WARNING!

SPOILER ALERT

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A primary principle of a products liability attorney is to always preserve the product at issue. Having litigated defects ranging from airbags to guardrails to chemical receptacles, I can confidently confirm the cogency of that credo. The absence of the product provides the defense expanded reign to fabricate alternate failure mode theories to the detriment of your case and client.

So what happens when the defendant itself fails to preserve your actual or potential evidence? This brief primer on the law humbly seeks to address this issue.

I. IS THERE A CAUSE OF ACTION FOR FIRST PARTY SPOLIATION?

Spoliation of evidence occurs when any document, object, or information that is required for discovery is significantly altered or destroyed. The Florida Supreme Court has ruled that there is no cause of action for first-party spoliation. *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342 (Fla. 2005). Instead, the Florida Supreme Court explained that sanctions, including striking of pleadings, under the Rules of Civil Procedure provide enough protection against a first-party defendant who destroys, damages, or misplaces evidence. *Jimenez v. Cmty. Asphalt Corp.*, 968 So. 2d 668, 671 (Fla. 4th DCA 2007). *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 391 (Fla. 2015).

Generally, in order to establish a claim for spoliation, a plaintiff must prove six elements:

1. Existence of a potential civil action;
2. A legal or contractual duty to preserve evidence which is relevant to the potential civil action;
3. Destruction of that evidence;
4. Significant impairment in the ability to prove the lawsuit;
5. A causal relationship between the evidence destruction and the inability to prove the lawsuit; and
6. Damages.

Gayer v. Fine Line Const. & Elec., Inc., 970 So. 2d 424, 426 (Fla. 4th DCA 2007).

"A duty to preserve evidence can arise by contract, by statute, or by a properly served discovery request (after a lawsuit has already been filed)." *Royal & Sunalliance v. Lauderdale Marine Ctr.*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004).

Establishing destruction of evidence and its detrimental impact on your client's ability to prove his or her damages is typically not where the spoliation battles are fought. Instead, the majority of spoliation claims hinge on the establishment of the duty to preserve (# 2) as the primary hurdle to overcome, which brings us to the next discussion.

II. IS THERE A DUTY TO PRESERVE IN ANTICIPATION OF LITIGATION?

a. Florida Law

i. Good Law

In *Hagopian v. Publix Supermarkets, Inc.*, 788 So.2d 1088 (Fla. 4th DCA 2001), Publix was sued for destroying a bottle that had exploded and injured the plaintiff. The store manager filled out an accident report, collected the bottle fragments, and placed them in storage. The plaintiff requested a copy of the incident report, but the manager refused. Three months after the accident, plaintiff's counsel then wrote a letter to Publix notifying the company of his client's claim, but the attorney did not request that Publix actually save the broken bottle. Several months later, the Publix store closed, and the broken soda bottle was discarded.

The plaintiff sued Coca Cola and Publix for strict liability and premises liability. Coca Cola requested that Publix produce the bottle for inspection, and Publix admitted that it had been discarded. Six years after the accident, the plaintiff also sought to inspect the bottle, and amended the complaint to add a cause of action for spoliation upon learning about the destruction.[1]

The Fourth District determined that Publix had a duty to preserve the bottle for use in *anticipated litigation* based on the fact that there was preparation of an incident report coupled with a refusal to give a copy to the plaintiff based on work product grounds. According to the court, these two facts evidenced Publix's anticipation of litigation, which made preserving the instrumentality of the injury a necessity. Therefore, the court determined that an adverse party's *duty to preserve evidence is created when that party recognizes that an adverse suit is imminent. Id. See* also*, Silhan v. Allstate Ins. Co.,* 236 F. Supp. 2d 1303, 1313 (N.D. Fla. 2002).

It should be noted that the Florida Supreme Court recently found that an adverse inference could be asserted for destruction of evidence "*even in the absence of a legal duty*." *League of Women Voters of Florida v. Detzner*, 172 So.3d 363, 391 (Fla. 2015). [Emphasis supplied]. However, despite not having a "legal duty," the defendant in *League* had acknowledged that litigation was "a moral certainty." *Id* at 378. This ruling would therefore seem to correlate with the "imminent" suit notion.

