Spoliation of Evidence in West Virginia: Do Too Many Torts Spoliate the Broth

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SPOLIATION OF EVIDENCE IN WEST VIRGINIA: DO TOO MANY TORTS SPOLIATE THE BROTH?

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I. INTRODUCTION

The right to a fair trial is central to the American concept of justice. \(^1\) To ensure that a jury is capable of making a just decision, evidence must be produced by both sides in a trial. When evidence is destroyed or altered, this is known as “spoliation” of evidence. \(^2\) Such spoliation may leave the trial record incomplete, may impact the apparent relevancy of other evidence, and may increase litigation costs as litigants scramble to “reconstruct the spoliated evidence or to develop other evidence, which may be less accessible, less persuasive, or both.” \(^3\) Courts have responded to this unfair practice by developing several preventative remedies. \(^4\)

Recently, a few jurisdictions have adopted an independent tort for the spoliation of evidence. Over twenty-six jurisdictions \(^5\) have addressed the issue and, of these, six have recognized the tort for negligent spoliation of evidence. \(^6\)

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\(^1\) See Stefan Rubin, Tort Reform: A Call for Florida to Scale Back its Independent Tort for the Spoliation of Evidence, 51 FLA. L. REV. 345, 346 (1999) (citing Boldt v. Sanders, 111 N.W.2d 225, 228 (Minn. 1961) (“It is essential to the achievement of justice that all of the admissible evidence be brought ... for trial or settlement with full knowledge of the facts.”)); Lawrence B. Solum & Stephen J. Marzen, Truth and Uncertainty: Legal Control of the Destruction of Evidence, 36 EMORY L.J. 1085, 1138 (1987) (“Destruction of evidence undermines two important goals of the judicial system—truth and fairness.”).

\(^2\) See BLACK'S LAW DICTIONARY 1409 (7th ed. 1999). The word's etymology derives from British ecclesiastical courts. See id. (“The wrongful deprivation of a cleric of his benefice.”). Some courts have used the term ‘spoliation’ in its stead; however, the terms are interchangeable. See, e.g., Hazen v. Municipality of Anchorage, 718 P.2d 456, 463 (Alaska 1986); La Raia v. Superior Court, 722 P.2d 286, 287 (Ariz. 1986).

\(^3\) Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 515 (Cal. 1998).


\(^5\) See Rubin, supra note 1, at 353; Jonathan Judge, Comment, Reconsidering Spoliation: Common-Sense Alternatives to the Spoliation Tort, 2001 WIS. L. REV. 441, 450 (sorting out the types of the spoliation tort recognized in each jurisdiction that has adopted one).

while seven have recognized the tort in situations of intentional spoliation,\(^7\) although this is complicated by the fact that different courts use different terminology to define and address the same spoliation issues.\(^8\) Attempts to come up with new remedies like these may be warranted, as a recent study has indicated that fifty percent of litigators find spoliation to be a recurring problem.\(^9\) However, most jurisdictions that have addressed the issue have not adopted the tort, holding either that spoliation is better remedied by existing case law,\(^10\) or that the court might recognize such a tort, but that it would be inapplicable under the facts of the matter before the court at the time.\(^11\) It has been said of courts of the latter variety that "[c]ourts appear eager to recognize the tort but reluctant to apply it."\(^12\)

Further damaging the tort's quest for acceptance, there appears to be a trend away from acceptance of the tort among jurisdictions, at least when such a


\(^8\) See Judge, supra note 5, at 450.


claim is brought against an adverse party to the original suit. Many of these courts have chosen to rely on court-enforced sanctions rather than adopt a new tort. If there is any trend towards adoption of a spoliation tort, it is in respect to spoliation claims against a third party, unrelated to the original suit. Since 1998, at least three courts have recognized the validity of such a claim.

Most states that have adopted the tort have agreed that intentional spoliation of evidence consists of the following elements: (1) pending or probable civil litigation, (2) knowledge of the spoliator that the litigation is pending or probable, (3) willful destruction of evidence, (4) intent of the spoliator to interfere with the victim’s prospective civil suit, (5) a causal relationship between the evidence and the inability to prove the lawsuit, and (6) damages. A minor-

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13 See Koesel, supra note 9, at 64-66 (citing several cases).
14 See id. at 65-66. For a description of court sanctions, see infra Part III.
15 See Koesel, supra note 9, at 66.
18 There is some disagreement as to what level of culpability constitutes “intent.” For example, in Hirsch v. Gen. Motors Corp., 628 A.2d 1108 (N.J. Super. Ct. Law Div. 1993), the court found intent to destroy evidence, even though the evidence had not shown destruction “with a view toward precluding examination.” Id. at 1130. In justifying itself, the court stated that “[f]or the destruction of evidence to be intentional, it need not rise to the level of a malicious or ‘evil minded act.’” Id. at 1129-30. A contrasting view can be found in Headley v. Chrysler Motor Corp., 141 F.R.D. 362 (D. Mass. 1991). In Headley, the court required a finding that the evidence was destroyed by a party’s agent after he received notice that the evidence would be needed for evidentiary purposes. Id. at 364 n.1.
19 There is typically an issue in spoliation cases as to whether the missing evidence disrupts the ability to calculate the amount of damages, as opposed to disrupting the ability to discern the existence of damages. Both are often speculative, but should be considered separately. See Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931). The Court stated,

It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect to their amount.

Id. See also Thompson, supra note 12, at 589-90 ("[T]he mere absence of specific items of destroyed evidence does not necessarily mean that success would have been possible with the
ity of jurisdictions that have adopted a tort for intentional spoliation of evidence have also added a duty element for intentional spoliation.\textsuperscript{20} Otherwise, there is a homogeneity to the tort’s elements.

Negligent spoliation of evidence is a very similar tort, differing only in the elements of intent and, usually, duty. The elements of negligent spoliation are set out in \textit{Continental Insurance Co. v. Herman},\textsuperscript{21} and there are six: (1) the existence of a potential civil action,\textsuperscript{22} (2) a legal or contractual duty to preserve evidence that is relevant to the potential civil action,\textsuperscript{23} (3) destruction of the 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) resulting damages. Most jurisdictions that recognize negligent spoliation of evidence have accepted this definition of the tort.\textsuperscript{24}

Thus far, the West Virginia Supreme Court of Appeals has refused to address the issue of whether it would recognize a claim in tort for either intentional or negligent spoliation of evidence.\textsuperscript{25} This Note will attempt to address the issue of whether West Virginia should adopt such a tort in any (or all) of its forms. Part II will examine the common law origins of the tort and discuss its evolution through the various jurisdictions that have adopted it. Part III will discuss the various alternative remedial measures available to the court system in general when instances of spoliation of evidence occur. Part IV takes a closer look at both intentional and negligent spoliation claims, and will further subdivide the two causes of action into: (1) claims against a party to the litigation, and (2) claims against a third party unrelated to the litigation. It will then test these subdivisions to determine whether they are needed in light of the alternative remedies laid out in Part III. In light of this analysis, along with looking at sev-

\textsuperscript{20} \textit{See} Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 514-15 (Cal. 1998) ("A tort, whether intentional or negligent, involves a violation of a legal duty, imposed by statute, contract[,] or otherwise, owed by the defendant to the person injured"); Wilhoit, \textit{supra} note 4, at 644 (citing Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1181 (Kan. 1987) (stating that the duty to preserve evidence can arise out of a special relationship, contract or agreement, or other form of voluntary assumption of a duty)).

\textsuperscript{21} Wilhoit, \textit{supra} note 4, at 644 (citing Continental Ins. Co. v. Herman, 576 So. 2d 313, 315 (Fla. Dist. Ct. App. 1990)).

\textsuperscript{22} Note the slight difference in wording between the first element of intentional spoliation and the first element for negligent spoliation. However, as of yet, there has been no difference in application of the terms in any court, regardless of any (potentially) semantic difference.

\textsuperscript{23} \textit{See supra} note 20; notes 221-23 and accompanying text.


eral policy considerations and West Virginia case law, Part V recommends that West Virginia only adopt a claim in tort for intentional spoliation by a third party.

II. ORIGINS AND DEVELOPMENT

Although spoliation of evidence seems to be a recent addition to legal terminology, the idea of preservation of evidence has been important to courts for centuries. In fact, the term "spoliation" comes from the Latin: omnia praesumuntur contra spoliatorem, or "all things are presumed against the destroyer or wrongdoer." See generally Wilhoit, supra note 4, at 637 (citing Terry R. Spencer, Do Not Fold Spindle or Mutilate: The Trend Towards Recognition of Spoliation as a Separate Tort, 30 IDAHO L. REV. 37 (1993)).

Most recently, in the 1984 products liability case of Smith v. Superior Court, California became the first state to recognize an independent cause of action in tort for intentional spoliation of evidence. The court held that the then-current remedies would neither compensate the party wronged by the spoliation, nor would they deter spoliators, as destruction of evidence was only a misdemeanor in California. The court was troubled by the potential difficulty in determining the measure of damages in a situation where the damages are inherently speculative, but noted that when the nature of the claim inherently precluded precision in determining damages, then only a "reasonable" level of certainty should be required to be shown. As a final justification for its

26 In fact, the term "spoliation" comes from the Latin: omnia praesumuntur contra spoliatorem, or "all things are presumed against the destroyer or wrongdoer." See generally Wilhoit, supra note 4, at 637 (citing Terry R. Spencer, Do Not Fold Spindle or Mutilate: The Trend Towards Recognition of Spoliation as a Separate Tort, 30 IDAHO L. REV. 37 (1993)).
28 In Armory, a chimney sweep gave a jewel that he had found to a jeweler to be appraised. The jeweler returned the setting to the boy, but had removed the stone. At trial, the jeweler asserted that the stone had been misplaced, and the court held that if the jeweler would not proffer the stone, then (because it would be impossible to determine the stone's value) the jury could presume it to be of the highest value possible for its size. Id.
29 See Part III.A. infra and accompanying notes.
32 See id. at 834.
33 See id. The obstruction-of-justice statute in West Virginia, which is also applicable in situations of intentional spoliation of evidence, is a misdemeanor, as well. See Thompson, supra note 12, at 570 (citing W. VA. CODE § 61-5-27 (1989)).
34 See Smith v. Superior Court, 198 Cal. Rptr. at 835. As authority, the court cited Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931) ("Where the tort
actions, the court analogized claims for intentional interference with prospective business advantage to the burgeoning tort.\textsuperscript{35} The court followed this comparison by stating that both causes of action would reimburse victims for \textit{probable expectations}, which make up "a large part of what is most valuable in modern life."\textsuperscript{36} The court reasoned that this importance should cause courts to do more to "discover, define, and protect [these expectancies] from undue interference."\textsuperscript{37}

A few months after the \textit{Smith} decision, in \textit{Bondu v. Gurvich}, the District Court of Appeal of Florida, Third District, was the first court to recognize an independent tort for the \textit{negligent} spoliation of evidence.\textsuperscript{38} In \textit{Bondu}, the court relied on \textit{Smith}, as well as the prior California case of \textit{Williams v. California},\textsuperscript{39} and made a somewhat tenuous leap in logic to conclude that

[i]f, as in \textit{Williams} and \textit{Smith}, an action for failure to preserve evidence or destruction of evidence lies against a party who has no connection to the lost prospective litigation, then, a fortiori, an action should lie against a defendant which, as here, stands to benefit by the fact that the prospect of successful litigation itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.").

