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THE HIGH HURDLE TO A SPOILIATION CLAIM: IS THE EVIDENCE CRUCIAL?

Construction Law Section

Chairs: Jason J. Quintero - Carlton Fields, P.A.; and Jeffrey M. Paskert - Mills Paskert Divers P.A.



lost. When discovered in litigation, it comes the spoliation claim from opposing counsel and up goes the tension.

A spoliation¹ claim in federal court consists of establishing three elements by the movant: (1) the alleged spoliated evidence existed, (2) there was a duty to preserve that evidence, and (3) “the evidence was crucial to the movant being able to prove its prima facie case or defense.”²

Upon successfully proving these elements, sanctions will only be imposed when the spoliator acted in



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bad faith,³ which may be proven either by direct or circumstantial evidence.⁴

The lynchpin to the successful spoliation claim — and the best area for staking out an opposition — usually depends upon proving the third, “essential” element, that the evidence is “crucial” to the moving party’s case.⁵ If a moving party cannot show that the spoliated evidence is crucial to its

case, its motion for sanctions should

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From moldy lunch boxes to deformed 2x4s, determining what paper, electronic data, materials, tools, and equipment might be relevant to a pending construction-related claim, and require preservation, is a daunting task. The problem is compounded once construction is completed and the project is turned over to the owner while a claim related to the project is pending (or in some instances, contemplated). In the midst of cleaning the job site, evidence related to the claim can oftentimes be discarded and forever

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be denied. A recent federal magistrate order demonstrates the significant impact of this element on a spoliation claim.

In *Vanliner Ins. Co. v. ABF Freight System*, the movant sought the electronic maintenance records for a tractor that had been involved in an accident.⁶ While the movant (a defendant/cross-claimant) received the maintenance records for the tractor in written discovery, ABF had apparently failed to preserve the Electronic Control Module (“ECM”) data relating to maintenance.⁷ Following the tractor accident, ABF hired a separate company to preserve the ECM data, but the only data preserved was accident-related and did not include historical maintenance information.⁸ Noting that the movant had already been provided an alternate means of securing the records it sought, although not in the movant’s desired electronic format, the court found the spoliated electronic data not “crucial to . . . [the] prov[ing] [of] its prima facie

case or defense.”⁹ Additionally, as an aside, the court noted the timing of the filing of the motion “on the eve of trial” as evidence that the electronic data was not crucial because the party had been able to develop its case in preparation for trial in the absence of this data.¹⁰

The *Vanliner* order illustrates the last, high hurdle that a party seeking sanctions for spoliation must successfully jump. Clearing this hurdle involves an examination of the evidence available to the parties, its relevance to the claims and defenses,¹¹ and, intriguingly, even a party’s timing in pursuing its sanctions.

¹ Spoliation is defined as “the intentional destruction, mutilation, alteration, or concealment of evidence.” *Vanliner Ins. Co. v. ABF Freight System, Inc.*, 2012 WL 750743, at *1 (M.D. Fla. Mar. 8, 2012) (internal quotations omitted).

² *Id.* (internal quotations omitted).

³ *Id.* (citing *United States v. Lanzon*, 639 F.3d 1293, 1302 (11th Cir. 2011)).

⁴ *Id.* (sanctions may include “(1) dismissal of the case; (2) exclusion of

expert testimony; or (3) a jury instruction on spoliation of evidence which raises a presumption against the spoliator.”)

⁵ *Id.* at *2.

⁶ *Id.* at **2-3.

⁷ *Id.*

⁸ *Id.* at *2.

⁹ *Id.* at *3 (internal quotations omitted).

¹⁰ *Id.*

¹¹ See also *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 2012 WL 948838 (S.D. Fla. Mar. 20, 2012) (denying sanctions because the non-available 2x4 board used to “jam” an allegedly defectively installed pipe into place following

a hurricane is not *crucial* to the defense where the defective pipe is available) (emphasis in original).



Authors: J. Derek Kantaskas, Carlton Fields, P.A. and William B. Collum, Carlton Fields, P.A.



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