Hagopian and *League* arguably expand the duty to preserve beyond contractual and statutory obligations. However, they appear to significantly temper that requirement by implicitly requiring notice of upcoming litigation.

ii. Bad Law

In *St. Mary's Hospital, Inc. v. Brinson*, 685 So.2d 33 (Fla. 4th DCA 1996), the plaintiffs brought a claim against the hospital after their infant suffered cardiac arrest while receiving excessive anesthesia. The claim was rooted in the negligent and/or intentional destruction of evidence after it was discovered that the hospital disassembled the halo thane vaporizer used in the anesthesia machine. The vaporizer allegedly played a significant role in the administration of the anesthesia.

In its subsequent discussion of *St. Mary's,* the Fourth District Court of Appeal in *Royal & Sunalliance v. Lauderdale Marine Ctr.*, 877 So.2d 843 (Fla. 4th DCA 2004) stated that the hospital's duty to preserve evidence in anticipation of litigation had arisen out of a statutory duty. The Fourth District stated that "neither *Hagopian* nor *Brinson* [*St. Mary's*] establishes a duty to preserve evidence when litigation is *merely anticipated.* Accordingly, we find Royal's argument that there was *a common law duty to preserve the evidence in anticipation of litigation to be without merit,* and thus, we affirm the trial court's dismissal of its claim for spoliation of evidence."[2] *Royal & Sunalliance v. Lauderdale Marine Ctr.*, 877 So. 2d 843, 846 (Fla. 4th DCA 2004) [Emphasis supplied].

To add to the confusion, the concurrence in *Royal* stated that the majority had misconstrued its own *Hagopian* opinion, resulting in an ensuing misinterpretation by the *Silhan* court. Without fully dissecting the legal gymnastics conducted in that concurrence, it is sufficient to say that it does not meaningfully alter the general conclusions reached in this primer. However, it could have an impact based on specific facts of a spoliation claim – i.e., if an entity voluntarily offered to protect evidence, it could have unwittingly imposed a duty of preservation upon itself.

It should also be noted that the Third District Court of Appeal also rejected the idea that there is a common law duty to preserve evidence absent formal notice to the alleged spoliator of an *intent to file* a lawsuit. *Pennsylvania Lumberman's Mutual Insurance Co. v. Florida Power and Light Company*, 724 So.2d 629, 630 (Fla. 3d DCA 1998). *Silhan v. Allstate Ins. Co.*, 236 F. Supp. 2d 1303, 1312 (N.D. Fla. 2002).

It should be noted that the dissent in the Florida Supreme Court's earlier *Martino* decision emphasized that there was not a legally recognized duty for Walmart to maintain the defective shopping cart. And as a matter of fact, the majority did indeed gloss over the duty element, and instead focused on the fact that Walmart was aware that the specific shopping cart led to an injury. *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 348 (Fla. 2005).

Therefore, these cases indicate that mere anticipation of a potential lawsuit is likely insufficient to trigger a duty to preserve evidence in the absence of a contractual or statutory obligation.

b. Federal Law

"[F]ederal law … makes clear that a litigant 'is under a duty to preserve what it knows, or reasonably should know, is relevant [to litigation or potential litigation].' *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 127 (S.D.Fla.1987) (quoting *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F.Supp. 1443, 1455 (C.D.Calif.1984))." *St. Cyr v. Flying J Inc.*, 3:06-CV-13-33TEM, 2007 WL 1716365, at *3 (M.D. Fla. 6-12-07).

However, "[t]here is *no federal cause of action for spoliation.*" *See, e.g., Sterbenz v. Attina*, 205 F.Supp.2d 65, 74 (E.D.N.Y.2002). *In re Elec. Mach. Enterprises, Inc.*, 416 B.R. 801, 872 (Bankr. M.D. Fla. 2009), aff'd in part, 474 B.R. 778 (M.D. Fla. 2012) [Emphasis supplied].

