CHAPTER 2

SPOLIATION OF EVIDENCE IN DIVORCE CASES: WHEN THE ADVERSE PARTY LOSES, CONCEALS, OR DESTROYS EVIDENCE*

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§ 2.1 Introduction

"The purpose of discovery is to provide a mechanism for making relevant information available to the litigants."[1] The rationale behind this policy is the belief that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[2] However, for as long as there have been laws in effect to govern the discovery process, there have been parties who flaunted not only the letter but also the spirit of those laws. One particular area of the law is often ripe for potential discovery abuse, that is, divorce litigation.

* The author would like to acknowledge the assistance of Brian S. Faughnan, a law student at the University of Memphis.

[1] Fed. R. Civ. P. 26, advisory committee notes to the 1983 amendments.

[2] Hickman v. Taylor, 329 U.S. 495, 507 (1947).

One of the most pernicious means of thwarting the discovery process is intentional destruction of material evidence, an action legally referred to as *spoliation.* Spoliation prevents evidence from being used in litigation and is usually undertaken by a party as a means of making certain that relevant information does not come to the attention of the opposition, or at the very least, is not presented at trial. This chapter seeks to provide some answers to the questions a party might raise when spoliation is suspected by the other side in an attempt to prevent justice from being obtained. What legal remedies are available to a party who believes the other spouse has intentionally destroyed evidence crucial to the "just, speedy, and inexpensive determination" of their action?[3]

Imagine a complicated and heavily contested divorce. One spouse, Mr. Flyer, pilots a commercial 767 airliner. Mr. Flyer, however, was not always prosperous. Twenty-six years ago, he was in flight school and nearly destitute. During his first year of school, he met your client, Mrs. Flyer. After a short courtship, they were married. She subsequently quit school to work and help him pursue his dream of becoming a commercial airline pilot. Mr. Flyer had mixed feelings about his wife's supporting him, but knew it was only for a short time; once successful, he could provide for his wife so that she would never have to work again.

Twenty-five years later, the situation has dramatically changed and Mrs. Flyer is currently in your office telling her story, seeking counsel to guide her through this troubled time. Mrs. Flyer's heart is broken. She suffered many long and lonely nights that are associated with being married to a pilot. She was not always happy, but loved her husband dearly and was completely unaware of his extramarital activities. Unknown to Mrs. Flyer, Mr. Flyer has had affairs with at least two other women. In fact, Mr. Flyer has an extensive relationship with both. During his marriage, Mr. Flyer purchased a condominium in Colorado. He subsequently placed the title in the name of Ms. Cooper, a local resident with whom he is romantically involved. Mr. Flyer repeated this activity in Florida, where he purchased a home and a yacht and placed the titles in the name of Ms. Keeney, a local resident he is also involved with. Mr. Flyer had contracts drawn up so that the property deeded in the women's names is actually owned by Mr. Flyer; if either woman and Mr. Flyer terminate the relationship, that asset is his.

Mrs. Flyer became suspicious of her husband when the couple developed significant cash-flow problems. When Mrs. Flyer confronted her husband and wanted to know why money was scarce, Mr. Flyer responded that he gambled and lost quite a large amount of cash. Unconvinced, Mrs. Flyer persisted and accused him of having an affair and spending money on other women. Eventually, Mr. Flyer admitted to having been unfaithful, but maintained that his gambling was the reason for the missing funds. He blamed her, said he was no longer attracted to her, offered her no apologies, and expressed no remorse.

[3] Fed. R. Civ. P. 1.

After some soul-searching, Mrs. Flyer decided to file for divorce. This morning, she told her husband that she wants a divorce. Now she sits in your office.

You assure her that she has a very good case. Based on your experience and what she has described, you believe she will be awarded the divorce, an equitable division of their assets, and significant alimony because she devoted the best years of her life to helping him become successful. She is convinced that her husband is lying about his gambling activities and is concerned that he has been siphoning away money. You reassure her that there are legal procedures to discover assets.

