



2005

Spoliation of Evidence: Why This Evidentiary Concept Should Not Be Transformed into Separate Causes of Action

Jason B. Hendren

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Civil Law Commons](#), [Evidence Commons](#), and the [Torts Commons](#)

Recommended Citation

Jason B. Hendren, *Spoliation of Evidence: Why This Evidentiary Concept Should Not Be Transformed into Separate Causes of Action*, 27 U. ARK. LITTLE ROCK L. REV. 281 (2005).

Available at: <https://lawrepository.ualr.edu/lawreview/vol27/iss2/2>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

SPOLIATION OF EVIDENCE: WHY THIS EVIDENTIARY CONCEPT SHOULD NOT BE TRANSFORMED INTO SEPARATE CAUSES OF ACTION

Jason B. Hendren*

I. INTRODUCTION

On September 28, 2000, the Supreme Court of Arkansas decided the case of *Goff v. Harold Ives Trucking Co.*,¹ and joined the growing number of jurisdictions expressly declining to recognize intentional first party spoliation of evidence as a separate cause of action in tort.² The court defined spoliation as “the intentional destruction of evidence and when established, [the] fact finder may draw [an] inference that [the] evidence destroyed was unfavorable to [the] party responsible for its spoliation.”³

Subsequently, proponents attempting to transform spoliation from an evidentiary concept to a basis for multiple causes of action submitted House Bill 2432 during the 84th General Assembly.⁴ Had this measure become law, new causes of action would have been created for intentional and negligent spoliation of evidence.⁵ The measure failed to distinguish between first party spoliation and third party spoliation, but would have allowed causes of actions against third parties, who could have been held liable for disposing of documents that might have been useful in establishing a claim or defense of another party in separate, often far-removed litigation.

Fortunately, House Bill 2432 did not become law, but it remains to be seen whether similar legislation will be proposed during a future legislative session. The purpose of this article is to discuss the rationale of *Goff v. Harold Ives Trucking Co.* and similar decisions around the country to illustrate why Arkansas should not adopt inherently speculative and hopelessly circular causes of action for spoliation of evidence.

* Jason B. Hendren is a partner with the law firm of Friday, Eldredge & Clark, L.L.P. in Little Rock, Arkansas, where he concentrates his practice on the defense of cases involving alleged medical/dental malpractice and medical products liability.

1. 342 Ark. 143, 27 S.W.3d 387 (2000).

2. *Id.* at 150, 27 S.W.3d at 391.

3. *Id.* at 146, 27 S.W.3d at 388 (quoting BLACK’S LAW DICTIONARY 1401 (6th ed. 1990) (brackets inserted by the court)).

4. H.B. 2432, 84th Gen. Assem., Reg. Sess. (Ark. 2003).

5. *Id.* § (b)(1) (establishing the tort of negligent spoliation of evidence); *id.* § (c)(1) (establishing the tort of intentional spoliation of evidence).

II. DISCUSSION

Goff v. Harold Ives Trucking Co. involved a motorist injured in a collision with a tractor-trailer rig driven by the defendant's employee.⁶ The plaintiffs, who were husband and wife, first filed suit against the defendant trucking company in federal district court alleging negligence in connection with the collision.⁷ During the course of discovery, the plaintiffs learned that some of the logs showing the employee's hours of service had either been lost or destroyed.⁸ Federal law required such logs to be kept for a minimum of six months.⁹ Instead of seeking discovery sanctions because of the missing logs,¹⁰ the plaintiffs filed an amended complaint adding a claim for spoliation.¹¹ The plaintiffs, however, later voluntarily nonsuited that claim when the federal district court refused to allow the plaintiffs to submit a claim for punitive damages based on spoliation.¹² After the jury returned a verdict awarding the plaintiffs damages based on the negligence claim, the plaintiffs filed suit in Pulaski County Circuit Court for the purpose of reasserting only the spoliation claim against the defendant.¹³

Specifically, the plaintiffs alleged that the employee's logs contained information relevant to their negligence claim and that the destruction of those logs deprived them of their opportunity to recover full compensation.¹⁴ The defendant filed a motion to dismiss arguing that the complaint failed to state a cause of action because Arkansas does not recognize the tort of spoliation of evidence, and even if such a tort was cognizable, the plaintiffs could still not prevail because they had already won the negligence action.¹⁵ The trial court granted the defendant's motion and the plaintiffs appealed.¹⁶ After a lengthy discussion of its thorough research on this issue of first impression, the Arkansas Supreme Court affirmed.¹⁷

As the court observed, few jurisdictions have recognized spoliation as an independent tort.¹⁸ An intermediate appellate court in California first recognized this new tort in 1984, based upon the idea that for every wrong

6. 342 Ark. at 144, 27 S.W.3d at 387.