So while a broader duty to preserve may exist under Federal Law, the execution of it is also couched in sanctions and inferences as opposed to an independent cause of action.

c. Additional Considerations

There is also potentially helpful, albeit distinguishable, authority under the workers' compensation statute and resultant case law regarding a duty to preserve in anticipation of litigation that may be triggered based on additional factors in a case. *See*, Florida Statute §440.39. ("[D]uty to cooperate also includes the duty to preserve evidence." *Shaw v. Cambridge Integrated Services Group, Inc.*, 888 So. 2d 58, 64 (Fla. 4th DCA 2004)).

III. REMEDIES

The Florida Supreme Court ruled that Florida courts may:

> [I]mpose sanctions, including *striking pleadings*, against a party that intentionally lost, misplaced, or destroyed evidence, and a jury could infer under such circumstances that the evidence would have contained indications of liability. If the evidence was negligently destroyed, a *rebuttable presumption of liability*[3] may arise … . In other words, as recognized by the Fourth District Court of Appeal, "an *adverse inference* may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence. *Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 781 (Fla. 4th DCA 2006) (quoting *Martino v. Wal–Mart Stores, Inc.*, 835 So.2d 1251, 1257 (Fla. 4th DCA 2003), approved, 908 So.2d 342); *see also Nationwide Lift Trucks, Inc. v. Smith*, 832 So.2d 824, 826 (Fla. 4th DCA 2002) (stating that "[c]ases in which evidence has been destroyed, either inadvertently or intentionally, are discovery violations" that may be subject to sanctions)."
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> *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 391 (Fla. 2015). [Emphasis supplied].

Therefore, depending on the nature of the destruction of the evidence and/or its correlation with a client's injuries, a court could strike the pleadings or impose an adverse inference/rebuttable presumption against a spoliating defendant.

IV. CONCLUSION

Florida case law is not clear regarding the trigger for preservation of evidence in the absence of a contractual or statutory obligation. In instances where the nexus between the product and the harm is more tenuous, the defense will draw a distinction with the more favorable *Hagopian* case by noting that *Hagopian* involved a single and discrete piece of evidence that related to a specific person's injury. Therefore, a much stronger argument would be made for a spoliation claim involving a destroyed product that actually failed and led to injury.

Otherwise, outside of a contractual or statutory obligation, the case law focuses on having knowledge of "imminent" or "certain" future litigation. An argument, for example, could be made that a massive recall pertaining to guardrail end-rails would be akin to a "moral certainty" to eventually result in litigation, and therefore the company should preserve certain recalled/defective end-terminals as evidence for use in future litigation. However, a court may find that to be far too broad of a standard, as it would require manufacturers to essentially retain every failed recalled product that could conceivably have safety implications.

As is evident, the rulings in the case law are more driven by the facts rather than black letter law. The closer in time to the lawsuit that the product was destroyed, the better the argument will be for the plaintiff's attorney. Essentially, the argument for spoliation is strengthened as greater notice or knowledge of impending litigation can be imputed onto the defendants. The next time a defendant fails to preserve crucial evidence in violation of its duty, a diligent plaintiff's attorney can confidently use Florida case law to spoil their fun. ■

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[1] Please note that this case came before the 2005 *Martino* opinion, which precluded first-party spoliation claims, discussed above.

[2] Other courts have also declined to expand the doctrine through *Brinson.* "It appears that the opinion could have been grounded upon a common law duty to preserve evidence due to the foreseeability of future litigation. Since it is questionable as to whether *Brinson* created a common law duty, this Court will not interpret *Brinson* so broadly." *Silhan v. Allstate Ins. Co.*, 236 F. Supp. 2d 1303, 1312 (N.D. Fla. 2002).

[3] Typically referred to as a "Valcin instruction." *See Pub. Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 597 (Fla. 1987)

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