However, there is a problem of which you are unaware. Faced with the possibility of his wife discovering hidden assets purchased during the marriage, Mr. Flyer thoroughly and quickly destroyed the paper trail that connects him to those assets. Several documents could prove traceable through other channels, but the contracts are gone.

Months pass. During the prolonged discovery phase of the proceedings, you manage to track down the so-called other women. Furthermore, you discover that they appear to be living above their means. You serve Mr. Flyer with interrogatories asking whether he has bought gifts for the women and if he owns marital property of which his spouse is unaware. Mr. Flyer admits that he has bought gifts, but denies having any marital assets of which his spouse is not aware. He also denies (to the best of his knowledge) having any documents reflecting gifts or purchases made to the other women. You go to court to request that Mr. Flyer be ordered to produce documents pertaining to assets acquired on behalf of these women, only to have the court say, "How can I make him produce documents that he says do not exist?" Mrs. Flyer implores, "What do we do now?"

The largest obstacle to any party seeking to remedy this situation is that the burden of proving destruction of evidence falls on their shoulders. Parties willing to risk destroying evidence will usually take steps to cover their tracks and tend to make it extremely difficult, if not entirely impossible, to prove intentional destruction of evidence. The burden of proving spoliation causes additional delays in the divorce proceedings over and above those brought about by the actual destruction of the relevant evidence. Delays add up to additional expenses, court costs, and attorney fees that the innocent party must bear because of improper actions by the adverse party. The unjustness of this situation has led courts to adopt remedies for spoliation in civil litigation. Recent decisions have created a tort of spoliation of evidence.

§ 2.2 Historical Remedy: Spoliation Inference

Historically, the primary remedy for spoliation was the spoliation inference. *Spoliation* is "[t]he intentional destruction of evidence and when it is established,

factfinder may draw inference that evidence destroyed was unfavorable to the party responsible for its spoliation."[4] As early as 1722, common-law courts addressed the issue of the destruction of evidence in civil litigation.[5]

Until recently, the exclusive remedy for spoliation was an adverse inference that courts and juries were allowed to draw from the act of spoliating evidence. This inference is well explained by McCormick:

> A party's failure to produce evidence when he is free to produce or withhold may . . . be treated as an admission. As might be expected, wrongdoing by the party in connection with his case, amounting to an obstruction of justice is also commonly regarded as an admission by conduct. By resorting to wrongful devices he is said to give ground for believing that he thinks his case is weak and not to be won by fair means. Accordingly, a party's . . . destruction . . . of relevant documents or objects . . . [is an] instance of this type of admission by conduct. Of course, it is not enough to show that a third person did the acts . . . charged as obstructive. They must be fastened to the party himself . . . by showing that he did the act or authorized it by words or other conduct. Moreover, the circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain the inference of consciousness of a weak case.[6]

The *spoliation inference* has also been described as a means of punishing "acts of bad faith, or that it is based upon public policy, even though not fully supportable in logic."[7] The core concept of the spoliation inference is the consciousness of guilt. It is that concept which allows presumptions to be drawn from the spoliation which are "not limited to particular evidence and may pervade the entire case."[8]

One of the most succinct statements of the policy behind the spoliation inference was announced over a century ago:

> It is because of the very fact that the evidence of the plaintiff, the proofs of his claim or the muniments of his title, have been destroyed [by defendant], that the law, in hatred of the spoiler, baffles the destroyed, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrong-doer by the very means he had so confidently employed to perpetrate the wrong.[9]

Although the theory behind the spoliation inference is to prevent injustice by deterring parties from destroying evidence and compensate parties harmed

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[4] Black's Law Dictionary 1401 (6th ed. 1990).

[5] Armory v. Delamirie, 93 Eng. Rep. 664 (K.B. 1722) (failure to produce a jewel allegedly disposed of prior to trial creates an inference that it was of a superior quality).

[6] McCormick on Evidence § 273, at 660–61 (2d ed. 1972) (emphasis added).

[7] 31A C.J.S. *Evidence* § 152, at 388 (1964).

