

## Spoilation Doesn't Have to Spoil Your Case

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A common tool plaintiff and defense lawyers may use during litigation is a motion for sanctions due to spoliation or a motion for an instruction on spoliation; however, it is important to understand when spoliation actually occurs and what the appropriate sanction should be once it's been determined it has occurred. *Estate of McDuffie-Connor v Neal and NSS Construction*, unpublished opinion per curiam of the Court of Appeals, issued February 8, 2024 (Docket No. 358870) is an opinion that provides an excellent analysis of both issues.

In *Estate of McDuffie-Connor v Neal and NSS Construction*, the decedent was killed in a motor vehicle crash on July 17, 2019, where the decedent tried to pass a dump truck driven by Neal. As Neal put his blinker on and turned right, the decedent smashed into the front passenger side of the dump truck, causing the decedent's vehicle to flip over the front of the dump truck, killing the decedent. *Id.* at 2. The personal representative of the decedent Plaintiff's estate sued defendant driver Neal and Neal's employer NSS Construction for negligence, wrongful death, and vicarious liability among other counts on June 15, 2020. *Id.* at 4. After the subject collision but before suit was filed, the decedent's car was sold from the police impound lot because Plaintiff failed to pick up the vehicle after some time. *Id.* Additionally, Defendant NSS's business was subsequently closed due to an unrelated foreclosure and numerous business documents were disposed of. *Id.* During litigation, Plaintiff sought sanctions against Defendant NSS based on the failure to produce several of the disposed of documents including Neal's driving and employment records and the dump truck's maintenance and inspection records. *Id.* at 5. Ultimately, the trial court imposed sanctions on Defendant NSS and held that it spoliated evidence by not producing the destroyed documents. *Id.* The trial court denied NSS's requested relief regarding Plaintiff's spoliation. *Id.* NSS appealed to the Court of Appeals, challenging the trial court's orders granting Plaintiff relief regarding spoliation and further denying NSS relief regarding Plaintiff's spoliation. *Id.*

### SECRET WARDLE NOTES

An allegation of spoliation is proper where the evidence spoliated is “(1) material, (2) not merely cumulative, and (3) not equally available to the opposite party.”

“A party has a duty to preserve evidence material to litigation that is pending or that is reasonably foreseeable.”

Sanctions once spoliation is determined to have occurred must be proportional and are proper if the court, “carefully fashions a sanction that denies the party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence.”

On appeal, the Court of Appeals held that the trial court abused its discretion by granting Plaintiff's motion regarding Defendant's spoliation and sanctioning Defendant while simultaneously denying Defendant's motion regarding Plaintiff's spoliation. *Id.* The Court of Appeals held that the trial court abused its discretion by sanctioning NSS for spoliation because: 1) the evidence was not material to Plaintiff's lawsuit, 2) litigation was not foreseeable, and 3) the sanctions imposed by the trial court were disproportionate. *Id.* 6-11. The Court went on to explain that Plaintiff's claims of spoliation were flawed because the evidence that Plaintiff claimed was spoliated was not material to relevant elements in the case.

“A jury instruction regarding spoliation is warranted ‘if the evidence that is the subject of the instruction is (1) material, (2) not merely cumulative, and (3) not equally available to the opposite party.’ *Id.* citing *Komendat v Gifford*, 334 Mich App 138, 150 (2020). Evidence is material if it is related to any fact that is of consequence to the determination of the action. *People v Crawford*, 458 Mich 376, 388 (1998). Materiality looks to the relation between the propositions that the evidence is offered to prove and the issues in the case. *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 667 (2011). Based on this analysis, the Court of Appeals held that the evidence Plaintiff contended was spoliated was not material to the litigation because it did not help to prove Plaintiff's allegations of negligence on the part of the driver. *Estate of McDuffie-Connor v Neal and NSS Construction*, 10. There was no evidence that the driver had committed a traffic infraction or otherwise caused the accident. *Id.* Furthermore, there was no allegation or evidence that established that some sort of defect with the truck caused the accident. *Id.* Because neither of those two issues were in dispute and the trial court failed to evaluate or determine whether the evidence sought was material, the Court of Appeals held that the trial court abused its discretion.” *Id.* 11.

The Court of Appeals also held that foreseeability is a necessary component when it comes to spoliation. “A party has a duty to preserve evidence material to litigation that is pending or that is reasonably foreseeable.” *Brenner v Kolk*, 226 Mich App 149, 162 (1997). If it is not foreseeable that evidence will be material to future litigation, then it is possible spoliation does not apply. *McDuffie-Connor v Neal and NSS Construction*, at 7 citing *Brenner v Kolk*. In *McDuffie*, the Court of Appeals acknowledged that the subject litigation was not pending at the time NSS disposed of its records and sold its dump truck. *Id.* 11. Plaintiff's argument that litigation was foreseeable since the collision resulted in a death did not hold water because, “there is nothing about the collision that would suggest that any tort occurred for which NSS would be facing liability.” *Id.* The dump truck driver was not cited by the police for any traffic violations and while NSS was involved in an unrelated labor dispute, that did not have any bearing on the preservation of evidence in this subject case. *Id.*

The trial court also abused its discretion when it disproportionately sanctioned Defendant NSS Construction by striking its affirmative defenses, preventing it from presenting any mitigating evidence regarding its business and maintenance and safety practices and awarding Plaintiff \$3,500. Sanctions for spoliation are appropriate if the trial court “carefully fashions a sanction that denies the party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence.” *Bloemendaal v Town & Country Sports Ctr, Inc.*, 225 Mich App 207, 212 (2002). A jury instruction regarding spoliation is warranted “if the evidence that is the subject of the instruction is (1) material, (2) not merely cumulative, and (3) not equally available to the opposite party.” *Estate of McDuffie-Connor v Neal and NSS Construction* citing *Komendat v Gifford*, 334 Mich App 138, 150 (2020). The Court of Appeals held that these sanctions interfered with Defendant's ability to assert affirmative defenses or present mitigating evidence, and thus were out of proportion to Defendant's alleged spoliation. The trial court's sanctions effectively ended the litigation. *Id.* The Court of Appeals went on vacate

NSS' Motion for Summary Disposition and remanded the matter to the trial court for entry of summary disposition in favor of NSS.

To summarize, while spoliation of evidence can be a devastating tool for a party to use against another party, the case discussed herein provides the following points to consider when a claim of spoliation is made or is considered. First, a party has a duty to preserve evidence material to litigation that is pending or that is reasonably foreseeable. Second, an allegation of spoliation is proper where the evidence spoliated is “(1) material, (2) not merely cumulative, and (3) not equally available to the opposite party.” And third, once spoliation is determined to have occurred, sanctions must be proportional and are proper if the court carefully fashions a sanction that denies the party the fruits of the party’s misconduct, but that does not interfere with the party’s right to produce other relevant evidence.

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