7. *Id.* at 145, 27 S.W.3d at 387.

8. *Id.*, 27 S.W.3d at 387-88.

9. *Id.*, 27 S.W.3d at 388.

10. *Id.* at 148 n.3, 27 S.W.3d at 390 n.3.

11. *Id.* at 145, 27 S.W.3d at 388.

12. *Goff*, 342 Ark. At 145, 27 S.W.3d at 388.

13. *Id.*, 27 S.W.3d at 388.

14. *Id.*, 27 S.W.3d at 388.

15. *Id.*, 27 S.W.3d at 388.

16. *Id.*, 27 S.W.3d at 388.

17. *Id.* at 151, 27 S.W.3d at 391.

18. *Goff*, 342 Ark. at 146, 27 S.W.3d at 388.

there is a remedy.¹⁹ The few courts which initially followed California in embracing an independent cause of action for spoliation of evidence cited the following three reasons:

- (1) Permitting the independent tort action promotes the desire to protect testimonial candor and the integrity of the adversarial system;²⁰
- (2) The tort protects the probable expectation of a favorable judgment or defense in future litigation;²¹
- (3) Often the traditional evidentiary remedies and sanctions are not effective enough or available to deter spoliation.²²

Over time, however, several of these jurisdictions began changing course based upon reasoning similar to that of the Supreme Court of Arkansas in *Goff*. As the Court pointed out, California's highest court ended its approximately fifteen year experiment with spoliation as a cause of action by holding that the tort would no longer be recognized.²³ While acknowledging the universal consensus that intentional destruction of evidence should not be condoned, the California Supreme Court ultimately decided that such conduct does not justify the creation of tort liability.²⁴ Of the six jurisdictions cited by the Supreme Court of Arkansas as recognizing a cause of action for spoliation, subsequent case law from two of those jurisdictions suggest that they, too, may soon join California in reconsidering their earlier decisions.²⁵

19. *Id.*, 27 S.W.3d at 388 (quoting *Smith v. Superior Court*, 198 Cal. Rptr. 829, 832, 837 (Ct. App. 1984)).

20. *Dowdle Butane Gas Co. v. Moore*, 831 So.2d 1124, 1130 (Miss. 2002) (citing *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312, 1319 (Ill. App. Ct. 1986)).

21. *Id.* (citing *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 464 (Alaska 1986)).

22. *Id.* (citing *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 17 (Mont. 1999)).

23. *Goff*, 342 Ark. at 146, 27 S.W.3d at 389 (citing *Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 521 (Cal. 1998)).

24. *Id.* at 146-47, 27 S.W.3d at 389 (citing *Cedars-Sinai Med. Ctr.*, 954 P.2d at 515). The California Supreme Court subsequently decided that negligent spoliation did not justify liability in tort. *See Temple Cmty. Hosp. v. Superior Court*, 976 P. 2d 223 (Cal. 1999).

25. *Goff*, 342 Ark. at 146, 27 S.W.3d at 388-89 (citing *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1985); *Hazen*, 718 P.2d 456; *Hirsch v. General Motors Corp.*, 628 A.2d 1108 (N.J. Super. Ct. Law Div. 1993); *Holmes v. Amerex Rent-A-Car*, 180 F.3d 294 (D.C. Cir. 1999); *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993); and *Coleman v. Eddy Potash*, 905 P.2d 185 (N.M. 1995) (overruled on other grounds by *Delgado v. Phelps Dodge Chino, Inc.*, 34 P.3d 1148 (2001)). Florida appellate courts are now divided on the issue of whether spoliation should be recognized as an independent tort. *See Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251 (Fla. Dist. Ct. App. 2003) (rejecting *Bondu*, 473 So. 2d 1307). One justice of the Ohio Supreme Court has expressed the following view: "In *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St. 3d 28, 29, 615 N.E.2d 1037, 1038 (1993), this court adopted the spoliation tort (placing this court among the minority of jurisdictions to