[8] *Id.*

[9] Pomeroy v. Benton, 77 Mo. 64, 86 (1882).

by the destruction of evidence, in reality the inference does not clearly provide a strong source of deterrence. When a party is fearful of the effects that a certain piece of evidence could have on the success of the case, knowledge that an unfavorable inference could be drawn as a result of the party's actions might not be enough to successfully deter an individual from destroying that evidence.[10]

In this example, Mr. Flyer has two distinct courses of action: (1) preserve the contracts that essentially show the property in the names of his paramours is really his and is marital property subject to an equitable division during the divorce proceedings, or (2) destroy them. The latter choice represents a method of self-protection. If Mr. Flyer preserves the evidence, it is subject to discovery and a later decision not to turn over those documents could lead to a finding of contempt of court. If Mr. Flyer destroys the documents, he could not be compelled to provide them because they do not exist; he might successfully exploit a loophole in the discovery rules.[11] The only way to force an individual to choose not to destroy documents is to create a sufficient repercussion of such action that deters someone from destroying the evidence.

The insufficient deterrent capacity of the spoliation inference is readily apparent. If Mr. Flyer preserves the contracts and provides them during discovery, the worst outcome (from his point of view) is that the judge or jury will know indisputably that hidden assets exist—marital property subject to equitable division. If Mr. Flyer destroys the evidence, the worst outcome (from his point of view) is that after considerable expense, his wife will figure out a way to prove that he destroyed the documents and the judge or jury infers that he has hidden marital assets. From Mr. Flyer's perspective, a decision to destroy, at worst, delays the discovery of his hidden marital assets and, at best, allows him to successfully hide his assets from his wife and deprive her of an equitable division of marital property.

It does not require much divorce trial experience to recognize that the phrase, "I'll believe it when I see it," is an accurate description of the attitude taken by many judges and juries. Visual proof affects people in a more visceral manner than any verbal description. The sight of the "smoking gun" does more damage than its mere description. When faced with these choices, the spoliation inference does not seem to provide the deterrence necessary to override Mr. Flyer's instinct to protect himself. Mr. Flyer has a greater chance of shielding his assets from Mrs. Flyer if the judge or jury has to infer that the documents that show that the property is really his asset exist, than if the documents are physically present in court.

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[10] In other words, the maxim *omnia praesumuntur contra spoliatorem* becomes helpful only when counsel can successfully prove spoliation occurred.

[11] *But see* Bowmar Instrument Corp. v. Texas Instruments, Inc., 25 Fed. R. Serv. 2d 423 (N.D. Ind. 1977) (implication that a court could enter an order compelling discovery even though documents have previously been destroyed).

A potential spoliator knows that it can be a difficult task to prove that spoliation occurred. This could bolster the impulse to destroy. An example of the traditional criteria for proving spoliation follows:

> The inference that destroyed evidence was unfavorable to the party responsible for its spoliation should be submitted to jury only where substantial evidence exists to support findings that such evidence had been in existence, in possession of or under control of the party, that it would have been admissible at trial, and that party responsible for its destruction did so intentionally.[12]

An attempt to prove spoliation can encounter problems in each area. Under traditional criteria, Mrs. Flyer must first prove these contracts existed. She might be able to accomplish this through testimony of the other women. However, she could face difficulties convincing the women to testify, or in subpoenaing a witness outside the jurisdiction. Even with the testimony of the paramours, Mrs. Flyer might face problems if her witness does not come across as credible. Assuming she could prove the existence of these contracts, Mrs. Flyer must prove that the documents were within Mr. Flyer's control. This also might require testimony by the other women. Otherwise, Mr. Flyer could convince the court that these documents were in the control of the paramours. However, if Mrs. Flyer is able to prove the existence of the documents, it is likely that she could sufficiently prove that they were within Mr. Flyer's control. Mrs. Flyer, however, must also prove that if the documents had not been destroyed, they would be admissible at trial.[13] It is a rather insignificant hurdle in this example, but under a different scenario, it could prove a troublesome obstacle. Furthermore, Mrs. Flyer would also have to prove by a preponderance of the evidence that the destruction was intentional, not accidental, or negligent.[14] In this example, Mrs. Flyer could show a strong relationship between the timing of the decision to destroy the documents and the beginning of divorce proceedings, and that Mr. Flyer considered it in his best interest to conceal or destroy these documents.

