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Where's the Evidence - Dealing with Spoliation by Plaintiffs in Product Liability Cases

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WHERE'S THE EVIDENCE? DEALING WITH SPOLIATION BY PLAINTIFFS IN PRODUCT LIABILITY CASES

I. INTRODUCTION

Suppose that you are a boat manufacturer.[1] You are served with a complaint which alleges that one of your products exploded due to a faulty bilge pump switch and a leaking fuel system.[2] The potential liability is quite large because the plaintiff's husband was killed in the explosion.[3] Your first logical step is to ask for access to the boat so that you may investigate its wreckage firsthand, but you learn that the plaintiff's expert ripped the boat apart in the course of his examination.[4] His investigation involved using a chainsaw and sledge hammer to cut crucial sections of the boat.[5] The boat was damaged to such an extent that you are unable to inspect it.[6]

In defending the lawsuit, you must now, in the absence of any evidence in your favor, overcome the jury's presumption that you are at fault. A boat you manufactured exploded and killed someone, and the plaintiff has an expert who will testify that your product was responsible for the explosion.[7] You have no information about the most critical piece of evidence except that offered by the opposing party.[8] Furthermore, you have no effective method for verifying or, preferably, disproving the claims made by the plaintiff's expert.[9] Because you cannot examine the boat, any theories you might advance regarding alternative causes of the explosion are pure speculation. Clearly, you are severely prejudiced in your ability to present a defense.

To what remedy should you be entitled because of the actions of the plaintiff's expert? What sanction, if any, should the plaintiff face for his expert destroying the evidence you need to fully defend the case? What if the plaintiff had no knowledge that the expert would use such destructive methods in his investigation? How should courts sanction plaintiffs when they neither actually destroy the evidence nor order that it be destroyed? What authority does the court have to impose sanctions?

Spoliation occurs when a party to a lawsuit destroys relevant evidence, either carelessly or deliberately. Obviously, if it was done to gain an advantage

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1. *See* Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 151 (4th Cir. 1995).
2. *Id.*
3. *Id.*
4. *Id.* at 155.
5. *Id.*
6. *Id.*
7. *Vodusek*, 71 F.3d at 155.
8. *Id.*
9. *Id.*

it would have to be deliberate, not careless.[10] Spoliation can result from the acts of either party or a third party.[11] In the typical product liability case, the focus of this Comment, the plaintiff is more likely than the defendant to be guilty of destroying evidence.[12] When a plaintiff alleges a product is defective, the product will be within his control at all times following the accident and leading up to the suit.[13] If the allegedly defective product is destroyed before the lawsuit is filed, testimony of the plaintiff's expert is the only remaining evidence.[14] The defendant can hardly be expected to defend the case based upon such one-sided evidence.[15]

The court's response to spoliation depends heavily upon which party destroyed the evidence.[16] However, the courts have not delineated or articulated this distinction. When a defendant destroys evidence, the plaintiff's right to recovery for his injuries has been severely limited.[17] Often the plaintiff needed the evidence just to meet his burden of proof. Without the evidence, the plaintiff is left with no grounds for continuing the suit. Some jurisdictions have responded to this situation by allowing an independent tort action for spoliation.[18] Some courts have gone so far as to allow recovery in tort for negligent spoliation, thereby punishing the defendant for even an innocent destruction of evidence.[19]

However, when plaintiffs destroy evidence, it is unclear how the courts should respond. A tort cause of action would be inappropriate because the defendant has suffered no injury that would entitle it to separate recovery.[20] The defendant is interested in the missing evidence only to the extent that it

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10. David A. Bell et al., *Let's Level the Playing Field: A New Proposal for Analysis of Spoliation of Evidence Claims in Pending Litigation*, 29 ARIZ. ST. L.J. 769, 771-72 (1997).

11. Maria A. Losavio, *Synthesis of Louisiana Law on Spoliation of Evidence—Compared to the Rest of the Country, Did We Handle It Correctly?*, 58 LA. L. REV. 837, 859-62 (1998). There has been little recognition by courts or scholars of the importance of determining which party destroyed the evidence. However, this distinction is critical as some remedies are exclusive to a particular party. It is hard to imagine, for example, how a defendant could have an independent cause of action for spoliation. *See infra* notes 14-20 and accompanying text.