In coming to its own conclusion in *Goff* that first party intentional spoliation should not be recognized as a tort, the Supreme Court of Arkansas noted a number of nontort remedies for addressing litigation misconduct such as spoliation.²⁶ The primary nontort remedy cited was the evidentiary inference, *omnia praesumuntur contra spoliator*, which translates from the Latin as “all things are presumed against a spoliator.”²⁷ This principal allows the finder of fact to infer that the evidence lost or destroyed, if produced, would have been unfavorable to the party responsible for its loss or destruction.²⁸ As the Arkansas Supreme Court noted, an Arkansas federal district court recognized this presumption as early as 1974.²⁹

The Arkansas Supreme Court found this evidentiary principle the most significant of all the nontort remedies for intentional spoliation because an aggrieved party can request that a jury be instructed to draw a negative inference against the spoliator.³⁰ The Arkansas Supreme Court Committee on Jury Instructions—Civil has since promulgated Arkansas Model Jury Instruction—Civil 106, which standardizes this principle where there is evidence of intentional loss, destruction, or suppression of tangible evidence by a party as follows:

If you find that a party intentionally [destroyed] [or] [lost] [or] [suppressed] (description of item) with knowledge that [it] [its contents] may be material to a [pending] [potential] claim, you may draw the inference that [the (contents of the) (document) (writing) (photograph) (description of item)] [an examination of it] would have been unfavorable to his [claim] [defense]. When I use the term “material” I mean evidence that could be a substantial factor in evaluating the merit of a claim or defense in this case.³¹

have done so) in a single conclusory paragraph—ten lines of text summarily responding to three certified questions from a federal district court. *Davis v. Wal-Mart Stores, Inc.*, 756 N.E.2d 657, 661–62 (Ohio 2001) (Cook, J., dissenting).

26. *Goff*, 342 Ark. at 147, 27 S.W.3d at 389 (quoting *Cedars-Sinai Med. Ctr.*, 954 P.2d at 517).

27. *Id.*, 27 S.W.3d at 389.

28. *Id.* at n.2, 27 S.W.3d at 389 n.2. This presumption is recognized as a sufficient remedy by a number of states which have refused to acknowledge spoliation of evidence as an independent tort. *See, e.g.*, *Beers v. Bayliner Marine Corp.*, 675 A.2d 829 (Conn. 1996); *Lucas v. Christiana Skating Ctr., Ltd.*, 722 A.2d 1247 (Del. Super. Ct. 1998); *Monsanto v. Reed*, 950 S.W.2d 811 (Ky. 1997); *Kammerer v. Sewerage & Water Bd.*, 633 So. 2d 1357 (La. Ct. App. 1994); *Miller v. Montgomery County*, 494 A.2d 761 (Md. App. 1985).

29. *Goff*, 342 Ark. At 147, 27 S.W.3d at 389 (citing *Carr v. St. Paul Fire & Marine Ins. Co.*, 384 F. Supp. 821, 831 (W.D. Ark. 1974)). *Carr* recognized that a jury certainly had a right to infer that the record[,] had it been retained, would have been useful in determining the issue of negligence. *Carr*, 384 F. Supp. at 830.

30. *Goff*, 342 Ark. at 150, 27 S.W.3d at 391.

31. ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 106 (4th ed. 2004) [hereinafter AMI

In addition to the evidentiary inference allowed in cases of intentional spoliation by parties to a lawsuit, the Supreme Court in *Goff* also noted that the Arkansas Rules of Civil Procedure allow various sanctions which may be imposed at the discretion of the trial court for failure of a party to comply with an order to provide or permit discovery.³² In addition, the Model Rules of Professional Conduct prohibit lawyers from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation [or to] engage in conduct that is prejudicial to the administration of justice.”³³ It is also a Class B misdemeanor in Arkansas if a person “alters, destroys, suppresses, removes, or conceals any record, document, or thing with the purpose of impairing its verity, legibility, or availability in any official proceeding or investigation.”³⁴