§ 2.3 Developing Remedy: The Tort of Spoliation of Evidence

"New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the

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[12] State v. Langlet, 283 N.W.2d 330 (Iowa 1979) (interesting comparison of the spoliation inference and the "missing witness" inference).

[13] This requirement is strikingly similar to the traditional two-step requirement in proving legal malpractice.

[14] *See* Vick v. Texas Employment Comm'n, 514 F.2d 734 (5th Cir. 1975) (no adverse inference could be drawn from the routine procedural destruction of employee records); Haynes v. Coca Cola

court has struck out boldly to create a new cause of action, where none had been recognized before."[15]

Because the spoliation inference is an obviously insufficient remedy, some jurisdictions created a new remedy to use when evidence is intentionally destroyed. This remedy is the "tort of spoliation" or the tort of "interference with prospective civil litigation by spoliation of evidence." This new tort bears some similarity to the "tort of interference with prospective economic advantages." Just as courts have begun to recognize a prospective economic relation as a legal interest worthy of protection, some jurisdictions have recognized the right to win a potential lawsuit as another legal interest that deserves protection.

This new tort developed primarily in the context of medical malpractice and product liability litigation. Within these contexts, this tort can be a powerful new source of recovery for litigants wronged by the destruction of crucial evidence by the adverse party. Usually the destruction involves either an allegedly defective part in the context of product liability litigation, or medical records, autopsy reports, or body tissues in the context of medical malpractice litigation. While clearly a vital new development in these areas, the tort of spoliation may prove significant in the context of family law. To date, there are no reported cases applying the tort of spoliation in the context of a divorce proceeding.

As is often the case, California was the first jurisdiction to recognize the existence of the tort of spoliation.[16] Several jurisdictions followed suit and recognized the tort of spoliation of evidence.[17]

A major problem with this new remedy for spoliation lies in the area of damages. Like almost all torts, damages must be proven with reasonable certainty.[18] However, over 60 years ago, the United States Supreme Court stated:

> [w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental

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Bottling Co., 350 N.E.2d 20 (Ill. App. Ct. 1976) (no spoliation inference can be drawn from accidental disposal of allegedly defective can of soda); Jagmin v. Simonds Abrasive Co., 211 N.W.2d 810 (Wis. 1973) (the inference is "reserved for deliberate, intentional actions and not mere negligence even though the result may be the same as regards the person who desires the evidence").

[15] Prosser & Keeton on Torts § 1, at 3–4 (4th ed. 1971).

[16] Smith v. Superior Court, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984) (auto dealer had promised accident victim that it would preserve certain allegedly defective auto parts for plaintiff to do further investigation).

[17] *See* Foster v. Lawrence Memorial Hosp., 809 F. Supp. 831 (D. Kan. 1992); Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986); Bondu v. Gurvich, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984), *cert. denied*, 484 So. 2d 7 (Fla. 1986); Reed v. Westinghouse Elec. Corp., 1995 WL 96819 (Ky. Ct. App. Mar. 10, 1995) (unreported); Hirsch v. General Motors Corp., 628 A.2d 1108 (N.J. Super. Ct. App. Div. 1993); Smith v. Howard Johnson Co., 615 N.E.2d 1037 (Ohio 1993).

[18] Prosser & Keeton on Torts § 30, at 143–44 (4th ed. 1971).

> principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.[19]

The damages in these tort actions are necessarily speculative, so determining an amount of damages can be particularly arduous. Should damages be measured by what the plaintiff could have recovered if that evidence had been available? Should damages be measured by the monetary value of the chance for a successful verdict? In either case, how would counsel prove what was that corresponding monetary amount?

