



THE WEAPONIZATION OF THE SPOILIATION OF EVIDENCE DOCTRINE

*The creation of liability
or punitive damages
claims where none
otherwise exists*

John Pion and Stephanie Hersperger Pion, Nerone, Girman, Winslow & Smith, P.C.

THE SCENARIO: DEFENDING A CLAIM THAT ONLY EXISTS BECAUSE OF SPOILIATION

For anyone defending against claims or lawsuits, we all have had those occasions where we look at the facts, whether they relate to a product, a premise, a contract, or a motor vehicle accident, and reasonably believe there is no liability. But, as the case develops, evidence lost or misplaced opens the door for applying the Spoliation Doctrine, and suddenly, there is a monumental shift in the liability analysis.

WHAT IS THE SPOILIATION DOCTRINE?

“Spoliation” generally means the destruction, concealment or the failure to preserve evidence by one party that is relevant to a claim and hampers the other party’s ability to advance its position. The

“Spoliation Doctrine” essentially permits a court to impose sanctions and remedies for spoliation of evidence.

HOW HAS THE SPOILIATION DOCTRINE TRADITIONALLY BEEN UTILIZED?

This legal doctrine is well-established and has been utilized by various Courts for hundreds of years. The Supreme Court of the United States addressed this issue as early as 1817 in the context of a ship’s captain throwing papers overboard and the impact of this under the Spanish Treaty of 1795. *The Pizarro*, 15 U.S. 227 (1817). In more modern times, this doctrine often has been used as a defense in products liability cases where the alleged defective product was not preserved, which prejudiced the defense in determining whether it was

defective and caused the alleged injuries. *Schroeder v. Com., Dep’t of Transp.*, 710 A.2d 23 (Pa. 1998) (affirming summary judgment in favor of the defendants due to the plaintiff failing to preserve an allegedly defectively designed product).

HOW IS THE SPOILIATION DOCTRINE CURRENTLY BEING UTILIZED?

While the Spoliation Doctrine often has been used as a “shield” in products liability cases, in recent years, it is increasingly being used as a “sword” by claimants or plaintiffs in all types of cases, involving all types of evidence, including electronic data. Electronic evidence includes surveillance video, data in vehicles or trucks, and metadata on computers. Courts will apply this Doctrine to just about “anything” that is relevant to the claim and should have been

preserved but was not, and the failure to preserve prejudices the other party.

HOW THE FAILURE TO PRESERVE EVIDENCE MAY PROVIDE THE OTHER SIDE WITH ENOUGH AMMUNITION TO KEEP ITS LIABILITY OR PUNITIVE DAMAGES CLAIM "ALIVE."

In an increasing number of cases, where there arguably are few or no facts to support liability, plaintiffs have been able to overcome this by pointing to alleged spoliation of evidence that has allegedly prejudiced them. As a sanction for the spoliation of evidence, the court will allow an otherwise legally or factually deficient case to proceed and may even instruct the jury that it may, or must, infer that the missing evidence is harmful to the defense.

Consider a recent premises liability case in Pennsylvania where the court denied the defendant store's motion for dismissal based on spoliation, despite the fact that the store's video surveillance was not in a location to capture the fall. The plaintiff fell in a store on a large puddle of water. This was not in dispute. What was in dispute was how the water ended up on the floor and how long it was there. In other words, did the store have notice of this allegedly dangerous condition?

After the fall, the plaintiff's attorney asked the store to retain and save all surveillance video from the date of the fall. For some unknown reason, the video was not preserved. After discovery in the case, the store moved for dismissal of the plaintiff's claims, with one of the bases being that the plaintiff failed to produce any evidence to show the store had notice of the puddle. In denying the store's motion, the court decided it did not even have to consider whether the store had notice because it had spoliated evidence, and as a sanction, the court would sanction the store with a permissive adverse inference, i.e., that the jury may find that the store's failure to preserve the video means it must have been harmful to the defense. The court did not explain what relevant evidence the video could have revealed, but instead focused on the fact that the plaintiff requested that the video be preserved, but the store failed to do this. The court inferred bad faith from this. The fact that arguably non-relevant store surveillance video was requested, and not preserved, got the plaintiff past the dismissal stage so that she was permitted to proceed to trial. Without this purported spoliation, the store likely would have prevailed. This is an example of alleged spoliation creating liability where it likely otherwise would not exist.