\textsuperscript{35} The elements for intentional interference with prospective business advantage are: 1) An economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; 2) knowledge by the defendant of the existence of the relationship; 3) intentional acts on the part of defendant designed to disrupt the relationship; 4) disruption of the relationship; and 5) damages proximately caused by the acts of the defendant. \textit{Smith v. Superior Court}, 198 Cal. Rptr. at 836 (citing Buckalo v. Johnson, 537 P.2d 865 (Cal. 1975); Asia Inv. Co. v. Borowski, 184 Cal. Rptr. 317 (Ct. App. 1982)), \textit{overruled by Cedars-Sinai}, 954 P.2d at 521. It should be noted that California is the only state to recognize such a cause of action. \textit{See} Judge, \textit{supra} note 5, at 455. Also, the analogy is not a particularly good one, as in prospective economic advantage cases, there is almost always a contract that has either been signed or was almost fully negotiated. Therefore, there is a basis for at least a reasonable ascertainment of injury and damages. \textit{Id}. Finally, this analogy was explicitly deemed a mistake by the Supreme Court of California in \textit{Temple Comm. Hosp. v. Superior Court}, 976 P.2d 223, 231 (Cal. 1999).

\textsuperscript{36} \textit{Smith v. Superior Court}, 198 Cal. Rptr. at 836 (quoting \textit{WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS § 130, at 950 (4th ed. 1971)}).

\textsuperscript{37} \textit{Id}.

\textsuperscript{38} 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984), \textit{cert. denied}, 484 So. 2d 7 (Fla. 1986).

\textsuperscript{39} 664 P.2d 137 (Cal. 1983).
against it has disappeared along with the crucial evidence. 40

Interestingly enough, the Bondu court chose to analyze the claim under the elements of simple negligence, rather than delineating any distinctive elements for a new cause of action. 41 Bondu further explained that a claim for negligent spoliation of evidence may only stand if there is a requisite duty owed by the spoliator to the plaintiff to preserve the evidence, and that the defendant hospital was bound by such a duty by Florida statute in the instant matter. 42 And so the claim for negligent spoliation of evidence was born.

In the fifteen years since Smith, a handful of states have joined California in adopting an independent tort for intentional spoliation of evidence. 43 It must have come as a shock to the courts of these states when California, birthplace of the tort for intentional spoliation, overruled Smith to an extent and scaled back the tort in the case of Cedars-Sinai Medical Center v. Superior Court. 44 The court explicitly disapproved of Smith to the extent that it allowed a cause of action against a party to the predominant claim in situations where the victim of the spoliation knew, or should have known, of the alleged spoliation prior to the trial or other decision on the merits. 45 The court concluded its limiting opinion by refusing to recognize whether there was a cause of action in tort for intentional spoliation of evidence against a nonparty ("third party") to the suit, or whether one existed where the victim did not know, or had no reason to know, of the spoliation prior to a decision on the merits. 46

The Cedars-Sinai court justified its decision by discussing the tort’s lack of necessity in light of the remedies already available to courts to combat spoliation. 47 The court further stated that these remedies seem to have some merit as deterrents because there did not appear to be a rampant problem with

40 Bondu, 473 So. 2d at 1312. For an explanation of how the two situations, in fact, may differ see infra Part IV and accompanying footnotes.

41 The court apparently adopted the new tort for intentional spoliation of evidence using the traditional elements for negligence: "(1) the existence of a duty recognized by law requiring the defendant to conform to a certain standard of conduct for the protection of others including the plaintiff; (2) a failure on the part of the defendant to perform that duty; and (3) an injury or damage to the plaintiff proximately caused by such failure." Bondu, 473 So. 2d at 1312.

42 See Bondu, 473 So. 2d at 1312. Bondu involved a hospital that lost the plaintiff’s anesthesia records and was subsequently unable to provide them to the plaintiff on his request. Id. at 1312-13.

43 See supra note 7.

44 954 P.2d 511 (Cal. 1998).

45 See id. at 521.

46 See id.

47 See id. at 517-18. See also infra Part III and accompanying notes.
spoliation within the justice system. Additionally, the court stated its belief that trial is the time when the opportunity arises for litigants to search out and reveal truth, and that propagation of such a tort would increase litigation, as well as possibly bringing about violations of collateral estoppel and res judicata.

One year later, the Supreme Court of California cut back the viability of a spoliation tort even further, eliminating the possibility of recourse in tort for intentional spoliation by third parties. The court relied largely upon its decision in Cedars-Sinai, basing its decision on fears of endless litigation, and referring to a “spiral of litigation giving rise to verdicts based on speculation.” Also, the court believed it would be anomalous for victims of spoliation to be able to collect great sums of money from third party spoliators, while being barred from doing so from adverse party spoliators, as a result of the existence of alternate remedies against adverse parties who spoliate.

The court was badly split however, with the author of the majority opinion of Cedars-Sinai penning the dissent of the 4-3 decision. Justice Kennard and his co-dissenters would “recognize a narrowly drawn tort remedy for the intentional destruction of evidence by someone not a party to the underlying cause of action to which the evidence is relevant, when the evidence is destroyed with the intent of affecting the outcome of the underlying action.” Justice Kennard disagreed that the opinion he penned in Cedars-Sinai was analogous to the instant matter, stating that non-tort remedies in instances of third party spoliation are much more limited than in adverse party spoliation. Kennard noted that non-tort remedies for third party spoliation do not help compensate victims in the same manner as adverse non-tort spoliation remedies attempt to do. Also, Justice Kennard made a strong argument that permitting a tort against third party spoliators would not interfere with the finality of judg-

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48 See Cedars-Sinai, 954 P.2d at 518.
49 Id. at 515-17.
50 Temple Cnty. Hosp. v. Superior Court, 976 P.2d 223, 225 (Cal. 1999). It should be noted that the lower courts of California have followed the reasoning put forth in Temple to eliminate the tort for negligent spoliation by a third party, as well. Therefore, all variations of the tort may be truly dead in California. See, e.g., Coprich v. Superior Court, 95 Cal. Rptr. 2d 884, 890 (Ct. App. 2000); Farmers Ins. Exch. v. Superior Court, 95 Cal. Rptr. 2d 51, 52 (Ct. App. 2000).
51 Temple, 976 P.2d at 225. The Court basically seemed to fear that juries would be forced to grasp more and more tenuously for justice, founding their decisions on evidence that is just as absent as it was during the first trial.
52 See id.
53 See id. at 234.
54 Id. at 235 (Kennard, J., dissenting).
55 See id. at 236.
56 See id.
ments. He reasoned:

[T]he spoliator has not litigated with the spoliation victim any issue relating to [the spoliated] evidence or to the underlying cause of action. Any judgment against the third party spoliator would not alter the previous determination of liability between the spoliation victim and the spoliation victim’s opponent in the underlying action.

Regardless, there is now no cause of action in California for intentional spoliation by a third party.

III. ALTERNATIVE REMEDIES

A. Spoliation Inference

State and federal courts have developed several measures for dealing with spoliation that may render an independent cause of action for spoliation unnecessary. The most traditional remedy for spoliation is the spoliation inference or presumption. When evidence is missing, the spoliation inference allows the jury to presume that such evidence would have been unfavorable to the spoliator. The inference shifts the burden of proof to the spoliator to show that the evidence was not unfavorable to him, which typically requires some sort of reasonable explanation for the unavailability of the evidence. Courts are split in determining when the spoliation inference is appropriate, with the culpability of the spoliator being the point of contention. Also, an inference is unlikely if

57 See id. at 237
58 Id.
59 These remedies include: 1) the spoliation inference, 2) discovery sanctions, 3) criminal sanctions, and 4) attorney discipline. See Part III infra and accompanying notes.
60 See, e.g., Wilhoit, supra note 4, at 647 (citing Armory v. Delamirie, 93 Eng. Rep. 664, 664 (discussed supra note 28 and accompanying text)). The spoliation inference has been used as the basis for denial of the recognition of a spoliation tort in Coletti v. Cudd Pressure Control, 165 F.3d 767 (10th Cir. 1999); Temple, 976 P.2d 223; and Trevino v. Ortega, 969 S.W.2d 950 (Tex. 1998).
61 See Wilhoit, supra note 4, at 647 n.113 (quoting Kammerer v. Sewerage & Water Bd., 633 So. 2d 1357, 1360 (La. Ct. App. 1994) (“The party is said to have admitted the adverse nature of the evidence by his or her conduct.”)).
62 See id. at 648 (citing Edwards v. Louisville Ladder Co., 796 F. Supp. 966, 971 (W.D. La. 1992)).
63 See id. (citing Brown v. Hamid, 856 S.W.2d 51, 56 (Mo. 1993)).
64 See KOESEL, supra note 9, at 37 (citing as examples requiring intent: Bashier v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997) (“mere negligence . . . does not sustain an inference of
the spoliator can show that the lost evidence was of little value.\textsuperscript{65} In determining whether to apply the inference, courts generally use a four-factor test: "(1) an act of destruction; (2) discoverability of the evidence; (3) an intent to destroy the evidence; and (4) occurrence of the act at a time after suit has been filed, or, if before filing, at a time when the filing is fairly perceived as imminent." \textsuperscript{66}

The spoliation inference is not a perfect remedy. Generally, plaintiffs need supporting evidence because they must still prove every element of the claim in order to recover, even in instances where spoliation has occurred.\textsuperscript{67} One commentator has also stated that the inference is not precise enough to handle the variety of procedural fairness issues that arise when spoliation becomes an issue.\textsuperscript{68} Instances of negligent spoliation are rarely punished by the inference, with courts desiring a showing of intent to spoliate in order to mandate such punishment.\textsuperscript{69} Finally, the inference is useless against third parties uninvolved in the suit.\textsuperscript{70}

\textsuperscript{65} See JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE \S 2.5, at 36-37 (1989).

