CONSEQUENCES OF SPOLIATION IN VIRGINIA AND THE MARCH TOWARD ADOPTING THE FEDERAL SPOLIATION RULES

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For more than one hundred years, Virginia courts have recognized the issue of spoliation of evidence and have struggled to dole out proportionate punishment for a party that destroys or fails to preserve evidence. In December 2015, Rule 37(e) of the Federal Rules of Civil Procedure was revised to make explicit the consequences of failing to preserve electronically stored information, making the federal spoliation analysis and potential punishment thereof much easier for courts and parties alike to navigate.[1] Two years later, the Supreme Court of Virginia arguably issued its most significant decision regarding spoliation in the case of *Emerald Point, LLC v. Hawkins*,[2] which set off legislative efforts to "correct" the Court's new spoliation standards. This article examines the evolution in the treatment Virginia courts have given spoliation and considers where the courts and law may be headed in the future.

I. Spoliation Case Law Pre-*Emerald Point*

Virginia courts have recognized the concept of spoliation for well over a century. In *Neece v. Neece*, the Supreme Court stated that "[i]n general, a party's conduct, so far as it indicates his own belief in the weakness of his cause, may be used against him as an admission" and that such "falsehood is a badge of fraud, and a case which is sought to be supported by means of deception may prima facie, until the contrary be shown, be taken to be a bad and dishonest case."[3] In addition, the Court noted that "[c]oncealing or destroying material is likewise admissible; in particular the destruction (spoliation) of documents as evidence of an admission that their contents are as alleged by the opponents."[4]

The Supreme Court of Virginia evaluated a defendant's alleged failure to preserve evidence almost forty years later in *Blue Diamond Coal Co. v. Aistrop*, when after an accident in a coal mine, a body was found in a room that had been exposed to poisonous gas.[5] No air samples were taken that day, although some

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1 Fed. R. Civ. P. 37(e).

2 294 Va. 544, 808 S.E.2d 384 (2017).

3 Neece v. Neece, 104 Va. 343, 348, 51 S.E. 739, 740–41 (1905).

4 *Id*. (quoting 1 Greenleaf Evid. § 195, at 325 (16th ed.)).

5 183 Va. 23, 28, 31 S.E.2d 297, 299 (1944).

were taken the next day, revealing that the air was sufficient in both quality and quantity.[6] There was no autopsy performed, nor was a blood sample taken from the decedent to determine whether carbon monoxide gas contributed to his death.[7] The administratrix filed suit against the coal company, seeking to recover for her husband's death, which she claimed was caused by his exposure to poisonous gas and improper ventilation. A verdict was returned in favor of the administratrix, and the coal company appealed. In affirming the jury's verdict, the Court held that the air testing employed by the coal company shed "little light" on the air quality on the day of the decedent's death and that "[t]he failure of these agents of the company to procure and produce this vital evidence, which was made available to them, justified the inference that they at least thought it would be adverse to their principal, and feared that it would fasten upon someone the responsibility for this fatal injury."[8]

More recently, in *Gentry v. Toyota Motor Corp.*, an expert retained by the plaintiffs examined a vehicle involved in a car accident, made an assessment of the vehicle, and—without permission—removed pieces of the vehicle with a hacksaw.[9] Toyota had no opportunity to have its own expert examine the vehicle before these pieces were removed, and it moved to dismiss the case for spoliation of evidence, arguing that plaintiffs' expert so damaged the vehicle that the manufacturer was deprived of its right to inspect the vehicle and create a defense to plaintiffs' allegation of a defect.[10] Ultimately, after the plaintiffs hired several additional experts and changed their theory of the cause of the accident, the trial court granted Toyota's motion to dismiss the case, finding the way in which the plaintiffs' original expert "destroyed the vehicle . . . prevented the defendant from properly being able to defend the case."[11]

On appeal, the Supreme Court of Virginia reversed the trial court. The Court stated, "[c]ourts often impose sanctions when a litigant or his attorney has acted in bad faith. The purpose of such a sanction is to punish the offending party and deter others from acting similarly."[12] The Court reasoned that the trial court erred because neither the plaintiffs nor their attorney acted in bad faith, as the wrongful act was committed by the expert who "acted on his own with neither the consent nor the knowledge of the Gentrys or their attorney."[13] The Court further noted that the dismissal of the plaintiffs' case, did not serve to punish the offending party, namely, the expert, but punished the nonoffending party, the

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6 *Id*.

