

Spoliation and the Evolution of Case Law

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In *Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, P.3d (Wash. Ct. App. Mar. 27, 2023), the Washington Court of Appeals, Division 1, discusses the evolution of Washington case law on spoliation of evidence and details the circumstances justifying the imposition of spoliation sanctions in the jurisdiction. Interestingly, the parameters set in *Seattle Tunnel Partners* differ from those in the federal courts and other states courts. This serves as a reminder that courts have different perspectives on what constitutes spoliation of evidence and when sanctions are appropriate. Because these perspectives shift over time, attorneys, litigants, and eDiscovery practitioners must be mindful of different jurisdictions' definitions of spoliation and their standards for when, and what types of sanctions, if any, may be applied.

First, Washington state law on spoliation requires, as a threshold showing, that the alleged spoliator owes a duty to the moving party to preserve the missing, lost, or destroyed evidence. The court found that, while petitioner Seattle Tunnel Partners (STP) owed the respondent a contractual duty to preserve records [to the respondent], it had no such parallel duty to the respondent's insurers. *Id.* at 30-33. Washington courts also differ from federal courts because Washington refuses to impose a preservation

obligation “merely because litigation is foreseeable in the absence of a demand for the retention of, or access to, the evidence” *Id.* at 34.

Second, the opinion notes that, under Washington state case law, an adverse inference jury instruction is appropriate as a sanction only for the intentional destruction of evidence or the willful failure to preserve evidence with an improper motive (i.e., bad faith). Where a party merely “consciously disregarded the importance of the evidence,” an adverse inference jury instruction is not an appropriate sanction. *Id.* at 37-38.

Third, the opinion explains that, under Washington state case law, harsh sanctions for spoliation of evidence are only appropriate where that evidence is sufficiently important to the case. The appellate court describes six factors to consider when evaluating the importance of missing, lost, or destroyed evidence in the spoliation context:

1. whether the missing evidence would provide direct evidence of a claim or defense;
2. whether the lost evidence is cumulative of other available evidence;
3. whether the culpable party admitted the evidence’s importance;
4. whether the nonspoliating party had the opportunity to inspect the evidence before it was lost;
5. whether the loss of the evidence impeded parties from developing expert opinions on liability, causation or damages; and
6. whether the loss of the evidence gave the culpable party an investigative advantage to the prejudice of the nonspoliating party.”

Id. at 37-38 (footnotes omitted).

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