Besides these various nontort remedies, the Arkansas Supreme Court in *Goff* also discussed the numerous public policy reasons why first party intentional spoliation should not be adopted as a new tort.³⁵ Specifically, damages in spoliation cases are inherently speculative, not only in terms of the amount of damages, but also in terms of whether any injury even exists.³⁶ Even if the adverse inference is made, it is impossible to determine what the lost, destroyed, or suppressed evidence actually would have shown, or to what extent it would have weighed in favor of the party alleging spoliation.³⁷ The fact finder would be required to speculate as to what role, if any, the spoliated evidence would have played in determining the outcome of the underlying lawsuit.³⁸

Indeed, in the *Goff* case, the court pointed out that there was no indication of what had been recorded in the missing logs, or what injury the plaintiffs suffered as a result of the destruction of the logs.³⁹ Moreover, the plaintiffs won their negligence case in federal district court and it remained to be seen what additional damages, if any, could have been proven in the state court spoliation case.⁴⁰

Civil].

32. 342 Ark. at 147–48, 27 S.W.3d at 389–90 (quoting ARK. R. CIV. P. 37(b)(2)).

33. *Id.* at 148–49, 27 S.W.3d at 390 (quoting ARKANSAS MODEL RULES OF PROF’L CONDUCT R. 8.4(c) and (d)).

34. *Id.* at 149, 27 S.W.3d at 390 (quoting ARK. CODE ANN. § 5-53-111 (Michie Repl. 1997)).

35. *Id.* at 149–50, 27 S.W.3d at 390–91.

36. *Id.* at 149, 27 S.W.3d at 390.

37. *Id.*, 27 S.W.3d at 390 (quoting *Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 518 (Cal. 1998)).

38. *Goff*, 342 Ark. At 149, 27 S.W.3d at 391 (quoting *Cedars-Sinai Med. Ctr.*, 954 P.2d at 518).

39. *Id.* at 149, 27 S.W.3d at 390–91.

40. *Id.* at 149–50, 27 S.W.3d at 391.

Finally, in emphasizing that it would be unnecessary and unwise to recognize a separate tort for first party spoliation of evidence, the Supreme Court of Arkansas quoted a decision from the Supreme Court of Texas as follows:

This Court treads cautiously when deciding whether to recognize a new tort. While 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, encouraging inefficient relitigation of issues better handled within the context of the core cause of action. We thus decline to recognize evidence spoliation as an independent tort [The] traditional response to the problem of evidence spoliation *properly frames the alleged wrong as an evidentiary concept, not a separate cause of action.*⁴¹

A. Legislative Reaction to *Goff*

Despite these admonitions, those in favor of creating new causes of action in tort for spoliation proposed House Bill 2432 during the Eighty-Fourth General Assembly.⁴² The Bill stated as follows:

16-118-108. Spoliation of evidence.

- (a) (1) A person or entity may petition a circuit court of this state, or file a motion or petition in an existing case in which the alleged spoliation occurred, for violation of this section if the person or entity has a reasonable belief that he or she can establish a claim under this section.
- (2) All spoliation actions shall be commenced within three (3) years after the date on which the spoliation occurred or was discovered.
- (b) (1) To establish the tort of negligent spoliation of evidence, a party must prove the following by a preponderance of the evidence:
- (A) The existence of a potential civil action;
 - (B) A legal or contractual duty to preserve evidence relevant to the civil action;
 - (C) Destruction of the evidence;

41. *Id.* at 151, 27 S.W.3d at 391 (quoting *Trevino v. Ortega*, 969 S.W.2d 950, 951–52 (Tex. 1998) (emphasis added by the Supreme Court of Arkansas)).

42. H.B. 2432, 84th Gen. Assem., Reg. Sess. (Ark. 2003).

- (D) Significant impairment of the ability to prove the potential civil action;
 - (E) A causal connection between the destruction of evidence and the inability of a party to establish an integral part of the potential civil action;
 - (F) A significant possibility of success of the potential civil action if the evidence were available; and
 - (G) Damages.
- (2) (A) If the violation of this subsection (b) is established in a separate civil action under this subsection (b), then the court may award damages to compensate the party harmed by the spoliation.
- (B) If the violation of this subsection (b) is raised in pending litigation, then the court may:
- (i) Consider the violation in ruling on any pretrial motions, including motions to dismiss or motions for summary judgment, or making any final decisions in the pending litigation; or
 - (ii) Instruct the jury to:
 - (a) Determine whether the violation occurred; and
 - (b) Use this determination in its decision on liability in the pending litigation.
 - (c) (1) To establish the tort of intentional spoliation of evidence, a party must prove the following by a preponderance of the evidence:
 - (A) The existence of a potential civil action;
 - (B) A potential party to the lawsuit's knowledge of a possible civil action;
 - (C) The intentional destruction of evidence designed to disrupt or defeat the potential civil action;
 - (D) Actual disruption of the potential civil action;
 - (E) A causal relationship between the act of spoliation and a party's inability to establish any part of the potential civil action; and
 - (F) Damages.

