the significance of the dissimilarities between each such remedy, particularly as they related to the issue of damages. The court noted that damages in contract actions normally must be established within a reasonable degree of certainty, which would be lacking where the underlying personal injury action had not been finally disposed of against the plaintiff. Nevertheless, the court determined that an equitable exception to this doctrine would apply so as to impose any risk of uncertainty upon the defendant, because he had created the situation. Therefore, the court concluded that a cause of action for spoliation of evidence could be maintained in either contract or tort, as long as a duty to preserve the evidence existed.

The second case, Continental Insurance Co. v. Herman, sought to define the degree of “impairment” to the plaintiff’s underlying claim, which was necessary to support such a cause of action, caused by the destruction of the evidence. The damaged vehicle was entrusted to the agents of the uninsured motorist carrier who, like the carrier’s agents in Miller, inadvertently destroyed it. Despite the loss of the vehicle, however, the plaintiff’s liability experts nevertheless were able to testify in the underlying litigation based upon photographs of the damage. As a result, the plaintiff prevailed at arbitration, receiving a $4.3 million damage award, which was reduced by her eighty percent comparative negligence, to a net award of $860,000. Subsequently, the plaintiff filed a suit for destruction of the car con-
tending that her ability to present her uninsured motorist claim was “hindered” by the absence of the vehicle itself, resulting in the high comparative negligence finding. In this case, the jury found the plaintiff “only” sixty-five percent at fault for causing the accident based upon several evidentiary presumptions designed to compensate the plaintiff for the loss of her vehicle.46

In overturning the jury’s verdict, the Third District rejected the plaintiff’s argument that she need only establish that she was “hindered” in presenting her case by the lost evidence. Instead, the court held that the plaintiff must establish that she suffered “a significant impairment” in her ability to prove her underlying case.47 On rehearing, the court further observed that while the question of whether an impairment was “significant” was ordinarily a question of fact, in light of the extent of the plaintiff’s recovery in her underlying arbitration, reasonable persons could not differ that there had been a lack of a significant impairment in this particular case.48

D. Application to Defendants

The seeds for the application of spoliation of evidence principles to defendants were sown in 1990 by the Fourth District in Hammer v. Rosenthal Jeweler Supply Corp. In Hammer, the Fourth District held that the plaintiff’s lawsuit for wrongful death could be dismissed as a sanction for the failure to comply with discovery unless the decedent’s surviving wife gave permission to exhume the decedent’s body and to allow an autopsy.49

Nearly a decade later, the Third District removed any doubt that spoliation of evidence principles would apply equally to the benefit of defendants in DeLong v. A-Top Air Conditioning Co.50 The court also reiterated the principle that the party’s intent was not critical, as it expressly observed that the plaintiff had “inadvertently lost or misplaced” the critical evidence.51

Florida’s recognition of a defense based upon spoliation of evidence is consistent with the holdings in many jurisdictions, particularly in products liability actions where the allegedly defective prod-

46. Id. at 315. “The two presumptions the jury was instructed to apply were: (1) that [the plaintiff’s] brakes failed prior to the accident, and (2) that [the plaintiff’s] vehicle would have cleared the intersection [but for the uninsured vehicle’s] excessive speed.” Id. at 315 n.1. The propriety of these presumptions was not challenged on appeal.
47. Id. at 315.
48. Id. at 316.
49. 558 So. 2d 460 (Fla. 4th DCA 1990).
50. 710 So. 2d 706 (Fla. 3d DCA 1998); see also Torres v. Matsushita Elec. Corp., 762 So. 2d 1014 (Fla. 5th DCA 2000).
51. DeLong, 710 So. 2d at 707.
uct is disposed of prior to suit. These cases generally have been
based upon the rationale that “products liability case[s] foc[us] on the
product itself,” and as such usually “involve competing expert testi-
mony [for] juries [to] evaluate.”

Courts have also expressed concern over the potential for fraud
inherent in these situations:

To permit claims of defective products where a purchaser of the
product has simply thrown it away after an accident, would both
encourage false claims and make legitimate defense of valid claims
more difficult. It would put a plaintiff (or plaintiff’s attorney) in
the position of deciding whether the availability of the item would
help or hurt his or her case. Where producing the product for de-
fense inspection would weaken rather than strengthen a case, we
unfortunately are obliged to conclude that some plaintiffs and at-
torneys would be unable to resist the temptation to have the prod-
uct disappear.

As a result, where the defendant is unable to examine the allegedly
defective product, these cases have generally concluded that the de-
fendant would be unduly prejudiced in having to defend against the
plaintiff’s claims.

Although generally involved in products liability cases, the de-
fense of spoliation has also been applied to a variety of other types of
cases as well, including medical malpractice, maritime, and
antitrust.

52. See, e.g., Vodusek v. Bayliner Marine Corp., 71 F.3d 148 (4th Cir. 1995) (involving
maritime case in which plaintiff’s expert conducted destructive testing on vessel’s engine);
Glover v. Bic Corp., 6 F.3d 1318 (9th Cir. 1993); Sipe v. Ford Motor Co., 837 F. Supp. 660
(M.D. Pa. 1993) (dismissing suit under Pennsylvania law based upon an alleged defect in
truck owned by plaintiff’s employer where employer repaired allegedly defective part); Lee
summary judgment against plaintiff where counsel lost can of drain cleaner that allegedly
exploded and injured plaintiff, even where samples of contents had been provided to defen-
dants for testing prior to loss of can); State Farm Fire & Cas. Co. v. Frigidaire, 146 F.R.D.
160 (N.D. Ill. 1992) (involving destruction of product by plaintiff’s expert); Headley v.
1991) (entering summary judgment against plaintiff claiming injury by defective coffee ca-
rack that exploded in her hand where fragments were thrown away).

54. Id.
55. Id.
in autopsy performed by plaintiff’s expert following exhumation of body for litigation pur-
poses).
57. Vodusek, 71 F.3d 148.
antitrust action where plaintiff destroyed documents of allegedly illegal campaign contribu-
tions).
Another case demonstrating the almost limitless potential for the imaginative application of spoliation remedies is *Vega v. CSCS International*.\(^5^9\) In *Vega*, the defendant successfully argued in the trial court that the plaintiff’s decision to undergo nonemergency surgery to remove a herniated lumbar disc without first providing an opportunity to be examined by another doctor constituted spoliation of evidence—the evidence in this case consisting of the plaintiff’s lumbar disc. Although the Third District subsequently reversed the trial court’s application of spoliation principles, it held that the court would have had the authority to sanction the plaintiff if the defendant had first filed a formal request for an independent medical examination under Rule 1.360 of the Florida Rules of Civil Procedure. Such a request, the court concluded, would have imposed a duty upon the plaintiff to postpone the surgery in order to allow the examination to go forward.

As with claims advanced by plaintiffs, courts in different jurisdictions have applied spoliation principles in favor of defendants in a variety of different ways. Some courts have dismissed plaintiff’s claims\(^6^0\) or recognized spoliation as an affirmative defense entitling a defendant to a verdict in its favor,\(^6^1\) while others have treated spoliation as merely giving rise to a presumption in the defendant’s favor.\(^6^2\) Still other courts have treated spoliation as a rule of evidence that is not even required to be pleaded in advance of the trial.\(^6^3\) Some courts have merely limited the proof that the plaintiff will be allowed to produce in an effort to cure the prejudice caused by the missing evidence.\(^6^4\)

Courts applying spoliation principles in favor of defendants have also recognized differing rules for its application. Some courts have required a showing of bad faith\(^6^5\) and others some degree of negligence.\(^6^6\) Still other courts have applied spoliation principles without either bad faith or negligence.\(^6^7\)

As with the recognition of a cause of action based upon spoliation in favor of plaintiffs, the actual application of spoliation defenses has

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59. 795 So. 2d 164 (Fla. 3d DCA 2001).
60. See, e.g., Torres v. Matsushita Elec. Corp., 762 So. 2d 1014 (Fla. 5th DCA 2000).
64. See, e.g., Headley v. Chrysler Motor Corp., 141 F.R.D. 362 (D. Mass. 1991); Barker, 85 F.R.D. at 545 (excluding plaintiff’s expert from testifying at trial where plaintiff’s expert conducted destructive testing of allegedly defective automobile parts).
67. See, e.g., Vodusek 71 F.3d at 155-56.
often been somewhat arbitrary and unnecessary. For example, some courts have dismissed products liability cases based upon spoliation even where the plaintiff’s claims relate to a design defect rather than a manufacturing one, so that the absence of the specific product would not be determinative to either party’s burden of proof.68

The determination of the parameters of the duty to retain a product or other potential evidence poses equally difficult practical problems in the application of spoliation principles to the actions of plaintiffs as it does to conduct by defendants. A good example of the scope of these problems can been seen in Schmid v. Milwaukee Electric Tool Corp.,69 which involved a products liability suit against the manufacturer of a circular saw for injuries sustained due to a purported design defect. The plaintiff claimed the defect allowed particles to improperly collect in the guard mechanism thereby preventing it from working.

Following the incident, plaintiff’s counsel retained an expert in order to determine why the accident occurred and if there was a product defect. The expert was required to disassemble the saw, during which process particles trapped in the guard mechanism fell out. The expert took photographs of the saw both before and after disassembly and then, after suit was filed, eventually forwarded the disassembled pieces to the manufacturer’s expert witness. Subsequently, the trial court struck the plaintiff’s expert witness for altering the evidence by allowing the trapped particles to fall out during the inspection.70

In reversing the trial court’s sanctions, the Third Circuit Court of Appeals noted that the expert did not destroy the product but merely disassembled it in order to make the determination of whether the plaintiff had a meritorious case in the first instance.71 Moreover, because of the nature of the defect, any handling of the saw as a practical matter would alter its condition to some degree. Therefore, the court reasoned that the only way to have avoided any alteration of the saw would have been for the plaintiff to identify all potential defendants to the controversy before suit was filed or an expert opinion reached as to the cause of the accident, and to invite each such potential defendant to participate in the inspection of the saw.72

Because this would have placed the plaintiff in an impossible “Catch

69. Schmid, 13 F.3d at 78.
70. Id.
71. Id. at 79.
72. Id. at 81.
22" situation, the court concluded that application of spoliation principles was unwarranted.\textsuperscript{73}

\textbf{E. Claims Against Third Parties}

The typical spoliation of evidence case based upon the actions of third parties who are not actual litigants in the underlying litigation generally involves experts,\textsuperscript{74} attorneys,\textsuperscript{75} insurance companies,\textsuperscript{76} employers,\textsuperscript{77} or other agents of the parties.\textsuperscript{78} Actions have also been recognized, however, against individuals and entities totally unrelated to the pending litigation and parties.