\textsuperscript{66} Id. \S\S 3.8-3.12, at 88-109.

\textsuperscript{67} See Wilhoit, supra note 4, at 648 (citing Kammerer v. Sewerage \& Water Bd., 633 So. 2d 1357, 1361 (La. Ct. App. 1994)).

\textsuperscript{68} Judge, supra note 5, at 445.

\textsuperscript{69} See id. (citing Beers, 675 A.2d at 832 (citing jurisdictions)). However, Judge notes a split among federal courts over this issue. Judge, supra note 5, at 445, n.34. Judge feels that the use of the inference should be expanded to also include instances of negligent spoliation, on the grounds that the inference restores accuracy and fairness to trials, and that the spoliator’s level of intent is irrelevant to trial. Useful evidence has been rendered powerless, regardless of intent. See id. at 464-65.

\textsuperscript{70} See infra Part IV and accompanying notes.
B. Discovery Sanctions

The discovery sanction is more precise, more diverse, and more tailored to the facts of the case than an adverse inference instruction. The scalpel-like specificity of discovery sanctions is perhaps their greatest boon because, as one court warned:

While we eschew the imposition of rigid guidelines for the trial courts in this circumstance-specific area of the law, the judge should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms. Whether deterrence or compensation is the goal, the punishment should be reasonably suited to the crime.

In tailoring such a sanction, some courts have suggested selecting the sanction that would best

serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine. [By] (1) deter[ring] parties from engaging in spoliation; (2) plac[ing] the risk of an erroneous judgment on the party who has wrongfully created the risk; and (3) restor[ing] “the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.”

These sanctions may be imposed against parties to a lawsuit that violate the appropriate rules of discovery, or may even be imposed through the “inherent power” of the court itself. Basically, because the court “must structure its proceedings for the most effective ascertainment of the truth,” it can punish any sort of spoliation, taking place at any time, as long as the court finds that such spoliation was intended to hinder justice. Many sanctions are available, includ-

71 See Judge, supra note 5, at 445-46.
73 West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (quoting Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998)).
74 See Wilhoit, supra note 4, at 649 (citing Bachmeier v. Wallwork Truck Ctrs., 507 N.W.2d 527, 533 (N.D. 1993)).
75 Judge, supra note 5, at 446 (citing Fed. R. Evid. 611).
76 Id. at 446-47 (citing Dillon v. Nissan Motor Co., Ltd., 986 F.2d 263, 268-69 (8th Cir. 1993) (holding that sanctions are appropriate, regardless of the presence of a court order, if those imposed are similar to those found in Rule 37(b)(2)(B) of the Federal Rules of Civil Procedure); Iain D. Johnston, Federal Courts' Authority to Impose Sanctions for Prelitigation or Pre-order Spoliation of Evidence, 156 F.R.D. 313, 318 n.39 (1994) (collecting cases)).
ing "exclusion of critical testimony, monetary sanctions,\textsuperscript{77} or even [] default judgment . . . or dismissal of the suit.\textsuperscript{78} Courts have typically held that, in imposing such sanctions, they should use the least restrictive sanction deemed necessary to remedy the problem.\textsuperscript{79} West Virginia's list of discovery sanctions is extensive, including, but not limited to, the following: undisclosed matters may be taken as established, uncooperative parties might not be permitted to support or oppose designated claims or defenses, uncooperative parties might be prohibited from introducing designated matters as evidence, part or all of the pleadings may be stricken, the proceedings may be stayed until the discovery order is obeyed, the claim may be dismissed or a default judgment entered, and expenses caused by failure to cooperate will be charged to the disobedient party.\textsuperscript{80}

A major problem with discovery sanctions is that such sanctions can only be imposed for direct violations of a court order or discovery request.\textsuperscript{81} To combat pretrial spoliation, courts have begun to impose similar sanctions springing from the inherent power of the courts themselves, in many cases not even requiring bad faith or intent on the part of the spoliator.\textsuperscript{82} The West Virginia Supreme Court of Appeals has set forth a list of factors to be considered in de-


\textsuperscript{78} Wilhoit, supra note 4, at 649. One court has held that "dismissal is a sanction of last resort that should only be imposed if the court concludes the parties' failure to cooperate in discovery was willful, in bad faith, or due to its own fault." \textit{Koessel}, supra note 9, at 31 (citing Beil v. Lakewood Eng'g and Mfg. Co., 15 F.3d 546, 552 (6th Cir. 1994)). Default judgements have been held to be at the same level of severity. \textit{In re Marriage of Lai}, 625 N.E.2d 330 (III. App. Ct. 1993), the court held that "default judgment is the most severe sanction a court can impose on a defendant and is proper only in those cases where actions of a party showed deliberate, contumacious, or unwarranted disregard of a court's authority." \textit{Id.} at 334.


\textsuperscript{80} \textit{See} W. VA. R. CIV. P. 37(b). These rules are to be "construed liberally to promote justice." Harrison v. Davis, 478 S.E.2d 104, 114 (W. Va. 1996).

\textsuperscript{81} \textit{See} Wilhoit, supra note 4, at 649.

\textsuperscript{82} \textit{Id.} (citing Patton, 538 N.W.2d at 118; Bachmeier v. Wallwork Truck Ctr's., 507 N.W.2d 527, 535 (N.D. 1993)). The United States Supreme Court has warned that this inherent power should be used with restraint, "[b]ecause inherent powers are shielded from direct democratic controls." \textit{Roadway Express, Inc. v. Piper}, 447 U.S. 752, 764 (1980).
ciding which sanction should be imposed in an instance when spoliation has occurred, consisting of: 1) the party's degree of control, ownership, possession or authority over the destroyed evidence; 2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; 3) the reasonableness of anticipating that the evidence would be needed for litigation; and 4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence. Because of such broad discretion on the part of courts, such sanctions have evolved into a more effective means of combating spoliation of evidence.

C. Criminal Sanctions

Another remedy that may persuade potential spoliators to act otherwise is the fact that many jurisdictions have obstruction of justice statutes that cover spoliation of evidence. In order for the statutes to apply, some courts require specific intent to obstruct, while others require only a showing that justice was likely to be obstructed. However, the act of destruction itself is often enough to establish specific intent.

This remedy is far from perfect, however. As one commentator has stated, criminal sanctions "cannot restore the accuracy of the original fact-finding proceeding, nor do they compensate the victim of evidence destruction for its loss in the civil suit." A judicial proceeding must be "pending" before the statute can be violated. Moreover, prosecutors seem unlikely to pursue an

83 Degree of fault meaning whether or not the spoliation was intentional or negligent.

84 See Tracy v. Cottrell ex. rel. Cottrell, 524 S.E.2d 879, 890 (W. Va. 1999). Other courts have also considered factors such as: the degree of interference with the judicial process; whether lesser sanctions will remedy any harm and deter future acts of spoliation; whether evidence has been irretrievably lost; and whether sanctions will unfairly punish a party for misconduct by the lawyer. See KOESEL, supra note 9, at 32-33 and accompanying notes.

85 See Wilhoit, supra note 4, at 650 (citing ARIZ. REV. STAT. § 13-2809 (2001); CAL. PENAL CODE § 135 (1985); and MINN. STAT. § 609.63(7) (1987)).

86 See Thompson, supra note 12, at 567 (citing Solum & Marzen, supra note 1, at 1113 (noting that the distinction is probably immaterial)).

87 See id.

88 GORELICK, supra note 64, § 5.13, at 198.

89 This term has been considered broadly. In the criminal context, for instance, courts have considered a proceeding "pending" even prior to the issuing of a subpoena. See Thompson, supra note 12, at 567 (citing United States v. Fineman, 434 F. Supp. 197, 202 (E.D. Pa. 1977), aff'd, 571 F.2d 572 (3d Cir.), cert. denied, 436 U.S. 945 (1978); United States v. Solow, 138 F. Supp. 812, 815 (S.D.N.Y. 1956)).

90 Some jurisdictions have removed this requirement, thus punishing those who would spoliate evidence for even a potential proceeding. See GORELICK, supra note 64, at 189-93
obstruction charge for spoliation in the civil context.\textsuperscript{91} This is likely a result of the fact that "[s]carce prosecutorial resources simply do not permit prosecution of spoliation in private lawsuits."\textsuperscript{92} In addition, criminal penalties for spoliation may be useless in civil proceedings, depending upon the wording of the statute in a particular jurisdiction.\textsuperscript{93} Finally, because many jurisdictions classify the obstruction of justice statute as a misdemeanor,\textsuperscript{94} many spoliators who have large sums of money at stake in such suits are willing to take the risk of having to pay a small fine or do a small amount of time in order to protect their finances.\textsuperscript{95} In short, obstruction of justice statutes have their faults in combating spoliation of evidence.

D. Attorney Discipline

Aside from all of the court measures that laypersons may face, attorneys face the possibility of professional discipline should they choose to participate in, or advise their clients to commit, spoliation of evidence.\textsuperscript{96} The Model Rules of Professional Conduct account for such malefic behavior,\textsuperscript{97} and many states have adopted similar rules in their attorney rules of conduct.\textsuperscript{98} Actually, this is a "double whammy" for attorneys because not only may they face suspension, (surveying state statutes).