In our example, Mrs. Flyer might prove damages with financial records that show Mr. Flyer's income offset against their actual expenses with a request that the court calculate the remaining balance as a marital asset. Other divorce cases involving spoliation could consider how the spoliated evidence would have influenced the equitable division of assets, or in states in which fault is still relevant, how it would have affected the determination of grounds for awarding the divorce itself. If damages can be proven, however, collection might be easier then in other types of litigation, because it could be argued that damages could be collected from the tortious spouse's share of the assets. Although the court's equitable division of assets is usually not influenced by questions of fault, the court could assess damages on the tort of spoliation and allow the victim to collect from the tortfeasor's share of the award of assets.

One question to be addressed by courts that undertake to recognize an independent tort of spoliation is whether the act of destruction must be intentional or need only be negligent. The most logical decision is to require that the destruction be intentional. It would be strange to require intentional destruction for the spoliation inference to be drawn, while requiring something less than intentional destruction for an action in tort. Currently, only California and Florida recognize the tort of negligent spoliation.[20] However, several jurisdictions have allowed a claim for negligent spoliation of evidence to be stated under general negligence action principles.[21] In a related development, New Jersey expanded the reach of the tort to include situations in which there has not been any actual destruction of evidence, but in which one party has intentionally concealed evidence.[22]

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[19] Story Parchment Co. v. Paterson P. Paper Co., 282 U.S. 555 (1931).

[20] Velasco v. Commercial Bldg. Maintenance Co., 169 Cal. App. 3d 874, 215 Cal. Rptr. 504 (1985); Miller v. Allstate Ins. Co., 573 So. 2d 24 (Fla. Dist. Ct. App. 1990).

[21] *E.g.*, Pirocchi v. Liberty Mut. Ins. Co., 365 F. Supp. 277 (E.D. Pa. 1973); Miller v. Gupta, 656 N.E.2d 461 (Ill. App. Ct. 1995) (allowing plaintiff to amend complaint to allege spoliation under existing negligence law); Coley v. Arnot Ogden Memorial Hosp., 107 A.D. 2d 67, 485 N.Y.S.2d 876 (1985).

[22] Viviano v. CBS, Inc., 597 A.2d 543 (N.J. Super. Ct. App. Div. 1991).

Among jurisdictions that have specifically recognized the tort of spoliation, only two have defined the elements of this new tort.[23]

California defines the elements of the tort of spoliation as:

1. Pending or probable litigation involving the plaintiff
2. Knowledge on the part of the defendant that litigation exists or is probable
3. Wilful or negligent destruction of evidence by the defendant designed to disrupt the plaintiff's case
4. Disruption of the plaintiff's case
5. Damages probably caused by the defendant's acts.[24]

Ohio defines the elements similarly, except that as a jurisdiction that has recognized only intentional spoliation, it limits the scope of the third element to wilful destruction of the evidence by the defendant designed to disrupt the plaintiff's case.[25]

Although it is not specifically mentioned as an element of the tort action, an implied element is that the destruction must have been beneficial to the spoliator.[26]

To date, only New Jersey has set forth elements for the tort of intentional concealment of evidence:

1. Defendant had a legal obligation to disclose evidence to the plaintiff.
2. Evidence was material to the plaintiff's case.
3. Plaintiff could not have readily acquired evidence in an alternative manner.
4. Defendant intentionally failed to disclose.
5. Plaintiff was harmed by the nondisclosure.[27]

In our example, Mrs. Flyer would have to prove:

1. There existed probable litigation, that is, the divorce, at the time of destruction
2. Mr. Flyer knew divorce litigation was probable at the time of destruction

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[23] County of Solano v. Delancy, 264 Cal. Rptr. 721 (1989) (upon denying review, the court ordered that the opinion not be officially published); Smith v. Howard Johnson Co., 615 N.E.2d 1037 (Ohio 1993).

[24] County of Solano v. Delancy, 264 Cal. Rptr. 721, 729.

[25] Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1038 (Ohio 1993).