7 *Id*.

8 *Id*. at 28–29, 31 S.E.2d at 299.

9 252 Va. 30, 31–32, 471 S.E.2d 485, 486 (1996).

10 *Id*. at 32, 471 S.E.2d at 487.

11 *Id*. at 33, 471 S.E.2d at 488.

12 *Id.* at 34, 471 S.E.2d at 488.

13 *Id*.

plaintiffs.[14] Moreover, the Court held that the expert's wrongful actions did not ultimately prejudice Toyota because "the theory upon which the [plaintiffs] now seek to recover is totally unrelated to the part of the vehicle that [the expert] destroyed" and Toyota's own expert testified that his opinions were unaffected by what the plaintiffs' original expert had done to the vehicle.[15]

In 2003, the Virginia Court of Appeals evaluated whether a spoliation/missing evidence inference was available to the plaintiff, who sought benefits for her child from the Birth-Related Neurological Injury Compensation Program, when a physician failed to ascertain certain blood levels from the child after delivery. In *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, the Court of Appeals of Virginia stated that "Virginia law recognizes a spoliation or missing evidence inference, which provides that 'where one party has within his control material evidence and does not offer it, there is an inference that the evidence, if it had been offered, would have been unfavorable to that party.'"[16] While the "textbook definition of 'spoliation' is 'the intentional destruction of evidence,'" the court noted that spoliation could also arise as a result of either negligent conduct or its being merely "lost, altered, or [unable to] be produced."[17] The court further stated that "[a] spoliation inference may be applied in an existing action if, at the time the evidence was lost or destroyed, 'a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.'"[18] The court remanded the case to the Workers' Compensation Commission to make the necessary factual findings in order to determine if a spoliation inference was warranted.[19]

II. December 2015 Amendments to Rule 37(e) of the Federal Rules of Civil Procedure

On December 1, 2015, a number of significant changes to the Federal Rules of Civil Procedure took effect, including to Rule 37, Failure to Make Disclosures or to Cooperate in Discovery; Sanctions. New Rule 37(e), titled "Failure to Preserve Electronically Stored Information," applies in situations where electronically stored information should have been preserved in anticipation or during the conduct of litigation, that a party lost the information by failing to take reasonable steps to preserve it, and that such information cannot be replaced through additional discovery.[20] If a court finds such a situation exists, and the court finds prejudice was done to another party due to the loss of the informa-

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14 *Id*.

15 *Id*.

16 40 Va. App. 565, 580–81, 580 S.E.2d 467, 475 (2003) (quoting Charles E. Friend, The Law of Evidence in Virginia § 10-17, at 338 (5th Ed. 1999) (brackets omitted)).

17 *Id*. at 581, 580 S.E.2d 475.

18 *Id*. (quoting Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 270–71 (Ill. 1995)).

19 *Id*. at 585.

20 Fed. R. Civ. P. 37(e).

tion, then the court can order measures no greater than necessary to cure the prejudice.[21]

Pursuant to the amended rule, federal courts are also required to find that a party intentionally acted to deprive another party of the use of certain electronically stored information in the litigation before the court may assume the lost information was unfavorable to the party, issue an adverse inference instruction to the jury, or dismiss the case.[22]

Advisory notes to this amendment make clear that the rule does not apply "when the loss of information occurs despite the party's reasonable steps to preserve." The may occur when the information itself is outside the party's control or the evidence is destroyed by events outside the party's control; for example, computer virus, "cloud" service failure, or flooding of the computer room.[23] The Committee Notes go on to explain the need for the courts to find intentional loss of information before issuing an adverse inference instruction:

> Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have.[24]

It is these amendments to Rule 37(e) that set the stage for the Supreme Court of Virginia to again weigh in on the appropriate punishment for a party found to have spoliated evidence.

III. The Supreme Court of Virginia Changes the Spoliation Landscape in *Emerald Point, LLC v. Hawkins*

In 2014, three tenants of the Emerald Point apartment complex in Virginia Beach filed suit against the management company/landlord of the apartments, alleging that due to faulty maintenance of the furnace and associated vent and flue system, the plaintiffs were repeatedly exposed to carbon monoxide resulting in permanent injuries.[25] Before trial, the plaintiffs moved for an adverse inference jury instruction based on the defendants' disposal of the furnace that had been removed from the plaintiffs' apartment. While the trial court did not agree

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21 Fed. R. Civ. P. 37(e)(1).