\textsuperscript{91} See Smith v. Superior Court, 198 Cal. Rptr. 829, 835 (Ct. App. 1984), overruled by Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 521 (Cal. 1998) ("We know of no reported prosecution under [California Penal Code] section 135--adopted in 1872 . . . for destroying or concealing documentary evidence relevant only to prospective civil action"). However, such a prosecution has occurred in at least one jurisdiction. See United States v. Lundwall, 1 F. Supp. 2d 249 (S.D.N.Y. 1998) (finding that civil discovery remedies might, at times, be insufficient and that the federal obstruction of justice statute was applicable, regardless of the fact that it had never previously been used in a civil destruction of evidence context).

\textsuperscript{92} Gorelick, supra note 64, at 198.

\textsuperscript{93} See KoeseL, supra note 9, at 69 (citing Gorelick, supra note 64, at 198).

\textsuperscript{94} See Thompson, supra note 12, at 570 (noting that seventeen states and the Model Penal Code all have misdemeanor obstruction of justice statutes, most of these statutes are treated as misdemeanors across the board).

\textsuperscript{95} See Smith v. Superior Court, 198 Cal. Rptr. at 835 ("If crucial evidence could be intentionally destroyed by a party to a civil action who thereby stands to gain substantially monetarily by such destruction, the effect of a misdemeanor would be of minimal deterrence.").

\textsuperscript{96} See Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 437 (Minn. 1990).

\textsuperscript{97} "[A]n attorney shall not 'unlaw-fully' [sic] obstruct another party's access to evidence or unlawfully alter, destroy or [i]conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act." Wilhoit, supra note 4, at 651 (quoting Model Rules of Prof'L Conduct R. 3.4(a) (1993)).

\textsuperscript{98} See, e.g., Federated Mut. Ins. Co., 456 N.W.2d at 437.
fines, or worse from their state bar associations for such conduct, but, should their client's case be dismissed as a result of spoliation, attorneys may face malpractice charges brought on by disgruntled clients. Attorney sanctions and potential malpractice claims should prove to be quite powerful deterrents, and any attorney who chooses to participate in, or recommend, spoliation of evidence is an unwise attorney, to say the least.

IV. VARIATIONS ON THE TORT

Failure to subdivide the tort of spoliation of evidence brings about confusion and ignores the differences between the variations, especially when considering the usefulness of the alternative remedies discussed in Part III. There are four possible variations of the tort of spoliation of evidence: (1) where "one of the parties to the litigation intentionally spoliates evidence; (2) a disinterested third party intentionally spoliates evidence; (3) one of the parties to the litigation negligently spoliates evidence; and (4) a disinterested third party negligently spoliates evidence." Some courts have analyzed the viability of a spoliation tort under the auspices of one blanket tort, and others have split the tort into intentional and negligent versions.

A. Intentional Spoliation by an Adverse Party

An independent cause of action for intentional spoliation of evidence by a party to the lawsuit seems to be one of the least valid variations, as far as its necessity in light of alternate remedies. The full gamut of court remedies is available in such an instance. The court may allow a jury to draw an adverse inference; it may impose whatever discovery sanctions it deems fit; obstruc-

99 See Wilhoit, supra note 4, at 651-52.
100 See Sweet v. Sisters of Providence, 881 P.2d 304, 313 (Alaska 1994) (failing to adopt a tort for negligent spoliation because a presumption against the spoliator should suffice to redress it); Coleman v. Eddy Potash, Inc., 905 P.2d 185, 189-90 (N.M. 1995); (holding that a negligent spoliation tort was unnecessary because sanctions and inferences would suffice to redress negligent spoliation); Wilhoit, supra note 4, at 661-62 (citing St. Mary's Hosp., Inc., v. Brinson, 685 So. 2d 33, 35 (Fla. Dist. Ct. App. 1996); (adopting the generic tort for spoliation of evidence)).
101 Wilhoit, supra note 4, at 634.
102 Id. For an analysis of each of the four variations when considered in light of the three fundamentals of tort law -- morality, compensation, and deterrence -- see id. at 663-73 & nn.210-38.
103 See Wilhoit, supra note 4, at 661-62.
104 For a list of the generally agreed-upon elements of intentional spoliation of evidence, see supra notes 17-20 and accompanying text.
105 For instances in which these first two remedies may be implemented, see Wilhoit, supra
tion of justice statutes may be enforced,\textsuperscript{106} and attorneys found to have been a party to spoliation may be sanctioned.\textsuperscript{107} The availability of such varied measures, combined with the vast discretion available to courts in applying them, suggests that courts may adequately deter such behavior by litigants, as well as compensate those harmed by the spoliation.\textsuperscript{108} The tort seems unnecessary in situations of intentional spoliation by a party to the suit.

B. Intentional Spoliation by a Third Party

Instances of intentional spoliation of evidence, when perpetrated by a disinterested third party, seem to present nearly the opposite side of the spectrum as a situation where a party to the suit intentionally spoliates. Spoliation inferences and discovery sanctions pose no threat to a party uninvolved in the litigation.\textsuperscript{109} Obstruction of justice charges, though still an option, are unlikely to be brought, at least in civil litigation,\textsuperscript{110} and although instigating attorneys may be sanctioned, spoliating third party clients are still not likely to receive punishment. Even if obstruction of justice charges were to be brought, the penalties for violation are usually slight, so the deterrence factor would be low.\textsuperscript{111} Also, the victim of the spoliation would likely remain uncompensated, as he would likely lose the suit as a result.\textsuperscript{112} It should be noted that the Temple court found the possibility of valuable evidence winding up in the hands of a party with independent motivation to destroy evidence in the litigation between the adverse parties in any given suit to be highly unlikely.\textsuperscript{113} However, the dissent correctly points out that, for example, indemnitators of a plaintiff or defendant in a matter may have economic incentive to destroy such evidence on the grounds that, should the lawsuit go against the party with whom they are associated, they may be held liable to that party for any such damages the court may award the

\textsuperscript{106} Again, admittedly, such charges are highly unlikely to be brought in a civil suit. \textit{See supra} note 88.

\textsuperscript{107} \textit{See} Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 437 (Minn. 1990).

\textsuperscript{108} \textit{See} Rubin, \textit{supra} note 1, at 358-59.

\textsuperscript{109} "[T]raditional procedural . . . remedies are flawed by their limited scope, their inadequate preventive effect, and their failure to provide the victim with just compensation." Steffen Nolte, \textit{The Spoliation Tort: An Approach to Underlying Principles}, 26 ST. MARY’S L.J. 351, 355 (1995).

\textsuperscript{110} \textit{See supra} notes 89-93 and accompanying text.

\textsuperscript{111} \textit{See} Wilhoit, \textit{supra} note 4, at 668.

\textsuperscript{112} \textit{See} id.

adverse party resulting from such evidence. Because of these concerns, some courts have adopted the tort against these third parties who destroy evidence, and with good cause. Of all variations of the spoliation tort, intentional spoliation by a third party is the most justified.

C. Negligent Spoliation by an Adverse Party

The situation of negligent spoliation of evidence by an adverse party can be examined in much the same way as that of intentional spoliation by an adverse party, at least as far as alternate remedies are concerned. The main difference between the two becomes apparent when considering that some courts have argued that “spoliation of evidence through negligence or inadvertence does not warrant as severe moral judgment against the spoliator as intentional spoliation.”

Even though the same remedies are available to courts, there is a possibility that, because of the lack of intent, and thus a perceived reduction in the level of culpability, courts may be less stringent in applying such remedies. However, implementing a claim in tort for such actions may not help in stopping negligent spolatory behavior, as scholars have noted that “tort liability for negligent acts adds little to deterrence because most individuals are rarely involved in tortious situations and, therefore, have little incentive to learn how to avoid tortious behavior.” Therefore, the best solution may be for courts to be equally aggressive in applying remedies for negligent spoliation as they would be when intentional spoliation is involved.

See id. at 240.

See Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 521 (Cal. 1998) (while limiting California’s claim of intentional spoliation against an adverse party, the court declined to decide on striking such a cause of action against third parties); Coleman, 905 P.2d at 189; Rubin, supra note 1, at 359 (citing Holmes, 710 A.2d at 848; Callahan, 703 A.2d at 1017 (stating that the recognition of the tort would signal ‘acceptable societal behavior’)).

See supra Part IV.A.

Wilhoit, supra note 4, at 669 (citing as an example Patton v. Newmar Corp., 538 N.W.2d 116, 119 (Minn. 1995)). It should be noted, however, that even this basic argument has been rejected by some courts which choose not to differentiate between negligent and intentional spoliation. See Farley Metals, Inc. v. Barber Colman Co., 645 N.E.2d 964, 968 (Ill. App. Ct. 1994) (“When crucial evidence is destroyed, the offending party’s intent becomes significantly less germane in determining a proper sanction. . . .”); Hamann v. Ridge Tool Co., 539 N.W.2d 753, 756-57 (Mich. Ct. App. 1995) (“Whether the evidence was destroyed or lost accidentally or in bad faith is irrelevant, because the opposing party suffered the same prejudice; specifically, defendant was unable to challenge the evidence or respond to it. . . .”).

For instance, in a situation in which court-imposed sanctions would be appropriate as a result of negligent spoliation, a court might opt to exclude certain pieces of evidence as opposed to dismissing the case outright.

Wilhoit, supra note 4, at 669 (citing RICHARD L. ABEL, TORTS, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 326, 340 (David Kairys ed., rev. ed. 1990)).
D. Negligent Spoliation by a Third Party

The court seems to be just as powerless in using discovery sanctions, or other internal corrective remedies, to punish instances of negligent spoliation by a third party as it is to punish intentional spoliation by a third party.\textsuperscript{120} Even remedies that the court system still might be able to enforce, such as obstruction of justice charges, are less likely to be brought in instances of negligent spoliation than in instances of intentional spoliation, as a result of the aforementioned perception of less culpability and intent in negligent actions than in intentional ones.\textsuperscript{121} In a strictly comparative analysis of remedies, without taking policy considerations into account, a cause of action for negligent spoliation of evidence by a third party seems to be the best option.\textsuperscript{122}

V. RECOMMENDATIONS IN LIGHT OF PUBLIC POLICY CONCERNS AND WEST VIRGINIA CASE LAW

The analysis of the four variations of the spoliation tort found in Part IV of the note may provide some guidance, but a final judgment as to the appropriateness of each potential claim cannot be made without considering the overarching concerns of public policy, as well as analyzing West Virginia case law, to see if any form of the tort appears more savory than the rest.