In \textit{Brown v. City of Delray Beach},\textsuperscript{79} a cause of action was upheld against a local police department for negligently disposing of evidence collected during its investigation into a hit and run accident, where proof was presented that the plaintiff’s counsel had requested access to the evidence while in the possession of the police. Despite assurances from the department that the evidence would be preserved and subsequently made available following the completion of their investigation, it was destroyed. In recognizing a claim for spoliation under these circumstances, the court focused on the existence of a duty to preserve the evidence created by the express promise of the police to maintain the evidence for the benefit of the plaintiff.\textsuperscript{80}

In the absence of such an express promise, however, there is generally no duty to assist a plaintiff in investigating a potential claim. As a result of the lack of such a duty, a spoliation claim asserted against a ship owner by an alleged rape victim for failing to assist her in the investigation of her incident was dismissed in \textit{Doe v. Celebrity Cruises}.\textsuperscript{81}

Another unusual application of the cause of action for spoliation occurred in \textit{Velasco v. Commercial Building Maintenance Co.},\textsuperscript{82} in

\begin{itemize}
\item \textsuperscript{73} Id. While it may have been impossible to determine the identity of all defendants to the case, it certainly would have been possible to advise the manufacturer of the intent to disassemble the saw and invite the manufacturer's participation.
\item \textsuperscript{75} E.g., Torres v. Matsushita Elec. Corp., 762 So. 2d 1014 (Fla. 5th DCA 2000).
\item \textsuperscript{77} E.g., Coleman v. Eddy Potash, Inc., 905 P.2d 185 (N.M. 1995).
\item \textsuperscript{78} E.g., Smith v. Superior Court, 198 Cal. Rptr. 829 (Cal. Ct. App. 1984).
\item \textsuperscript{79} 652 So. 2d 1150 (Fla. 4th DCA 1995); see also Williams v. State, 664 P.2d 137 (Cal. 1983).
\item \textsuperscript{80} See \textit{Brown}, 652 So. 2d at 1153.
\item \textsuperscript{82} 215 Cal. Rptr. 504 (Cal. Ct. App. 1985).
\end{itemize}
which the plaintiff sued a building maintenance company for inadvertently throwing away bottle fragments left by his attorney in an unmarked paper bag on his desk. Although recognizing that such a cause of action could be stated under certain circumstances, the court held that the maintenance company could not have been found negligent as a matter of law in this case, because the bag was unmarked and appeared to be garbage. The real crux of the court's holding, however, appears more to reflect an unwillingness to extend the cause of action for spoliation when dealing with unrelated third parties to the same lengths as when parties to the litigation are involved.

F. Insurance Coverage for Spoliation Claims

After initially concluding that insurance coverage existed for spoliation claims under liability policies, recent cases have taken diametrically opposed positions on this issue. In DiGiulio v. Prudential Property & Casualty Insurance Co., the first Florida case to consider the issue, the Fourth District concluded that coverage existed for a spoliation claim under a homeowner's insurance policy. The case began when a young child was injured in a boating accident. The parents immediately retained an attorney, who secured an agreement from the boat owner to preserve the boat's seat upon which the child had been injured. After preserving the evidence for approximately one month, the boat owner subsequently sold his craft, mistakenly believing that the child's attorney had inspected and photographed the boat.

The parents subsequently sued the boat owner for spoliation of evidence, seeking damages equal to those that they claimed they would have received if the evidence had not been destroyed. After the insurer denied coverage, the parents entered into a so-called "Coblentz settlement" with the boat owner, pursuant to a settlement agreement between the parties, following which the boat owner assigned to the parents all of his rights under his homeowner's policy. Thereafter, the parents brought suit directly against the insurer for the damages set forth in the settlement agreement.

83. Id. at 506.
84. 710 So. 2d 3 (Fla. 4th DCA 1998).
85. Id. at 4.
86. Such agreements are named after Coblentz v. Am. Surety Co., 416 F.2d 1059 (5th Cir. 1969), in which the court upheld a judgment entered against an insurer based upon a settlement between the insured and the plaintiff following the insurer's improper denial of coverage. The settlement provided that the judgment could only be satisfied against the insurer. In the absence of fraud or collusion, the court concluded that by denying coverage, the insurer had waived any right to complain about the terms of the settlement. See also Shook v. Allstate Ins. Co., 498 So. 2d 498 (Fla. 4th DCA 1986); Steil v. Fla. Physicians' Ins. Reciprocal, 448 So. 2d 589 (Fla. 4th DCA 1984).
The Fourth District reversed the trial court’s entry of summary judgment in favor of the insurer, concluding:

[A] prospective civil action . . . is a valuable “probable expectancy” that the court must protect from interference . . . . We understand the cause of action to be that the claimant had, as a result of the insured’s undertaking to preserve the evidence to allow inspection and photographing, an intangible and beneficial interest in the preservation of the evidence. It is that beneficial interest that he claims was lost when the insured negligently discarded the wooden [seat] base. Thus it was not the insured’s own interest that was affected, but instead the claimant’s.87

Subsequently, in Norris v. Colony Insurance Co.,88 the Fourth District did an abrupt about-face by refusing to extend coverage under a general commercial liability policy to a claim of spoliation based upon a gas station’s erasure of a surveillance videotape in an underlying assault and battery claim brought by a customer. The court distinguished its earlier DiGiulio opinion by concluding that it had never addressed the issue of coverage in the first instance but only the applicability of policy exclusionary clauses.89

This time around, the Fourth District concluded that the spoliation claim was not based upon bodily injury but instead a destruction of evidence. Although the purported destruction of evidence constituted a physical erasure of a videotape, the court further concluded that it did not constitute a “physical injury to tangible property [of the claimant] . . . [a]t best, the spoliation in this case had an effect only on an intangible, plaintiff’s cause of action against her assailant.”90

After initially following Norris, the Third District reversed itself on rehearing en banc in Lincoln Insurance Co. v. Home Emergency Services, Inc.,91 in which an employee brought suit for his employer’s alleged failure to preserve a defective ladder causing his injuries. Noting that the policy recovered “damages because of ‘bodily injury,’”92 the Third District concluded that the claim for spoliation was

87. DiGiulio, 710 So. 2d at 5 (emphasis added) (quoting St. Mary’s Hosp., Inc. v. Brinson, 685 So. 2d 33 (Fla. 4th DCA 1996)).
88. 760 So. 2d 1010 (Fla. 4th DCA 2000).
89. Id. at 1012.
90. Id. (emphasis added) (holding that the physical damage to the insured’s property (i.e., the videotapes) could not be considered because of a policy provision excluding coverage for damage to the insured’s property).
92. Id. at *4.
properly viewed as arising “because of bodily injury” and therefore fell within the policy’s terms or coverage.93

In an earlier decision, the Third District had previously refused to extend liability insurance coverage arising out of a spoliation claim caused by the insured’s intentional destruction of evidence in Scott Technologies, Inc. v. Reliance Insurance Co. of Illinois.94 The court concluded that the insured’s intentional conduct, which the trial judge had characterized as “the most egregious case of discovery abuse this Court has ever seen”95 and that had resulted in the entry of a default judgment, constituted a violation of the policy’s cooperation clause.

G. Criminal Cases

Somewhat incongruously, criminal cases have been much more restrictive in allowing spoliation of evidence claims, despite the state’s significantly greater burdens to preserve and produce evidence than found in civil cases. For example, in State v. Erwin,96 the court rejected the defendant’s spoliation of evidence claim in a DUI manslaughter case where the police had used up one vial of blood removed from the defendant and then accidentally destroyed a second one before the defense had an opportunity to test it. In reversing the lower court’s suppression order, the Fifth District focused upon the fact that because there is “no duty upon the state or its agents to collect two vials for analysis,” the state could not be penalized for accidentally destroying the second vial, even if it possibly contained exculpatory evidence.97

III. THE TREND AWAY FROM REQUIRING A LEGAL DUTY

Although the early Florida spoliation cases made it clear that a legal duty to preserve the evidence in question must exist, loose language in several subsequent Third and Fourth District opinions have routinely been cited for the proposition that a duty to preserve evidence may arise merely because litigation is imminent or foreseeable.98 More recent decisions, however, have shown a marked diver-

93. Id. The court went on to find against the plaintiff, however, concluding that a policy exclusion for work-related injuries was also applicable.
94. 746 So. 2d 1136 (Fla. 3d DCA 1999). This decision was a continuation of the earlier case of Figgie Int’l, Inc. v. Alderman, 698 So. 2d 563 (Fla. 3d DCA 1997), discussed in Part VII.
95. Scott Techs., Inc., 746 So. 2d at 1137 (quoting Figgie Int’l, Inc., 698 So. 2d at 564).
96. 686 So. 2d 688 (Fla. 5th DCA 1996).
97. Id. at 689 (emphasis added). As discussed infra, the court also relied upon the U.S. Supreme Court’s holding in Arizona v. Youngblood, 488 U.S. 51 (1988), which required the defendant to establish bad faith on the part of the state in destroying evidence.
98. Similar language is also found in a number of spoliation cases from other jurisdictions. See, e.g., In re Wechsler 121 F. Supp. 2d 404 (D. Del. 2000); State Farm Fire & Cas.
gence between the Third and Fourth District Courts of Appeal on this issue, with the Fourth District continuing to expand spoliation remedies, while the Third District has begun to retreat from the implication in *Spenco Manufacturing, Inc. v. Alcover* that a duty to preserve evidence is created by the mere foreseeability of litigation.

In *Alcover*, the Third District upheld a spoliation of evidence claim against a manufacturer who had discarded the allegedly defective product (i.e., a ladder), despite the fact that there had been no statute, court order, or agreement requiring its retention. On its face, the court’s opinion failed to enunciate its rationale, but has been read at both the trial and appellate levels to imply the existence of a legal duty to preserve the product merely by virtue of the fact that a lawsuit was imminent. This, of course, would represent a quantum leap in the extension of spoliation of evidence principles by recognizing the existence of a duty based solely upon the foreseeability of possible litigation.

Such a leap came one step closer when the Fourth District subsequently relied upon *Alcover* in *St. Mary's Hospital, Inc. v. Brinson* to also uphold a spoliation of evidence suit without reference to the existence of any statute, court order, or agreement requiring the product’s retention. Here the plaintiff’s decedent, a nineteen-month-old child, died while under anesthesia at the defendant’s hospital. Subsequently, the hospital gave the anesthesia machine back to the manufacturer in order to investigate whether it had malfunctioned, following which the manufacturer disassembled it.

The decedent’s survivors thereafter sued both the hospital and the anesthesiologist for medical negligence. After settling the case against the anesthesiologist for $675,000, the plaintiffs filed a second, separate suit against the hospital for spoliation of evidence based upon the hospital’s surrender of the anesthetic equipment to its manufacturer and its subsequent disassembly.

Ultimately, the trial court consolidated the two actions against the hospital, despite its argument that the consolidation placed it in the “untenable position of being forced to choose between foregoing the statutorily created privilege for risk management material . . . in the underlying negligence action, or being prohibited from using information necessary to defend against the allegation of negligent spo-

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100. 685 So. 2d 33 (Fla. 4th DCA 1996).
During the course of the trial, the court subsequently entered a default against the hospital based upon its refusal to turn over various documents claimed to be privileged, following which the jury returned a verdict of $8,325,000.

