

WHERE HAVE ALL THE PRODUCTS GONE? SPOILIATION OF EVIDENCE IN PRODUCT LIABILITY ACTIONS

INTRODUCTION

The preservation of evidence is of paramount concern in any case, but assumes a heightened importance in product liability actions. Without the product, the inevitable battle of the experts is often reduced to little more than speculative meanderings premised on contrived "factual" scenarios. For this reason, courts have recognized a duty to preserve potentially relevant evidence and have punished breaches of this duty. This article discusses some of the more favorable case law supporting such sanctions and is offered as a guide in drafting spoliation motions. This article does not analyze any of the cases in opposition to sanctions. Additionally, though several jurisdictions have adopted the tort of intentional spoliation of evidence, this article does not address that doctrine.

THE DUTY TO PRESERVE EVIDENCE

A party's affirmative duty to preserve the product at issue in a product liability suit arises once a party is on notice of a potential claim, even if such notice occurs before the complaint has been filed. The duty to preserve applies to any evidence a person knows or reasonably should know could be material to a subsequent product liability action. Fire Insurance Exchange v Zenith Radio Corp., 747 P.2d 911 (Nev. 1987). As the Nevada Supreme Court emphasized:

even where an action had not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action. *Id.*, at 914.

Similarly, the District Court for the Northern District of Illinois has held that:

a plaintiff is obligated, under penalty of sanctions, to preserve the allegedly defective product which it knew, or reasonably should have known, would be material in the **contemplated** product liability action. State Farm Fire & Casualty Co. v Frigidaire, 146 F.R.D. 160, 162 (N.D. Ill. 1992). (emphasis added.)

PRACTICAL IMPLICATIONS

A plaintiff's failure to preserve the allegedly defective product or other critical evidence should trigger a defense motion to dismiss or to bar evidence or testimony concerning the allegedly defective product. The arguments for dismissal are two-fold: first, the failure of proof is emphasized; absent the

missing evidence, plaintiff may not be able to establish a prima facie case. Second, the ends of justice are best served by penalizing a party for its actions or omissions that have prejudiced another party. In essence, the aggrieved party is requesting that the playing field be leveled. Both of these arguments merit treatment in a spoliation motion.

NO PRIMA FACIE CASE

Initially, plaintiff's failure to preserve the allegedly defective product or other critical pieces of evidence may thwart plaintiff's efforts to establish a prima facie case of defect. Proof of defect generally requires a showing that the product was defective when it left the manufacturer, that it remained in this defective condition at the time of the incident giving rise to the litigation, and that the alleged defect caused any resulting injuries. If plaintiff has failed to preserve the product or other critical evidence, plaintiff's proofs may fail on one or all of these elements.

The Minnesota Supreme Court's opinion in Patton v Newmar Corp. 538 N.W.2d 116 (Minn. 1995), illustrates this proof problem. Plaintiff in Patton was injured while exiting a motor home after the engine had caught fire. Plaintiff subsequently sued the manufacturer of the motor home, alleging a design defect. Although plaintiff's expert extensively inspected and photographed the vehicle, defendant's expert was denied this opportunity because the vehicle's location was unknown. Defendant moved for summary judgment and the trial court dismissed plaintiff's action.

In affirming the trial court's ruling, the Patton court commented that dismissal was not the sanction imposed for the loss of evidence; rather, "the only sanction imposed . . . was the exclusion of testimony and other evidence derived from the expert's inspection." *Id.*, at 118. The Court emphasized that:

the summary judgment of dismissal was not itself a sanction, but only the inevitable consequence of the plaintiffs' failure, without evidence of the physical condition of the product itself, to raise genuine issues of material fact with regard to their claim of design defect liability. *Id.*

Even "if the plaintiffs could demonstrate that a design defect existed at the time the motor home left manufacturer's control, plaintiff's failure to preserve the evidence eliminates their ability to demonstrate that the defect was present at the time of the fire." *Id.* Consequently, plaintiff's failure of proof required dismissal of the action.

