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Construction Law

Evidence Preservation on the Construction Job Site

BY WILLIAM H. TOBOLSKY
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The need to repair construction failures on the job site may often destroy probative evidence of fault, such as material failure, poor workmanship or design defect. In the case of fire, water damage or structural weakness, urgent repairs may be needed to protect life and property. Unrepaired defects in critical path tasks may cause substantial delay, monetary losses and contract breach by innocent parties, and may compel immediate corrective action.

When litigation due to construction failure is reasonably foreseen (and when isn't it?), the owner, project manager, general contractor or others with control over the failed element come under a duty: to notify all parties who are potentially responsible for the defect and to provide an opportunity to photograph and inspect the failed elements and to provide reasonable opportunity to obtain an expert inspection, preferably before repair. This obligation may arise from a duty to allow opportunity to cure, or from the duty to preserve evidence that is likely to be probative in reasonably foreseeable litigation. There will be difficulty in promptly notifying each of possibly several hundred contracting parties and professionals involved in the project. Strict compliance with a duty to notify prior to repair is often difficult if not impossible.

When critical evidence has been destroyed, the court must balance the rights of a litigating party to access to tangible evidence on the job site wi th the practical problems and difficulties in fulfilling the duty to preserve evidence, even if acting in good faith. The court must determine if spoliation has occurred, and the sanctions and remedies that should follow. In addition to the general case law, special considerations have been proposed for aiding in the analysis of spoliation issues on the construction jobsite.

WILLIAM H. TOBOLSKY, *founder of Tobolsky Law, focuses his practice on representing large and small businesses, nonprofits and charitable foundations in a broad array of civil litigation, including business, commercial and construction disputes, insurance coverage litigation, real estate litigation, foreclosure defense, surety and guarantee matters, construction liens and bonding issues. He may be reached at 856-428-5700 or via e-mail at wtobolsky@tobolskylaw.com.*

Though spoliation of ESI has been the procedural flavor du jour of the past decade, the doctrine is of ancient lineage. Since 1617, the English courts have held to the principle of *omnia praesumuntur contra spoliatorem* (all things are presumed against a wrongdoer), which established the remedy of an adverse inference against an intentional spoliator.

The spoliation doctrine began its modern evolution in 1959 in California's *Agnew v. Parks* and the Eastern District of Pennsylvania's *Pirocci v. Liberty Mutual*. *Pirocci* found a duty of care against the defendant, which gratuitously assumed the duty of custody of a collapsed chair and altered it. The defendant interfered with the plaintiff's reasonable expectation of economic gain from a prospective third-party suit.

The purposes of the developing law of spoliation are to achieve the following:

- Restore the parties to a level playing field as nearly as possible as if the destruction of evidence had not occurred, or to make the non-spoliator whole;
- Punish the intentional or reckless spoliator; and
- Deter the spoliator and others from future destruction of evidence.

These purposes inform the rich brew of fact-sensitive considerations that guide the courts in sculpting remedies for spoliation.

Remedies are available to the courts either under the discovery rules or as sanctions within the inherent powers of the court. Remedies in the underlying litigation include the following:

- A permissible inference against the spoliator;
- A presumption of fact against the spoliator;
- Taking certain facts as conclusively established;
- Preclusion of evidence, such as an expert report when the adverse party does not have the same opportunity to inspect the allegedly defective work;
- Dismissal, default or other dispositive remedy;
- Permitting a separate, bifurcated proceeding against a spoliator for damages caused by the destruction of evidence, including additional litigation costs and attorneys fees occasioned by the loss of evidence and any consequent inability to prove damages in the underlying proceeding; and
- A subsequent damages action against the spoliator.

Some jurisdictions also recognize causes of action for intentional spoliation, by name or subsumed under the tort of fraudulent conceal-

ment. A few jurisdictions recognize a claim for negligent spoliation, either as a stand-alone tort or as a species of general negligence. See *Elias v. Lancaster*, a 1998 Pennsylvania case recognizing a claim for general negligence resulting in the destruction of evidence (pacemaker wires). Sanctions against offending attorneys and prosecution for obstruction of justice may also ensue, particularly where there is government involvement in the construction project.

