

Preserve Your Claims by Preserving the Evidence

Article By:

John Mark Goodman

A recent case out of Washington serves as a good reminder to preserve evidence that may be relevant to pending or future litigation. That includes not only evidence in the form of documents and electronic information, but also physical evidence. In [*Seattle Tunnel Partners*, 2023 WL 2856616](#) (Wash. Ct. App. April 10, 2023) the contractor was hired to dig an underground tunnel to replace the [*Alaskan Way Viaduct*](#) in Seattle. While excavating the tunnel, the contractor encountered an abandoned well that damaged the tunnel boring machine and shut down mining operations for two years. Several pieces of the abandoned well were removed from the ground and placed in the contractor's construction yard. Before the evidence could be moved to a storage warehouse, an unwitting equipment operator threw it into a dumpster while cleaning out the yard. By the time this was discovered, the dumpster was long gone.

In the ensuing litigation, the contractor claimed the abandoned well was a differing site condition and sought compensation from the owner and various insurers. The defendants denied liability and sought sanctions against the contractor for failing to preserve the physical evidence that it removed from the ground. The trial court found that the contractor failed to properly preserve the physical evidence and gave an adverse inference instruction to the jury, i.e., the judge instructed the jury that it could infer the spoliated evidence was harmful to the contractor's case. The jury returned a verdict for the defendants and against the contractor. On appeal, the jury's verdict was reversed because there was no evidence that the contractor intended to destroy the evidence or otherwise acted in bad faith. At most, it was guilty of negligence, which under Washington law does not justify sanctions for spoliating evidence. The appellate court was also not convinced that the physical evidence was all that important given that the contractor had smartly taken pictures of the evidence before it was discarded. While the contractor's failure to preserve the evidence may not cost it the case this time, *Seattle Tunnel Partners* is nevertheless a good reminder to preserve relevant evidence whenever litigation is pending or reasonably contemplated. It could be crucial to preserving your claims.

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