A. Policy Concerns

1. Integrity of the Judicial System

A policy concern that warrants adoption of all variations of the tort is that spoliation of evidence threatens the integrity of our judicial system.\textsuperscript{123} Regardless of a party's affiliation to the suit, he or she should not be able to get away with, let alone benefit from, such behavior.\textsuperscript{124} However, allowing a cause of action in tort for such violations brings about "the risk of inconsistent results or double recovery."\textsuperscript{125} For instance, in third party spoliation claims, it is possible that both of the adverse parties might assert that the evidence was favorable to their case, both might sue the guilty third party, both might win, and thus gain

\textsuperscript{120} See supra Part IV.B.
\textsuperscript{121} See supra notes 117-18 and accompanying text.
\textsuperscript{122} For examples of policy considerations that swing the pendulum back towards non-adoption, see supra Part V.A.
\textsuperscript{123} See Rubin, supra note 1, at 364.
\textsuperscript{124} See id. at 364-65.
\textsuperscript{125} Id.
inconsistent verdicts.\textsuperscript{126} Because of these difficult issues, proponents of both sides of the spoliation debate may rely on the integrity of the judicial system to support their cause.

2. Deterrence

As mentioned, deterrence of spoliation of evidence is an important policy goal.\textsuperscript{127} This policy concern begs the adoption of the tort in instances of third party spoliation, where many of the court-imposed remedies are largely unavailing, or often go unenforced, as with obstruction of justice statutes.\textsuperscript{128} Additionally, the possibility of punitive damages being recovered adds to the efficiency of deterrence under any variation of the tort because, should the evidence be particularly incriminating, a party might otherwise destroy evidence under the logic that he has nothing to lose.\textsuperscript{129} The possibility of punitive damages may curb such temptation.

3. Compensation

Another previously-mentioned policy concern that mandates the adoption of the tort in third party situations is that of compensation.\textsuperscript{130} Although suitably efficient in cases where the spoliator is a party to the suit, court-imposed remedies are, again, found lacking in compensating the injured party when a third party spoliates. The victim of the spoliation will likely lose the suit without the evidence, and the court is unlikely to impose summary judgment, or other sanctions or remedies, against a party to the suit who has done no wrong.\textsuperscript{131} This may be prevented in instances where an agency, or other similar, relationship is shown between a party to the suit and the accused spoliator.\textsuperscript{132} Because of this conundrum, a spoliation tort against third parties may be the

\textsuperscript{126} See Judge, \textit{supra} note 5, at 460 (citing Temple Cnty. Hosp. v. Superior Court, 976 P.2d 223, 231 (Cal. 1999)).

\textsuperscript{127} See \textit{supra} notes 111, 119 and accompanying text.

\textsuperscript{128} See Elias v. Lancaster Gen. Hosp., 710 A.2d 65, 67-68 (Pa. Super. 1998) (stating that "traditional remedies would be unavailing, since the spoliator is not a party to the underlying litigation"); Rubin, \textit{supra} note 1, at 365 (citing Holmes v. Amerex Rent-a-Car, 710 A.2d 846, 849 (D.C. 1998) (stating that when the spoliator is a third party, "an adverse inference against the spoliator would serve no purpose.").


\textsuperscript{130} See \textit{supra} note 18.

\textsuperscript{131} See Wilhoit, \textit{supra} note 4, at 667, 668.

\textsuperscript{132} See id. For a discussion of agency and the burden of persuasion, see \textit{infra} notes 133-35 and accompanying text.
only way to achieve compensation for the injured party.\textsuperscript{133}

However, in regard to the compensation argument for adoption of the tort against third parties, it is worth noting that courts have been willing to place the burden of preservation squarely on the party to the suit in instances where that party entrusts evidence to his agents, experts, insurers, lawyers, etc., and such evidence is subsequently spoliated.\textsuperscript{134} This somewhat harsh argument has been set forth by one court as follows:

[The plaintiff] knew that the [evidence] was relevant to his claims against [the defendants] and he, therefore, had a duty to preserve the evidence. His argument that only [plaintiff’s agent] had a duty to preserve the [evidence] is misguided. [The agent] did not enter the suit as a party until almost a year after [the plaintiff] filed his complaint. Moreover, that [the agent] may also have had a duty to preserve the evidence did not absolve [the plaintiff] of his duty to preserve evidence that was relevant to his own claims against [the defendant].\textsuperscript{135}

Such decisions seem to suggest that those who “own” the claim are ultimately responsible for keeping track of important evidence supporting such a claim.\textsuperscript{136} Alternate solutions to this difficult situation that have been suggested include some form of malpractice tort for expert witnesses who damage evidence, as well as some combination of certification and contract law, where litigants could buy insurance to have a previously specified sum paid as liquidated damages should vital evidence be destroyed or lost.\textsuperscript{137} Also, this potentially harsh solution may be allayed somewhat should a court find that, under the laws of agency or bailment, an agent or bailee bore a duty to preserve evidence for his respective principal or bailor. In such an instance, a court could potentially make the agent or bailee liable to the principal or bailor.\textsuperscript{138}

\textsuperscript{133} See Rubin, supra note 1, at 366.

\textsuperscript{134} See KOESEL, supra note 9, at 12.


\textsuperscript{136} A claim or cause of action is typically viewed as a type of personal property. 63C AM. JUR. 2d Property § 22 (1997).

\textsuperscript{137} Judge, supra note 5, at 459 n.132.

\textsuperscript{138} See infra notes 221-23 and accompanying text for a discussion of when a court may find a duty to preserve. Bailment is typically created when a "bailor" gives personal property to a "bailee" for safekeeping. See 8A AM. JUR. 2d Bailments § 1 (1997). "[A] voluntary bailee owes a duty of reasonable care to the bailor." See Judge, supra note 5, at 465-66 n.162 (citing 8 C.J.S. Bailments § 25 (1988)). If a bailee causes or permits the destruction or damage of the property, or returns the property in a damaged condition, this constitutes a conversion of the property to the bailee’s own use, and a violation of the duty of reasonable care. In such in-
4. Speculation as to Fact of Damages

Another strong counterargument to compensation is the inherent difficulty of proving the fact of injury in a spoliation suit. If the damages themselves are unable to be convincingly shown, it is difficult to assert anything in need of compensation. The fact that the evidence is missing makes it nearly impossible to weigh the value that such evidence would have had on the case, which may lead to speculation. However, the Supreme Court of Appeals of West Virginia has defined injury as "invasion of any legally protected interest," and some courts have held that a prospective civil action qualifies as such an interest. Thus, deprivation of the chance of victory itself may count as something of value. A quote from Prosser's *Handbook on the Law of Torts* is often used to support the argument to adopt the spoliation tort, especially against third parties. Dean Prosser states:

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 court has struck out boldly to create a new cause of action, where none has been recognized before. . . . The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff’s interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel


139 See supra note 126 and accompanying text.

140 See Lionberger, supra note 4, at 219.


142 See, e.g., Galarza v. Union Bus. Lines, Inc., 38 F.R.D. 401, 404 (S.D. Tex. 1965); Hazen v. Municipality of Anchorage, 718 P.2d 456, 463-64 (Alaska 1986); Button v. Drake, 195 S.W.2d 66, 69 (Ky. 1946); Oliver v. Stimson Lumber Co., 993 P.2d 11, 16 (Mont. 1999). Incidentally, this is the same line of reasoning that was used to prevent defendants in the original action from being able to bring suit for spoliation. In most instances, defendants are unable to establish loss of a potential cause of action. See Koesel, supra note 5, at 62 (citing Hewitt v. Allen Canning Co., 728 A.2d 319 (N.J. Super. Ct. App. Div. 1999)). Apparently, where there is an interference in a defendant’s ability to defend against a potential suit, “the rules of court provide more than sufficient remedy.” Hewitt, 728 A.2d at 321-22. But see Hazen, 718 P.2d at 464 (common law cause of action for intentional interference with a prospective civil action by spoliation of evidence; prior defendant’s prospective false arrest and malicious prosecution actions are “valuable probable expectancies”).

will not of itself operate as a bar to the remedy. 144

However, this reasoning is irrelevant when used to support a potential cause of action that is already covered by an existing tort or alternate remedy, as is the case with most of the variations of a potential spoliation tort. 145

5. Sufficiency of Current Remedies and Claims

Perhaps the strongest argument against adoption of most variations of the spoliation tort is that there are various remedies and claims already available that can sufficiently handle instances of spoliation of evidence. 146 First, a spoliator who is party to the litigation can be foiled by the alternate remedies set forth in Part III of this note. 147 The spoliation inference, in particular, has been deemed superior to the tort on the grounds that it is "more efficient, it avoids the horrors of derivative litigation, and it does the best job of fairly compensating the victimized party." 148 Also, it has even been argued that allowing causes of action for discovery violations steps on the toes of the court because legislatures have explicitly given judges power to handle such instances. 149 In addition to the remedies set forth in Part III, an exception to the "best evidence" rule would allow typically banned evidence into trial when the "best" evidence has been spoliated. 150 Finally, at least one commentator has suggested a statutory remedy that would increase the number of legislative remedies even further. 151 However,

144 WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS § 1, at 3-4 (4th ed. 1971). The idea of "a remedy for every wrong" stems from the Magna Carta, which curbed the unjust practice of courts' selling writs to the highest bidder. See David Schuman, The Right to a Remedy, 65 TEMP. L. REV. 1197, 1201-02 (1992). It has been argued that this "right to a remedy" is not without limits. See Judge, supra note 5, at 461 n.144 (citing statutes of limitations as an example). However, a victim of spoliation can be differentiated from one whose statute of limitations has expired on his potential claim. The victim of spoliation cannot necessarily be said to have "slept on his rights."

