Arm Your Client

Using Spoliation as a Sword in Litigation Defense

By Megan S. Peterson and Alexandra Celio

In litigation, defendants are often faced with threats of spoliation sanctions or claims by plaintiffs' counsel. Allegations that the defense has either failed to retain evidence or suspend routine document retention protocols lead to discovery issues, which ultimately may affect the value of the case. In many instances, these allegations arise long after defense counsel had any opportunity to prevent the evidentiary loss in the first place.

But the door for preservation and spoliation of evidence swings both ways. Plaintiffs have an equal duty to preserve evidence and are often the only gatekeepers of the evidence that could prove beneficial to the defenses or counterclaims at issue in the litigation. Taking steps to enforce a plaintiff's duty to preserve evidence can result in evidentiary rulings in favor of the defense, refocus the issues, and affect the underlying value of the case.

Physical Evidence. The most often litigated spoliation claim against a plaintiff involves the physical evidence that is the subject of the lawsuit, typically a vehicle or premises involved in a loss. As the Fourth Circuit has explained, "[t]he duty to preserve material evidence arises not 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 anticipated litigation." *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir.2001) (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir.1998)). Even if the party does not control the evidence, that party nevertheless must provide notice to the interested parties about how they may access the evidence and the potential for destruction. *Id.* Thus, the plaintiff has a duty to preserve the evidence or advise the defendant of the evidence's location and the possibility that it may be lost. *Id.* at 592.

In *Silvestri*, the United States Court of Appeals for the Fourth Circuit affirmed the severe sanction of dismissal in a case in which the plaintiff failed to preserve the vehicle at the heart of a product liability claim. *Id.* at 595. After the accident, the plaintiff retained the vehicle for over three months and had two experts inspect the vehicle, each of whom recommended that the manufacturer, General Motors, be allowed the opportunity to inspect the vehicle. *Id.* at 586. The plaintiff allowed the vehicle to be lost in the interim and did not notify General Motors of the claim until three years later when suit was filed. *Id.*

Similarly, in *Perez-Velasco v. Suzuki Motor Co., Ltd.*, 266 F. Supp. 2d 266, 269 (D.P.R. 2003), the plaintiff sold the vehicle allegedly subject to a manufacturing defect. The court noted that the plaintiff had a duty to advise the potential defendant of the evidence and that it might be destroyed once handed over to the third party. *Id.* at 268. The court did not dismiss the case, finding that the conduct was merely negligent, not reckless, but excluded the report and testimony of the plaintiff's expert, the only person who had previously inspected the damaged vehicle. *Id.* at 269.

Sanctions of an adverse jury instruction can also be appropriate against a plaintiff when the physical evidence at the heart of a case is lost. In *Arch Ins. Co. v. Broan-NuTone, LLC*, 509 Fed. Appx. 453, 456 (6th Cir. 2012), the property at issue was damaged in a fire. Experts inspected the property and determined that a fan and light assembly was the probable cause, but before further and more conclusive testing could be performed, the assembly was destroyed. *Id.* The Sixth Circuit affirmed the trial court's jury instruction, allowing the inference that "further testing would have disproved Plaintiffs' causation theories." *Id.* at 455 n.1.

Facebook and Other Digital Evidence. Plaintiffs often control not only the physical evidence at the heart of their claim, but they also control the circumstantial evidence that can be used to defend the case properly. Such evidence can include photographs and video, particularly of the plaintiff's condition or impressions of the claim. When the plaintiff has such evidence and destroys it, spoliation sanctions may be appropriate.

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In *Mercado Cordova v. Walmart Puerto Rico, Inc.*, CV 16-2195, 2019 WL 3226893, at *4 (D.P.R. July 16, 2019), the U.S. District Court for the District of Puerto Rico imposed an adverse inference sanction after the defendant showed that the plaintiff deleted her Facebook account—she previously claimed the account was closed, and she could not remember the username. The defendant moved for summary judgment, requesting dismissal. 2019 WL 3226893, at *2. The court declined to impose the dismissal sanction but granted the defendant an adverse inference due to the spoliation of Facebook data. *Id. See also Painter v. Atwood*, 2:12-CV-1215, 2014 WL 3611636, at *2 (D. Nev. July 21, 2014) (affirming a magistrate judge's spoliation sanctions in a sexual assault case following the plaintiff's destruction of social media evidence where the plaintiff deleted text messages and Facebook posts that contradicted her deposition testimony).

Medical Evidence. As with digital materials, evidence of a plaintiff's medical condition is solely in the control of the plaintiff. Spoliation sanctions may be appropriate when a plaintiff fails to submit to an independent medical examination before a surgical procedure.

