400 SPOLIATION: INFERENCE

[Describe the conduct the court has found to constitute spoliation of evidence.]

You may, but are not required to, infer that ((plaintiff) (defendant)) (describe spoliation) because producing that evidence would have been unfavorable to (plaintiff)'s (defendant)'s interest.

(For example: The defendant destroyed all of his or her medical records for patient care provided prior to (relevant date). You may, but are not required to, infer that the defendant destroyed his or her medical records from prior to (relevant date) because producing that evidence would have been unfavorable to defendant's interest.)

COMMENT

This instruction and comment were approved in 2010. This revision was approved by the Committee in September 2021; it added to the comment.

Prior to giving this instruction, the court must first determine if spoliation occurred. If the court finds spoliation has occurred, the court must then determine if the proper sanction for the spoliation of evidence is to instruct the jury on the spoliation inference. This may be appropriate when the destruction of evidence is intentional.

Spoliation Defined. Omnia Praesumuntur Contra Spoliatorem: "All things are presumed against a despoiler or wrongdoer." Black's Law Dictionary 1086 (rev. 6th ed. 1990).

Spoliation is defined as the destruction or withholding of critically probative evidence resulting in prejudice to the opposing party. Estate of Neumann v. Neumann, 2001 WI App. 61, 242 Wis.2d 205, 245, 626 N.W.2d 821.

The duty to preserve evidence exists whether litigation is pending or not. In evaluating an allegation of document destruction a court should examine whether the party knew or should have known at the time it caused the destruction of the documents that litigation against (the opposing parties) was a distinct possibility. Garfoot v. Fireman's Fund Ins. Co., 228 Wis.2d 707, 718, 599 N.W.2d 411 (Ct. App. 1999), citing Milwaukee Constructors II v. Milwaukee Metro Sewerage District, 177 Wis. 2d 523, 532, 502

N.W.2d 881 Ct. App. 1993; S.C. Johnson & Son, Inc. v. Morris, 2010 WI App. 6, 322 Wis.2d 766, 779 N.W.2d 19.

When a party deliberately destroys documents, the court may find spoliation by applying a two-part analysis. First, the court should consider "whether the party responsible for the destruction of evidence knew, or should have known, at the time it destroyed the evidence that litigation was a distinct possibility." Second, the court should consider "whether the offending party destroyed documents which it knew, or should have known, would constitute evidence relevant to the pending or potential litigation." "The purposes of the spoliation doctrine are served only if the offending party has notice that the evidence is or is likely to be relevant to pending or foreseeable litigation and proceeds to destroy the evidence anyway." Ins. Co. of N. Am. v. Cease Electric Inc., 2004 WI App 15, ¶¶15 and 16, 269 Wis.2d 286, 294, 674 N.W.2d 886, 890.

There is a five step process for evaluating the destruction of evidence and whether it constitutes spoliation.

(1.) Identification, with as much specificity as possible, of the evidence destroyed;

(2.) The relationship of that evidence to the issues in the action;

(3.) The extent to which such evidence can now be obtained from other sources;

(4.) Whether the party responsible for the evidence destruction knew or should have known at the time it caused the destruction of the evidence that litigation against the opposing parties was a distinct possibility; and

(5.) Whether, in light of the circumstances disclosed by the factual inquiry, sanctions should be imposed upon the party responsible for the evidence destruction and if so, what those sanctions should be.

Milwaukee Constructors II v. Milwaukee Metro Sewerage District, 177 Wis.2d 523, 532, 502 N.W.2d 881 Ct. App. 1993 citing Struthers Patent Corp. v. Nestle Co., 558 F. Supp. 747, 756 (D.N.J. 1981).

Burden of Proof. The party seeking the evidence must prove by clear, satisfactory, and convincing evidence that relevant evidence was intentionally withheld or destroyed. Estate of Neumann v. Neumann, 2001 WI App. 61, ¶¶82 and 83, 242 Wis. 2d 205, 246, 626 N.W.2d 821 citing Jagmin v. Simonds Abrasive Co., 61 Wis.2d 60, 80-81, 211 N.W.2d 810 (1973).