Although citing prior Florida cases permitting a cause of action for negligent destruction of evidence, the Fourth District’s ensuing opinion is silent on its face as to the basis of the legal duty imposed upon the hospital to preserve the evidence, which was held to be essential in earlier cases in order to give rise to such a cause of action. In fact, the court appeared to dispose of the duty issue by merely noting:

[T]he Brinsons alleged that because St. Mary’s knew of the potential civil claim against the vaporizer’s manufacturer, it had a duty to preserve the vaporizer, and [St. Mary’s] failure to [maintain the same] impaired the Brinsons’ ability to prove a cause of action against the manufacturer and other responsible agents of the vaporizer unit.102

The court added that such claims are justified on the grounds that “a prospective civil action . . . is a valuable ‘probable expectancy’ that the court must protect from interference.”103 As with Alcover, the Fourth District’s opinion on its face appears to imply the existence of such a duty merely by virtue of the fact that the decedent died during a surgery, thereby giving rise to the expectation that a lawsuit would follow.

Nevertheless, a review of the underlying trial court records in each of these cases clearly indicates that such an implied duty was neither found nor relied upon by the trial court, which in each case instead found the existence of such a duty in keeping with prior decisions. In Alcover, for example, the record in the trial court clearly established that the ladder in question was in fact disposed of years after the plaintiff’s lawsuit was filed.104 The trial court record further indicates that following the accident in September 1990, the ladder was turned over to its manufacturer, Sponco, by the plaintiff’s employer in December 1990. In August 1991, the plaintiff filed his products liability suit against Sponco and several other co-defendants. After suit was filed, Sponco’s counsel agreed to make the ladder available for inspection; however, it later was learned that the ladder was inadvertently disposed of sometime in 1993.105

101. Id. at 34 (citation omitted).
102. Id.
103. Id. at 35 (citation omitted).
104. See Answer Brief of Appellee/Plaintiff at 9, Sponco Mfg. Inc. v. Alcover, 656 So. 2d 629 (Fla. 3d DCA 1998) (No. 94-02671).
105. Id.
As a result of the disappearance of the ladder, the plaintiffs moved for the entry of a default and other sanctions, supported by the affidavit of an expert who stated that without the opportunity to actually inspect the ladder, the “plaintiffs will be unable to either go forward in establishing liability or to adequately respond to the defendants’ assertion of comparative negligence, assumption of the risk, product alteration, or product abuse/misuse without this critical piece of physical evidence . . . .”\textsuperscript{106} The expert’s affidavit went on to further state that the available pictures of the ladder were insufficient to form a basis to render valid opinions regarding the ladder’s design or manufacturing defects.\textsuperscript{107}

The trial court granted the plaintiff’s motion, specifically relying upon the fact that the ladder had disappeared “after suit had been filed,” thereby raising the court’s inherent power to sanction:

\begin{quote}
[A] party or litigant who, as here, breaches its duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.\textsuperscript{108}
\end{quote}

Although not at all apparent from the Third District’s opinion, the basis of the lower court’s ruling and the plaintiff’s argument on appeal were the provisions of Florida Rule of Civil Procedure 1.380(b)(2)(c)\textsuperscript{109} and the court’s “inherent power to regulate litigation, preserve and protect the integrity of proceedings before it, and sanction parties for abusive practices.”\textsuperscript{110}

While Florida courts had previously relied upon these authorities to sanction parties even in the absence of the violation of a specific court order,\textsuperscript{111} it is nevertheless clear that for these authorities to be applicable there must at least be a pending lawsuit at the time of the conduct in question. Therefore, although it is not at all apparent from the loose wording of the opinion itself, when reviewing the underlying record it is clear that \textit{Alcover} does not hold that a legal duty to preserve evidence arises merely because the filing of a lawsuit is foreseeable or imminent. Instead, \textit{Alcover} is clearly limited to situa-
tions where the evidence is lost after suit is filed, resulting in a violation of Florida’s discovery rules or the court’s inherent power to control the litigation before it.\textsuperscript{112}

The limited nature of the holding in \textit{Alcover} was further verified by the Third District’s more recent holding in \textit{Pennsylvania Lumberman’s Mutual Insurance Co. v. Florida Power & Light Co.},\textsuperscript{113} in which the court expressly refused to recognize a “common law duty” upon a defendant to preserve an allegedly defective piece of equipment in the absence of proof that the defendant had received formal notice of the plaintiff’s intent to initiate litigation.\textsuperscript{114} In affirming the lower court’s grant of summary judgment in favor of the defendant, the Third District observed:

Unlike the defendant in \textit{Bondu v. Gurvich}, the defendant in this case was not under any statutory or contractual duty to maintain or preserve the transformer in question. To the extent that the appellant, who was the plaintiff below, argues that the defendant was under some type of common law duty to preserve the transformer in question after being notified of possible legal action against the defendant in connection with the transformer, we note that the record refutes the plaintiff’s contention that the defendant’s legal department was notified both by a letter and a “fax” concerning the possible initiation of legal action and, therefore, should have preserved the transformer as potential evidence in that legal action.\textsuperscript{115}

Although the Third District did not definitely answer the question of whether a common law duty could arise under any set of circumstances, it nevertheless made it clear that at the very least, such a duty would require sufficient proof of the receipt of formal notice of an intent to initiate litigation.

\textsuperscript{112} In \textit{Alcover}, the Third District made it clear that it was not proceeding under the same rules that would be applicable to a pure spoliation of evidence cause of action. 656 So. 2d at 630 n.1. In fact, the court’s note clearly implies that the requirements for stating a cause of action for spoliation would be more strenuous, by noting “[u]nder certain circumstances, the destruction of evidence may confer in an aggrieved party a separate cognizable claim.” \textit{Id.} (emphasis added) (citations omitted). The clear implication is that such circumstances did not exist in the present case.

\textsuperscript{113} 724 So. 2d 629 (Fla. 3d DCA 1998).

\textsuperscript{114} The Third District’s retraction from \textit{Alcover} is further evidenced by its even more recent decision in \textit{Vega v. CSCS International}, 795 So.2d 164 (Fla. 3d DCA 2001), in which it held that in the absence of a formal request for an independent medical examination under Rule 1.360, a plaintiff could not be guilty of spoliation by proceeding with surgery to remove a lumbar disc without first undergoing an examination by a second physician. The court concluded, however, that a formal request under Rule 1.360 would create a duty for the plaintiff to undergo such an examination before proceeding with the surgery.

\textsuperscript{115} \textit{Pa. Lumberman’s Mutual Ins. Co.}, 724 So. 2d at 630 (citations omitted); see also \textit{Grand Hall Enter. Co. v. Mackoul}, 780 So. 2d 275 (Fla. 3d DCA 2001) (holding that mere disassembly of a product in the absence of a court order or improper motive does not justify spoliation sanctions).
A close inspection of the lower court record underlying Brinson also clearly indicates that the claims of spoliation by the plaintiffs at trial were not based upon any implied common law duty arising because of the foreseeability of possible litigation. Instead, it was argued at both the trial and appellate levels that the hospital had a duty to preserve the anesthesia equipment intact by virtue of either the Food, Drug and Cosmetic Act ["FDA"], section 395.0197, Florida Statutes, or Florida Administrative Code Rule 59A-3.222. Although there is a serious issue as to whether any of these statutes or rules provides a sufficient basis for a duty to preserve evidence, it is nevertheless clear that both the plaintiffs and the trial court were proceeding forward on the theory that the hospital violated a statutory or administrative duty to retain the equipment intact and not on

116. 656 So. 2d 629 (Fla. 3d DCA 1995).
117. See Respondent Brinson’s Brief on the Merits at 31-39, St. Mary’s Hosp., Inc. v. Brinson, 656 So. 2d 629 (Fla. 3d DCA 1995) (No. 89,889); Petitioner St. Mary’s Hospital’s Initial Brief on the Merits at 34-40, St. Mary’s Hosp., Inc. v. Brinson, 656 So. 2d 629 (Fla. 3d DCA 1995) (No. 94-2130).
118. 21 U.S.C. § 360i(b) (2000). This statute provides:
   (b) User reports
      (1)(A) Whenever a device user facility receives or otherwise becomes aware of information that reasonably suggests that a device has or may have caused or contributed to the death of a patient of the facility, the facility shall, as soon as practicable but not later than 10 working days after becoming aware of the information, report the information to the Secretary and, if the identity of the manufacturer is known, to the manufacturer of the device . . . .
      (B) Whenever a device user facility receives or otherwise becomes aware of—
         (i) information that reasonably suggests that a device has or may have caused or contributed to the serious illness of, or serious injury to, a patient of the facility, or
         (ii) other significant adverse device experiences as determined by the Secretary by regulation to be necessary to be reported, the facility shall, as soon as practicable but not later than 10 working days after becoming aware of the information, report the information to the manufacturer of the device or to the Secretary if the identity of the manufacturer is not known.
   (6)(a) Each licensed facility subject to this section shall submit an annual report to the agency summarizing the incident reports that have been filed in the facility for that year.
   . . . .
   (7) The licensed facility shall notify the agency no later than 1 business day after the risk manager or his or her designee has received a report pursuant to paragraph (1)(d) and can determine within 1 business day that any of the following adverse incidents has occurred . . . .
120. Fla. Admin. Code R. 59A-3.222 provides in pertinent part:
   (1) Each hospital shall develop, implement, and maintain a written preventive maintenance plan, in conjunction with the policies and procedures developed by the infection control committee, to ensure that the facility is maintained in accordance with the following:
   . . . .
   (b) All patient care equipment shall be maintained in a clean, properly calibrated, and safe operating condition; . . . .
121. See infra Part VII.B.2 (discussing Statutory and Administrative Duties).
some common law duty based upon the foreseeability of future litigation.

Recently, the Fourth District further expanded upon Brinson in Hagopian v. Publix Supermarkets, Inc., which recognized the existence of a duty to preserve evidence simply by virtue of the preparation of a work product incident report. Hagopian was injured while shopping in a Publix store in April of 1991 by a bottle that either exploded or fell off of a shelf. The store manager filled out an accident report and saved the bottle fragments, along with the other bottles from the same six-pack.

In July of 1991, plaintiff’s attorney wrote to Publix to put it on notice of Ms. Hagopian’s claim; however, no request was made to inspect the bottle fragments. Several months later the Publix store where the accident occurred was closed down and the bag with the fragments was not preserved.

While suit was eventually filed in 1994, the first request to inspect the bottle by the plaintiff was not made until 1997, some six years after the accident. Although recognizing that the fragments had been destroyed incidentally and prior to the initiation of suit, the Fourth District nevertheless concluded that the preparation of the incident report, coupled with Publix’s refusal to produce it on work product grounds, evidenced that it anticipated litigation, thereby creating a duty to preserve the potential evidence.

The further extension of Alcover and Brinson by Hagopian can hardly be deemed insignificant, because the existence of a legally recognized duty is the cornerstone of tort law. Even under contract theories there must be a legal duty arising either as the result of an express or implied agreement. Thus, if the opinions in these cases are used to support the creation of such a duty merely by virtue of the

122. 788 So. 2d 1088 (Fla. 4th DCA 2001).
123. The scope of Brinson was originally also cast into doubt by the Fourth District’s subsequent decision in Strasser v. Yalamanchi, 783 So. 2d 1087 (Fla. 4th DCA 2001). Without reference to Brinson, the court concluded that a duty to preserve documents arose by virtue of a discovery request seeking such documents in a pending lawsuit. Although not expressly rejecting the contention that such a duty can arise prior to the filing of the lawsuit, this was the clear implication of the court’s ruling:

Appellants claim that because there was no lawful duty on their part to preserve the evidence, the claim should never have gone to the jury. While we agree that Appellants were under no statutory or contractual duty to maintain such evidence, a party does have an affirmative responsibility to preserve any items or documents that are the subject of a duly served discovery request. (“The duty of a litigant to preserve relevant evidence is established by the opposing party’s submission of a discovery request identifying documents of the same subject matter as those which the receiving party possesses . . ..”).