22 Fed. R. Civ. P. 37(e)(2).

23 Advisory Committee Notes to Rule 37(e) (2015 Amendment).

24 *Id.*

25 Emerald Point, LLC v. Hawkins, 294 Va. 544, 550–51, 808 S.E.2d 384, 388 (2017).

to offer a mandatory adverse inference instruction, it did give the following spoliation instruction to the jury:

> If a party has exclusive possession of evidence which a party knows, or reasonably should have known would be material to a potential civil action and the party disposes of that evidence, then you may infer, though you are not required to do so, that if that evidence had been available it would be detrimental to the case of the party that disposed of it[ ]. You may give such inference whatever force or effect you think is appropriate under all the facts and circumstances.[26]

In giving the instruction, the trial court advised the jury that the "landlord 'did nothing in bad faith' in disposing of the furnace."[27] After a four-day trial, the jury returned its verdict in favor of the plaintiffs, and the defendants appealed. On appeal, the defendants argued that the trial court erred in granting an adverse inference instruction based on the defendants' disposal of the furnace. The Supreme Court of Virginia agreed.

At the outset, the Supreme Court noted that this was a case of first impression on "whether to warrant remedial action by the trial court, such as the granting of an adverse inference instruction, the destruction of the evidence must be undertaken with the deliberate intent to deprive the other party of its use at trial in a pending or reasonably foreseeable litigation between the parties."[28] Because the trial court had affirmatively found the defendants' destruction of the furnace was not done in bad faith, the Supreme Court had to determine whether

> a party who is either aware or should reasonably be aware of the relevance of evidence in its possession or under its control to either probable or pending litigation, and fails to preserve such evidence without bad faith shall be penalized by having the jury instructed that it may infer that the missing evidence would have been unfavorable to that party.[29]

In making that decision, the Court looked to Rule 37(e) of the Federal Rules of Civil Procedure, finding that the standard it sets forth for the spoliation of electronically stored information should not only be used in the Commonwealth but should be applicable to all forms of spoliation.[30] The Court held that "the evidence must support a finding of intentional loss or destruction of evidence in order to prevent its use in litigation before the court may permit the spoliation

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[26] *Id*. at 555–56, 808 S.E.2d at 391.

[27] *Id*. at 556, 808 S.E.2d at 391.

[28] *Id*.

[29] *Id*.

[30] *Id*. at 558, 808 S.E.2d at 392.

inference."[31] In the case at hand, the Court found that the furnace was disposed of only after it had been sitting in a maintenance bay for more than one year and that the disposal by the defendants was negligent at worst.[32] As the tenants did not demonstrate that the disposal of the furnace was motivated by the defendants' desire to deprive them of access to it as material evidence in probable litigation, the trial court erred in granting the spoliation instruction. The Court directed the case to be retried and that if the plaintiffs' evidence is similar, then the plaintiffs would not be entitled to a spoliation instruction with regard to their inability to inspect the furnace.[33]

IV. The Virginia Legislature Takes Action on Spoliation in the Wake of *Emerald Point, LLC v. Hawkins*

On the heels of the *Hawkins* decision, the Virginia legislature, through a bill sponsored by two well-known plaintiffs' attorneys, took aim at the spoliation guidance provided by the Supreme Court of Virginia. During the 2018 legislative session, HB 1336 was introduced to create a spoliation jury instruction at Virginia Code section 8.01-379.2:1. This bill passed the House of Delegates with the following language:

> A. For the purposes of this section, "evidence" includes any information, records, papers, documents, physical items, or any other materials that any party to pending or probable litigation may have desired to introduce at trial.
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> B. If a party, or such party's agents, employees, or servants, has possession, custody, or control of evidence that such party, or such party's agents, employees, or servants, knows or reasonably should know may be material to pending or probable litigation, and such evidence is disposed of, altered, concealed, destroyed, or not preserved by such party, or such party's agents, employees, or servants, or by another person or entity at the direction or with the consent or knowledge of such party, or such party's agents, employees, or servants, a court may instruct that a jury may infer that, if such evidence had been introduced, such evidence would be detrimental to the case of such party.
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> The party seeking such instruction need not show that the disposal of, alteration of, concealing of, or failure to preserve such evidence was undertaken intentionally or in bad faith in order for such instruction to be given.[34]

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[31] *Id.* at 559, 808 S.E.2d at 392–93.

[32] *Id.* at 559, 808 S.E.2d at 393.