SANCTIONS FOR PREJUDICE SUFFERED BY THE NON-SPOLIATOR

Even assuming, however, that plaintiff can establish a prima facie claim premised on circumstantial evidence, plaintiff's actions or inactions may warrant sanctions because of their adverse affect on the defense of the case. The Seventh Circuit articulated the potential prejudice inuring to a party in an automotive product liability action if the car were not preserved:

[t]he car itself may be the best witness about conditions at the time of the accident. Strong forces leave telltale signs in physical objects, signs that can be read by people who know what to look for and have the right instruments. Pries v Honda, 31 F.3d 543 (7th Cir. 1994).

Although various courts emphasize different factors in determining whether to impose sanctions, the common thread in all decisions is an analysis of the prejudice suffered by the non-spoliator from the loss or destruction of evidence. Absent any showing of prejudice, sanctions generally will not be imposed.

In fashioning an appropriate sanction, courts should consider whether plaintiff's breach of its duty to preserve evidence has "deprived [defendant] of the ability to establish its case." Allstate Ins. Co. v Sunbeam Corp., 53 F.3d 804 (7th Cir. 1995). In Sunbeam Corp., plaintiff insurance company filed a product liability action as subrogee of its insured against the manufacturer of an allegedly defective gas grill. Plaintiff contended that the grill caused the fire that led to the loss. Shortly after the fire but before the complaint was filed, the insurance investigator and an engineer inspected and photographed the scene, but could not determine the sole cause of the fire. Despite this, they saved only a portion of the grill. The remaining portions, including the grill frame, side burner, and a second propane cylinder, were discarded. *Id.*, at 805.

After defendant learned about plaintiff's failure to preserve "significant physical evidence," it filed a motion for sanctions premised on plaintiff's spoliation of evidence. The magistrate judge concluded that defendant had been "irremediably prejudiced because it was deprived of what might have been convincing evidence" of an alternative theory of the fire's origin. *Id.* at 806. Consequently, the court barred the plaintiff from presenting expert testimony concerning the alleged grill defects, thus prompting dismissal of the action.

Similarly, in American Family Ins. Co. v Village Pontiac GMC, Inc., 223 Ill.App.3d 624 (2nd Dist. 1992), plaintiffs transferred title to their automobile insurer before filing a complaint, but without taking steps

to preserve the car for inspection, despite their belief that the fire which destroyed their home originated in the car. The car was subsequently destroyed by a salvage company. Consequently, the court barred all evidence, both direct and circumstantial, concerning the condition of the car, and granted summary judgment for the defendant. The court believed this was an appropriate sanction because the "plaintiffs intentionally allowed the most crucial piece of evidence in this case to be destroyed." *Id.*, at 627.

Similar reasoning was applied by the Sixth Circuit in Welch v United States, 844 F.2d 1239 (6th Cir. 1988). In Welch, defendant doctors removed a portion of plaintiff-decedent's skull following an operation and discarded it, rather than sending it to the pathology lab. The Sixth Circuit recognized that an examination of the skull bone flap would have proved or disproved the crucial issue in the case, and, quoting from National Ass'n of Radiation Survivors v Turnage, 115 F.R.D. 543, 557 (N.D.Cal. 1987), concluded that:

[w]here one party wrongfully denies another party the evidence necessary to establish a fact in dispute, the Court should draw the strongest allowable inferences in favor of the aggrieved party.

Finally, in Stubli v Big D Intl Trucks, Inc., 810 P.2d 785 (Nev. 1991), the Nevada Supreme Court held that dismissal of plaintiff's product liability action was the appropriate sanction where plaintiff's attorney and his expert had authorized the sale of the trailer prior to the filing of the complaint, but before any examination by defendants. Plaintiff claimed that the allegedly defective design and repair of the suspension system had caused the accident. Given the plethora of expert testimony showing that plaintiff's theory could be proved or disproved only by an examination of the lost evidence, plaintiff's agent's actions had effectively thwarted the defense of the case and warranted dismissal of plaintiff's action. *Id.*, at 788. "A lesser sanction," the court observed, "will not compensate for that loss." *Id.*

THE EXISTENCE OF PHOTOGRAPHS DOES NOT PRECLUDE SANCTIONS

Although some courts weigh the existence of photographs of the allegedly defective product heavily against dismissal as a sanction, photographs alone may not be sufficient to stave off severe sanctions.