12. This is not because plaintiffs are less ethical than defendants, but because in the product liability context, the plaintiff usually has possession of the product.

13. John F. Kuppens, *There Is No Substitute: Spoliation of Evidence in Product Liability Suits*, S.C. LAW., Mar.-Apr. 1994, at 28 (discussing the remedies available when the plaintiff destroys evidence).

14. *Id.* at 30-31.

15. *Id.*

16. *Id.* at 31.

17. *See* Rodgers v. St. Mary's Hosp. of Decatur, 597 N.E.2d 616 (Ill. 1992). In *Rodgers*, the plaintiff suffered physical injuries but was unable to pursue a personal injury suit because the hospital failed to preserve the plaintiff's x-rays. *Id.* at 618. The court allowed an independent suit against the hospital for violating Illinois' X-Ray Retention Act. *Id.* at 620.

18. Losavio, *supra* note 11, at 839-40.

19. *Id.* at 842-43.

20. Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 371 (9th Cir. 1992). A plaintiff's spoliation "damage[s] [his] own ability to bring a claim against [the defendant]." *Id.*

provides a defense to the spoliator's suit.[21] Therefore, an independent cause of action is not warranted. Following this logic, courts have granted escalating remedies to defendants in spoliation cases beginning with an adverse jury instruction.[22] However, no jurisdiction has made an independent tort cause of action available to defendants. The more significant remedies the courts have recognized are the exclusion of any testimony relating to the missing evidence[23] and even dismissal of the plaintiff's case.[24] It is difficult to determine the appropriate sanction under the facts of a particular case. In any spoliation case, two competing and compelling considerations exist—the right of the plaintiff to have his day in court and the prejudice suffered by the defendant in defending the case. How does a court determine which consideration should predominate?

The hypothetical described at the outset of this Comment is based on *Vodusek v. Bayliner Marine Corp.*,[25] a case which effectively demonstrates some of the difficulties the courts face when a plaintiff destroys evidence before the defendant has an opportunity to conduct its own investigation. Such destruction leaves the defendant unable to completely develop theories of alternative causes of the accident or to counter the plaintiff's claim that a particular mechanism was defective. Furthermore, the defendant must refute expert testimony offered by the plaintiff.[26] From the jury's perspective, the plaintiff has put forth a convincing case based upon the testimony of a credible expert. The defendant, on the other hand, can counter only with speculation, unsupported by any expert testimony. The prejudice to the defendant is obvious, and the only issue to be resolved is the appropriate remedy.

Directing sanctions against the plaintiff might be too extreme. This is especially true if the plaintiff did not destroy the evidence himself, as was the case in *Vodusek*,[27] or destroyed the evidence unintentionally.[28] The plaintiff in *Vodusek* suffered legitimate injuries from the boat accident and may have been

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21. *See id.*

22. *See, e.g.*, Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 394-95, 396 S.E.2d 369, 372 (1990) (allowing an adverse inference when plaintiff inexplicably disposed of evidence in violation of a court order); Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156-57 (4th Cir. 1995) (holding that an adverse jury instruction would be the appropriate sanction absent bad-faith conduct by the plaintiff).

23. *See, e.g.*, *Unigard*, 982 F.2d at 368 (affirming the trial court's decision to exclude the plaintiff's expert testimony, thereby leading to a dismissal due to a lack of evidence).

24. *See, e.g.*, Moyers v. Ford Motor Co., 941 F. Supp. 883, 885 (E.D. Mo. 1996) (granting the defendant summary judgment due to the prejudice it suffered by being unable to inspect the evidence),

25. 71 F.3d 148.

26. Headley v. Chrysler Motor Corp., 141 F.R.D. 362, 366 (D. Mass. 1991).

27. *Vodusek*, 71 F.3d at 155.

