

ITEM 2.02 | SPOLIATION CLAIMS

The essential elements of a spoliation cause of action are:

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.¹

The Florida Supreme Court clarified the application of spoliation law to parties and nonparties. In *Martino v. Wal-Mart Stores, Inc.*,² the Court held that the remedy for spoliation against a first party defendant is not an independent cause of action for spoliation. Rather, the remedy is imposition of discovery sanctions and a rebuttable presumption of negligence for the underlying tort. The Court did not consider whether there is a cause of action against a third party for spoliation of evidence. The Court also did not consider whether a counterclaim against a plaintiff may be made for spoliation of evidence.

For purposes of spoliation, “evidence” does not include the injured part of a litigant’s body. Thus a plaintiff who suffered a herniated disc was not obligated to forego surgery and preserve the damaged disc for examination.³ The court suggested, however, that a personal injury litigant might be guilty of spoliation if he or she had surgery while a request for a defense medical examination was pending.

Worker’s compensation immunity does not bar an employee’s action against an employer for spoliation.⁴ The issue is unrelated to worker’s compensation, because spoliation is an independent cause of action. Furthermore, the employer’s spoliation might harm the employee’s causes of action against third parties, rather than the employer itself.⁵

Trial Lawyers Section of the Florida Bar
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Footnotes

¹ *Hagopian v. Publix Supermarkets, Inc.*, 788 So. 2d 1088, 1091 (Fla. 4th DCA 2001); see also *Sullivan v. Dry Lake Dairy, Inc.*, 898 So. 2d 174 (Fla. 4th DCA 2005).

² 908 So. 2d 342 (2005).

³ *Vega v. CSCS International, N.V.*, 795 So. 2d 164, 167 (Fla. 3d DCA 2001).

⁴ *Townsend v. Conshor*, 832 So. 2d 166 (Fla. 2d DCA 2002).

⁵ *Id.*