(2) (A) If the violation of this subsection (c) is established in a separate civil action under this subsection (c), then the court may:

- (i) Award damages to compensate the party harmed by the spoliation; or
- (ii) Award damages to punish the party who destroyed the evidence in an amount not to exceed five (5) times the actual damages established by the party harmed.

(B) If the violation of this subsection (c) is raised in pending litigation, then the court may:

- (i) Consider the violation in ruling on any pretrial motions, ruling on evidence, ruling on witness testimony, or making any final decisions in the pending litigation; or
- (ii) Instruct the jury to:
 - (a) Determine whether the violation occurred; and
 - (b) Use this determination in its decision on liability in the pending litigation.

(d) The court may consider whether the party defending against a petition or motion for violation of this section destroyed the evidence for the following reasons:

- (1) In the regular course of business; or
- (2) To eliminate a hazardous condition.⁴³

If it had been enacted, this legislation would have created causes of action against first parties and third parties for both negligent and intentional spoliation. A first party spoliator is often defined as "a party to the underlying action who has destroyed or suppressed evidence relevant to the plaintiff's claims against that party."⁴⁴ A third party spoliator may or may not be a party to the underlying litigation and is alleged to have destroyed evidence relevant to the plaintiff's causes of action against another defendant(s).⁴⁵

43. *Id.*

44. *Dowdle Butane Gas Co. v. Moore*, 831 So. 2d 1124, 1128 (Miss. 2002) (citing *Temple Cmty. Hosp. v. Superior Court*, 976 P.2d 223, 227 (Cal. 1999)).

45. *Id.* at 1128-29.

B. Ramifications of House Bill 2432 on First Party Spoliation Claims

As discussed above, the *Goff* decision explained quite convincingly why it would be unwise to adopt a new cause of action for first party intentional spoliation, such as would have been allowed by House Bill 2432 had it become law. Numerous courts from other jurisdictions later cited *Goff* favorably in likewise declining to recognize a new cause of action for first party intentional spoliation.⁴⁶ Thus, if enacted, House Bill 2432 would have been a tremendous step backward for Arkansas with respect to first party intentional spoliation.

Had House Bill 2432 become law, trial courts would have been faced with the numerous difficulties the *Goff* court sought to avoid because it would have created separate and duplicate remedies for spoliation. In addition to the sanctions available under the Arkansas Rules of Civil Procedure governing discovery in pending litigation,⁴⁷ parties asserting spoliation against their opponents would be able to recover additional damages by establishing spoliation in a separate civil action.⁴⁸

For example, a plaintiff could discover during litigation, perhaps years after the cause of action arose, that certain evidence that might have been helpful to the plaintiff had been negligently or intentionally destroyed by the defendant at some point. Even if the plaintiff obtained a verdict against the defendant on the underlying claim, the plaintiff could still file a separate civil action arguing that the spoliation discovered during the underlying lawsuit resulted in the jury not awarding as much compensation as it would have if the evidence had been available. Of course, if the plaintiff lost the underlying action, she could file a separate spoliation action and argue that, but for the loss or destruction of the evidence in question, she would have won the underlying action and would have received the compensation sought in the underlying action.

Likewise, a defendant could discover during litigation that the plaintiff lost or destroyed a product, or parts thereof, which the plaintiff claims to have been unreasonably dangerous for one reason or another. If a jury ultimately awarded damages against the defendant, a separate action for spoliation could be filed by the defendant claiming that, but for the plaintiff's loss or destruction of the evidence, the jury would have found in favor of the defendant on the underlying claim. Damages could include the amount of the jury verdict in the underlying case.