Id. at 1093-94 (emphasis added) (citations omitted). Nevertheless, in light of its even more recent Hagopian decision, it appears the Fourth District did not intend to limit Brinson in this manner.
fact that an accident occurred, so that a lawsuit (just like Mary’s lamb) was sure to follow, the practical and legal ramifications of such decisions are extremely troubling.

Does this mean that every time there is an accident that involves some instrumentality, product, or condition, the owner or possessor must preserve it intact until a lawsuit is filed, sometimes years later, so that all of the attorneys and their experts can examine it? Would a landowner be guilty of spoliation of evidence simply because he fills in a hole on his premises that someone tripped in to make his property safer? Are the drivers of two cars that collide guilty of spoliation of evidence because they move their cars off of the busy highway or because they subsequently repair their cars? Is a store owner guilty of destroying evidence because he cleans up a spill in which a patron fell or because he retiles the floor to make it safer? If an electric utility guilty of spoliation every time it repairs a generator that caused a power outage, as claimed in Pennsylvania Lumberman’s Mutual Insurance Co.? An affirmative answer to any of these questions does not require much of an extension of Brinson, Alcover, and Hagopian.

IV. FEDERAL TREATMENT

The threshold question faced by federal courts is whether the spoliation issues are to be decided by the substantive law of the forum state or by federal evidentiary or procedural law. As typical, there is authority supporting both points of view.

125. 724 So. 2d 629 (Fla. 3d DCA 1998). As observed by Florida Power & Light in its brief:
Such a requirement would cripple FPL by requiring it to retain thousands upon thousands of useless transformers for years. While this may, at first blush appear alarmist, the court will agree that every power outage raises the potential for litigation—everything from computer related problems to elevator entrapment. The plaintiff's proposal would require Florida Power and Light to keep every failed transformer at least until the statute of limitations expires in four years. Answer Brief of Appellee Florida Power & Light Co. at 12-13, Pa. Lumberman’s Mut. Ins. Co. v. Fla. Power & Light Co., 724 So. 2d 629 (Fla. 3d DCA 1998) (No. 98-01290).
126. These situations are not at all far-fetched. The author has previously defended a lawsuit in which a cruise ship passenger claimed to have been injured on a chair that allegedly broke. After the passenger advised the Staff Captain that he was not injured in the accident, the chair was discarded or repaired. One year later the passenger sued the cruise line for injuries alleged to have been sustained from the collapsing chair. Two years after the suit was initially filed, the plaintiff moved to amend his complaint to assert a cause of action for spoliation of evidence. See Schulmann v. Royal Caribbean Cruises Ltd., No. 97-24239 CA 01 (27) (Fla. Miami-Dade County Ct. 1999).
Federal courts have generally looked to either their inherent power to regulate litigation or the authority granted by the Federal Rules of Civil Procedure to sanction discovery abuses as their source of authority in fashioning spoliation remedies. Generally these remedies have taken the form of adverse inferences or the exclusion of expert testimony. Federal courts have also generally differed as to whether bad faith is a prerequisite for the imposition of spoliation remedies.

The Eleventh Circuit treats spoliation of evidence claims through the use of adverse inferences; however, this requires a showing of bad faith. “Mere negligence” in losing or destroying the records is not enough for an adverse inference, as “it does not sustain an inference of consciousness of a weak case.” Accordingly, in Bashir, the Eleventh Circuit held that in the absence of bad faith amounting to evidence tampering, the railroad’s failure to preserve a speed recorder tape would not give rise to an adverse inference, even though it was central to the plaintiff’s case, which was based upon the claim that the train had been traveling at an excessive rate of speed.

Surprisingly, although the Eleventh Circuit required bad faith to obtain an adverse inference in the case of spoliation, it required only a showing of negligence as a predicate to obtaining discovery sanctions in Gray v. Lockheed Aeronautical Systems Co. for the incidental destruction of documents. The court predicated an award of attorney’s fees under Federal Rule of Civil Procedure 37(d) because the defendant did not promptly admit that the requested documents had been destroyed, requiring the plaintiff to expend attorney’s fees in litigating the discoverability of the nonexistent documents.

131. Compare Bashir, 119 F.3d at 932 (requiring bad faith), with Vodusek, 71 F.3d 148, and Glover v. Bic Corp., 6 F.3d 1318 (9th Cir. 1993) (holding that a showing of bad faith is not required).
132. Bashir, 119 F.3d at 931; Vick, 514 F.2d at 737. Vick was adopted as binding precedent by virtue of Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981).
133. Bashir, 119 F.3d at 931 (citations omitted) (quoting Vick).
134. Id. at 932.
135. 125 F.3d 1371 (11th Cir. 1997).
V. THE NEED TO REDEFINE SPOLIATION OF EVIDENCE REMEDIES IN FLORIDA

A. Constitutional Limitations

Although Valcin has often been cited as authority for the more recent spoliation of evidence opinions, the Florida Supreme Court’s decision was extremely limited in nature and not intended to be given the broad scope that some of these more recent decisions have attributed to it. Perhaps even more importantly, in Valcin the supreme court reversed the district court of appeal’s adoption of an irrebuttable presumption of negligence on constitutional grounds, even though it was limited to situations where the failure to create or maintain records was both intentional and required by statute.

It is hard to rationalize how the entry of a default judgment or the striking of a party’s pleadings is any less of an abridgement upon that party’s right to due process or trial by jury than the use of the irrebuttable presumption rejected in Valcin. In each case the result is the same. Instead, the court in Valcin utilized the least drastic remedy possible in an effort to remedy the required abuse, while at the same time preserving both parties’ right to due process and trial by jury. In so doing, the supreme court further made it clear that even this narrow remedy was to be given a very restricted application, stating “We first stress the limited function of the presumption. . . . The presumption, shifting the burden of producing the evidence, is given life only to equalize the parties’ respective positions in regard to the evidence and to allow the plaintiff to proceed.”

Therefore, to fill the need for such a remedy while at the same time making a workable and practicable solution that does not impair the parties’ constitutional rights to due process and trial by jury, the further development of the principle of spoliation of evidence must not lose sight of the remedy’s limited nature as well as its potential to do considerable constitutional mischief.

B. California’s About-Face

The nationwide expansion of spoliation remedies received a serious setback in 1998, when the California Supreme Court in Cedars-Sinai Medical Center v. Superior Court refused to recognize the tort created by one of its immediate appellate courts fourteen years earlier. In a medical malpractice case against a hospital arising from birth-related injuries, the California Supreme Court reversed a long line of prior decisions by intermediate appellate courts recognizing a tort for the intentional spoliation of evidence. The court concluded:

137. 954 P.2d 511 (Cal. 1998).
The intentional destruction of evidence is a grave affront to the cause of justice and deserves our unqualified condemnation. There are, however, existing and effective nontort remedies for this problem. Moreover, a tort remedy would impose a number of undesirable social costs, as well as running counter to important policies against creating tort remedies for litigation-related misconduct.138

The court began its analysis by first addressing the issue of duty. After noting that all torts involve a violation of a legal duty “imposed by statute, contract or otherwise,”139 it then went on to further observe that: “the concept of duty ‘is a shorthand statement of a conclusion, rather than an aid to analysis in itself.’ It is ‘only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.’”140

The court thereafter turned to the policy considerations giving rise to the need for a tort remedy to address spoliation:

No one doubts that the intentional destruction of evidence should be condemned. Destroying evidence can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action. Destroying evidence can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both.

That alone, however, is not enough to justify creating tort liability for such conduct. We must also determine whether a tort remedy for intentional first party spoliation of evidence would ultimately create social benefits exceeding those created by existing remedies for such conduct, and outweighing any costs and burdens it would impose. Three concerns in particular stand out here: the conflict between a tort remedy for intentional first party spoliation and the policy against creating derivative tort remedies for litigation-related misconduct; the strength of existing nontort remedies for spoliation; and the uncertainty of the fact of harm in spoliation cases.141

As with Chief Judge Schwartz’s dissent in Valcin, the court placed great reliance upon the common law’s long history of limiting remedies for litigation-related misconduct to sanctions within the underlying lawsuit, rather than by creating new derivative actions. Relying upon the need for finality to litigation, the court observed that California law did not allow separate causes of action for perjury, concealing or withholding evidence, or the presentation of false evidence, despite the obvious grievous nature of such offenses. Accordingly, the court concluded: “Endless litigation, in which nothing was ever fi-

138. Id. at 512.
139. Id. at 514.
140. Id. at 515 (citations omitted).
141. Id.
nally determined, would be worse than occasional miscarriages of justice . . .”142

The court’s analysis next turned to the availability of alternative nontort remedies already in existence to remedy spoliation. Foremost among these remedies is the existence of an evidentiary inference, which can be tailored to remedy the specific facts of the spoliation involved in a particular case. Other remedies include the full range of sanctions typically permitted for discovery abuses, including fines, contempt, the establishment of particular designated facts, the striking of specific claims or defenses, disciplinary sanctions against attorneys, and even criminal penalties. The court concluded that the wide range of alternative remedies available was clearly sufficient to remedy spoliation of evidence without resort to an independent tort.

The next stage of the court’s analysis focused upon the lack of certainty associated with the damage claims inherent in spoliation actions. In such cases, the court concluded:

[Even if the jury infers from the act of spoliation that the spoliated evidence was somehow unfavorable to the spoliator, there will typically be no way of telling what precisely the evidence would have shown and how much it would have weighed in the spoliation victim’s favor. Without knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action. The jury could only speculate as to what the nature of the spoliated evidence was and what effect it might have had on the outcome of the underlying litigation.]143

After concluding that the problems inherent in a tort remedy for spoliation of evidence outweighed the value for such a cause of action, the court looked to the indirect effects that such cause of action might produce. At the top of the list were the immeasurable expenses that society as a whole would incur as businesses and individuals were required “to take extraordinary measures to preserve for an indefinite period documents and things of no apparent value solely to avoid the possibility of spoliation liability if years later those items turn out to have some potential relevance to future litigation.”144

The court also looked to the costs of litigating what it termed “meritless spoliation actions,”145 where the potentially relevant evidence no longer existed because it had been discarded or misplaced in the ordinary course of events rather than for any ulterior purpose.