[33] *Id.*

[34] HB 1336, 2018 Session, Introduced (2018).

Once in the Senate, the Committee for Courts of Justice revised HB 1336, adding a very narrow definition of "probable litigation":

> A. For the purposes of this section:
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> "Evidence" includes any information, records, papers, documents, physical items, or any other materials that any party to pending or probable litigation may have desired to introduce at trial.
>
> "Probable litigation" means those instances where there has been a specific threat of litigation from a party or the legal counsel of a party.
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> B. If a party, or such party's agents, employees, or servants, has possession, custody, or control of evidence that such party, or such party's agents, employees, or servants, has been put on notice that such evidence is material to pending or probable litigation, and such evidence is disposed of, altered, concealed, destroyed, or not preserved by such party, or such party's agents, employees, or servants, or by another person or entity at the direction or with the consent or knowledge of such party, or such party's agents, employees, or servants, a court may instruct that a jury may infer, subject to any explanation that may be made by such party, that, if such evidence had been introduced, such evidence would be detrimental to the case of such party.
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> The party seeking such instruction need not show that the disposal of, alteration of, concealing of, or failure to preserve such evidence was undertaken intentionally or in bad faith in order for such instruction to be given.[35]

This version was rejected, and the Courts of Justice Committee then completely reworked the proposed spoliation instruction to essentially adopt the *Hawkins* ruling and Rule 37(e) of the Federal Rules of Civil Procedure. This version read as follows:

> A. A party or potential litigant has a duty to preserve evidence that may be relevant to reasonably foreseeable litigation. In determining whether and at what point such a duty to preserve arose, the court shall include in its consideration the extent to which the party or potential litigant was on notice that specific and identifiable litigation was likely and that the evidence would be relevant.

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[35] HB 1336, Senate Substitute (Feb. 26, 2018).

> B. If evidence that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, or is otherwise disposed of, altered, concealed, destroyed, or not preserved, and it cannot be restored or replaced through additional discovery, the court (i) upon finding prejudice to another party from such loss, disposal, alteration, concealment, or destruction of the evidence, may order measures no greater than necessary to cure the prejudice or (ii) only upon finding that the party acted with the intent to deprive another party of the evidence's use in the litigation, may (a) presume that the evidence was unfavorable to the party, (b) instruct the jury that it may or shall presume that the evidence was unfavorable to the party, or (c) dismiss the action or enter a default judgment.[36]

This alternative Senate bill was also rejected, and the bill was sent back to the Courts of Justice Committee at the end of the 2018 session without any agreement on language.

This bill has been resubmitted in the Senate for consideration during the 2019 legislative session, using the same language as above, incorporating the spoliation standards set forth in F.R.C.P. Rule 37(e).[37] The Supreme Court of Virginia's decision in *Emerald Point, LLC v. Hawkins* has forced the Commonwealth to take yet another step toward adopting the Federal Rules of Civil Procedure.

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[36] HB 1336, Senate Substitute (March 5, 2018).

[37] 8.01-379.2:1, Spoliation of evidence. SB 1619, Introduced (2019). The proposed legislation was amended and passed the General Assembly as amended. The amendment permits the court to offer an adverse inference instruction in situations where a party has *recklessly* lost or destroyed evidence, not just intentionally. The bill was also amended to make clear it was not creating an independent cause of action for negligent or intentional spoliation of evidence. The entirety of the bill, as passed, reads as follows (with the amendments in italics):

> A. A party or potential litigant has a duty to preserve evidence that may be relevant to reasonably foreseeable litigation. In determining whether and at what point such a duty to preserve arose, the court shall include in its consideration *the totality of the circumstances*, including the extent to which the party or potential litigant was on notice that specific and identifiable litigation was likely and that the evidence would be relevant.
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> B. If evidence that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, or is otherwise disposed of, altered, concealed, destroyed, or not preserved, and it cannot be restored or replaced through additional discovery, the court (i) upon finding prejudice to another party from such loss, disposal, alteration, concealment, or destruction of the evidence, may order measures no greater than necessary to cure the prejudice, or (ii) only upon finding that the party acted *recklessly or* with the intent to deprive another party of the evidence's use in the litigation, may (a) presume that the evidence was unfavorable to the party, (b) instruct the jury that it may or shall presume that the evidence was unfavorable to the party, or (c) dismiss the action or enter a default judgment.
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> C. *Nothing in this section shall be interpreted as creating an independent cause of action for negligent or intentional spoliation of evidence.*