46. *Id.* at 1127–28; *see also* *Jost v. Lakeland Reg. Med. Ctr., Inc.*, 844 So. 2d 656, 658 (Fla. App. 2003); *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251, 1253–56 (Fla. App. 2003); *Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420, 424–28 (Mass. 2002); *Timber Tech Engineered Bldg. Prod. v. The Home Ins. Co.*, 55 P.3d 952, 954 (Nev. 2002).

47. H.B. 2432, at § (c)(2)(B).

48. *Id.* § (b)(2)(A).

Under either scenario, boundless litigation could go on for years because separate actions for spoliation could be filed under House Bill 2432 "within three (3) years after the date the spoliation occurred *or was discovered*."⁴⁹ There is no reasonable diligence requirement, as contained in other discovery rule exceptions to limitations periods.⁵⁰ This would allow the type of duplicative litigation and inefficient relitigation of issues expressly discouraged by the Supreme Court of Texas (as quoted by the Supreme Court of Arkansas in *Goff*) as detrimental to an already crowded judicial system.⁵¹ Such litigation would also result in the inherently speculative determination of whether actionable spoliation occurred (because the respondent would undoubtedly assert the affirmative defenses allowed by House Bill 2432⁵²), and if so, what the spoliated evidence would have shown, how another fact finder would have weighed that evidenced had it been available, and what amount of money could fairly compensate the aggrieved party.⁵³

If enacted, House Bill 2432 would have changed Arkansas law even more dramatically with respect to first party negligent spoliation. As discussed above, a jury in Arkansas may be instructed regarding the evidentiary inference against a spoliator only where there is evidence of *intentional* loss, destruction or suppression of tangible evidence by a party.⁵⁴

49. *Id.* § (a)(2) (emphasis added).

50. *See, e.g.*, ARK. CODE ANN. § 16-114-203(b) (Michie 1987) (allowing actions for medical injury to be commenced outside the normal two (2) year limitations period where the basis for the claim is "discovery of a foreign object in the body of the injured person which is not discovered and could not reasonably have been discovered within such two-year period, [in which case] the action may be commenced within one (1) year from the date of discovery or the date the foreign object reasonably should have been discovered, whichever is earlier").

51. *Goff v. Harold Ives Trucking Co.*, 342 Ark. 143, 151, 27 S.W.3d 387, 391 (2000) (quoting *Trevino v. Ortega*, 969 S.W.2d 950, 951-52 (Tex. 1998)).

52. H.B. 2432, *supra*, at § (d).

53. *Goff*, 342 Ark. at 151, 27 S.W.3d at 390 (quoting *Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 518 (Cal. 1998)).

54. AMI CIVIL 106 (4th ed.): *see also* *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 746 (8th Cir. 2004) (interpreting Arkansas law); *Tomlin v. Wal-Mart Stores, Inc.*, 81 Ark. App. 198, 209, 100 S.W.3d 57, 64 (2003) (affirming trial court's decision refusing to give spoliation instruction where there was no evidence that the surveillance tape at issue was intentionally destroyed); *Rodgers v. CWR Constr., Inc.*, 343 Ark. 126, 133, 33 S.W.3d 506, 511 (2000) (holding that a trial court did not abuse its discretion by failing to give a spoliation instruction where there had been no finding that the evidence in question had been intentionally lost or destroyed); *cf. Smith v. United States*, 128 F. Supp. 2d 1227, 1233-34 (E.D. Ark. 2000) (drawing an adverse inference in the bench trial of a medical malpractice case *not* based upon intentional destruction or loss of tangible evidence, but rather where a physician merely failed to dictate a post-surgical note). It should be carefully noted that the value of the *Smith* decision as precedent in spoliation cases is extremely doubtful not only because it did not predicate the adverse inference upon a finding of *intentional* loss, destruction or suppression of tangible evidence (as apparently required under the *Goff* and *Rodgers* decisions and as specifically required under AMI 106), but also because the trial court in *Smith* vacated and set aside its own rulings in a subsequent order *nunc pro tunc*. *See Smith v. United States*, No.