142. Id. at 517.
143. Id. at 518.
144. Id. at 519.
145. Id.
“Many corporations and other entities, for example, have document retention policies under which they destroy at stated intervals documents for which they anticipate having no further need. The mere fact of destruction, however, would permit a disappointed litigant to sue the prevailing party for spoliation . . . .”146

Finally, the court weighed the practical difficulties in trying a spoliation tort cause of action jointly with the claims in the underlying action. At the very least, the court concluded that such a joinder of claims would create a very significant potential for jury confusion and inconsistencies of results.147

On the other hand, requiring the spoliation remedy to proceed separately from the underlying action:

[W]ould result in duplicative proceedings without avoiding the potential for inconsistent results. The spoliation action would require a “retrial within a trial” for all of the evidence in the underlying action would have to be presented again so that the spoliation jury could determine what effect the spoliated evidence would have had in light of all of the other evidence.148

As a result of its analysis, the court concluded that while the intentional spoliation of evidence is “an unqualified wrong,”149 that it was:

[T]he rare case in which a tort remedy for an intentionally caused harm is not appropriate. The remedies already available in first party spoliation cases to the spoliation victim, especially the evidentiary inference provided by Evidence Code section 413 and the discovery remedies of Code of Civil Procedure section 2023, provide a substantial deterrent to acts of spoliation, and substantial protection to the spoliation victim. Given that existing remedies will in most cases be effective at ensuring that the issues in the underlying litigation are fairly decided, whatever incremental additional benefits a tort remedy might create are outweighed by the policy considerations and costs described above.150

VI. THE EXPERIENCE OF OTHER STATES

Most states now recognize some form of a spoliation of evidence remedy,151 although a number still do not allow a separate cause of

146. Id. at 519-20 (citations omitted).
147. Id. at 520.
148. Id.
149. Id. at 521.
150. Id.
Those states that do permit spoliation claims generally recognize the necessity for the existence of a duty to preserve the evidence in the first instance; however, they have defined the duty in a variety of different manners.

Indiana, for instance, which refers to its tort as intentional interference with civil litigation, limits its application to the following situations: where there exists "an independent tort, contract, agreement, or special relationship imposing a duty to the particular claimant."\(^1\) The Kansas Supreme Court, which adopted a similar standard, stated:

Appellant readily concedes in his brief that “no jurisdiction has recognized a general common-law duty to preserve evidence” and that “under the present case law, [defendant] has no articulated common-law duty to preserve [plaintiff’s] evidence.” It is fundamental that before there can be any recovery in tort there must be a violation of a duty owed by one party to the person seeking recovery.\(^2\)

Several states, however, have concluded that a duty to preserve evidence arises where there is “[p]ending or probable litigation involving the plaintiff” and “knowledge on the part of defendant that litigation exists or is probable.”\(^3\) Some of the factors which courts have looked at to determine whether a party has sufficient notice of pending litigation are whether it has performed a formal investigation\(^4\) or retained its own experts.\(^5\) Other states follow different rules for defining the duty to preserve evidence whether the spoliation is alleged to be intentional or merely negligent.\(^6\)


153. Levinson, 644 N.E.2d at 1268.


156. Frigidaire, 146 F.R.D. at 163; Zenith Radio Corp., 747 P.2d at 914.

157. Id.

VII. A PROPOSED FRAMEWORK OF ANALYSIS

A. Is a Separate Cause of Action Merited?

The Florida Supreme Court has yet to expressly recognize a separate cause of action for spoliation of evidence. As with California, the remedy was first developed by the state’s intermediate appellate courts. The obvious question that arises is whether the Florida experience will mirror the California one once the Florida Supreme Court finally weighs in on this issue.

The arguments against recognizing a separate cause of action are thoroughly expressed and analyzed by the California Supreme Court in Cedars-Sinai Medical Center v. Superior Court. Although discussed in much more detail in Part V.B of this Article, these arguments include the conclusion that a separate cause of action is unnecessary in light of existing remedies; the strong policies against creating derivative tort remedies for litigation-related misconduct underlying the law; the uncertainty of establishing harm; and the adverse indirect effects of such a cause of action, particularly on normal business practices and the significant practical difficulties caused in trying a spoliation claim, either jointly or separately from the underlying claim.

Florida’s District Courts of Appeal, which have recognized a separate cause of action, have generally relied upon the decisions in Smith v. Superior Court and Valcin v. Public Health Trust. The

159. 954 P.2d 511 (Cal. 1998).
160. As pointed out in the 2000 Handbook on Discovery Practice published by the Joint Committee of the Trial Lawyers Section of the Florida Bar and Conferences of Circuit and County Court Judges, “[m]any practitioners are frustrated by the ostensible reluctance of trial courts to sanction parties for discovery abuse. This reluctance probably stems from the trial courts’ failure to fully appreciate their broad powers.” JOINT COMM. OF THE TRIAL LAWYERS SECTION OF THE FLA. BAR AND CONFERENCES OF CIRCUIT AND COUNTY COURT JUDGES, 2000 HANDBOOK ON DISCOVERY PRACTICE 1 [hereinafter 2000 HANDBOOK]. As further noted in the Handbook, Florida Rule of Civil Procedure 1.380(b)(2) specifies the permissible sanctions including:

A. An order that the matters about which the questions were asked or any other designated facts shall be taken to be established;
B. An order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting that party from introducing certain matters in evidence;
C. An order striking pleadings or staying further proceedings until the order is obeyed, or dismissing the action or part of it, or rendering a judgement of default against the disobedient party;
D. In addition to the above, an order treating is contempt of count the failure to obey; . . .

F. [T]he [award of] reasonable expenses . . . which may include attorney’s fees . . .

Id. at 3-4.

162. 507 So. 2d 596 (Fla. 1987).
validity of such a conceptual framework, however, is extremely questionable. Not only has Smith been overruled, but the Florida Supreme Court’s decision in Valcin stopped far short of recognizing a separate cause of action for spoliation of evidence.

In fact, the Florida Supreme Court’s opinion in Valcin raises serious questions concerning the constitutional validity of such a new tort by concluding that the sanctioning of an *irrebuttable* presumption of negligence, even where the spoliation (failure to keep records) was intentional, would constitute a violation of the defendant’s right to due process, as well as an abrogation of the jury’s function. In striking the broader remedy fashioned by the Third District on the basis that it “sw[ept] wider than necessary,” the Florida Supreme Court also repeatedly stressed the need to strictly limit spoliation remedies only to the specific action necessary to cure the prejudice created to avoid these constitutional problems.

In light of the numerous less-burdensome and constitutionally troubling remedies available to directly address the prejudice caused in spoliation circumstances, a separate cause of action appears to be both superfluous and outside the scope of permissible remedies.

Similarly, the recognition of a separate cause of action where the spoliation is unintentional or merely negligent is also inconsistent with the well-established law of Florida governing discovery sanctions. Florida courts have repeatedly held that the striking of pleadings or dismissal of a suit with prejudice for noncompliance with a discovery order are the severest of sanctions, which are only appropriate where the offending party willfully and deliberately fails to comply with previous discovery orders. Striking pleadings or entering a default is also proper when a party engages in *willful* misconduct.

Even in the criminal law context, where there is a much higher burden on the state to preserve potentially exculpatory evidence for the defense than upon the parties in a civil suit, the defendant is required to establish bad faith on the part of the law enforcement personnel in discarding such evidence before a denial of due process is found to exist. For example, in Arizona v. Youngblood, the

163. Id. at 599.
164. Id.
166. 2000 HANDBOOK, supra note 160, at 7-8 (emphasis added).
United States Supreme Court rejected claims that a defendant had been denied due process by the state’s failure to preserve critical semen samples in a rape prosecution, even though the samples might have exculpated the defendant because the critical issue in the case had been the identification of the rapist. The Court’s decision was an outgrowth of its earlier opinion in *California v. Trombetta*, in which it refused to suppress the results of a breath test upon which a drunk driving conviction was based, where the police discarded the test samples before they could be analyzed by the defendant’s expert.

In both cases, the Supreme Court stressed the importance of the government’s lack of bad faith in discarding the evidence. Although noting that the government’s good faith or lack thereof was not relevant in cases dealing with the state’s violation of its constitutional duty to disclose material exculpatory evidence, the Court concluded that a different analysis was required where the issue was the failure to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. The Court went on to observe that “[p]art of the reason for the difference in treatment is . . . [that] ‘whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.’” Accordingly, the Court held that even negligence on the part of the police would not be a sufficient ground to base a due process claim and that instead actual bad faith was required.

**B. The Existence of a Duty to Preserve**

Regardless of whether a separate cause of action is recognized or whether spoliation remedies are limited to presently existing alternatives, the first issue that must be addressed in any analysis is whether a duty exists on the part of the possessor to preserve or maintain the evidence. Without such a duty, there can be no valid legal basis for the imposition of sanctions, much less the striking of pleadings or the award of damages. Likewise, without a clear delineation of the parameters of the duty to preserve evidence, one cannot determine whether they are subjecting themselves to liability by cleaning up a spilled substance on a grocery store’s floor, moving a damaged car off the road, or disposing of a broken chair.

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170. *Youngblood*, 488 U.S. at 57.
171. *Id.* at 57-58.
Although it is easy to find such a legal duty where there is a court order, a promise to preserve evidence, a statute or administrative regulation requiring documents to be maintained, the existence of such a duty is much more difficult to find (and justify) in the absence of such circumstances. As discussed above, several recent cases have gone so far as to imply the existence of such a duty by the mere fact that litigation may some day be filed.

The Third District has rejected the contention that a common law duty exists to preserve a defective product, at least in the absence of actual notification of legal action or a request to maintain the product. Courts from other states have also refused to find such a common law duty on a variety of different grounds. In Koplin v. Rosel Well Perforators, Inc., for example, the Supreme Court of Kansas observed:

[A]bsent a duty to preserve the [product], appellee is not a wrongdoer and had an absolute right to preserve or destroy its own property as it saw fit. To adopt such a tort and place a duty upon an employer to preserve all possible physical evidence that might somehow be utilized in a third party action by an injured employee would place an intolerable burden upon every employer.

As a result, the court went on to conclude that “absent some independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties,” the State of Kansas would not recognize an independent tort based upon spoliation of evidence.

1. Common Law Duty

The formal filing of a lawsuit provides a clear line of demarcation for setting such a duty in the absence of an applicable statute, administrative rule, or promise to preserve evidence, because it clearly places all parties on notice of their need to comply with all applicable

172. See, e.g., Rockwell Int’l Corp. v. Menzies, 561 So. 2d 677 (Fla. 3d DCA 1990).
173. See, e.g., Brown v. City of Delray Beach, 652 So. 2d 1150 (Fla. 4th DCA 1995); Miller v. Allstate Ins. Co., 573 So. 2d 24 (Fla. 3d DCA 1990).
174. See, e.g., Builder’s Square, Inc. v. Shaw, 753 So. 2d 721 (Fla. 4th DCA 1999) (imposing a statutory duty upon employer to preserve evidence critical to employee’s potential third party claim via worker’s compensation statute).
176. See, e.g., Hagopian v. Publix Supermarkets, Inc., 788 So. 2d 1088 (Fla. 4th DCA 2001); St. Mary’s Hosp. v. Brinson, 685 So. 2d 33 (Fla. 4th DCA 1996); Sponco Mfg., Inc. v. Alcover, 656 So. 2d 629 (Fla. 3d DCA 1995).
179. Id. at 1181-82.
180. Id. at 1183.
rules of court, including the duty to preserve evidence. In addition, the filing of a lawsuit also brings attorneys, who can better gauge what constitutes evidence and its potential role in the upcoming litigation, into the picture. Nevertheless, total reliance upon such a bright line standard may be too harsh, particularly where there is no doubt that litigation will in fact result, or if the evidence is absolutely essential to a fair trial.