[26] *See* Panich v. Iron Wood Prods. Corp., 445 N.W.2d 795 (Mich. Ct. App. 1989) (declining to consider whether the tort action exists since the destruction of the allegedly defective electrical box would not have benefitted the spoliator, as the spoliator was subrogated to the victim's product liability claim). *Accord* Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177 (Kan. 1987).

[27] Hirsch v. General Motors Corp., 628 A.2d 1108, 1122 (N.J. Super. Ct. App. Div. 1993).

3. Intentional destruction of the evidence by Mr. Flyer designed to disrupt Mrs. Flyer's case
4. Actual disruption of Mrs. Flyer's case
5. Damages probably caused by Mr. Flyer's action.

Each of the first four elements could be easily proven by Mrs. Flyer. Any difficulties Mrs. Flyer might incur would involve the requirements of proving the fifth element of the tort.

§ 2.4 Procedural Considerations

Jurisdictions that have adopted the tort of spoliation have given little attention to the procedural aspects of alleging the intentional destruction of evidence.[28] The recognition of this new tort presents some intriguing procedural questions. Should or must the tort action be pursued only after resolution of the original action during which the act of spoliation occurred? Can the tort action be pursued by amending the original complaint to allege the act of spoliation that occurred after the filing of the original complaint? What elements should counsel allege if the jurisdiction has not recognized the tort or has recognized it but failed to define its elements?

The issue of how to allege that the tort has occurred may depend upon the actual stage of the proceedings in which the spoliation occurred.[29] Furthermore, the decision of whether to file as a separate action or to amend the original complaint may also depend on the jurisdiction. In jurisdictions that have adopted the federal rules, it becomes important in terms of procedure to know whether the spoliation actually occurred after the proceedings commenced or before the actual filing of the original complaint. Procedurally, the first scenario presents the need for a supplemental pleading, because the spoliation would be a transaction or occurrence that happened since the filing of the original pleading.[30] The second scenario requires adherence to the general rule for

[28] *But see* Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434 (Minn. 1990) (declaring resolution of the underlying claim would be necessary to demonstrate cognizable injury for purposes of spoliation claim, should they decide to recognize the tort in the future.) *Accord* Bondu v. Gurvich, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1985); Fox v. Cohen, 406 N.E.2d 178 (Ill. App. Ct. 1980).

[29] Obviously, different avenues would be available to a plaintiff who discovered that evidence had been destroyed before filing a complaint than would be available to a plaintiff making a similar discovery on the first day of trial.

[30] Fed. R. Civ. P. 15(d) states:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original

amending a pleading[31] or in some circumstances, adherence to the rule for an amendment to conform to the evidence.[32]

A decision to assert the claim for relief from the spoliation through an amendment appears to be the safest method of addressing situations in which counsel is suspicious that spoliation has occurred. It may also be feasible to successfully assert the claim for relief as a separate action, but any decision to do so should be undertaken with extreme caution. Its success or failure depends upon the jurisdiction's interpretation of the concepts of res judicata and collateral estoppel.

The factor that makes this new tort most appealing, especially in the context of product liability and medical malpractice litigation, is the potential imposition of punitive damages against the spoliator. Because the area of damages is at best difficult to prove when someone has destroyed evidence, the best hope for compensation might lie in a punitive damage award.

The nature of spoliation itself, particularly its showing of contempt for the goals of the discovery process and traditional notions of justice and fair play, make it ripe for punitive damages, especially in jurisdictions in which intent must be proven to substantiate the tort.

Only New Jersey has specifically addressed the appropriateness of punitive awards in cases involving intentional spoliation of evidence.[33] The New Jersey

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pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

[31] Fed. R. Civ. P. 15(a) states:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

[32] Fed. R. Civ. P. 15(b) states:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

[33] Viviano v. CBS, Inc., 597 A.2d 543, 551–52 (N.J. Super. Ct. App. Div. 1991).

court in a workplace personal injury case recognized the tort and held that punitive damages were appropriate awards when there was substantial evidence of intentional wrongdoing. The wording in that decision implies that there are two separate thresholds in these cases. One level of wilfulness is required for the tort action to lie, and another level of wilfulness is required for punitive damages to be imposed. This interpretation makes sense, and would be in keeping with the majority of tort law. However, this differentiation of levels might significantly decrease the deterrent capability of this tort. If individuals know that due to the difficulty of proving damages, they can get away with "slightly wilful" destruction, but not with "very wilful" destruction, they will fashion their actions accordingly.

