THERE IS NO TORT CAUSE OF ACTION FOR INTENTIONAL OR NEGLIGENT SPOLIATION IN CALIFORNIA [But Other Remedies May Be Available]

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CASENOTE

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DISCUSSION

1. TORT OF INTENTIONAL SPOLIATION OF EVIDENCE

Prior to the California Supreme Court's 1998 decision in *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1 (*Cedars-Sinai*), some Court of Appeal decisions, beginning with *Smith v. Superior Court* (1984) 151 Cal.App.3d 491, had recognized the tort of intentional spoliation of evidence - "that is, intentional destruction or suppression ... of evidence." (*Cedars-Sinai, supra,* at p. 4.) In *Smith,* the plaintiff had been injured while driving her car when the left rear wheel of an oncoming van flew off the van and crashed into the windshield of the plaintiff's car. The plaintiff alleged that after the accident, the van had been towed to a dealer that had previously worked on the van, that the dealer promised the plaintiff's counsel that it would "'maintain securely in their care, possession, custody and control for later examination and testing by Plaintiff's technical experts'" the left rear wheel, tire, lug bolts, lug nuts and brake drum of the van. (*Smith, supra,* 151 Cal.App.3d at p. 495.) It thereafter intentionally lost or destroyed those items. The *Smith* court quoted Dean Prosser's observation that "'[n]ew and nameless torts are being recognized constantly'" (*ibid.*), and directed the trial court to vacate its order sustaining the dealer's demurrer to the plaintiff's cause of action for intentional spoliation.

Our own court recognized the tort in *Willard v. Caterpillar, Inc.* (1995) 40 Cal.App.4th 892, a case in which the plaintiff was a man who had owned his own tractor repair business for 20 years and was injured when a tractor he was repairing "'took off' in reverse" after he started the engine. (*Id.* at p. 898.) Although the plaintiff in *Willard* was successful in his products liability action against the tractor manufacturer, and obtained a judgment of $578,549.05 (after his damages of $1,157,098.11 were reduced by 50% because the jury found the plaintiff to be 50% at fault), the jury also found that the manufacturer had intentionally destroyed "design documents" and that "plaintiff's ability to prove his case was substantially impaired by the destruction of the documentation." (*Id*. at pp. 895, 906.) The manufacturer's destruction of the design documents had occurred years before the plaintiff's accident. We held that, under the

facts of that particular case, the trial court had erred in submitting to the jury the cause of action for intentional spoliation of the manufacturer's design documents. (*Id.* at p. 895.)

In *Cedars-Sinai,* the court held that "there is no tort remedy for the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant, in cases in which, as here, the spoliation victim knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action." (*Cedars-Sinai, supra,* 18 Cal.4th at pp. 17-18, fn. omitted.)

In a footnote, the *Cedars-Sinai* court also stated "[w]e do not decide here whether a tort cause of action for spoliation should be recognized in cases of 'third party' spoliation (spoliation by a nonparty to any cause of action to which the evidence is relevant) or in cases of first party spoliation in which the spoliation victim neither knows nor should have known of the spoliation until after a decision on the merits of the underlying action" and "[w]e disapprove of *Willard v. Caterpillar, Inc., supra*, 40 Cal.App.4th 892 and *Smith v. Superior Court, supra,* 151 Cal.App.3d 491[1] to the extent they are inconsistent with our decision here." (*Cedars-Sinai, supra,* at p. 18, fn. 4.)

One year after *Cedars-Sinai*, the Supreme Court in *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464 (*Temple*) decided one of the issues it had left open in its *Cedars-Sinai* footnote, and held that "no tort cause of action will lie for intentional third party spoliation of evidence." (*Temple, supra,* at p. 466.)

2. **TORT OF NEGLIGENT SPOLIATION OF EVIDENCE**

After *Cedars-Sinai* and *Temple*, some litigants have attempted to avoid the holdings of those cases by alleging that a defendant's alleged spoliation of evidence was not "intentional" but "negligent." However, every reported case to address this issue has concluded that labeling the alleged spoliation as "negligent" rather than "intentional" will make no difference.

"A tort cause of action for negligent spoliation of evidence cannot be maintained. We believe that this conclusion follows inexorably from two recent decisions from our Supreme Court: [*Cedars-Sinai, supra,*] 18 Cal.4th 1 …, holding that no tort cause of action lies for first party intentional spoliation of evidence, and [*Temple, supra,*] 20 Cal.4th 464 …, holding that no tort cause of action will lie against a third party for intentional spoliation of evidence." (*Farmers Ins. Exchange v. Superior Court* (2000) 79 Cal.App.4th 1400, 1401-1402 (*Farmers Ins. Exchange*).) "Farmers' position is simply stated: If a party cannot be held liable for intentionally destroying or suppressing evidence that would be relevant to a lawsuit, surely the party cannot be held liable if it negligently commits these acts. We agree." (*Id.* at p. 1404.)