There is always a danger of creating too impracticable or meaningless a rule by making it too fact-specific. Such a rule would require a case-by-case determination of its applicability. However, a certain amount of flexibility is needed to prevent unfair and unjust results. In this context, reference to the types of circumstances that have been found to give rise to common law duties under traditional tort law can be useful to determine whether an analogous duty to preserve evidence is appropriate in the presuit setting. The most commonly accepted situations in which such a common law duty would logically be recognized are where: (1) there is an express request for the evidence actually communicated to the possessor; (2) it is necessary to protect one party from its reasonable detrimental reliance upon the other; (3) one party is prevented or thwarted from acting or conducting an attempted investigation by another; (4) a special relationship exists requiring protection of one party’s interests by the other; or (5) there is a voluntary assumption of a duty or responsibility by one party to protect the other’s interests.

2. Statutory and Administrative Duties

The threshold question in determining the existence of a statutorily created duty to retain evidence is whether such a duty arises only where the statute in question creates a private cause of action for its breach. Although this issue was addressed by the litigants in St. Mary’s Hospital, Inc. v. Brinson, it was never answered by the Fourth District, which simply ignored the issue in its opinion.

A statutory tort cause of action, just as a common law one, consists of four elements: (1) a duty, (2) a breach of the duty, (3) causation, and (4) damages. In determining whether there is a

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181. See, e.g., Strasser v. Yalamanchi, 783 So. 2d 1087 (Fla. 4th DCA 2001); Figgie Int’l, Inc. v. Alderman, 698 So. 2d 563 (Fla. 3d DCA 1997).
183. 685 So. 2d 33 (Fla. 4th DCA 1996).
statutory cause of action, the focus therefore goes beyond the question of whether there is merely a duty, but also includes the policy question of whether the law recognizes a private right to enforce a violation of that duty.185

From a logical standpoint, the critical issue in the spoliation analysis should therefore not focus on whether the statute creates a private cause of action but whether it creates a duty to preserve evidence. In fact, where the statutory violation gives rise to a specific cause of action, arguably no additional remedy is necessary. Reference to statutes to determine the existence or scope of a duty, even where the statute’s violation does not give rise to private causes of action, is typical in many other analogous contexts in the law.

For example, violations of traffic regulations generally constitute evidence of negligence in the operation of motor vehicles.186 Likewise, violations of administrative rules often are found to constitute evidence of negligence in products liability cases.187 Similarly, violation of a bar rule will be considered evidence of legal malpractice in a civil action,188 even though the Rules Regulating the Florida Bar expressly provide that such a violation will not give rise to a civil cause of action.189

For such statutes or administrative regulations to give rise to a duty in the spoliation context, however, they must expressly require the preservation of the evidence in question. As pointed out in the previous discussion of Brinson,190 neither the federal191 nor state statutes192 relied upon by the plaintiff created any express duty upon the hospital to save the purportedly defective anesthesia equipment. At most, these statutes merely required the hospital to report the incident in question to the appropriate authorities. Even in the less demanding context of considering nonbinding statutes as evidence of negligence, the statutory provisions must at least be relevant and directly applicable to the conduct in question.

185. The guidelines for determining whether a statute gives rise to a private cause of action are found in the Florida Supreme Court case Murthy v. N. Sinha Corp., 644 So. 2d 983 (Fla. 1994).
186. See Fla. Std. Jury Instr. (Civ) 4.11.
188. Pressley v. Farley, 579 So. 2d 160 (Fla. 1st DCA 1991).
189. PREAMBLE, R. REGULATING FLA. BAR.
190. See supra Part III.
3. **Scope of Duty**

Closely related to the issue of the existence of a duty to preserve evidence is the corollary question of the extent of this duty. This question, in turn, is divided into two separate subissues, each with different considerations.

   a. **Tangible Evidence.**—Once the duty to preserve tangible evidence is established, the scope of the duty is largely defined by the evidence’s potential importance to the precise issues raised in the litigation and the inability to replace the evidence through other means. Thus, while the loss of a particular product would potentially have tremendous significance in a products liability action based upon a defect in its construction, it would have much less importance in a case based upon defective design.\(^{193}\)

   This issue was addressed initially in *Valcin*\(^{194}\) and more recently in *Harrell v. Mayberry*.\(^{195}\) In assessing the prejudice caused to the plaintiff by failing to prepare the operative report required by statute in *Valcin*, the supreme court observed that the absence of such a record will not necessarily bear on the issues in all malpractice cases. Accordingly, the court went on to hold that spoliation remedies will only be appropriate when necessary to correct the loss of evidence which is essential to the issues necessary to be proved.

   In *Harrell*, the Second District Court of Appeal was faced with the loss of relevant evidence, a tripmaster that recorded the truck’s speed and use of its lights, two central issues in the case.\(^{196}\) Nevertheless, the court still concluded that spoliation remedies were not appropriate because sufficient alternative evidence existed for the plaintiff to prove its case. The court observed that “[c]ollisions between vehicles without tripmaster devices occur all of the time and proceed to litigation.”\(^{197}\)

   Therefore, for spoliation remedies to be applicable, the missing evidence must be both directly relevant to the issues to be tried and incapable of replacement through other available evidence.

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194. 507 So. 2d 596 (Fla. 1987).
195. 754 So. 2d 742 (Fla. 2d DCA 2000).
196. Id.
197. Id. at 745.
b. **Intangible Evidence.**—Cases throughout the country have also extended spoliation of evidence principles to nonphysical “evidence” as well. For example, an injured bus passenger was allowed to recover damages where the driver failed to obtain sufficient identification of the truck colliding with his vehicle so as to deprive his passengers of their potential claim.198

Although Florida appellate decisions have not yet gone so far, the Fourth District’s opinion in *Brown*199 comes very close. The plaintiff, who was seriously injured in a bicycle accident with a hit-and-run driver, entrusted his bicycle to the local police department as part of its criminal investigation into the accident. Although the police department allegedly agreed to preserve the bicycle and return it to the plaintiff along with all of the other “evidence” that it had collected at the conclusion of the investigation, everything was discarded.

In upholding the plaintiff’s subsequent spoliation claim against the police department, the Fourth District concluded that it was not limited to merely the loss of the plaintiff’s bicycle, but also included the other evidence collected by the police from sources besides the plaintiff. Therefore, the court expanded the spoliation claim to include not only the specific property owned by the party, but nonowned property as well.200

**C. The Significance of Intent**

Florida’s appellate courts have also disagreed over the significance and importance of the intent of the party in destroying evidence under virtually identical circumstances. An example of the disparate treatment of this issue is seen by contrasting the First District’s decision in *Metropolitan Dade County v. Bermudez*201 with the Third District’s opinions in *Figgie International Inc. v. Alderman*202 and *DeLong v. A-Top Air Conditioning Co.*203

In *Bermudez*, the First District reversed the trial judge’s exclusion of the defendant’s expert in a case based upon an automobile accident. Following the expert’s examination of the vehicle in an effort to find evidence to support the defendant’s seatbelt defense, the plaintiff requested the opportunity to inspect the vehicle. However, the defendant advised him that it had been previously destroyed. In fact, it was subsequently determined that the vehicle had still been in exis-

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199. Brown v. City of Delray Beach, 652 So. 2d 1150 (Fla. 4th DCA 1995).
201. 648 So. 2d 197 (Fla. 1st DCA 1994).
202. 698 So. 2d 563 (Fla. 3d DCA 1997).
203. 710 So. 2d 706 (Fla. 3d DCA 1998).
tence at the time of the request and was not actually destroyed until twenty-two months later.

In reversing the lower court’s decision, the First District directed it to reevaluate its action based upon the following test:

What sanctions are appropriate when a party fails to preserve evidence in its custody depends on the willfulness or bad faith, if any, of the party responsible for the loss of the evidence, the extent of prejudice suffered by the other party or parties, and what is required to cure the prejudice.204

Although Alderman involved significantly greater egregious conduct, the Third District concluded, “[d]ocument-production requests put the parties on notice that documents should be preserved, regardless of the spoliator’s subjective intent.”205 Likewise, in DeLong, the court expressly took pains to note that the evidence was “inadvertently lost or misplaced.”206

This confusion in Florida has been further exacerbated by the fact that there has been a lack of internal consistency even among individual district courts of appeal. For example, the Third District followed its earlier Alderman and DeLong opinions with its decision in Kloster Cruise Ltd. v. Igac,207 in which the court refused to require a spoliation instruction where the plaintiff “lost” a critical CAT scan, stating “[w]e cannot conclude that this is one of ‘those extremely rare instances that the evidence establishes an intentional interference with a party’s access to critical medical records.’” Although not apparent from the court’s brief opinion, the record of the case shows that the critical CAT scan disappeared three months after the defendant’s request for production, despite the court’s earlier admonition in Alderman.208

As discussed in more detail in the following subsection analyzing alternative remedies, there is a conceptual difference between attempting to address the intentional destruction or failure to preserve evidence as compared to conduct that is merely negligent or innocent. Where the spoliation does not constitute an intentional attempt to destroy evidence for the purpose of prejudicing another party, the remedy to be fashioned should be compensatory in nature rather than punitive. Where the actions were not taken for the purpose of gaining an undue or unfair advantage in litigation, the goal should be merely to place the parties in the same position they would have

204. Bermudez, 648 So. 2d at 200 (emphasis added).
205. 698 So. 2d at 567 (emphasis added) (citations omitted).
206. 710 So. 2d at 707.
207. 741 So. 2d 1215 (Fla. 3d DCA 1999) (quoting Pub. Health Trust v. Valcin, 507 So. 2d 596, 599 (Fla. 1987)), rev. denied, 762 So. 2d 917 (Fla. 2000).
208. 698 So. 2d at 564.
been in had the evidence been preserved. As also subsequently discussed in more detail, there are generally sufficient alternative remedies—that of recognizing a separate cause of action for spoliation of evidence—that exist to address this type of situation.

On the other hand, where there has been an intent to perpetrate a fraud or to prejudice a party, punitive action is generally warranted. In such a case, the goal is not only to remove any disadvantage occurring to the innocent party but also to punish the wrongdoer for his conduct and to further set an example to deter others from similar actions.209 Under these circumstances, a separate cause of action is more warranted as recognized by many states which limit such claims to intentional spoliation.

