

SPOLIATION OF EVIDENCE AS A TORT

By **Elliot H. Gourvitz**

A new cause of action has come into existence as a separate tort, for the intentional destruction of evidence, which has been dubbed "spoliation of evidence". **Black's Law dictionary** defines "spoliation" as follows:

"The destruction of evidence...The destruction, or significant and meaningful alteration of a document or instrument."

For review of the genesis and development of the idea, one must look at the California case of County of Solano v. Delancy which sets forth the elements of the tort as:

"(1) Pending or probable litigation involving

the plaintiff;

(2) Knowledge on the part of the defendant that

litigation exists or is probable;

(3) Willful, possible, negligence destruction of

evidence by the defendant designed to disrupt the

plaintiff's case.

(4) Disruption of plaintiff's case; and

(5) Damage probably caused by the defendant's acts."

In a non-matrimonial case, the Court in Viviano v. CBS, Inc.

adapted the principles above and also extended the spoliation doctrine from destruction of evidence to "concealment of evidence".

This Court then set forth the elements for fraudulent concealment which require:

(1) The defendants had a legal obligation to disclose the

evidence to plaintiff;

- (2) That the evidence was material to plaintiff's case;
- (3) That plaintiff could not have readily learned that the concealed information without defendant disclosing it;
- (4) That defendant intentionally failed to disclose the evidence to the plaintiff; and
- (5) That plaintiff was harmed by the relying on the non-disclosure. At p.123.

This trial court then concluded that as of yet there was no tort for negligence spoliation of evidence as an independent court citing **Nerney v. Garden State Hosp.**

In the later non-matrimonial case of **Hirsch v. General Motors Corp.** a more extensive analysis of the intentional tort of negligence spoliation of evidence was made, recognizing the tort

but rejecting the tort of negligent spoliation of evidence.

In **Smith v. Superior Court for the County of Los Angeles**, a car involved in a collision was immediately towed to a dealer for repairs after the accident. The dealer made an agreement with plaintiff's counsel to maintain certain parts of the van pending further investigation. The dealer thereafter destroyed, lost or transferred these parts, making it impossible for plaintiff's experts to test them. Plaintiff later sued the dealer.

The California Court of Appeals reversed the trial court's dismissal of the complaint, recognizing a new tort for intentional spoliation of evidence. The court pointed out that "new and nameless torts are being recognized constantly" and that the "common thread woven into all torts is the idea of unreasonable interference with the interests of others." The Court analogized to the tort of intentional interference with prospective business advantage and stated that a prospect civil action in a produce liability case is a valuable "probable expectancy" and that the Court "must protect from the kind of interference alleged herein."

The Alaskan Court in **Hazen v. Municipality of Anchorage**

involved the false arrest civil action and civil rights claim against a municipality wherein an owner of a massage parlor was falsely arrested for being a prostitute.

In the midst of arrest, the police taped the confrontation which clearly exculpated her from any wrongdoing. After dismissal of the criminal charges, in the civil action, the tape was found to have been altered.

The Court analogized to the tort of intentional interference with prospective business advantage and stated that a prospect civil action in a product liability case is a valuable "probable expectancy" that the Court "must protect from the kind of interference alleged herein."

The plaintiff's prospective false arrest and malicious prosecution actions were valuable probably expectancies. If the arrest tape was intentionally altered, this was an unreasonable interference with those expectancies that can be remedied at tort.

In **Miller v. Allstate Insurance Co.**, , the Florida Court once more upheld the cause of action for spoliation of evidence, which previously recognized the existence of a tort action for negligent failure to preserve evidence in civil litigation in a malpractice action.

In this case, the Court refused to distinguish between applying of the doctrine in a tort action, and that in a contract action where Allstate Insurance Co. failed to preserve an automobile for inspections by experts and instead, sold the car to a salvage yard where it was assembled and disposed of.

The plaintiffs sued in contract rather than tort, alleging that as a result of Allstate's breach of agreement to preserve the wrecked automobile for expert inspection, she was denied the opportunity to maintain a products liability action against the manufacturer.

The Court stated:

"It is now an accepted principle of contract law, nonetheless, that recovery will be allowed where a plaintiff has been deprived of an opportunity or change to gain an award or profit even where the damages are uncertain. In fact, the law of protecting changes or opportunities originated not as a tort cause of action, but rather as an action for breach of contract. This alternative theory of recovery was established under the English Common Law where the courts rejected the all-or-nothing approach and permitted recovery under circumstances where not only the amount of damages was uncertain, but also where the fact of damage remained open to question. Recovery was based not on the value of the contract; instead the value of the plaintiff's opportunity or change of success at the time of the breach became the basis for the award."

The Court noted that if the plaintiff can show by burden of proof that Allstate's interference cost her an opportunity to prove her law suit, noting that a prima facie case has already been made or products liability, then there may be recovery for spoliation of evidence.

In March of this year, in a yet unpublished opinion, the Kentucky Court of Appeals in **Reed v. Westinghouse Electric Corp.** reviewed the contention that the trial judge abused his discretion in failing to permit an amendment to the complaint to include the tort of spoliation of evidence.

Although sanctions are provided for intentional and negligent destruction of relevant evidence in Kentucky law, at the time that the judge made the decision, no case law had yet to recognize the tort of intentional spoliation of evidence, thus the trial court did not abuse its discretion in this regard.

Having already noted that, the Appellate Division remanded the case for further proceedings, and directed the trial court to allow the amended complaint alleging the tort of spoliation of evidence to be filed.

The Court specifically noted:

"Such directive action on our part will be the recognition of a cause of action for this tort to the extent of our ability to do so. We are of the opinion that the tort of spoliation is consistent with the statutory and common law of this jurisdiction."

The Court further noted:

"In recent times, with the increased frequency of acts of spoliation of evidence, such conduct must be brought to light and redressed in our courts. Our Supreme Court time and again reminds us that litigation is the search for truth for the purpose of attaining fundamental fairness of all parties. Spoliation of evidence is the undermining of the basic principles of our jurisdiction because, if truth is to be sought, spoliation of evidence is its antithesis."

The Court further quoting 75 Am. Jr. 2d Trial, par. 1

observes that:

"A trial is not a contest between lawyers but a presentation of facts to which the law may be applied to resolve the issues between the parties and to determine their rights. Nor is it a sport; it is in inquiry into the truth in which the general public has an interest. The real objective of a trial is to secure a fair and impartial administration of justice between the parties to the litigation..."

Turning to the question of damages in spoliation cases, the Court stated that there must be a first determination of whether the one party owed a "duty to the other party to preserve the evidence. This duty can arise by contract, voluntary assumption or due to a special relationship of the parties."

How many times have we as matrimonial attorneys seen evidence disappear, or refusal to produce documents? By applying the tort theory of spoliation of evidence to a matrimonial situation, we now have a distinct tool and means of relief for the non-production or destruction of documents.

If a document should exist, for instance recent stock portfolio statements, homeowners insurance floater policies, checks and checking statements; the mere non-existence of

these items when they should exist, and the guidelines set forth in **Viviano, supra**, may grant recovery of money damages in themselves.

Most, if not all, cases of spoliation of evidence are only apparent after the initial pleading have been filed and discovery has begun. Therefore, it is necessary to make an amended complaint to include the spoliation of evidence tort, to judges who you must familiarize with the concept.