"We conclude the policy considerations that caused the court in *Cedars-Sinai* and *Temple Community* to find that there is no tort remedy for intentional spoliation of evidence also compel the conclusion that there is no tort remedy for negligent spoliation." (*Coprich v. Superior Court* (2000) 80 Cal.App.4th 1081, 1083.) "[Respondent] does not suggest negligent spoliation should be treated any differently than intentional spoliation under *Cedars-Sinai*. Nor do we see any basis upon which to draw such a distinction, in light of recent decisions holding there is no cause of action for negligent spoliation. [Citations.]" (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1348, fn. 8 (citing *Farmers Ins. Exchange*, *supra*, 79 Cal.App.4th 1400 and

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First party spoliation occurs when the spoliator is a party to the lawsuit. Third party spoliation occurs when the spoliator is not a party to the action. (*Lueter, supra,* 94 Cal.App.4th at p. 1293.)

Coprich, supra, 80 Cal.App.4th 1081 and reversing a $10,000 jury award for negligent spoliation).) "The viability of appellants' claim of spoliation of evidence has been resolved by the decisions in *Cedars-Sinai* ... (no tort remedy for the intentional spoliation of evidence by a party to the cause of action); *Temple* ... (no tort cause of action for intentional spoliation against person who is not a party to lawsuit); and *Coprich* ... (no tort remedy for negligent spoliation)." (*Cody F. v. Falletti* (2001) 92 Cal.App.4th 1232, 1238-1239.)

"[T]here is no tort cause of action for the negligent spoliation of evidence." (*Lueter*, *supra,* 94 Cal.App.4th at p. 1289.) "[W]e must be mindful of the fact that recognizing a tort cause of action for negligent spoliation would, in many if not all instances, effectively abrogate the Supreme Court's decisions in *Cedars-Sinai* and *Temple Community*. This is so because most types of conduct that could be called intentional can also be rephrased in terms of negligence. [Citation.]

In this light, the recognition of a negligent spoliation cause of action would provide a loophole that effectively could swallow the holdings of *Cedars-Sinai* and *Temple Community.*" (*Lueter, supra,* 94 Cal.App.4th at p. 1296.) "In our view, the decisions discussed *ante* [the same decisions cited above in this opinion] establish beyond reasonable dispute that there is no tort cause of action against a litigant or third party for intentional or negligent destruction of evidence." (*Forbes v. County of San Bernardino* (2002) 101 Cal.App.4th 48, 57.) "Various Courts of Appeal have held there is no cause of action for negligent spoliation of evidence." (*National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.* (2003) 107 Cal.App.4th 1336, 1346, fn. 4.)

After *Cedars-Sinai* and *Temple*, "[l]ater appellate decisions ... refused to recognize a cause of action for either first party or third party negligent spoliation based on the same policy considerations discussed in *Cedars-Sinai* and *Temple*." (*Rosen v. St. Joseph Hospital of Orange County* (2011) 193 Cal.App.4th 453, 460 (*Rosen*) (affirming judgments entered in favor of defendants after the sustaining of a demurrer without leave to amend, and concluding that plaintiff/appellant's variously named causes of action (*id.* at p. 457) actually "constituted spoliation of evidence claims" (*id*. at p. 455).)

"Although the state's high court has not had the occasion to rule on the viability of the tort of negligent spoliation of evidence, appellate courts have concluded, in reliance on *Cedars-Sinai* ... and *Temple* ..., that the tort of negligent spoliation, whether of the first party or third party variety, is no longer viable. [Citations.] We agree with the reasoning of these cases and note, as did the court in *Coprich, supra,* [80 Cal.App.4th] at page 1089, that 'it would be anomalous to impose liability for negligence with respect to conduct that would not give rise to liability if committed intentionally.'" (*Strong v. State of California*(2011) 201 Cal.App.4th 1439, 1458-1459, fn. omitted.)