Thus, if House Bill 2432 had been passed it would have transformed first party negligent spoliation into a full-fledged cause of action, whereas before such negligence would not have even given rise to a jury instruction on spoliation in Arkansas. Adoption of a cause of action for first party negligent spoliation would have placed Arkansas in the extreme minority of jurisdictions⁵⁵ and would have resulted in enormous costs to individuals and entities which would have been required to undertake unnecessary and expensive document and material retention policies.⁵⁶

C. Ramifications of House Bill 2432 on Third Party Spoliation Claims

The practical and public policy considerations expressed above regarding first party spoliation apply with equal force in regard to causes of action for third party spoliation.⁵⁷ Third parties have no inherent duty to preserve evidence which may at some point be useful to others.⁵⁸ One federal district court judge examined this issue thoroughly and could find no duty, either statutory, common law, or assumed, requiring a third party in Arkansas to preserve evidence for another's use in litigation.⁵⁹ Automatic imposition of such a duty, such as envisioned by House Bill 2432, would infringe upon the third party's own property rights by requiring the third party to preserve evidence simply because it might be of use to others in pending or future litigation.⁶⁰ As one jurist observed, "[i]t could be a wrecked car, a severed body part, an item of clothing, a bandage, a dead cat. Who knows?"⁶¹

This is not to say that parties in or anticipating litigation are without recourse in protecting against loss or destruction of evidence possessed by third parties. Duties to preserve such evidence may be imposed upon third parties in various ways. For example, a third party may be required to produce particular evidence it possesses in response to a *subpoena duces tecum*.⁶² This method provides definiteness with respect to the particular

LR-C-99-789 (E.D. Ark. Jan. 23, 2001).

55. Benjamin J. Vernia, Annotation, *Negligent Spoliation of Evidence, Interfering with Prospective Civil Action, as Actionable*, 101 ALR 5th 61, 86-93 (2002).

56. *Dowdle Butane Gas Co. v. Moore*, 831 So. 2d 1124, 1133 (Miss. 2002) (citing *Temple Cmty. Hosp. v. Superior Court*, 976 P.2d 223, 228-32 (Cal. 1999), which gave the example that "[m]edical [care] providers . . . might feel constrained to retain contaminated surgical devices and by products of medical procedures out of fear of liability").

57. *Id.* at 1131 (citing *Temple Cmty. Hosp.*, 976 P.2d at 227-30).

58. *Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420, 424 (Mass. 2002); *see also* *Timber Tech Engineered Bldg. Products v. The Home Ins. Co.*, 55 P.3d 952, 954 (Nev. 2002) (noting that there is no duty in tort to preserve evidence).

59. *Wilson v. Beloit Corp.*, 725 F. Supp. 1056, 1058 (W.D. Ark. 1989) (interpreting Arkansas law), *aff'd*, 921 F.2d 765 (8th Cir. 1990).

60. *Fletcher*, 773 N.E.2d at 425.

61. *Graves v. Daley*, 526 N.E.2d 679, 682 (Ill. App. 1988) (Heiple, J., dissenting).

62. *Fletcher*, 773 N.E.2d at 425 (citing MASS. R. CIV. P. 45(b), which is similar to ARK.

item(s) of evidence that must be maintained and prevents subsequent loss or destruction of that evidence by the third party. The duty to maintain such evidence following service of a subpoena duces tecum may be enforced by court orders, including the sanction of contempt.⁶³ Thus, the existing rule governing subpoenas may be used to impose upon a third party a duty to preserve particular evidence, and further provides a remedy if the third party fails to carry out that duty.⁶⁴ The Supreme Judicial Court of Massachusetts wrote in reference to the subject of *subpoenas* in declining to create a cause of action for third party spoliation that “[t]here is no need to invent a cause of action to enforce a duty when the rules that created the duty in the first place already provide their own remedies.”⁶⁵

In addition, a third party may enter into a formal agreement to preserve a particular item of evidence, and in so doing create an enforceable contract.⁶⁶ Remedies for breach of contract can be found in existing law.⁶⁷ Because contract law already provides a cause of action and a remedy in circumstances where a contractual duty to preserve evidence has been breached by a third party, there is no need to create a separate, duplicate cause of action in tort, as proposed in House Bill 2432.⁶⁸

These considerations apply primarily to third parties to pending or future litigation. Different problems occur in the event of actions brought against third parties after the conclusion of the underlying litigation. Courts have been “reluctant to provide disappointed litigants a second opportunity to seek the compensation they sought in the original lawsuit, even if they seek it against a party not involved in the original lawsuit.”⁶⁹ Likewise, courts have been “reluctant to require courts to provide a forum for parties who seek to avoid the *effect* of a prior judgment by asserting that a collateral wrong improperly affected the verdict.”⁷⁰

The spoliation tort [as against a third party] not only would provide the disappointed litigant a second opportunity to seek compensation, it would

R. Civ. P. 45(b), governing subpoenas duces tecum).

63. *Id.* (citing MASS. R. CIV. P. 45(f), which is similar to ARK. R. CIV. P. 45(g), governing the sanction of contempt for failure to obey a subpoena).