Sanctions. The decision whether to impose a sanction for the spoliation of evidence is committed to the trial court's discretion. City of Stoughton v. Thomasson Lumber Co., 2004 WI App. 6, & 38, 269 Wis.2d 339, 675 N.W.2d 487 citing Garfoot v. Fireman's Fund Ins. Co., 228 Wis.2d at 717. A circuit court has a "broad canvas upon which to paint in determining what sanctions are necessary." Milwaukee Constructors II v. Milwaukee Metropolitan Sewerage District, 177 Wis. 2d 523, 538, 502 N.W.2d 881 (Ct. App. 1993).

The primary purpose behind the doctrine of spoliation is two fold: (1) to uphold the judicial system's truth-seeking function and (2) to deter parties from destroying evidence. A remedy for spoliation should "advance truth by assuming that the destroyed evidence would have hurt the party responsible for the

destruction of evidence and act as deterrent by eliminating the benefits of destroying the evidence." Ins. Co. of N. Am. v. Cease Electric Inc., 2004 WI App. 15, ¶16, 269 Wis.2d 286, 295, 674 N.W.2d 886, 891 (Ct. App. 2003).

Courts have fashioned a number of remedies for evidence spoliation. The primary remedies used to combat spoliation are:

(1) Pretrial discovery sanctions;
(2) Monetary sanctions;
(3) Exclusion of evidence;
(4) Reading the Wis JI-Civil 400 to the jury;
(5) Dismissal of one or more claims; and
(6) See American Family Mut. Ins. Co. v. Golke, 319 Wis.2d 397, ¶42, 768 N.W.2d 729 (Ct. App. 2015); Sentry Ins. V. Royal Ins. Co. of America, 196 Wis.2d 907, 918-19, 539 N.W.2d 911 (Ct. App. 1995); Estate of Neumann v. Neumann, 242 Wis.2d 205, ¶80, 626 N.W.2d 821 (Ct. App. 2001); Mueller v. Bull's Eye Sport Shop, LLC, 2021 WI App 34, 398 Wis.2d 329, ¶20, 961 N.W.2d 112.

See also Wis. Stat. § 804.12 for sanctions for a failure to make discovery.

Spoliation Inference. Where the spoliation inference is applied, the trier of fact is permitted to draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it. Estate of Neumann v. Neumann, 2001 WI App. 61, ¶81, 242 Wis.2d 205, 246, 626 N.W.2d 821 citing Beers v. Bayliner Marine Corp., 236 Conn. 769, 675 A.2d 829, 832 (Conn. 1996). The spoliation inference is inappropriate where evidence was negligently destroyed, but may be appropriate where destruction is intentional. Jagmin v. Simonds Abrasive Co., 61 Wis. 2d 60, 80-81, 211 N.W.2d 810 (1973). See also, Mueller, supra, at ¶21. In Wisconsin, the operation of the Maxim Omnia Praesumuntur Contra Spoliatorem is reserved for deliberate, intentional actions and not mere negligence even though the result may be the same as regards the person who desires the evidence. Jagmin v. Simonds Abrasive Co., 61 Wis.2d 60, 80-81, 211 N.W.2d 810 (1973) Id. at 80-81. See also S.C. Johnson & Son, Inc. v. Morris, 2010 WI App 6, 322 Wis.2d 766, 779 N.W.2d 19.

A permissible inference instruction is a proper sanction when the spoliation was intentional but not egregious. American Fam. Mut. Ins. Co. v. Golke, 319 Wis. 2d 397, ¶42; Jagmin v. Simonds Abrasive Co., 61 Wis.2d 60, 80-81, 211 N.W.2d 810 (1973). Wisconsin case law does not mandate that sanctions for intentional spoliation achieve a remedial effect or a definitive result. Instead, this instruction allows a jury to infer that that unavailable evidence is adverse to the spoliator. Mueller, supra, at ¶40.