145 See infra Part V.A.5.

146 See infra Part V.A.5.

147 See id.; supra Part III and accompanying notes.

148 Judge, supra note 5, at 464.

149 See Thompson, supra note 12, at 594.

150 See FED. R. EVID. 1004(a)(1) (exception created if evidence is lost or destroyed, as long as not done in bad faith by the proponent). See, e.g., Bendix Corp. v. United States, 600 F.2d 1364, 1371-72 (Cl. Ct. Cl. 1979) (acknowledging the exception and admitting secondary evidence when the best evidence was lost or destroyed).

151 See Judge, supra note 5, at 462. Judge suggests the following statute to legislatively clarify one’s duty to preserve evidence:

(1) Individuals and corporate and political entities have an obligation reasonably to preserve all property within their control that may be discoverable in an im-
even lacking legislative action, the current alternatives prove sufficient in most instances.  

One final reason for not adopting the tort in situations where negligent spoliation is asserted is that a simple negligence claim is fully capable of covering instances of negligent spoliation. This has been a primary reason upon which several of the courts that have deigned not to adopt a tort for negligent spoliation have relied. The reasoning seems to be that "[r]ecognizing that a negligent spoliation claim is essentially a disguised negligence claim, many states have concluded that the damaged party can pursue their claim under a negligence theory, and the state need not recognize a new tort."  

Reminident or pending legal action of which they have actual knowledge. All non-parties who possess potentially discoverable evidence must be formally served with notice of the legal action containing a general description of the type of evidence required to be preserved for the parties’ inspection. Nonparties who have received actual notice of imminent or pending litigation under this section may petition the court with jurisdiction over the action for reasonable compensation for the burdens of preservation, if any, in the event that the parties cannot otherwise agree on a defined rate.

(2) Notwithstanding section (1), individuals and corporate and political entities who control property that may constitute evidence in a foreseeable future proceeding may have a duty to preserve potential evidence provided that the requesting party can demonstrate by clear and convincing evidence that the property owner took actions consistent with constructive knowledge of a likely proceeding involving the potential evidence.

Id. at 462-63.

See, e.g., Aikens v. Debow, 541 S.E.2d 576, 578 Syl. Pt. 5 (W. Va. 2000) ("[T]he determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.").


Federated Mut. Ins. Co., 456 N.W.2d at 436 (citing as example Pirocchi, 365 F. Supp. at 281-82; Bondu, 473 So. 2d at 1312-13; Coley, 107 A.D.2d at 68-69); Rubin, supra note 1, at 355 (citing Boyd, 652 N.E.2d at 270; Coleman, 905 P.2d at 190; Elias, 710 A.2d at 68). It should also be noted that the New Jersey Supreme Court has recently held that, at least in instances of third party spoliation, it is possible to fit a spoliation claim into the elements of the tort of fraudulent concealment, as well. See Rosenblit v. Zimmerman, 766 A.2d 749, at 757-58

https://researchrepository.wvu.edu/wvlr/vol104/iss2/8
caster General Hospital,
illustrates this "disguised negligence claim" by analyzing the attempted spoliation under the four negligence elements of duty, breach, proximate cause, and damages, with convincing results.

Montana is one of the very few jurisdictions to acknowledge this argument and still adopt a tort for negligent spoliation of evidence. Although not explicitly addressing the argument, the Oliver court did treat negligent spoliation somewhat differently than a simple negligence claim in two respects. First, the Oliver court lowered the traditional standard of proof required in negligence actions from a "preponderance of the evidence" to a "significant possibility of success." Although the Oliver court did not justify this change with an explanation, it can be inferred that the change was based on a desire to account for the speculation inherent in any spoliation claim. The Holmes v. Amerex Rent-A-Car decision, upon which the Oliver court largely relied, used just such an argument as justification. Basically, it seems that this "down-tuning" of the burden of proof turns a claim that would be difficult to prove, under normal circumstances, into one that is likely to be difficult to refute. Additionally, the more lenient standard accomplishes nothing, because "[i]n the absence of a proven injury, a breached duty has not 'caused' anything." It seems that the Oliver court believed that it was forced to decide between a lesser of two evils, and opted in favor of potential victims of spoliation, rather than those accused of such spoliation.

Second, the Oliver court adopted the following damage calculation for-


156 See id. at 68-69. The plaintiff in Elias failed to convince the court of an existing duty to preserve on the part of the defendant hospital. See id. at 69.


158 See id. at 21. The court continued, "a plaintiff must demonstrate a substantial and realistic possibility of succeeding, but need not demonstrate that such success was more likely than not." Id. (citing Holmes v. Amerex Rent-a-Car, 710 A.2d 846, 850 (D.C. 1998).

159 710 A.2d 846 (D.C. App. 1998).

160 Id. at 850 ("reasonably close causal connection" standard generally used to show proximate cause "does not adequately protect the interests of a plaintiff in a third-party spoliation claim . . . because the very purpose of an independent action for spoliation of evidence lies in the inability of the plaintiff to prove proximate causation to the proper degree of certainty required in the underlying suit.").

161 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 30 at 165 (5th ed. 1984) ("Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered."); Judge, supra note 5, at 454 (citing Uppgren v. Executive Aviation Servs., Inc., 304 F. Supp. 165, 167 (D. Minn. 1969) ("[M]ere negligence 'in the air' is not a tort and does not become actionable until the force of the wrongful conduct impinges on a person.").
mula: multiply a reasonable estimation of total damages by the probability of victory for the plaintiff had the evidence not been spoliated. In so holding, the court reasoned:

[T]he interest of the plaintiff to recover the entire amount of damages that he would have received if the underlying action had been pursued successfully must be balanced with the defendant's interest in not providing the plaintiff with a windfall. The plaintiff should not be allowed to benefit more from the spoliation than he would have in the underlying suit. On the other hand, the defendant should be adequately punished for his offending conduct and should be required to adequately compensate the plaintiff for the loss of his ability to pursue the underlying suit.

This modification, unlike "down tuning" the burden of proof, does appear fair to both parties. However, no reason exists as to why such a standard for damages could not be adopted under a negligence claim, whenever spoliation serves as the basis for the claim. "The amount of damages should be determined by the trial court and the trier of fact after a full trial on the merits[.]

In contrast, Smith v. Adkinson more effectively addressed the spoliation issue under the confines of a negligence claim. The Smith court began its analysis by stating that an "action for negligent spoliation can be stated under existing negligence law without creating a new tort." The court then held that in such instances a rebuttable presumption will be created in favor of the plaintiff, that being that the plaintiff would have prevailed in the underlying action but for the spoliation. The third party can overcome such a presumption by showing that the plaintiff would not have prevailed, even had the spoliated evidence been available. The three additional factors that a plaintiff must show in order to gain the benefit of this presumption are: "(1) that the defendant spoliator had actual knowledge of pending or potential litigation; (2) that a duty was

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162 See Oliver, 993 P.2d at 21.
163 Id. (citing Holmes, 710 A.2d at 853).
165 771 So. 2d 429 (Ala. 2000).
166 Id. at 432 (quoting Boyd, 652 N.E.2d at 270).
167 See id. at 435.
168 See id.
imposed upon the defendant through a voluntary undertaking, an agreement, or a specific request; and (3) that the missing evidence was vital to the plaintiff’s pending or potential action.” The Smith court reasoned that the use of the rebuttable presumption created a fair balance:

[It] neither simply condones the defendant’s negligent spoliation of evidence at the plaintiff’s expense nor imposes an unduly harsh and absolute liability upon a merely negligent party. Instead, this approach merely selects which of two parties – the innocent or the negligent – will bear the onus of proving a fact whose existence or nonexistence was placed in greater doubt by the negligent party.  

The Smith court also opted not to adopt any unusual damage calculation formula, squarely placing the risks of the uncertainty of damages on the wrongdoer. The court explained that damage calculation formulas that try to measure the plaintiff’s probability of success were merely “too tenuous a measure to be consistently applied and that any attempt to apply [such formulas] would constitute pure speculation.” The court instead opted to use the same compensatory damages that would have been awarded in the underlying suit, with the risks of loss shifted as explained above. This seems a much better overall remedy than that used in Oliver, as both courts attempted to resolve some of the inherent speculation involved in spoliation, with the Smith court having been much more successful. In summation, any rationalization that justifies the adoption of a spoliation tort in an instance where a claim for negligence would suffice, appears, at best, to be grounded in a desire to effect burden-shifting to spoliation defendants in a situation where either plaintiff or defendant is inherently likely to be put at a distinct disadvantage. At worst, such a rationalization seems grounded in a simple philosophical desire to see an expansion of the tort system. The aforementioned remedies and alternative claims appear to be at least as adequate as a tort for spoliation of evidence would be and account for all instances of spoliation except for intentional spoliation by a third party.

169 Id. at 432.
170 Id. at 435 (quoting Welsh v. United States, 844 F.2d 1239, 1248 (6th Cir. 1988)).
171 See id. at 436.
172 Id. at 438.
173 Id. See also supra note 163.
174 It should be noted that the dissenting opinion of Smith felt that the court had, de facto, adopted a tort for negligent spoliation, as a result of the additional elements necessary to effect the burden shifting. Id. at 439 (See, J., dissenting). Regardless of whether the Smith court actually adopted a new cause of action in its decision, the Smith remedy is very attractive.
6. Desire to Prevent Endless Litigation

Another policy reason that several courts have used to denigrate the spoliation tort is the desire to prevent endless litigation. The Supreme Court of Texas refused to adopt a spoliation tort largely based on this reasoning, stating that

[w]hile the law must adjust to meet society’s changing needs, we must balance that adjustment against boundless claims in an already crowded judicial system. We are especially averse to creating a tort that would only lead to duplicative litigation[ and] encourag[e] inefficient relitigation of issues. . . .

Much of this concern stems from what courts refer to as “derivative tort” actions, or those premised on the idea that the conclusion of one lawsuit permits the filing of another. Derivative tort actions are perceived as a threat to the finality of judgments, and the limited resources of the court system strongly favor an end to litigation.