64. *Id.*

65. *Id.*

66. *Id.* (citing *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177 (Kan. 1987) (recognizing that the duty to preserve evidence may be imposed “by reason of an agreement, contract, statute, or other special circumstance”)): *see also* *Timber Tech Engineered Bldg. Products v. The Home Ins. Co.*, 55 P.3d 952, 954–55 (Nev. 2002) (recognizing that a preservation of evidence agreement “created contractual rights and obligations between the parties to the agreement,” although the plaintiff in the case was not one of the parties to the agreement).

67. *Fletcher*, 773 N.E.2d at 423.

68. *Id.*

69. *Temple Cmty. Hosp. v. Superior Court*, 976 P.2d 223, 229 (Cal. 1999).

70. *Id.*

require retrial of the first case in order to permit the plaintiff to demonstrate in what respect the alleged spoliation altered the outcome of the first trial. Indeed, the matter might still continue, for spoliation in the second trial might give rise to yet a third lawsuit.⁷¹

To compound matters further, it may be the case that *both* parties in the underlying litigation feel that they have each suffered injury due to a third party's spoliation of evidence, which could give rise to competing claims of spoliation which could, in turn, result in inconsistent verdicts.⁷² Neither judges nor juries should be called upon to determine who, if anyone, has suffered an injury where one portion of a document lost through a third party's spoliation would have favored one party in the underlying litigation while another portion of that same document would have favored the opposing party.⁷³ A New York appellate court cited such dizzying scenarios, among numerous other reasons, in declining to recognize third party negligent spoliation, and concluded as follows:

We thus decline to recognize an inherently speculative and hopelessly circular cause of action for spoliation where, as here, the act of spoliation was allegedly inadvertent, occurred prior to commencement of the underlying claim, and was committed by one not a party to the underlying claim and with no relationship, and hence no duty, to Met-Life, the spoliation plaintiff. Instead, we join the majority of courts that have recognized the comparative advantages of remedying any injury through the imposition of carefully chosen and specifically tailored sanctions within the context of the underlying action.⁷⁴

III. CONCLUSION

The preservation of evidence which might be relevant at some point in litigation is undeniably desirable.⁷⁵ Any consideration, however, of whether to create a new cause of action in tort for intentional and/or negligent spoliation of evidence must take into account the fact that using tort law to remedy misconduct such as spoliation raises issues of practicality and public policy unlike those involved in tort remedies created in other contexts.⁷⁶

A number of jurisdictions, including Arkansas, have considered this issue over the last sixteen years. A clear majority of those jurisdictions, in-

71. *Id.*

72. *Metlife Auto & Home v. Joe Basil Chevrolet*, 753 N.Y.S.2d 272, 280 (N.Y. App. 2002), *aff'd* 807 N.E.2d 865 (N.Y. 2004) (citing *Temple Cmty. Hosp.*, 976 P.2d at 231–32).

73. *Id.* (citing *Temple Cmty. Hosp.*, 976 P.2d at 231).

74. *Id.* at 282.

75. *Dowdle Butane Gas Co. v. Mare*, 831 So. 2d at 1124, 1135 (Miss. 2002).

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

cluding Arkansas, have concluded that the burdens imposed upon society by spoliation causes of action outweigh their benefits. Such causes of action dilute the finality of adjudication by encouraging duplicative lawsuits which may go on for years. Such causes of action are redundant in light of the numerous other remedies available under discovery rules, evidentiary instructions, ethical canons and penal statutes for misconduct such as spoliation. Such causes of action are also inherently uncertain with respect to causation and damages, giving rise to endless speculation regarding the nature and extent of harm suffered by victims of spoliation. For all these reasons, Arkansas should not adopt legislation such as House Bill 2432, or otherwise create new causes of action in tort based upon the properly evidentiary concept of spoliation.