The potential for punitive damages in divorce actions seems promising because of the special legal relationship that exists between parties. Spoliation by one spouse as a means of depriving the other of marital assets or maintenance and support seems particularly vile and worthy of punishment. Punitive damage awards would send a much-needed message to present and future divorcees that the discovery rules apply to them. Perhaps punitive damage awards against spoliators could provide an incentive to stop the kinds of discovery abuse that appear in many divorce cases. Furthermore, the tort of spoliation can be addressed in divorce actions in a manner similar to other torts such as assault and battery, or fraud.

§ 2.5 Decisions Rejecting the Tort of Spoliation

Not all jurisdictions have been receptive to creating a new tort to remedy the spoliation of evidence. Jurisdictions that have not adopted the tort usually rely on one of three reasons:

1. Inability to find a duty to preserve[34]
2. Alternate remedy that already exists is adequate[35]
3. Refusal to adopt based entirely on policy grounds.[36]

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[34] *E.g.*, Murphy v. Target Prods., 580 N.E.2d 687 (Ind. Ct. App. 1991). *Accord* Wilson v. Beloit Corp., 921 F.2d 765 (8th Cir. 1990); Edwards v. Louisville Ladder Co., 796 F. Supp. 966 (W.D. La. 1992); Diehl v. Rocky Mountain Communications, Inc., 818 S.W.2d 183 (Tex. Ct. App. 1991).

[35] *E.g.*, Miller v. Montgomery Co., 494 A.2d 761 (Md. Ct. Spec. App.), *cert. denied*, 498 A.2d 1185 (Md. 1985) (determining that when the spoliator is also a party to the case the spoliation inference provides an adequate remedy). *Accord* Wilder-Mann v. United States, Nos. 87-2392, 90-2136 (D.D.C. June 28, 1993); La Raia v. Superior Court, 722 P.2d 286 (Ariz. 1986) (finding that since plaintiff was suing for actual physical injuries, existing tort remedies were adequate and there was no need to create a new tort action).

[36] *See* Gardner v. Blackston, 365 S.E.2d 545 (Ga. Ct. App. 1988); Baugher v. Gates Rubber Co., 863 S.W.2d 905 (Mo. Ct. App. 1993); Weigl v. Quincy Specialties Co., 158 Misc. 2d 753, 601 N.Y.S.2d 774 (Sup. Ct. 1993).

Courts that fail to adopt on the basis of no duty to preserve the evidence usually look to the normal established categories of contract, voluntary assumption, or special relationship of the parties.[37] It is the last category that makes divorce actions particularly viable cases for recognizing this newly developing tort. The relationship of husband and wife certainly fits into the category of special relationship in which there is a clear duty upon the parties to preserve evidence that would be important in potential divorce litigation between parties. For this reason, divorce actions may be the best vehicle for increasing the recognition of this tort.

Other jurisdictions have avoided adopting the new tort by failing to recognize the insufficiencies of the adverse inference as a remedy. Moreover, some jurisdictions have refused to adopt based on the belief that such a decision would result in increased litigation and be against the public policy of the state.

§ 2.6 Sanctions for Abuse of Discovery: A Viable Alternative?

Another potential remedy when spoliation has occurred can be found in the rules of discovery that authorize sanctions for abuse of discovery. Various jurisdictions have addressed the appropriate remedial sanctions in cases in which destruction of evidence has occurred.[38] Many jurisdictions rely on statements that the decision is a discretionary one and avoid setting any particular guidelines, but several jurisdictions have been more clear in consideration of the issue.[39]

In all contexts, the consensus is that the destruction must be wilful and deliberate. There is one notable exception—a product liability case in Illinois.

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[37] *See* Wilson v. Beloit Corp., 921 F.2d 765 (8th Cir. 1990); Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177 (Kan. 1987).

