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Spoliation in South Carolina

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Spoliation is the destruction of evidence which one might otherwise have expected to have been relevant to a case. Although not technically the same, the doctrine is similar to one that presumes that an expected, available witness who is not called to testify would have said something unfavorable. *See Ex parte Hernlen*, 153 S.E. 133, 134 (S.C. 1930). However, unlike that theory, which requires that the witness be available, spoliation involves evidence which is specifically *not available* to either party. The presumption does not arise from the failure to present the evidence, but from the role that the party had in preventing it from being reviewed by the jury or court.

Spoliation in State Court

The courts of South Carolina have long recognized that a party is entitled to favorable presumptions about the contents of missing evidence when an opponent is responsible for the destruction of evidence which might otherwise be expected to have been relevant. In a pair of very early cases, the South Carolina Court of Appeals hit upon the policy for the rule: presumptive prejudice to the other party. While spoliation cases in South Carolina have been few and far between, the reasoning of the early cases remains true today.

First, in *Halyburton v. Kershaw*, 1810 WL 298 (S.C. Ct. App. 1810), a carpenter contracted to build a house for £800 for Mr. William White who paid a £500 advance. Before the house was built, Mr. White died. The plaintiff was to inherit Mr. White's land while another relative was to receive the balance of the estate. The decedent's administrators improperly canceled the construction contract and received a refund of the £500 advance. The plaintiff sued, claiming that, had the administrators not canceled the contract, he would have had a house worth £800 on his inherited property; because the contract was canceled, the value of the contract (i.e., the refunded £500) would pass to the other beneficiary.

The administrators admitted in their answer that a contract had once existed but asserted that they had canceled it and destroyed the actual paperwork. They argued that their admission about the one-time existence of the contract was inadmissible against the estate. But, even if the admission of a contract's existence could bind the estate, the administrators claimed that there was no longer a source of sufficiently detailed information about the terms to enforce it.

On appeal, the court sided with the plaintiff. First, the court observed that the admission by the administrators could, indeed, be held against the estate and that their admission itself provided enough details to enforce the contract. The court further noted that the plaintiff would have been entitled to a *presumption* regarding the agreement if further details had been necessary: "For the administrators having under a mistaken idea cancelled and destroyed the evidence of the contract of which the complainant claims the benefit, and to the use of which he would have been entitled, in order to support his claim . . . would be stript [sic] by this objection of the only means of establishing the facts, upon which his claim rests; without any default on his part, and by the act of the defendants. This would be too mischievous in its effects to be allowed to prevail." *Id.* at *4. Even though the administrators had not acted maliciously, "[t]he Court will

go very far in presuming against those who destroy papers and instruments necessary to the security or elucidation of the rights of others, *in odium spoliatoris*, as it is expressed. I do not apply that phrase to these defendants: they are good men, who acted unadvisedly, and not wilfully wrong; but the effects of that error are the same to the complainant. And he would be entitled to the benefit of all the presumptions *which could reasonably be raised out of the circumstances* for his benefit." *Id.* (emphasis added).

In other words, even absent any purposeful misbehavior, the court would have been willing to justify a negative presumption. The absence of the evidence meant that the other party was hamstrung in the proof of his own case. The intent to hide favorable information is not a necessary element for the presumption.

A short time later another case, *Executors of Blake v. Lowe*, 1811 WL 319 (S.C. Ct. App. 1811), involved a spoliator with less pure motives but established some limits of the reach of the presumption. In *Blake*, the decedent bought the contents of a jewelry store owned by his friend, the defendant, at a sheriff's sale at far below their real value. The decedent apparently wanted to rectify his windfall later; he made a gift, to take effect upon his death, back to the defendant of the assets which he had bought at such a low price at the sheriff's sale. When the decedent died, the defendant acted upon the gift and seized all of the contents of the store.

The executors of the estate sued, claiming that the defendant had taken not just those things which had been acquired below cost at the sheriff's sale but much more – property that was not included in the gift and that should have gone to the estate for distribution. Moreover, the defendant had taken the books from the store and torn out pages, making an accurate computation of the difference between the value of the goods taken and the value of the gift difficult, if not impossible.