In particular, the Alabama Supreme Court concluded that photographs were a poor substitute for an expert inspection. Capitol Chevrolet, Inc. v Smedley, 614 So.2d 439 (Ala. 1993). Reversing a judgment for the plaintiff, the Court held that the trial court abused its discretion in not dismissing the

case after the allegedly defective van had been "irreparably lost" by plaintiff. Although plaintiff's expert had taken photographs, the Court believed they were insufficient to overcome the prejudice to defendant where defendant's own expert could not examine the van.

Additionally, in Jackson v Nissan Motor Corp., 121 F.R.D. 311 (M.D.Tenn. 1988), the court granted defendants' motion to dismiss because plaintiff's attorney's "fail[ure] to take simple, reasonable steps to secure the most important piece of evidence in the case" resulted in the destruction of the car. *Id.*, at 321. Plaintiff's attorney neither informed defendant's attorney of the location of the car nor ensured the car's safety. Although photographs of the car had been taken by plaintiff's expert, the court concluded that lesser sanctions were not feasible in this context, where, even assuming the existence of a design defect, defendants had been denied the opportunity to challenge the causation issue. *Id.* at 323.

THE ABSENCE OF BAD FAITH DOES NOT INSULATE A PARTY FROM SANCTIONS

In some jurisdictions, even the absence of bad faith cannot insulate a party against sanctions for the spoliation of evidence. The reasoning underlying this approach, succinctly stated by the Michigan Court of Appeals, is that the non-spoliating party suffers the same prejudice whether the evidence was destroyed negligently or in bad faith. Hamann v Ridge Tool Co., 213 Mich.App. 252 (1995).

Although some jurisdictions consider the culpability of the spoliator and the appropriateness of lesser sanctions, such considerations do not *ipso facto* preclude dismissal of a claim because of spoliation. Bachmeier v Wallwork Truck Centers, 544 N.W.2d 122 (N.D. 1996).

In Bachmeier, the North Dakota Supreme Court held that the absence of an allegedly defective part mandated dismissal of plaintiff's action because it deprived defendant of its best defense. Bachmeier, *supra*, at 124. Plaintiffs sued PACCAR, alleging strict product liability, negligence and breach of warranty after their son died in an accident while riding as a passenger in a truck manufactured by PACCAR. Plaintiffs contended that a fracture of the truck's right front hub had caused the accident.

Before filing suit against PACCAR, plaintiffs settled with the owner of the truck. The owner's insurer subsequently told its expert that he could dispose of all parts in his possession, including the hub. The expert complied. Consequently, the hub was unavailable in the subsequent suit. Upon learning this, PACCAR moved for summary judgment, contending that plaintiff's failure to preserve the hub precluded plaintiff from establishing a prima facie case and resulted in "unreasonable prejudice" to defendant by

denying defendant an opportunity to examine the allegedly defective hub.

The district court granted defendant's motion, explaining that without the allegedly defective hub, defendant would be deprived of its "lack of lubrication" defense. Although the Supreme Court initially remanded the case for reconsideration, holding that defense counsel's assertions of prejudice were insufficient, the Supreme Court later affirmed the district court's granting of defendant's motion on remand after defendant submitted an affidavit explicitly detailing why the cause of the hub's failure could not be determined without the hub. While the trial court recognized the absence of bad faith or even culpable conduct by the plaintiff, the prejudice to defendant warranted dismissal of the action.

CONCLUSION

The critical importance of preserving evidence in product liability cases has prompted some courts to sanction breaches of this duty to preserve. Sanctions are generally not imposed, however, unless the non-spoliator can establish prejudice resulting from the failure to preserve evidence. The prejudice suffered often determines the nature of the sanction. Though dismissal is viewed as a harsh sanction, numerous courts have held that such a sanction is appropriate where plaintiffs failure to preserve the evidence has greatly prejudiced the defense of the action. While some courts require a showing of "bad faith" on the part of the spoliator, others place greater emphasis on the prejudice suffered by the non-spoliator.

To increase the likelihood of success in a spoliation motion, both plaintiff's inability to establish a prima facie case and the prejudice suffered by defendant should be emphasized. Whenever possible, an affidavit explicitly detailing this prejudice should be filed with the motion. Although the success of these motions, like other motions, cannot be predicted with any certainty, the increased willingness of courts to sanction the loss of crucial evidence counsels in favor of filing such a motion if the defense has been prejudiced.