[38] *See* Thomas v. Bombardier-Rotax Motorenfabrik, GmbH, 909 F. Suppl 585 (N.D. Ill. 1996) (court may sanction party for distruction of material evidence if the destruction was unreasonable and would prejudice other party); Henderson v. Tyrell, 910 P.2d 522 (Wash. Ct. App. 1996) (direct sanctions are available when the spoliation is in some way connected to the party against whom the sanction is to be made); Sentry Ins. v. Royal Ins. Co. of Am., 539 N.W.2d 911 (Wis. Ct. App. 1995) (imposition of sanctions for spoliation is within the sound exercise of trial court's discretion).

[39] *See* Sweet v. Sisters of Providence, 895 P.2d 484 (Alaska 1995) (applying a rebuttable presumption thereby shifting the burden of proof to the spoliator); Sponco Mfg. v. Alcover, 656 So. 2d 629 (Fla. Dist. Ct. App. 1995) (factors to consider are wilfulness or bad faith, if any, of party responsible for loss of evidence, extent of prejudice suffered by other party or parties, and what is required to cure prejudice); Patton v. Newmar Corp., 538 N.W.2d 116 (Minn. 1995) (standard by which to test impact of spoliation is prejudice to the opposing party, and implicit in that standard is the need to examine the nature of item lost in context of claims asserted and potential for remediation of prejudice); Global Servs., Inc. v. Bianchi, 901 S.W.2d 934 (Tex. 1995) (imposition of sanctions cannot be based merely on party's assertions; there must be some evidence of abuse of discovery).

In that case, the federal district court held that a defendant need not show that the plaintiff intentionally destroyed or discarded evidence, but only that the plaintiff knew at the time that the evidence would be material.[40]

The most troublesome area of seeking relief from spoliation in the form of discovery sanctions is that such relief is only available in limited circumstances.[41] In our example, Mrs. Flyer does not normally have discovery sanctions available because there is no court order directing Mr. Flyer to produce the contracts. Therefore, Mr. Flyer is not in violation of any court order that makes sanctions available.[42] However, there is some conflict among courts on this point. Some cases conclude that there can be no sanctions without a court order compelling discovery.[43] Other cases recognize the special problem of spoliation and allow sanctions to be imposed without a prior court order.[44] The latter approach is more logical, but due to conflict of authority, the tort of spoliation and the spoliation inference take on greater importance as potential remedies for parties facing a spoliator.

The newly developing tort of spoliation is an area of the law that is pertinent to issues in divorce cases; the fastest way to its widespread recognition may lie in the discussion of the issue within the context of family law. However, the most effective remedy in the context of divorce litigation may, in fact, lie in the effective application and use of the spoliation inference.

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[40] Iowa Ham Canning, Inc. v. Handtmann, Inc., 870 F. Supp. 238 (N.D. Ill. 1994).

[41] Fed. R. Civ. P. 37(b)(2) states in part:

> If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just.

[42] One notable exception would be if this hypothetical takes place in Georgia, where Ga. Code Ann. § 9-11-37(d)(1) provides that sanctions can be imposed even without a prior filing of a motion to compel.

[43] *See* Anport, Inc. v. MBR Indus., Inc., 772 F. Supp. 1301 (D.P.R. 1991); Goldman v. Goldman, 883 P.2d 181 (Okla. Ct. App. 1992), *reh'g denied, cert. dismissed,* 883 P.2d 164 (Okla. Ct. App. 1994).

[44] *See* Patton v. Newmar Corp., 520 N.W.2d 4 (Minn. Ct. App. 1994), *review granted,* 538 N.W.2d 116 (Minn. 1995); Fire Ins. Exch. v. Zenith Radio Corp., 747 P.2d 911 (Nev. 1987); Berwecky v. Montgomery Ward & Co., 214 A.D.2d 936, 625 N.Y.S.2d 725 (1995) (destruction of evidence before notice to produce is served does not necessarily prohibit imposition of a discovery sanction).