The Court of Appeals wrote: "[I]f there was any difficulty in discriminating, it arose solely from the unjustifiable and illegal act of [the defendant] in taking possession of the whole shop and all its contents; and in taking the books of the shop and in cutting out the leaves, and so destroying the evidence which would have thrown light on the case. That *in odio spoliatoris omnia presumuntur*; and that [the defendant] should be made liable to the utmost extent that the Court could do it." *Id.* at *2. The court continued, "There is no doubt that the conduct of [the defendant] was highly unjustifiable; and considerable indignation is excited by his conduct in this respect, as well as in his taking the books and cutting out some of the leaves." *Id.* at *3.

While the *Blake* court was willing to create an unfavorable presumption, it refused to enter an *unjustifiably* negative presumption based on the defendant's acts: "[W]e must not permit our resentment against the acts of the spoiler to lead us to do injustice even to him." *Id.* Instead, the court explained, "There must be *some ground* to act upon in our presumptions." *Id.* (emphasis added). In that case, the court was convinced that the defendant had destroyed store records, but the court was not convinced how great the difference between the property removed and the intended gift had been. The only testimony of the value of the store's contents had been a "mere guess" by a shop manager. *Id.* Moreover, the court questioned whether the decedent had even ever had *any* jewelry that was not traceable to the jewelry purchased from the defendant: "What [the decedent] bought was carried back to the shop. [The decedent] was not a jeweller;

there is no proof that he ever bought any other jewelry, or ever dealt in that way." *Id.* The court continued: "If I had any reasonable doubts on this subject, I should have great difficulties how to discriminate. In that case I should presume much against him, if that presumption would lead to any fair and certain conclusion. But I confess I have not much doubt. I cannot therefore, because a man has behaved very ill in getting possession irregularly of the goods, make him liable beyond what I really believe him to be, as a punishment of his injustice." *Id.* (emphasis added).

The requirement that there be at least *some reason* to suspect that the destroyed evidence would have been favorable in the first place avoids what would otherwise be a self-fulfilling illogical rationale: Plaintiff is entitled to a presumption that the evidence would have been favorable because Defendant destroyed the evidence, and one must presume that it was destroyed because it was unfavorable. As a result, one should be prepared to show that there was at least *some reason* to think that the evidence not only could have been helpful in a metaphysical sense, but that it truly would have been helpful.

While the common law continues to provide for a punishment for spoliation, more recently, litigants have made use of the Rules of Civil Procedure. In *Kershaw County Board of Education v. United States Gypsum Co.*, 396 S.E.2d 369, 372 (S.C. 1990), for example, the school board sued the manufacturer of the ceiling plaster in many of Kershaw County's schools, alleging the plaster contained asbestos. The trial court ordered the manufacturer to be notified prior to any asbestos removal. Despite this order, the school board did not notify the manufacturer before asbestos abatement was conducted at one of its schools, so the manufacturer moved for judgment in its favor on the claims related to that school.

Rather than simply seeking a favorable presumption based on the destruction of the evidence, the manufacturer moved to dismiss the claims related to the one school whose asbestos had been removed in violation of the court's order. The manufacturer cited Rule 37 of the South Carolina Rules of Civil Procedure, but the court rejected the idea that dismissal would have automatically been appropriate:

> Judge Smith's order was drawn to facilitate discovery . . . . Although the order itself contains no provision regarding sanctions, as a discovery order, it is subject to those measures contained in SCRCP Rule 37. The relief sought by Gypsum is contained in Rule 37(b)(2)(C), which provides for failure to comply with a discovery order the sanction of "striking out pleadings or parts thereof, . . . or dismissing the action or proceeding or any part thereof . . . ." A dismissal under Rule 37(b)(2)(C) is not mandatory; rather, the trial court is allowed to make such orders as it deems just under the circumstances, and the selection of a sanction is within the court's discretion. Whatever sanction is imposed should serve to protect the rights of discovery provided by the rules . . . .
>
> We conclude that the trial judge in this case exercised appropriate discretion in denying Gypsum's motion to dismiss the claim pertaining to Camden High School. *Such a sanction would have been too severe under the facts of this case.* Gypsum has not demonstrated on appeal that the ruling was