As noted by the Federal Circuit this May in *Micron Tech. v. Rambus*, the duty to preserve evidence arises when litigation is reasonably foreseeable, a flexible, fact-sensitive inquiry. Some cases impose the duty once litigation is suspected.

Other decisions defer the moment until litigation appears imminent.

In determining what, if any, sanction or remedy to impose for spoliation, the court must consider a variety of factors in all cases, as well as a number of special factors in construction cases. The 2010 New Jersey case of *Robertet v. Tri-Form Const*. addresses spoliation on the jobsite in detail.

The relevant factors include:

• Fault: Was there fraudulent intention by the spoliator? Did the company preserve evidence helpful to itself and destroy incriminating evidence? Was the loss due to mere carelessness, for example, or an overzealous janitorial crew? Was destruction of the evidence necessary, as when a structure has collapsed or is near failure, or an electrical failure has caused a fire? In general, dispositive sanctions are not imposed in the absence of a fraudulent intent. Some states, such as Delaware in *Beard Research v. CB Research* (2009), generally do not impose even lesser sanctions when the spoliation is negligent or accidental.

• Harm: What is the harm to the non-spoliator? Are there documents or other evidence which could replace the lost evidence? Are there sufficient photographs to allow for a competent expert report without an actual pre-repair inspection? Have other parties obtained experts, whose materials may be used? How critical to the issues in dispute is the missing evidence? Can a surgical removal of some claims eliminate the prejudice? In construction cases, there are usually numerous parties on the site with voluminous records, specifications, sketches, daily job site worksheets and photographs. The availability of this other evidence is likely to reduce the prejudice to the adverse party.

• Contributory Fault: Is the non-spoliator partly at fault for failing to obtain the evidence? Did it timely respond to an invitation to inspect the premises prior to the repair? Did it timely issue a "litigation hold" notice to the spoliator? Once litigation has begun, did it promptly serve a demand for inspection? If the spoliator makes an inadequate response to discovery demands, did the adverse party act seasonably in protecting its rights? Delaware in particular imposes a duty on the non-spoliator to affirmatively act to protect its rights. Spoliation is a shield, not a sword.

• Lesser Sanction: Unless the sanctions are intended to be punitive, for reckless or fraudulent destruction of evidence, is there a lesser sanction that will serve to adequately level the playing field? An effective, lesser sanction will ordinarily preclude a dispositive remedy.

• Public Policy: The degree of offense to the court system and the adversary system of civil justice, as well the economical management of court dockets and the public's interest in the expeditious resolution of litigation are factors.

• Identity: Is the spoliator the plaintiff or defendant? Does the spoliation prevent the plaintiff from proving its case (which might be remedied by a suit for fraudulent concealment), or is it preventing the defendant from defending itself?

• Third Party: Was the evidence altered by a non-party? Was the alteration intentional, designed to obstruct access to evidence? Was the third party under subpoena, or had it been requested to preserve evidence for future litigation? What burden would preservation impose on the third party? Is the evidence a cracked two-by-four, or several tons of a collapsed structure or hazmat? What is the justification for interfering with a third party's right to destroy or dispose of its own property? Are we imposing more judge-made rules and inefficiency on an already strained economy?

• Discovery Date: Has the spoliation been discovered before trial? Can it be remedied by burden-shifting or corrective presumptions? Or was the verdict already rendered, making a retrial, even a bench trial, impracticable? Should the remedy be a separate lawsuit for damages arising from spoliation, or a retrial of the underlying proceeding?

• Conflict of Laws: What state's law of spoliation is to apply? Spoliation has been viewed as both substantive and procedural, and as sounding in both contract and tort. Does *lex loci* apply? Does the "governmental interest analysis" test apply, or does the "most significant contacts" test, with its presumption of site of the harm, apply?

Which state's statute of limitations applies?

Job site safety comes first. Repairs that must be made should be made, and as soon as possible. Immediate notification to everyone of a planned important repair should be made. To err on the side of notification is wise. The other contractors can decide whether to inspect or not. If litigation results, there is enormous fact-sensitive flexibility in determining whether a duty to preserve was owed, whetherit has been breached, and the remedy to apply.