

BUSINESS AND COMMERCIAL LITIGATION ALERT

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Ohio Supreme Court Restricts Spoliation Claims

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The Ohio Supreme Court has issued an important decision limiting a party's ability to pursue an independent tort claim for spoliation of evidence. Ohio law excludes tort claims for negligent spoliation of evidence, but permits intentional spoliation claims. *Smith v. Howard Johnson Co.*, 67 Ohio St.3d 28, 615 N.E.2d 1037 (1993). The elements of intentional spoliation of evidence have been: (1) pending or probable litigation involving the plaintiff was in existence, (2) defendant had knowledge that litigation existed or was probable, (3) willful destruction of evidence by defendant designed to disrupt plaintiff's case, (4) disruption of plaintiff's case, and (5) damages proximately caused by the defendant's acts.

In [Elliott-Thomas v. Smith, Slip Opinion No. 2018-Ohio-1783](#), the Supreme Court narrowed the scope of intentional spoliation claims by adding the requirement of actual proof of destruction or alteration of evidence. Further, the Supreme Court held that claims for intentional concealment of, or intentional interference with, evidence are excluded from intentional spoliation claims.

The Supreme Court reached this decision on several grounds. First, the Supreme Court observed that Ohio is one of only a few jurisdictions recognizing the independent tort of intentional spoliation of evidence. Second, the Supreme Court noted that no other jurisdiction recognizing intentional spoliation as a separate tort has held that the tort includes concealment or interference with evidence. Rather, all other jurisdictions require actual destruction of evidence for the tort to apply.

Third, the Supreme Court found that adequate remedies already exist to deter and punish interference and concealment of evidence. Specifically, Rule 37 of the Ohio Rules of Civil Procedure provides trial courts with broad discretion to impose sanctions on any party that violates the rules governing the discovery process. In addition, the ethical rules governing attorneys deter counsel from abusing the discovery process. Fourth and finally, absent proof of actual destruction or alteration of evidence, juries speculate about the effect the missing evidence might have had on the outcome of the litigation.

Although *Smith* narrows intentional spoliation claims, it does not eliminate them or possible sanctions. As such, it is best to take reasonable steps to preserve evidence when one reasonably anticipates litigation. Clients should review and update litigation hold policies and procedures. Continue to segregate and preserve documents, things, and electronically stored and created information that may be relevant to the claims or defenses in a case. Such items may include employment files, videos, audio recordings, photographs, and vehicle data if it is available. Preventing any such documents or information from destruction will provide for a more streamlined discovery process and provide peace of mind regarding any separate causes of action for the spoliation of evidence.

Attorneys at Roetzel & Andress are experienced in advising clients on preservation of evidence and litigation hold policies and procedures. Please contact us with any questions.

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