> unreasonable, *that it was unduly prejudiced thereby*, or that a sanction of dismissal would serve to protect the rules of discovery. We believe this is particularly true in light of the fact that *there was no evidence of any intentional misconduct on the part of Kershaw or its counsel*. Accordingly, we hold that the procedure followed by the trial court in this case was appropriate.

Id. at 372 (citations omitted) (emphasis added).

Although *Kershaw County* did not turn on the common law spoliation presumption, the court's position on Rule-based penalties for the destruction of evidence is consistent with the earlier rulings on spoliation: While an inference can be argued to arise from the destruction of the evidence based on the facts of the case, the destruction of evidence itself should not automatically lead to an *unfairly* adverse presumption – in that case, a dismissal by the court. The court left the door open to a full range of penalties – from a spoliation charge to dismissal of the claim. The court observed that the traditional factors of intentional misconduct and prejudice to the other party were both relevant to the proper penalty. In the end, the court upheld a jury charge which advised that "when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party." *Id.* at 372. The party who had had possession of the evidence was given the chance to explain to the jury just what had happened, and the jury was authorized to weigh the spoliation as it saw fit.

Where the court determines that a spoliation presumption might apply in lieu of a more severe court-imposed penalty, it is for a jury to decide whether the negative inference is justified or not. For example, in *Stokes v. Spartanburg Regional Medical Center*, 629 S.E.2d 675 (S.C. Ct. App. 2006), a hospital was sued for its alleged negligence in caring for a patient who died following a surgery. During trial, the family of the decedent pointed out two pieces of medical documentation that were missing from the medical records: the results from a blood sample and a medical chart. The hospital was unsure why the chart was missing but speculated that it had been misplaced during the surgery. The hospital also believed that the blood might never have actually been sent out for testing at all.

The trial court refused to instruct the jury about spoliation, and the jury returned a defense verdict. On appeal, the Court of Appeals found that the evidence justified the request for the charge and that it had been a reversible error to refuse it: "While the jury may well have accepted the Hospital's explanations, it was also in its province to draw a negative inference from the Hospital's failure to produce those pieces of evidence." *Id.* at 678. Giving the finder of fact the ability to decide what weight to place on the spoliation is the preferred practice in South Carolina. *Karppi v. Greenville Terrazzo Co.*, 489 S.E.2d 679 (S.C. Ct. App. 1997).

Spoliation in Federal Court

The imposition of a sanction (*e.g.*, an adverse inference) for spoliation of evidence is an inherent power of federal courts and the decision to impose such a sanction is governed by federal law. *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir.2001) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991)). Much of the law regarding spoliation of

evidence is similar in South Carolina state and federal courts. For example, in both jurisdictions, there is a need for some showing that the destruction of the evidence might actually have been helpful. *See Bryte v. American Household, Inc.*, 142 Fed. Appx. 699 (4th Cir. 2005) ("Absent proof of damage, Plaintiffs are not entitled to an adverse inference instruction or to the other extraordinary remedies they seek."). Likewise, in both jurisdictions, the party responsible for the missing evidence should be given a chance to explain away the absence. *See Vodusek v. Bayliner Marine Corp.*, 78 F.3d 148, 156 (4th Cir. 1995) ("A party's failure to produce evidence may, of course, be explained satisfactorily."). Nevertheless, there are differences.