Another reason given not to adopt the spoliation tort, and that can also be reduced to the court system’s desire to see an end to litigation, is that destruction of evidence is similar to perjury or embracery “in that both undermine the integrity of a trial; yet, there are no independent torts recognized for these crimes.” Again, the rationale comes down to the desire to end litigation. As one court that relied upon in the Cedars-Sinai decision aptly put it:

[W]hen [the aggrieved party] has a trial, he must be prepared to meet and expose perjury then and there. . . . The trial is his opportunity for making the truth appear. If, unfortunately, he fails,

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176 *Trevino*, 969 S.W.2d at 951.

177 *Cedars-Sinai*, 954 P.2d at 515.

178 *Id.* at 515-16.

179 *See id.* at 516; Judge, *supra* note 5, at 457.

180 “Embracery is ‘[t]he crime of attempting to influence a jury corruptly to one side or the other.’” *Trevino*, 969 S.W.2d at 953 (quoting BLACK’S LAW DICTIONARY 522 (6th ed. 1990)).

181 Rubin, *supra* note 1, at 367 (citing Regal Marble, Inc., v. Drexel Invs., Inc., 568 So. 2d 1281, 1283 (Fla. Dist. Ct. App. 1990); Smith v. Superior Court, 198 Cal. Rptr. 829, 834 (Ct. App. 1984), overruled by Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 521 (Cal. 1998)). Both *Regal Marble, Inc.* and *Smith v. Superior Court* stated that perjury is a crime against the state, deserving of criminal prosecution rather than a civil action. *Id.*
being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong, in such case, is of course a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice. . .

However, spoliation can be differentiated from both of these crimes on the ground that it is often revealed during discovery rather than during or after the trial. Therefore, there is at least an argument that a tort for spoliation might be more justified than a tort for either of these crimes because by their very nature, they may only happen during trial and will not be caught early enough to amend the party’s complaint. Also, false dealings such as perjury may be exposed during cross-examination if discovered, while the spoliation victim appears without recourse. The spoliation is not a false set of facts to be disproven, but rather a nullity; it cannot be presented to the jury and plays no role whatsoever in deliberations. Regardless, adding this desire of courts to end litigation to the mix of issues dogging adoption of a spoliation tort makes the tort’s adoption that much more of an uphill battle.

7. Need to Limit the Effects of Res Judicata and Collateral Estoppel

A policy concern tied closely to that of the desire to prevent endless litigation is that adoption of such a tort might lead to violations of res judicata and collateral estoppel when the spoliation issue has already been adjudicated.

182 Cedars-Sinai, 954 P.2d at 516-17 (quoting Pico v. Cohn, 27 P. 537 (Cal. 1891)).
183 See Cedars-Sinai, 954 P.2d at 516, 520.
185 See id. at 239 (Kennard, J., dissenting).
186 Also called claim preclusion, res judicata “essentially is a finality doctrine whereby ‘a final judgment on the merits bars a second suit for the same claim by parties or their privies.’” Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 439 (Minn. 1990) (citing Kaiser v. Northern States Power Co., 353 N.W.2d 899, 902 (Minn. 1984)).
187 “The application of collateral estoppel is appropriate where: (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.” Federated Mutual Ins. Co., 456 N.W.2d at 439.
in the original action. Courts generally prefer to handle spoliation claims in the original action. The Supreme Court of Illinois reasoned in Boyd v. Travelers Ins. Co. that

a single trier of fact may be allowed to hear an action for negligent spoliation concurrently with the underlying suit on which it is based. . . . A single trier of fact would be in the best position to resolve all the claims fairly and consistently. If a plaintiff loses the underlying suit, only the trier of fact who heard the case would know the real reason why.

The Boyd court went on to explain that it would be simple to include the third party spoliator in the underlying action by employing joinder, and finding two closely related transactions to base such an action on: the explosion of the evidence, and the subsequent loss of the evidence by the third party. The court explained that employing joinder in this instance would "promote fairness and consistency, while conserving valuable judicial resources." Some courts, however, have stated a second action may be appropriate in instances of spoliation, either on grounds that (1) the spoliation itself is an intervening fact that gives new grounds for the claims and defenses of the parties, or (2) that spoliation centers around the breach of a duty to preserve evidence, and thus differs from the issues of the original action. At least one court has settled on a middle ground: when spoliation is discovered "in time for the underlying litigation," it may be handled in the underlying suit by use of the spoliation inference. If,


189 See KOESEL, supra note 9, at 62-63.


191 See Boyd, 652 N.E.2d at 272-73.

192 Id. at 273. The court also explained that in this single action, the plaintiff need not show that he would have won the case had he possessed the missing evidence, but only that he had a reasonable probability of success in the underlying suit. Id. at 271.


however, it is not discovered until "after the underlying action has been lost or otherwise seriously inhibited," then a separate cause of action in tort is appropriate.\textsuperscript{196} It seems that the best solution may be to handle the spoliation issue in the original case, when arising prior to trial, but because doing so may cause more severe problems concerning speculation of damages, it is arguable that it is a viable option to handle such a claim in a second suit.\textsuperscript{197}

8. Speculation as to Amount of Damages

The debate over whether to handle spoliation issues in the original or subsequent trial leads to a third policy concern that weighs against a spoliation tort: the inherent speculation involved in determining the value of evidence that no longer exists, because

it is impossible to know what the destroyed evidence would have shown. It would seem to be sheer guesswork, even presuming that the destroyed evidence went against the spoliator, to calculate what it would have contributed to the plaintiff's success on the merits of the underlying lawsuit. Given the plaintiff has lost the lawsuit without the spoliated evidence, it does not follow that he would have won it with the evidence. The lost evidence may have concerned a relevant, but relatively trivial matter. If evidence would not have helped to establish plaintiff's case an award of damages for its destruction would work a windfall for the plaintiff.\textsuperscript{198}

However, it appears that in instances where it is obvious that spoliation has significantly inhibited the party's ability to recover, or significantly increased chances of loss, so the fact of damages is present, but specificity of damages is not, such speculation may be immaterial.\textsuperscript{199} This may be helped by allowing the underlying claim to be litigated and then using the result to attempt to weigh the value of the missing evidence, a practice that has been adopted by

\textsuperscript{196} See id.
\textsuperscript{197} See infra Part V.A.8.
\textsuperscript{198} Federated Mutual Ins. Co., 456 N.W.2d at 438 (quoting Petrik v. Monarch Printing Corp., 501 N.E.2d 1312, 1320 (Ill. App. Ct. 1986)). See also Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 518 (Cal. 1998) ("Without knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action.").
\textsuperscript{199} "Juries often are asked to determine damages in wrongful death and personal injury cases or in other actions in which the nature of the claim makes the calculation uncertain. A denial of all recovery in such cases simply because the damages cannot be stated with certainty would allow wrongdoers to profit from their wrongs." Thompson, supra note 12, at 589.
some states.\textsuperscript{200} It is possible to evaluate missing evidence using a formula such as that adopted in \textit{Oliver}.\textsuperscript{201} This may seem a daunting and subjective task, but some proponents of the tort have analogized the potential action to that of legal malpractice, which uses a similar standard.\textsuperscript{202} The argument for adopting the tort, when necessary, is further aided by the possibility that the spoliation issues litigated in the subsequent suit may not be the same as those in the original suit, especially when the subsequent suit is against a third party.\textsuperscript{203} Situations of third party spoliation may present no other remedy, and the United States Supreme Court has held that when the tort itself precludes the ascertainment of damages, "it would be a perversion of fundamental principles of justice to deny all relief to the injured person."\textsuperscript{204} It has also been said that such speculation may be a part of \textit{every} tort suit, which is why causation and resulting damages are an element of every tort.\textsuperscript{205} However, it seems a better option to use alternative remedies in adverse party claims of spoliation because, even with helpful formulas, a calculation of the amount of damages is still somewhat subjective, and may result in windfalls for potentially injured parties.\textsuperscript{206}

9. Concern for Property Rights

A final argument that courts have recognized in opposition to adoption of an independent spoliation tort is that it could result in severe infringement of

\begin{itemize}
  \item \textit{See supra} note 162 and accompanying text.
  \item \textit{See Pati Jo Pofahl, Smith v. Superior Court: A New Tort of Intentional Spoliation of Evidence, 69 MINN. L. REV. 961, 975. In fact, the standard in malpractice actions is often more stringent, requiring that "but for" the attorney's conduct, the plaintiff would have won the case. In spoliation claims, the standard is typically that there was a "reasonable probability" that the plaintiff would have obtained compensation "but for" the spoliation. Id. at 974-75. However, legal malpractice actions are easier to prove than spoliation actions. In malpractice suits, plaintiffs only need to establish the proper standard of care for the reasonable attorney. This is not hard to accomplish, as the plaintiff only need gain access to one of the vast array of legal expert witnesses in circulation. Expert testimony on missing evidence, however, would be nearly worthless, because "each piece of evidence is necessarily unique, and there is unlikely to be any mechanism that enables an expert to testify about the value of evidence he has never examined, much less what effect that evidence would have had on the outcome of the plaintiff's particular claim." Judge, \textit{supra} note 5, at 456.
  \item \textit{See, e.g., Federated Mut. Ins. Co.}, 456 N.W.2d at 438-39.
  \item \textit{See Temple, 976 P.2d at 239 (Kennard, J., dissenting)}.
  \item \textit{See Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 519 (Cal. 1998)}.
\end{itemize}
private property rights.\textsuperscript{207} One extreme result could be that fear of liability for spoliation might prevent individuals from destroying property that presents a health or safety risk.\textsuperscript{208} Another might be that people would be forced to stockpile junk out of fear that a piece of it might turn out to be evidence needed for trial, thus subjecting the person to claims in tort.\textsuperscript{209} This is exemplified by the fact that many corporations have routine document destruction programs that might come into direct conflict with such a tort, if not implemented correctly.\textsuperscript{210} Such cost arguments have been criticized by at least one critic as being excessive, asserting that costs to preserve evidence should be minimal, and should they prove otherwise, the court may order the evidence into the custody of the affected party and charge them with the costs of preservation.\textsuperscript{211} Also, this problem is reduced somewhat by the need for a duty to preserve in negligent, as well

\textsuperscript{207} Rubin, supra note 1, at 368 (citing Walsh v. Caidin, 283 Cal. Rptr. 326, 327 (Ct. App. 1991) (holding that a widow had the sole authority over the disposition of the decedent’s remains and did not owe a duty to the appellants to preserve the “evidence” because “the law does not treat a human dead body as merely another form of physical evidence”); Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1183 (Kan. 1987) (recognizing that the limitless scope of an independent spoliation tort would cause “the unwarranted intrusion on the property rights of a person who lawfully disposes of his own property”); Edwards v. Louisville Ladder Co., 796 F. Supp. 966, 970 (W.D. La. 1992) (recognizing that “courts must also be concerned with interference with a person’s right to dispose of his own property as he chooses”)).