Claimants and plaintiffs' attorneys not only are using spoliation to create liability, where there otherwise may be none, but to support punitive damages claims, i.e., that the defendant's conduct was reckless or outrageous so that it should be punished. For instance, in another recent case, the court found that the defendant transportation logistics company had intentionally failed to preserve metadata from its system used to provide routes to drivers for independent motor carriers. One of the drivers arguably exceeded the applicable hours of service permitted by the Federal Motor Carrier Safety Regulations, and while doing so, hit a van, killing and injuring several of its occupants.

The issue arose of whether someone had changed the electronic data on the routing system to show that the driver was within the hours of service. The plaintiff argued that it possibly could have determined the identity of this person from metadata on the computer system being utilized by the logistics company. It was unclear whether the data that was not preserved would have shown this. More importantly, the type of metadata at issue was not routinely backed up on the system, and it was not specifically requested to be preserved by any party. Regardless, the plaintiff argued that the lawsuit was foreseeable to the logistics company, so it was entitled to an adverse inference. The court agreed, and in doing so, found that the company intentionally or grossly negligently failed to preserve the data. Once the court's finding of intentional conduct was made, the plaintiff used this to support a punitive damages claim against the logistics company.

WHAT CAN YOUR BUSINESS DO TO AVOID SPOLIATION?

You may not be able to prevent all claims of spoliation. However, there are steps you can take to lessen the chance, and success, of such claims:

- Your company should have a retention policy, including a policy or procedure, to ensure the preservation of data and other evidence when there is a possible claim.
- Examine your company's retention policy, if you have one, to determine if it needs to be updated and is reasonable. Where your company is located, where you do business, or other laws or regulations, may impact what should be preserved and for how long.
- Make sure to follow your company's retention policy. If you want to deviate from it for some reason, seek counsel on whether this may be harmful.

- Educate your employees on your company's retention policy so that there is no question what should be done if they are presented with a claim or notice of an accident.
- If there is an accident or a claim, determine as soon as possible what type of evidence may be relevant and which a party may seek. Time is of the essence. When in doubt, seek legal counsel to assist with this.
- Do not assume that persons in possession of possible evidence employed by your company, or within your company, know to preserve evidence, or are doing so. When there is a possible claim, double check to make sure possible evidence is preserved.
- If you receive a preservation letter, consult with your legal department, or counsel, as soon as possible to determine what is demanded, what is reasonable to preserve, and how you should respond to the preservation request.
- Re-evaluate your company's retention policy on a regular basis to ensure that it is still reasonable.

Obviously, you cannot always predict how an opposing party may attempt to use the Spoliation Doctrine against you or your business. But being aware of its existence, and considering it when there are any claims, is a first step to ensuring it is not used to create liability or a punitive damages claim against you, where one otherwise does not exist.



John Pion is a founding shareholder of Pion, Nerone, Girman, Winslow & Smith, P.C. in Pittsburgh, Pennsylvania. He focuses on transportation defense and is the past chairman of the American College of Transportation Attorneys and a former chairman of the USLAW Transportation Group. John can be reached at jpion@pionlaw.com.



Stephanie Hersperger is a shareholder of Pion, Nerone, Girman, Winslow & Smith, P.C., who practices out of its Harrisburg, Pennsylvania, office. She has a diverse litigation practice but focuses on writing on complex legal issues and appeals. Stephanie can be reached at shersperger@pionlaw.com.