The Fourth Circuit has explained that dismissal of claims is a severe remedy which should only be used in extreme cases in which there was fault on behalf of the spoliator and in which prejudice exists. In *Silvestri v. General Motors Corp.*, a motorist sued an automobile manufacturer alleging that an airbag in his vehicle did not deploy as warranted. *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001). After the accident but before suit had even been filed, the plaintiff's lawyer hired two accident reconstructionists to examine the vehicle for a defective airbag. One of the experts for the plaintiff noted in his report that "the car has to be kept" and that "General Motors needs to see the car." *Id.* at 586. Notwithstanding the anticipation of litigation against General Motors, the plaintiff's counsel and plaintiff did not take any steps to preserve the vehicle or to notify General Motors of the existence of the vehicle and the plaintiff's potential claim. As a result, the vehicle was sold and repaired, hindering General Motors' defense, and the claim was dismissed based on spoliation.

On appeal, the Fourth Circuit defined spoliation as "the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonable foreseeable litigation." *Id.* at 590. It is "[t]he need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth" that gives rise to the court's power to sanction. *Id.* The duty to preserve material evidence arises "[n]ot only during litigation, but also extends to that period *before the litigation when a party reasonably should know that the evidence may be relevant to anticipate a litigation*." *Id.* (emphasis added).

The plaintiff contended that dismissal was too harsh, but the Fourth Circuit disagreed. A district court enjoys broad discretion to select a fitting response, which should serve the twin purposes of "leveling the evidentiary playing field and . . . sanctioning the improper conduct." *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir.1995). The range of options available to a district court includes dismissal, but such a harsh sanction should be imposed only if "a lesser sanction will [not] perform the necessary function." *Silvestri*, 271 F.3d at 590. Moreover, typically a dismissal based on misconduct is appropriate "only in circumstances of bad faith or other 'like action.'" *Silvestri*, 271 F.3d at 593 (quoting *Cole v. Keller Indus., Inc.*, 132 F.3d 1044, 1047 (4th Cir.1998)).

The Fourth Circuit agreed with the plaintiff that dismissal was severe and constituted the ultimate sanction for spoliation but explained its decision by stating, "[E]ven when conduct is less culpable, dismissal may be necessary if the prejudice to the Defendant is extraordinary, denying him the ability to adequately defend its own case." *Id.* at 593. The court recognized that the destruction of the evidence might have been merely negligent and not deliberate; therefore,

dismissal on that basis alone was not proper. On the other hand, the court determined that the prejudice to the defendant was great; it had been denied what the lower court described as the "sole evidence" in the case and would otherwise have been left relying on the few incomplete measurements taken by the plaintiff's own expert. The significance of the particular evidence to the case led the court to affirm the dismissal.

Although the Fourth Circuit did not establish any bright line test in *Silvestri* for when either the purposeful conduct of a party or the resulting prejudice would be adequate to *dismiss* a claim, the court did suggest that the standards are high:

> To justify the harsh sanction of dismissal, the District Court must consider both the spoliator's conduct and the prejudice caused and be able to conclude either (1) that the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the Defendant the ability to defend the claim.

Id. at 592.

Although the *Silvestri* court expressed the bases for the rule in the disjunctive, the court also wrote that there must be at least *some showing* of fault by the spoliator. *Silvestri*, 271 F.3d at 590 ("[A] court must find some degree of fault to impose sanctions."). An adverse inference cannot be drawn merely from one's negligent loss or destruction of evidence. Instead, "the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction." *Vodusek*, 71 F.3d at 156.

Where the prejudice has been severe, the court may very broadly define "fault" to justify even remedies as strong as dismissal. *See Silvestri*, 271 F.3d at 593 ("[S]ometimes even the inadvertent, albeit negligent, loss of evidence will justify dismissal because of the resulting unfairness . . . ."). In one recent unpublished opinion, the Fourth Circuit showed just how broadly it would construe fault in spoliation cases. In *King v. American Power Conversion Corp.*, 2006 WL 1344817, *2-3 (4th Cir. May 17, 2006), a store and its principals brought a products liability suit against the manufacturer of an uninterrupted power source (UPS) unit, which allegedly caused a fire that destroyed the store. Following the fire in the plaintiffs' store, three people, including two experts, examined the cause of the fire, but none was able to conclusively establish the cause. Each one suggested that the UPS unit might have been involved. The unit was removed to a storage location maintained by an expert used by the plaintiffs' insurer. Over the course of almost two years, plaintiffs' counsel reminded the insurer's expert that the unit should be saved and that plaintiffs were willing to store the unit themselves if necessary. Nevertheless, the expert's firm eventually sent a letter to the insurer without notifying plaintiffs asking for permission to dispose of the unit. The insurer gave permission to dispose of the unit. About a month later, plaintiff sued the manufacturer of the unit, but only learned that the unit had been destroyed a month after filing suit.