\textsuperscript{209} See Wilhoit, supra note 4, at 657 (citing County of Solano v. Delancy, 264 Cal. Rptr. 721, 736-37 (Ct. App. 1989) (unpublished opinion) (Anderson, J., dissenting)). Judge Anderson discussed the burden that might be imposed upon the public using car accidents as an example:

[B]ecause every accident causing personal injury and/or property damage involves the probability of a lawsuit, including numerous foreseeable and unforeseeable defendants, the owner of all wrecked cars will now be forced to store the wreck (or drive the partially damaged car without repair) for an indefinite period of time. The absurdity of this scenario is self-evident considering the logistical problems of keeping track of tens of thousands of piled up vehicles, the vast expense of storage fees, the hardship worked upon the owners and their family by not being able to get reimbursement for their damaged cars, and the safety problems created by driving unrepaired, inherently dangerous automobiles on the public roadways. What little landscape our ever encroaching ‘civilization’ has left will hence forward be transformed into one giant junk yard.

\textit{Id.} at 736-27.


\textsuperscript{211} See Pofahl, supra note 202, at 973.
as intentional, instances of spoliation. It is apparent that this property argument appears somewhat weaker in comparison with other arguments against adoption of the tort, such as the sufficiency of existing remedies and speculation as to the amount of damages.

B. West Virginia Statutory and Case Law

West Virginia has repeatedly declined to address the issue of an independent spoliation tort, and has tended to rely on alternative remedies when available. However, the West Virginia Supreme Court of Appeals has stated that "it appears there may be a valid cause of action for spoliation of evidence in appropriate cases," and it appears that the court may have decided to agree with other jurisdictions on what the elements of such a cause of action would

212 See Rubin, supra note 1, at 356-57 (noting the parallel elements of negligent and intentional spoliation in the states where the tort has been adopted, and that "courts have held that even the intentional spoliation tort requires that a defendant owe some duty to a plaintiff to preserve the evidence before a defendant can be held liable[,]" and citing Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1181 (Kan. 1987); Maria A. Losavio, Synthesis of Louisiana Law on Spoliation of Evidence—Compared to the Rest of the Country, Did We Handle It Correctly?, 58 La. L. Rev. 837, 849 (1998)). Such a duty may arise from various sources, including contracts, statutes or regulations, bailments, document retention policies, or ethical duties (in the case of attorneys). See KOESEL, supra note 9, at 8-9; Judge, supra note 5, at 465-66. Duty has also been assigned to a party through actual or constructive notice on a pending suit. See Judge, supra note 5, at 451-53. In deciding whether to impose constructive notice of a pending suit upon a party, one court considered such factors as "(1) the sheer magnitude of the losses; (2) that [the party] attempted to document the damage through photographs and reports; and (3) that it immediately brought to counsel as well as experts to assess the damage and attempt to ascertain its likely causes in anticipation of litigation." Indemnity Ins. Co. of North America v. Liebert Corp., No. 96 Civ. 6675(DC), 1998 WL 363834, at *4, n.3 (S.D.N.Y. June 29, 1998).


214 Brady v. Deals On Wheels, Inc., 542 S.E.2d 457, 466 (W. Va. 2000) (Starcher, J., dissenting) (stating that a spoliation inference would have been appropriate in this case); Tracy, 524 S.E.2d at 887, 890; Adkins v. K-Mart Corp., 511 S.E.2d 840, 847 (W. Va. 1998); (stating a determination of proper sanctions was inappropriate as the alleged spoliator was not a party to the lawsuit); Chambers v. Spruce Lighting Co., 95 S.E. 192 (W. Va. 1918) (stating failure to produce a document raises the presumption that it would not support his position, and that new trials may be necessary as a result of such conduct). See also W.V. R. Civ. P. 37(b) for the list of discovery sanctions available to the court.

215 Adkins, 511 S.E.2d at 848.
include, should it ever decide to adopt one.\textsuperscript{216} Although West Virginia has avoided the issue of whether to adopt a spoliation tort, it \textit{has} addressed two situations that might be analogous to the tort and that might shed some light on whether, and to what extent, to adopt the tort.\textsuperscript{217}

The first of these situations concerned whether to allow recovery of economic damages as a result of an interruption in commerce caused by negligent injury to the property of a third person, absent privity of contract or some other special relationship with the alleged tortfeasor.\textsuperscript{218} The \textit{Aikens} court declined to adopt such a claim, basing its decision largely upon the requirement for some duty to the plaintiff, as well as foreseeability of the injury on the part of the alleged tortfeasor.\textsuperscript{219} The case can be analogized to the spoliation issue by considering that West Virginia would require a violation of a duty to preserve before it would allow a spoliation claim to be given merit.\textsuperscript{220} However, the \textit{Aikens} court explicitly held that its decision applied strictly to situations of "economic loss from an interruption in commerce caused by another's negligence[,]" so, implicitly, the court might not expand its views to include spoliation issues.\textsuperscript{221}

The \textit{Aikens} court elaborated somewhat on the idea of a "special relationship" existing between parties when considering an assignment of duty to a party.\textsuperscript{222} The court stated that such a relationship, which would include instances of privity of contract, would be required whenever damages are solely economic in nature.\textsuperscript{223} The court designed not to give a comprehensive list of situations when a special relationship might arise, but did provide the following guideline:

The existence of a special relationship will be determined largely by the extent to which the particular plaintiff is affected differently from society in general. It may be evident from the

\textsuperscript{216} \textit{Harrison}, 478 S.E.2d at 117 (agreeing with the elements set forth in Foster v. Lawrence Mem’l Hosp., 809 F. Supp. 831, 836 (D. Kan. 1992)).

\textsuperscript{217} \textit{See infra} notes 218-32 and accompanying text.

\textsuperscript{218} \textit{Aikens} v. Debow, 541 S.E.2d 576 (W. Va. 2000). For more on the court’s assessment of the role of a "special relationship" between parties in assigning duty, see \textit{infra} notes 222-24 and accompanying text.

\textsuperscript{219} \textit{Aikens}, 541 S.E.2d at 579. For more on the foreseeability issue in the court’s assessment of an assignment of duty, see \textit{infra} notes 224-29 and accompanying text.

\textsuperscript{220} \textit{See infra} notes 222-24 and accompanying text.

\textsuperscript{221} \textit{Aikens}, 541 S.E.2d at 591. The court further stated that this opinion did not “encompass, and has no effect upon, our prior rulings regarding medical monitoring, negligent infliction of emotional distress cases, or nuisance law.” \textit{Id}.

\textsuperscript{222} \textit{See id.} at 590.

\textsuperscript{223} \textit{See id.} It would seem that such an instance will typically be the situation in spoliation cases, at least in the civil context.
defendant’s knowledge or specific reason to know of the potential consequences of the wrongdoing, the persons likely to be injured, and the damages likely to be suffered.  

It is likely that a similar assessment might be used in determining a duty to preserve evidence under a potential spoliation claim.

In its discussion on foreseeability, the Aikens court stated that “[t]he ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised.” In other cases, the court has suggested, in accordance with some jurisdictions, that such a duty might exist in potential instances of third party spoliation. It appears that the Adkins court would have addressed the validity of a spoliation claim, were it not for the fact that the accused spoliator was a third party to the action. The court did seem to implicitly suggest that at least certain forms of third party spoliation might justify an independent cause of action when such foreseeability imposes a duty.

The second potentially analogous situation involved whether to allow a claim for anticipated medical monitoring costs when plaintiffs had been tortiously exposed to toxic substances, but were not yet exhibiting signs of illness. In Bower, this claim was held to exist in West Virginia, but with the caveat that the plaintiff must prove “with reasonable certainty that such costs would be incurred as a proximate consequence of a defendant’s tortious conduct.” To analogize this, West Virginia might require that plaintiffs prove to a

224 Id. at 589.


226 See supra note 217.


228 See id.

229 See supra note 215 and accompanying text.


231 Id. at 430. Unlike the potential spoliation tort, however, this cause of action was approved
reasonable certainty that they would have won the case, if not for the spoliation. This would prove to be quite difficult to do without the evidence available, and would be a significantly higher standard than that used in cases such as Oliver.\(^{232}\)

C. Recommendations

When the issue does finally come before the court, West Virginia should adopt a tort for spoliation of evidence only in the most necessitous of circumstances. West Virginia has skirted the issue consistently to date, and there are a multitude of alternate remedies available and policy concerns that would seem to oppose such a tort’s adoption. The alternate remedies, if enforced vigorously, preclude the need for such a tort where the alleged spoliator is a party to the existing suit. West Virginia can avoid adoption of the negligent version of the tort, should it so choose, by following those jurisdictions that have held the claim to be fully encompassed within a general negligence claim. The methodology used by the court in *Smith v. Atkinson* seems quite sound and the best option, regardless of whether one chooses to call its end result a modified negligence claim or an independent tort for negligent spoliation of evidence by a third party. The court should be particularly narrow, and adopt a spoliation tort only in instances of third party intentional spoliation, as recommended by the dissenters in *Temple*, where it seems mandated by policy concerns, and where there is no other remedy available to an injured party. However, should the court opt for uniformity by adopting the tort for all third party spoliators, it could just as easily adopt the *Smith v. Atkinson* standard as an independent tort for negligent spoliation by a third party, and merely add the element of intent for intentional spoliation by a third party.

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Based largely because of health concerns, after plaintiffs had proven that they had been exposed to toxic substances. *Id.* at 431.

\(^{232}\) *See supra* notes 157-60 and accompanying text.

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