D. Degree of Damage or Prejudice

Loose language in several cases has caused a gradual erosion as to the degree of damage or prejudice that must exist before spoliation principles will be given effect in Florida. In Valcin and the early Florida spoliation cases, the courts required the plaintiff to establish that the missing evidence prevented it from establishing even a prima facie case.210 Although most subsequent cases have reasserted this requirement,211 some recent cases, however, have appeared to significantly lower the bar by implying that it is only necessary for the plaintiff to establish that it was “hindered,”212 “impaired,”213 or “cost [him] an opportunity to prove [his] lawsuit.”214

In the recent Strasser v. Yalamanchi decision, the court appeared to be trying to strike a middle ground between these positions by holding:

Florida law does not require that it be impossible for a party to prove its case in order to recover damages on a spoliation claim. A party significantly impaired by the destruction of evidence may still be able to prevail in an action for breach of contract on the basis of existing evidence, albeit to a lesser extent and for reduced damages.215

209. See, e.g., Tramel v. Bass, 672 So. 2d 78 (Fla. 1st DCA 1996).
210. Pub. Health Trust v. Valcin, 507 So. 2d 596, 599-600 (Fla. 1987); see also Hernandez v. Pino, 482 So. 2d 450 (Fla. 3d DCA 1986).
211. See, e.g., Harrell v. Mayberry, 754 So. 2d 742 (Fla. 2d DCA 2000) (overturning order striking pleadings where defendant destroyed speed monitor in truck); Sponco Mfg., Inc. v. Alcover, 656 So. 2d 629 (Fla. 3d DCA 1995); Cont'l Ins. Co. v. Herman, 576 So. 2d 313 (Fla. 3d DCA 1990).
212. E.g., King v. Nat'l Sec. Fire & Cas. Co., 656 So. 2d 1335, 1337 (Fla. 4th DCA 1995).
213. See, e.g., St. Mary's Hosp., Inc. v. Brinson, 685 So. 2d 33, 34 (Fla. 4th DCA 1996).
214. E.g., Brown v. City of Delray Beach, 652 So. 2d 1150, 1154 (Fla. 4th DCA 1995) (citations omitted).
215. 783 So. 2d 1087, 1094 (Fla. 4th DCA 2001) (emphasis added).
Of course, the Third District reached the nearly opposite conclusion in *Herman*,216 thereby leaving the status of Florida law on this precise issue in doubt. Conceptually, the “loss of chance” standard is inconsistent with Florida tort law in general, as even routine negligence cases typically require proof of causation at least to a “more likely than not” standard.217 The “hindered” and “impaired” standards are not only virtually devoid of meaning, but would also appear to require even less proof than a “loss of a chance.”

The most consistent standard consonant with the principles underlying the theory of spoliation cases mandates a return to the original requirement that the plaintiff must demonstrate an inability to proceed without the missing evidence. Such a standard is required whether one views spoliation claims in the context of either a tort action218 or one based upon the court’s power to award sanctions.219

As observed by the California Supreme Court in *Cedars-Sinai Medical Center*,220 tort law generally requires reasonable certainty as to the existence of damage, especially where there may be some uncertainty as to the amount of the damage. In the absence of requiring a party to establish its inability to proceed (or defend) without the missing evidence, the existence of harm becomes too speculative to justify tort recovery.221

The same result is reached if one approaches spoliation as part of the court’s power to sanction litigants. Normally sanctions must be commensurate with the harm—in other words, “the punishment must fit the crime.” In the absence of irreparable harm, the allowance of a spoliation remedy would therefore exceed compensation and amount to an unwarranted penalty, particularly in the absence of intentional wrongdoing.223

E. Proof of Causation

Closely related to the issue of the degree of damage or prejudice necessary to sustain a spoliation of claim is the question of proving

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216. *Herman*, 576 So. 2d 313. In an uninsured arbitration proceeding without the damaged vehicle, the adverse driver was found 20% at fault. In a subsequent spoliation suit, aided by various evidentiary presumptions to compensate for the missing vehicle, the adverse driver was found to be 35% at fault. The appellate court concluded, however, that the increase of 75% over the original result did not constitute a significant impairment as a matter of law in vacating the jury’s verdict and finding for the insurer.


219. Harrell v. Mayberry, 754 So. 2d 742 (Fla. 2d DCA 2000).


221. *Id.* at 518-19; see also *Bondu*, 473 So. 2d at 1311.

222. *See Harrell*, 754 So. 2d at 744.

causation—in other words, is it necessary for the party raising spoliation to go out and actually lose its case first?

In Bondu, the Third District held that the claim “did not arise until the summary judgment adverse to her [underlying] medical malpractice claims was entered.” The court reasoned that until the underlying claim was disposed of adversely to the plaintiff, there were no legally recognizable damages.

Subsequently in Miller, however, the same court retreated from its earlier conclusion and relying upon the California decision of Smith v. Superior Court held that “[f]or 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 derivative claim.” The status of Florida law on the issue was cast even further in doubt when the Third District observed recently that “liability for spoliation does not arise until the underlying action is completed.”

From a conceptual standpoint, the speculation over the actual effect of the missing evidence is one of the greatest problems with the spoliation remedy. As pointed out by the Supreme Court of Minnesota in Federated Mutual Insurance Co. v. Litchfield Precision Components, Inc.: 

> [I]t is impossible to know what the destroyed evidence would have shown. . . . It would seem to be sheer guesswork, even presuming that the destroyed evidence went against the spoliator, to calculate what it would have contributed to the plaintiff’s success on the merits of the underlying lawsuit. Given that plaintiff has lost the lawsuit without the spoliated evidence, it does not follow that he would have won it with the evidence.

Where the spoliation claimant is not required to at least go forward without the evidence, the situation exists where there is speculation on top of speculation as to both the outcome and the reasons for it. Thus, by consolidating both claims for trial purposes there is speculation as to both the existence and the extent of the injury.

An extremely analogous circumstance from which useful parallels can be drawn is the legal malpractice cause of action. To prove its damages where the claim is based upon the attorney’s handling of litigation matters, the client must prove the so-called “case within a case.” In other words, the plaintiff must prove that “but for” his at-

224. 473 So. 2d at 1310.
228. 456 N.W.2d 434, 438 (Minn. 1990) (citations omitted).
torney’s negligence he would have prevailed in the underlying suit.\textsuperscript{229} Under some circumstances the client must not only lose the underlying suit at trial\textsuperscript{230} but also on appeal as a condition precedent to establishing his damages with legal sufficiency.\textsuperscript{231}

The rules governing the establishment of damages and causation in legal malpractice claims form a useful and logical guide for determining these same issues in the spoliation context because of the strong analogy between the two types of actions. In the legal malpractice case the causation issues generally center around the question of “but for attorney’s negligence, would the client have recovered?” The exact same question applies in the spoliation context, “but for the missing evidence, would the plaintiff (or defendant) have prevailed?” It therefore makes sense to utilize a body of law developed over the years to deal with this issue.

Closely related to the issue of causation is the format to be used for trying the spoliation claim. Allowing consolidation with the underlying negligence claim, as in \textit{Brinson}\textsuperscript{232} and \textit{Miller},\textsuperscript{233} creates both practical and conceptual problems.

Initially, the strategy in defending a spoliation claim is often just the opposite of defending a nonspoliation suit. In the spoliation action, one key defense is generally the argument that there was sufficient evidence to establish liability without the missing evidence. Accordingly, one of the ways to defend a spoliation suit is to therefore establish the existence of alternative evidence which is still available to prove the proponent’s case.

By consolidating the claims, however, the defendant will be unfairly placed in the “Catch 22” situation whereby successfully defending the spoliation action, it proves the plaintiff’s liability case. Thus, where both claims are tried together, the party defending the spoliation claim is faced with the Hobson’s Choice of having to decide whether to produce evidence (or make arguments) in defense of the spoliation claim that will assist its opponent in proving its negligence claim. A variation of this problem was seen in the \textit{Brinson} case, where the only way for the defendant hospital to defend the spolia-

\textsuperscript{229} See, e.g., Tarleton v. Arnstein & Lehr, 719 So. 2d 325 (Fla. 4th DCA 1998); Kovach v. Pearce, 427 So. 2d 1128 (Fla. 5th DCA 1984); Weiner v. Moreno, 271 So. 2d 217 (Fla. 3d DCA 1973).

\textsuperscript{230} See, e.g., Ferrari v. Vining, 744 So. 2d 480 (Fla. 3d DCA 1999) (and cases cited therein).

\textsuperscript{231} See, e.g., Richards Enters., Inc. v. Swofford, 495 So. 2d 1210 (Fla. 5th DCA 1986); Chapman v. Garcia, 463 So. 2d 528 (Fla. 3d DCA 1985).

\textsuperscript{232} St. Mary’s Hosp., Inc. v. Brinson, 685 So. 2d 33 (Fla. 4th DCA 1996).

\textsuperscript{233} Miller v. Allstate Ins. Co., 573 So. 2d 24 (Fla. 3d DCA 1990).
tion claim was to give up its statutorily created risk management privilege.234

Another potential problem arising from consolidation is the danger of duplicate damage recoveries, particularly where the missing evidence only impairs the plaintiff from proving his entire case and does not render it impossible. In Strasser, the Fourth District observed:

A party significantly impaired by the destruction of evidence may still be able to prevail in an action for breach of contract on the basis of existing evidence, albeit to a lesser extent and for reduced damages. By entitling [plaintiff] to certain evidentiary presumptions, the spoliation claim permits recovery for those missing damages that but for [defendant’s] destruction of evidence [plaintiff] otherwise would have been able to prove. The total measure of damages remains the same—namely, the amount of money due [plaintiff] under the contract. Accordingly, we find no error in permitting the jury to find for [plaintiff] on both the spoliation and breach of contract claims or in failing to provide for a separation of damages for each on the verdict form.235

While it may be relatively easy to prevent a duplication of recovery in the contract setting, particularly where the damages are liquidated, the same cannot be said in those tort cases where the damages are unliquidated. The California Supreme Court’s recognition of the problems arising from consolidation was one of the bases for its reversal of the entire Smith line of cases in Cedars-Sinai Medical Center:

[I]f, as plaintiff seeks to do here, a spoliation tort cause of action were tried jointly with the claims in the underlying action, a significant potential for jury confusion and inconsistency would arise. The jury in such a case logically would first consider the underlying claims. . . .

In doing so, the jury would consider any acts of spoliation by applying the evidentiary inference of Evidence Code section 413. If the jury rejects the spoliation victim’s position on the underlying claims, it has either rejected application of the evidentiary inference to the case before it (e.g., because the spoliation victim has not demonstrated that the spoliation was intentional), or has determined that, even applying the inference in favor of the spoliation victim, the other evidence in the case compels a different result. The jury would then consider and decide the spoliation tort claim; in doing so, however, it would necessarily be reconsidering its adjudication that either no intentional spoliation occurred or that the spoliated evidence would not have led to a different result.

234. 685 So. 2d at 34.
235. Strasser v. Yalamanchi, 783 So. 2d 1087, 1094-95 (Fla. 4th DCA 2001).
At the least, this would be confusing to the jury; at most, it would lead to inconsistent results. 236

F. Existence of Other Remedies

Many less drastic remedies exist under both the Florida Rules of Evidence and the Florida Rules of Civil Procedure. In Bermudez, the court concluded that where the party destroying the evidence acts willfully and maliciously, sanctions “will almost invariably” be warranted, including dismissal of a claim or defense. 237 Where the evidence is inadvertently destroyed, however, the court held that “less drastic measures are ordinarily appropriate.” 238 Included within the realm of such less drastic measures are the exclusion of experts, 239 the use of rebuttable presumptions to shift the burden of proof, 240 the use of evidentiary inferences, and jury instructions. 241

A good example of the type of curative practices that can be used is found in the Youngblood 242 case where the police had failed to retain semen samples used to identify the defendant in a rape prosecution. To help remedy the potential prejudice caused by the failure to maintain this potentially important evidence, the lower court instructed the jury that if the state had destroyed or lost evidence, that it could “infer that the true fact is against the state’s interest,” 243 while allowing the defendant to argue that the testing would have exculpated him.