The defendant had the case dismissed, and the plaintiffs appealed. On appeal, the plaintiffs argued that dismissal was unfair since they had done nothing to encourage the disposal of the unit and had, in fact, tried to keep it safe. Moreover, the destruction of the unit had been

committed by the third party. Nevertheless, the Fourth Circuit was moved by the severe prejudice to the defendant and found culpability by the plaintiffs in that they failed to notify the defendant of the possibility of a claim or the location of the device.

The case is significant because it demonstrates how far the Fourth Circuit is willing to go to use spoliation to protect a defendant from prejudice. Most lawyers would agree that the plaintiffs had done nothing wrong; indeed, they had taken affirmative steps to try to preserve the evidence. Nevertheless, when the unit was nevertheless destroyed *by a third party*, the Fourth Circuit recognized a duty to affirmatively alert the opposing party of the evidence and the potential claim. While the language used in federal opinions suggests a more guarded use of spoliation and a narrower remedy, the actual application of the doctrine seems more liberally employed than in South Carolina state cases.

An interesting, unintended consequence of the Fourth Circuit's ruling might be the creation of a new tort. More and more courts have begun hearing claims for intentional spoliation as a separate compensable claim from the underlying wrong that the evidence might have proved. *See* Thomas G. Fischer, *Intentional spoliation of evidence, interfering with prospective civil action, as actionable*, 70 A.L.R.4th 984 (1989). Some states have also begun to recognize a common law tort of negligent spoliation. So far, the states which have adopted that tort have required some sort of common law duty to preserve evidence. Most frequently, those courts have found the duty in very narrow circumstances arising out of some other relationship such as a bailment. *See* Benjamin J. Vernia, *Negligent Spoliation of Evidence, Interfering with Prospective Civil Action, as Actionable*, 101 A.L.R.5th 61 (2002). South Carolina has not weighed in on either form of action, and the Fourth Circuit has noted in passing that substantive claims for spoliation do not exist, *Silvestri*, 271 F.3d at 590 ("[T]he acts of spoliation do not themselves give rise in civil cases to substantive claims or defenses."). Still, it is possible that the Fourth Circuit's recognition of a common law duty to make sure that an opponent has a fair chance to review and perhaps preserve evidence might well become the toehold for such claims when the facts are finally litigated in the state courts in South Carolina.

Conclusion

A lawyer in South Carolina who has had potentially helpful evidence misplaced or destroyed by an adverse party should seek relief from the court. As an initial matter, a lawyer must be prepared to make a showing that the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder. Assuming that the evidence could have been helpful, the lawyer must then convince the court that some action by the adverse party justifies a presumption that the evidence actually would have been helpful.

Neither the state nor federal courts provide relief where the loss was simply negligent (e.g., the loss of documents caused by a flooded basement). But, where the conduct was intentional (whether or not the destruction was malicious), a lawyer should certainly ask to have the court instruct the fact finder that the absent evidence could be presumed to have been helpful to the lawyer's position. Where the conduct was not only intentional *but also* malicious, the actions of the adverse party should be highlighted as an additional reason for a negative presumption.

Fault plays a greater role in the federal analysis, but the lawyer seeking the assistance of the court should not be intimidated. Despite the strict language used in federal opinions, one is perhaps even more likely to receive judicial assistance in a federal case given the scope of conduct amounting to fault.

Lastly, if the destruction of the evidence ran afoul of a court order, the lawyer should seek affirmative, pretrial relief from the court in the form of a dismissal if either prejudice or intentional actions can be established.