In *Guzman v. Jones*, 804 F.3d 707, 709 (5th Cir. 2015), the Fifth Circuit affirmed the district court's decision denying an adverse inference sanction for spoliation, where the plaintiff had a surgical procedure before the defendant could perform an independent medical examination. The court found that the defendants "made no request to be informed of [the plaintiff's] surgery date, nor did they ask that he delay surgery pending his examination," thus, sanctions were inappropriate. *Id.* at 713. *See also Rogers v. Averitt Express, Inc.*, 215 F. Supp. 3d 510, 520 (M.D. La. 2017) (finding that the failure to advise the defense properly of the pending surgery date in enough time to allow an independent medical examination did not warrant spoliation because it was not intentional; however, the plaintiff could not argue at trial that the defense doctor's findings were less worthy because he was unable to examine the plaintiff).

Conclusion. These cases make clear that the plaintiff must preserve *all* evidence, not simply favorable evidence. Defense counsel should consider sending preservation letters to the plaintiff for physical evidence, potential cross-examination evidence (such as social media data), and medical evidence, particularly through a demand for a pre-surgical, independent medical examination. In taking a proactive approach to gathering evidence and placing the plaintiff on notice, you are better arming your client in the litigation with the sword of a possible spoliation sanction.

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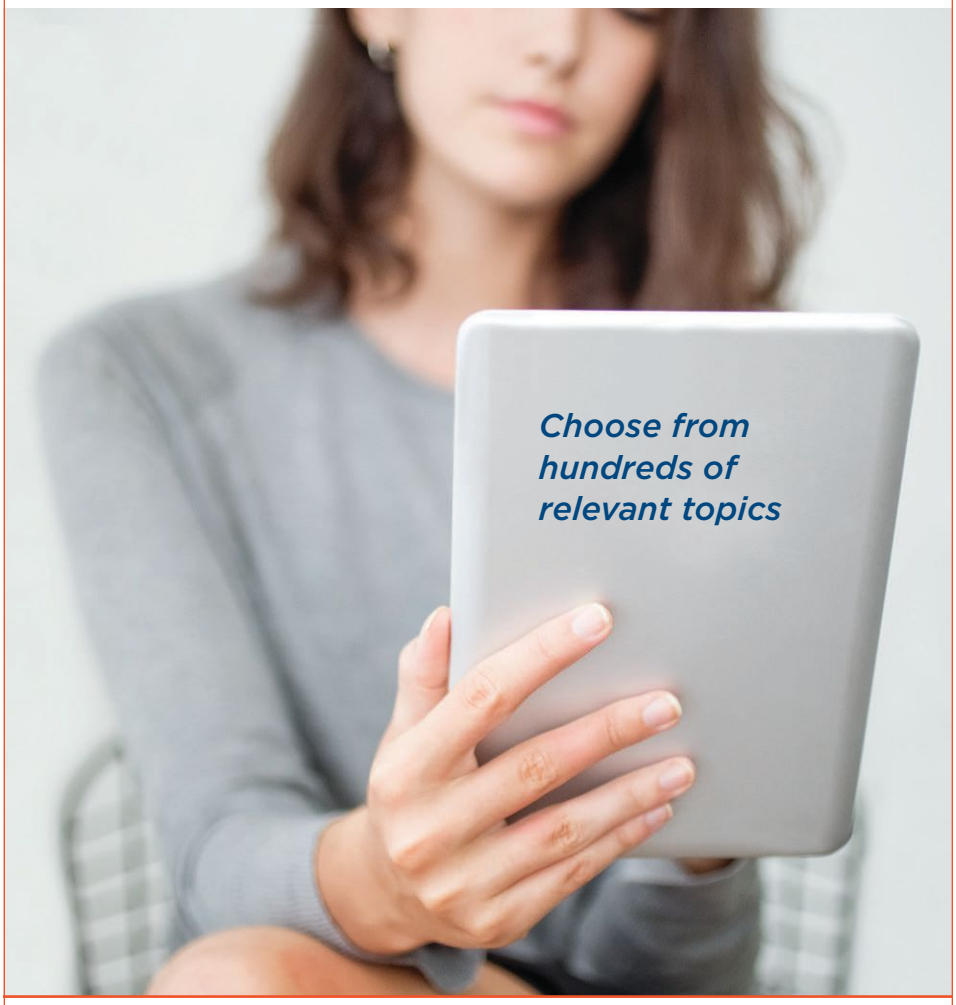

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