Consideration must also be given to the appropriate construction for presumptions designed to compensate for the spoliation of evidence. Some jurisdictions recognize the presumption that “but for the fact of the spoliation of evidence the plaintiff would have recovered in the pending or potential litigation.” 244 Other courts, however, have limited the presumption to an inference that “the destroyed evidence would have been unfavorable to the party that destroyed it.” 245

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238. Id.
241. Bermudez, 648 So. 2d 197; see also Strasser v. Yalamanchi, 783 So. 2d 1087 (Fla. 4th DCA 2001) (concluding that it was appropriate to advise the jury of the defendant’s destruction of the evidence in question as an exception to the general rule that prohibits the introduction of evidence at trial of pretrial discovery conduct).
243. Id. at 54.
In circumstances where the destruction or failure to preserve the evidence is unintentional, this latter approach is clearly much more consistent with principles underlying spoliation, which are designed to compensate the party affected by the missing evidence to level the playing field. In such cases, the inference that the evidence in question would have been adverse to that party does not replace the parties’ need to produce sufficient evidence of the material facts necessary to establish the elements of the specific cause of action, nor does it shift the burden of proof. Thus, in these circumstances, the party receiving the benefit of the spoliation inference is in no better or worse situation than they would be if the evidence had been preserved.

The argument that a stronger inference would be appropriate where the spoliation is intentional is a valid one. Where a party intentionally destroys evidence to secure a litigation advantage, the calculated nature of its conduct gives rise to the strong inference that the party itself concluded that the evidence would be so harmful to its case that it was worth the risk of getting caught to destroy it. Therefore, a much stronger inference is created by such conduct.

In such cases, a reasonable argument can also be made that it is necessary not only to place the injured party in the same position it would have been in absent the loss of the evidence, but also to punish the wrongdoer. The need for such a sanction is not only necessary to punish the party for its wrongful conduct, but also to act as a deterrent against similar conduct in the future.

\section*{G. Other Factors}

\subsection*{1. Due Diligence}

While most courts have weighed the diligence of the party seeking to invoke spoliation remedies as part of their prejudice analysis, some courts have treated such diligence as a separate element, that must be proved as part of the spoliation claim. The Connecticut Supreme Court has gone so far as to require “[i]f the spoliated evidence was necessary for inspection or testing, the party who seeks the inference must have taken all appropriate means to have the evidence produced. This may include, if necessary, an attempt to obtain a court-ordered inspection.”

\begin{itemize}
  \item \footnote{246. See, e.g., Beers, 675 A.2d at 833; DeLaughter, 601 So. 2d at 822-23.}
  \item \footnote{247. See, e.g., Tramel v. Bass, 672 So. 2d 78, 84 (Fla. 1st DCA 1996).}
  \item \footnote{248. \textit{Id.}}
  \item \footnote{249. See, e.g., North v. Altech Yachts, Inc., No. 4D01-225, 2002 WL 54512 (Fla. 4th DCA Jan. 16, 2002); Harrell v. Mayberry, 754 So. 2d 742 (Fla. 2d DCA 2000).}
  \item \footnote{250. See, e.g., Beers, 675 A.2d at 833.}
  \item \footnote{251. \textit{Id.} (citations omitted).}
\end{itemize}
2. Control of Evidence at Time of Loss

Evidence which is destroyed must be within the possession or control of the party against which spoliation is asserted. Accordingly, a claim will not lie against a party where the evidence is disposed of by an unrelated third party over which it had no control.\(^{252}\)

An analogous rationale was followed in *Gentry v. Toyota Motor Corp.*,\(^{253}\) where the plaintiff’s expert removed a piece of the plaintiff’s car with a hacksaw as part of his evaluation for purposes of supporting the plaintiff’s products liability action against the manufacturer. Because the expert had acted without the plaintiff’s knowledge or authorization, the court refused to charge the plaintiff with responsibility for his actions.

The issue of control also arose in another context in *Valcin,*\(^{254}\) in which a hospital was held responsible for a surgeon’s failure to prepare a statutorily required operative report. Although the court noted that there was generally an independent contractor relationship between doctors and hospitals that would not give rise to the hospital’s liability for spoliation, where there was an employer-employee relationship the hospital would be held vicariously responsible for the surgeon’s actions.

3. Notice

A number of courts have also wrestled with the issue of the sufficiency of notice of the potential litigation that is necessary to give rise to a duty to preserve potential evidence. In *American Family Insurance Co. v. Village Pontiac GMC, Inc.*,\(^{255}\) the court concluded that a single call from the plaintiff to a manufacturer’s local dealer advising it of an accident with its product was not sufficient to place the manufacturer on notice of the need to immediately investigate the cause of the accident and to anticipate a potential products liability suit. Likewise, in *Dunham v. Condor Insurance Co.*,\(^{256}\) a California appellate court held that the insurer in a motor vehicle accident had no duty to preserve an allegedly defective truck part for a subsequent products liability suit where the plaintiffs had made no request for its retention.

\(^{252}\) See, e.g., Anesthesiology Critical Care & Pain Mgmt. Consultants v. Kretzer, 802 So. 2d 346 (Fla. 4th DCA 2001) (finding *Valcin* presumption not applicable to healthcare provider who is not responsible for maintaining records in question); Aldrich v. Roche Biomedical Labs., Inc., 737 So. 2d 1124 (Fla. 5th DCA 1999) (finding that fault for loss of pathology slides could not be firmly fixed); King v. Nat’l Sec. Fire & Cas. Co., 656 So. 2d 1335 (Fla. 4th DCA 1995).

\(^{253}\) 471 S.E.2d 485 (Va. 1996).

\(^{254}\) 507 So. 2d 596 (Fla. 1987).


\(^{256}\) 66 Cal. Rptr. 2d 747 (Cal. Ct. App. 1997).
Recently, the Supreme Court of Alabama has also reached a similar conclusion in *Smith v. Atkinson*, holding:

[A] third party’s constructive notice of a pending or potential action is not sufficient to force upon the third party the duty to preserve evidence. “Limiting the usual duty in third-party negligent spoliation to an agreement to preserve, or a voluntary undertaking with reasonable and detrimental reliance, or a specific request, ensures that such a spoliator has acted wrongfully in a specifically identified way.”

Florida’s Fourth District Court of Appeal took a much more expansive view of the type of notice necessary to create such a duty, however, in *Builder’s Square, Inc. v. Shaw*, which arose from an employee’s fall from a ladder claimed to be defective. Section 440.39, *Florida Statutes*, imposes a duty upon an employer to cooperate with an employee in maintaining a claim against third parties. The courts have construed this obligation to include the duty to preserve evidence critical to the suit.

In this particular case, the employer had notice within three days after the incident that the employee had been injured on one of the twelve ladders that had been maintained on the premises. Although the employer did not have actual notice as to which of the twelve ladders had been specifically involved in the accident, the court concluded “while actual notice of identified evidence is the clearest form, an employer can similarly be charged with notice when the circumstances are such that it should have known that certain evidence could conceivably be critical to an employee’s claim.” As a result, the court concluded that the employer had a duty to consult with its employee before disposing of any of its ladders.

**VIII. Conclusion**

The threshold issue that courts must address is whether a separate cause of action for spoliation of evidence will be recognized. Some jurisdictions have concluded that a separate cause of action is appropriate, while others instead have opted to utilize existing alternative remedies. In either circumstance, however, logic would dictate that the same rules and guidelines should be applicable as a requisite to applying a spoliation remedy, whether it be under the guise of

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257. 771 So. 2d 429 (Ala. 2000).
258. *Id.* at 433 (citations omitted).
259. 755 So. 2d 721 (Fla. 4th DCA 1991).
261. See, e.g., Gen. Cinema Beverages of Miami, Inc. v. Mortimer, 689 So. 2d 276 (Fla. 3d DCA 1995).
262. *Shaw*, 755 So. 2d at 724.
a tort claim or through one of the other alternatives available to courts.

First and foremost, there must be a duty to preserve or maintain the evidence. In the absence of such a duty, a party who fails to preserve or which disposes of evidence is not a wrongdoer, because individuals have an absolute right to preserve or destroy their own property as they see fit in the absence of a legal prohibition. Such a duty must be a requisite regardless of whether the remedy under question is potential liability under tort or merely a sanction in pending litigation. In either case, the parties legal rights are being affected and therefore must be subject to the same due process protections.

Secondly, the precise spoliation remedy permitted should also be dependent upon the degree of culpability or scienter of the party disposing or failing to preserve the evidence in question. In the absence of willful and intentional conduct specifically designed to thwart another party’s legal rights or to obtain an improper advantage in legal proceedings, the guiding principle behind the remedy should be limited to compensating the injured party for the missing evidence so that it would be in the same position had the evidence been maintained. As such, the victim of an unintentional spoliation is not entitled to being placed in a superior position, nor is the nonmalicious spoliator subject to a penalty in the form of incurring a greater legal burden.

Where the spoliator’s actions are intentional or malicious in nature, however, other policy considerations come into play. Under these circumstances, a much stronger inference arises from such calculated conduct and it is also appropriate to punish the wrongdoer for its conduct and to seek to deter others from similar actions.

In many ways, focusing the scope of the remedy upon the degree of intent or scienter of the spoliating party is similar to the conceptual framework underlying the distinctions between compensatory and punitive damages in tort law. In the tort context, an actor whose conduct negligently injures another is liable only for compensatory damages designed to place that individual back in the same position it would have been in but for the negligent infliction of the injury. Where, however, a defendant is guilty of intentional, willful or reckless misconduct, punitive damages are allowed to both punish the wrongdoer and to deter others from similar conduct. This same analogy applies equally to spoliation remedies, whether they be in the form of a separate cause of action or one of the alternative remedies.

Third, spoliation remedies should only come into play, particularly when dealing with unintentional and nonmalicious actions, when there has been a significant and measurable harm created by the loss of the evidence. Early cases limited spoliation remedies to those circumstances where the missing evidence literally prevented the plaintiff from establishing a prima facie case. 264 By its very nature, the effects of spoliation are generally speculative. As observed by the United States Supreme Court in Youngblood, 265 when attempting to determine the effect of missing evidence, “courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.” Therefore, regardless of what type of spoliation remedy is under consideration, a high threshold of injury is important to justify the necessary degree of speculation inherent in such claims. Once again, however, where the actions of the spoliator are intentional, a much lower threshold is required.

Finally, in considering spoliation remedies, courts should also require the use of the least drastic alternative, particularly where the spoliation is unintentional in nature. Discovery and evidentiary rules generally provide courts with considerable discretion in fashioning sanctions and remedies for discovery problems and abuses. These rules are designed to cause the least damage to the parties’ right to due process and trial by jury. In creating spoliation remedies, courts should always be cognizant of the parties’ constitutional rights to due process, trial by jury, and the lawful use of their property.

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264. See, e.g., Pub. Health Trust v. Valcin, 507 So. 2d 596 (Fla. 1987); Hernandez v. Pino, 482 So. 2d 450 (Fla. 3d DCA 1986).