



CHAPTER II
FLORIDA HANDBOOK ON CIVIL DISCOVERY PRACTICE (2016)
[ALL-IN-ONE DOCUMENT]

CHAPTER II
REMEDIES FOR LOSS OR DESTRUCTION OF EVIDENCE

E: TextBookDiscrimination@gmail.com
W: www.TextBookDiscrimination.com

visit TBD's [website](#) for the most up-to-date information

TABLE OF CONTENTS | CHAPTER II | REMEDIES FOR LOSS OR DESTRUCTION OF...

ID	Item	Title	Page
0200	2.00	Chapter 2 Intro	4
0201	2.01	Spoliation Claims	5
0202	2.02	Sanctions for First Party Spoliation	7
-	n/a	Appendix	10

2016 FLORIDA HANDBOOK ON CIVIL DISCOVERY PRACTICE

CHAPTER II REMEDIES FOR LOSS OR DESTRUCTION OF EVIDENCE

ITEMS: 2.00 through 2.02

ITEM 2.00 | CHAPTER 2 INTRO

Evidence can be lost or destroyed. It can be lost or destroyed by the defendant or the plaintiff and the act of losing or destroying evidence can be negligent or intentional. Evidence can be lost or destroyed before any claim involving the evidence is made or after a lawsuit is pending. This issue is commonly referred to as spoliation, and an entire handbook can be written concerning these issues.

*Trial Lawyers Section of the Florida Bar
Conference of Circuit Court Judges
Conference of County Court Judges*

ITEM 2.01 | 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
Conference of Circuit Court Judges
Conference of County Court Judges

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.*

ITEM 2.02 | SANCTIONS FOR FIRST PARTY SPOILIATION

The Court, in *Martino*, determined that the remedy against a first party defendant for spoliation of evidence should be the Valcin presumption and sanctions, if found to be necessary.⁶ To determine whether sanctions are warranted and if so, what sanction(s) is appropriate, the court shall determine (1) whether the evidence existed at one time, (2) whether the spoliator had a duty to preserve the evidence, and (3) whether the evidence was critical to an opposing party being able to prove its prima facie case or a defense.⁷

If a party destroyed relevant and material information (and that information is so essential to the opponent's defense that it cannot proceed) then striking of pleadings may be warranted.⁸

While striking pleadings and/or dismissal with prejudice is considered a harsh sanction, doing so is justified in some cases.

In *Tramel v. Bass*,⁹ the trial court struck a defendant's answer and affirmative defenses and entered a default judgment after finding that the defendant had altered critical videotape evidence. The First District upheld the trial court's action, stating:

The reasonableness of a sanction depends in part on the willfulness or bad faith of the party. The accidental or negligent destruction of evidence often justifies lesser sanctions directed toward compensating the victims of evidence destruction. The intentional destruction or alteration of evidence undermines the integrity of the judicial process and, accordingly, may warrant imposition of the most severe sanction of dismissal of a claim or defense, the striking of pleadings, or entry of a default. Thus, in the case of the intentional alteration of evidence, the most severe sanctions are warranted as much for their deterrent effect on others as for the chastisement of the wrongdoing litigant.¹⁰

In *Tramel*, the egregious nature of the defendant's misconduct justified the entry of a default judgment. Note, however, that a default judgment can be entered without a finding of fraud or willful misconduct.

If a plaintiff cannot proceed without certain evidence and the defendant fails to preserve that evidence, a default judgment may be entered against the defendant on that basis.¹¹ A finding of bad

faith is not imperative.¹² Conversely, in cases where evidence is destroyed unintentionally and the prejudice is not fatal to the other party, lesser sanctions should usually be applied.¹³

In *Figgie International, Inc. v. Alderman*,¹⁴ the trial court entered a default judgment against a defendant for numerous discovery violations, including destruction of relevant documents. On appeal, the Third District Court of Appeal affirmed. It agreed with the trial court that defendant violated the discovery rules willfully and in bad faith, and that the most severe sanction was justified.

As the Third District observed in *Figgie International*, severe sanctions are justified when a party willfully fails to comply with discovery obligations. Therefore, destruction of documents alone can trigger a default order as long as the destruction is willful.

In *Figgie International*, however, there was more than document destruction involved. The trial court also found the defendant presented false and evasive testimony through its safety director and provided incomplete discovery responses. That conduct provided additional support for the trial court's decision to enter a default judgment.

The Third District also upheld dismissal in *Lent v. Baur Miller & Webner*. P.A.¹⁵ In that case, the plaintiff and her counsel apparently tried to intimidate a critical witness to prevent him from testifying. The plaintiff also refused to allow the witness's deposition to be taken though the court had entered an order compelling her to consent. The court's opinion explained that consent to the deposition was required under the applicable German law.¹⁶ Apparently, German law would have otherwise made the discussions between the plaintiff and the witness privileged.

The Second District has held that a legal duty to preserve video recordings does not arise until the injured party makes a written request for preservation of the recorded information.¹⁷

Hernandez v. Pino,¹⁸ involved the unintentional misplacement of dental x-rays by plaintiff's counsel. The court held that summary judgment was inappropriate in that defense counsel had given the x-rays to its expert (before they were misplaced) and was able to defend the case. No willful conduct was found.¹⁹

Trial Lawyers Section of the Florida Bar
Conference of Circuit Court Judges
Conference of County Court Judges

Footnotes

⁶ *Martino*, at 347. See, *Public Health Trust v. Valcin*, 507 So. 2d 596 (Fla. 1987).

⁷ *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777 (Fla. 4th DCA 2006).

⁸ *New Hampshire Ins. Co. v. Royal Ins. Co.*, 559 So. 2d 102 (Fla. 4th DCA 1990); *Sponco Manufacturing, Inc. v. Alcover*, 656 So. 2d 629 (Fla. 3d DCA 1995); rev. dismissed, 679 So. 2d 771 (Fla. 1996).

⁹ *Tramel v. Bass*, 672 So. 2d 78 (Fla. 1st DCA 1996).

¹⁰ 672 So. 2d at 84 (citations and footnotes omitted).

¹¹ *Sponco Manufacturing*, supra.

¹² *Id.*

¹³ *Aldrich v. Roche Biomedical Laboratories, Inc.*, 737 So. 2d 1124 (Fla. 5th DCA 1999).

¹⁴ 698 So. 2d 563 (Fla. 3d DCA 1997).

¹⁵ 710 So. 2d 156 (Fla. 3d DCA 1998).

¹⁶ *Id.* at 157.

¹⁷ *Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389 (Fla. 2d DCA 2012).

¹⁸ 482 So. 2d 450 (Fla. 3d DCA 1986).

¹⁹ *Aldrich v. Roche Biomedical Laboratories, Inc.*, supra.

APPENDIX

COPYRIGHT NOTICE

TextBookDiscrimination.com is not the author of this handbook. Instead, TextBookDiscrimination.com merely re-printed and reformatted them for easier use.

ORIGINAL SOURCE

<u>#</u>	<u>Item</u>	<u>Link</u>
1	Original Source	NinthCircuit.org

CONTACT INFORMATION

E: TextBookDiscrimination@gmail.com

W: www.TextBookDiscrimination.com

Congratulations! You're now ***booked up*** on Chapter II from Florida's Handbook on Civil Discovery Practice (2016)!