3. **IF NO TORT CAUSE OF ACTION WHAT IS POSSIBLE REMEDY FOR INTENTIONAL SPOLIATION OF EVIDENCE?**

While there is no tort cause of action for destruction of evidence after litigation has commenced, several remedies are available to deter and punish intentional spoliation of evidence committed by a party to the litigation. (*Cedars–Sinai, supra,* 18 Cal.4th at p. 11.) "Chief among these is the evidentiary inference that evidence which one party has destroyed or rendered unavailable was unfavorable to that party." (*Ibid.*) The inference is contained in Evidence Code section 413, which reads: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to

explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case." Additional remedies for spoliation of evidence by a party to the litigation are discovery sanctions when spoliation amounts to a misuse of the discovery process, State Bar disciplinary action, and criminal penalties. (*Cedars–Sinai, supra,* 18 Cal.4th at pp. 11–13.)

A finding a party committed spoliation of evidence would entitle the opposing party to the evidentiary inference of Evidence Code section 413. That inference in itself would have been a potent remedy. CACI No. 204 instructs the jury on the inference as follows: "You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party." The trial court was free to adapt the instruction to "fit the circumstances of the case, including the egregiousness of the spoliation and the strength and nature of the inference arising from the spoliation." *Cedars–Sinai, supra,* 18 Cal.4th at p. 12.

"Trial courts, of course, are not bound by the suggested language of the standard BAJI instruction and are free to adapt it to fit the circumstances of the case, including the egregiousness of the spoliation and the strength and nature of the inference arising from the spoliation." (*Cedars-Sinai Medical Center v. Superior Court, supra,* 18 Cal.4th at p. 12.)

4. **AS A DISCOVERY SANCTION:**

Spoliation of evidence means the destruction or significant alteration of evidence or the failure to preserve evidence for another's use in pending or future litigation. (*Willard v. Caterpillar, Inc.* (1995) 40 Cal.App.4th 892, 907, overruled on other grounds in *Cedars–Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 18, fn. 4.) Such conduct is condemned because it "can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action. Destroying evidence can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both." (*Cedars–Sinai, supra,* at p. 8.) While there is no tort cause of action for the intentional destruction of evidence after litigation has commenced, it is a misuse of the discovery process that is subject to a broad range of punishment, including monetary, issue, evidentiary, and terminating sanctions. (Code Civ. Proc., §§ 2023.010, subd. (d), 2023.030, subds. (a)-(d); *Cedars–Sinai,* at p. 12.) A terminating sanction is appropriate in the first instance without a violation of prior court orders in egregious cases of intentional spoliation of evidence. (*R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 497). *Williams v. Russ* (2008)167 Cal.App.4th 1215, 1223.

5. **PROMISE TO PRESERVE EVIDENCE:**

While there is no tort cause of action for negligent or intentional spoliation of evidence, some courts have recognized a claim for promissory estoppel or breach of contract or "voluntary assumption of duty" in such matters as where a person promises to preserve evidence but does not do so.

Where the insurance carrier for the defense promised to preserve a tire which was the possible subject of a potential lawsuit but did not, the court that plaintiff could proceed with the claim of promissory estoppel or "voluntary assumption of a duty". State Farm to plaintiff to preserve the allegedly defective tire. Whether based on a contract principle of promissory estoppel or a tort theory of a voluntary assumption of a duty, plaintiff relied to his detriment on State Farm's promise to preserve the tire and/or voluntary assumption of a duty. As a result, State

Farm owed a duty to plaintiff. (See, e.g., *Coprich v. Superior Court* (2000) 80 Cal.App.4th 1081, 1091–1092); *Williams v. State of California* (1983) 34 Cal.3d 18, 23).

"The elements of a promissory estoppel claim are '(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.' [Citation.] [¶] 'Promissory estoppel is a "doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced." [Citation.]' " (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901–902.) Not unlike promissory estoppel is a defendant's voluntary undertaking of a duty to plaintiff. "As a rule, one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act. [Citations.] ... the volunteer who, having no initial duty to do so, undertakes to come to the aid of another ... is under a duty to exercise due care in performance and is liable if ... the harm is suffered because of the other's reliance upon the undertaking. [Citation.]" (*Williams v. State of California, supra,* 34 Cal.3d at p. 23.) *Cedars–Sinai, supra,* 18 Cal.4th 1 and *Temple, supra,* 20 Cal.4th 464, the primary cases relied upon by State Farm, are inapposite. In both cases the issue before the court was whether to *impose in the first instance* a duty on first and third party spoliators to preserve evidence. Here, by contrast, the duty to preserve evidence was independently assumed by State Farm when it made the promise to preserve the tire and plaintiff relied thereon. ***Cooper v. State Farm Mut. Auto. Ins. Co.*** (2009) 177 Cal.App.4th 876, 892. See also: ***Rosen v. St. Joseph Hospital of Orange County*** (2011) 193 Cal.App.4th 453, 460.