28. *See* Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 394-95, 396 S.E.2d 369, 372 (1990) (involving plaintiff school board that unintentionally violated a court order not to remove asbestos without first notifying the defendant).

entitled to damages.[29] Sanctions might prevent such a recovery. Prejudice to the defendant and plaintiffs' rights to recover are in constant tension, and the spoliation doctrine attempts to balance these competing policies.[30]

In *Vodusek*, the court held that an adverse jury instruction was the appropriate sanction for the plaintiff's destruction of evidence.[31] The jury was instructed that it could infer that the destroyed evidence "would have been unfavorable to the plaintiff's theory in the case."[32] But how effectively does this remedy level the playing field for the defendant, who is still unable to inspect the evidence or to effectively counter the plaintiff's expert? Would a more severe sanction, such as excluding the expert's testimony or dismissing the plaintiff's case, be too harsh? These are the types of questions many courts have grappled with,[33] but which no South Carolina court has endeavored to answer. In this state, there has been no attempt to adopt a sophisticated framework for dealing with the problems caused by spoliation of evidence.[34] South Carolina courts have permitted an adverse inference to be drawn against the destroying party in only a few cases.[35] For these reasons, this Comment will analyze the various approaches to spoliation committed by plaintiffs in products liability cases and will recommend an approach for the South Carolina courts to adopt in the future.

Part II of this Comment will discuss different problems with and perspectives on spoliation and will culminate with an analysis of the various tests courts apply to determine if sanctions for spoliation are appropriate. Part III will explore the next step after finding sanctions are appropriate, namely the determination of what remedy is appropriate in a particular case. Part III will also discuss the advantages and drawbacks of the various remedies. Part IV will focus specifically on South Carolina case law and the spoliation sanctions that South Carolina courts have recognized. Finally, Part V will offer an approach South Carolina courts should adopt to provide sanctions commensurate with the severity of the plaintiff's misconduct.

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29. *Vodusek*, 71 F.3d at 151.

30. *See* Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994) (employing a test for imposing sanctions which measures both the fault of the plaintiff and the prejudice to the defendant).

31. *Vodusek*, 71 F.3d at 157.

32. *Id.* at 155.

33. *See* Losavio, *supra* note 11, at 838-69 (surveying many of the problems which have arisen in spoliation cases).

34. *See* Goewey v. United States, 886 F. Supp. 1268, 1284 (D.S.C. 1995) (noting that South Carolina has never recognized a tort remedy for a defendant's spoliation); Kuppens, *supra* note 13, at 31 (noting that the adverse inference is the only sanction recognized in South Carolina and discussing the various remedies available elsewhere).

35. *See, e.g.*, Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990) (finding an adverse inference to be the proper remedy for inadvertent spoliation by plaintiff school board); Gathers v. S.C. Elec. & Gas, 311 S.C. 81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993) (allowing adverse inference when defendant disconnected and discarded the power line that apparently electrocuted the plaintiff).

II. GENERAL SPOLIATION ISSUES

A. Source of Authority For Imposing Sanctions

Exploring the source of the court's authority to impose sanctions highlights an important distinction within the spoliation cases. In *Unigard Security Insurance Co. v. Lakewood Engineering & Manufacturing Corp.*,[36] the Ninth Circuit affirmed the trial court's decision to exclude evidence offered by the plaintiff, but it disagreed with the trial court's choice of authority in excluding the evidence.[37] In *Unigard*, there was a fire on a yacht insured by the plaintiff.[38] The plaintiff's expert blamed the fire on a space heater manufactured by the defendant.[39] However, the plaintiff's subrogation department determined that the defendant would not be liable because the space heater was labeled with a warning which admonished the user not to leave the unit unattended.[40] The plaintiff's subrogation department discarded the heater and the remaining evidence.[41] However, after hiring a new attorney to handle subrogation cases, the plaintiff decided to file suit.[42] The trial court excluded the testimony of the plaintiff's expert because the defendant was unable to inspect the evidence.[43]

The trial court based its decision to exclude the evidence upon Federal Rule of Civil Procedure 37.[44] However, Rule 37(b) allows the court to impose sanctions only where a party violates a discovery order.[45] In many cases, the court has issued an order during discovery directing the parties to preserve any relevant evidence in their possession.[46] In *Unigard*, there was no such discovery order.[47] Obviously, there could not have been such an order as the evidence was destroyed before the lawsuit was ever filed.[48] The very futility of issuing such an order led the trial court to apply the discovery-sanctions provision, notwithstanding the literal language of the rule.[49] The court reasoned that "'the principles underlying [Rule 37] extend[ed] to situations where compulsion orders would be futile, because the evidence ha[d] been

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36. 982 F.2d 363 (9th Cir. 1992).
37. *Id.* at 368.
38. *Id.* at 365.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Unigard*, 982 F.2d at 365.
43. *Id.* at 366.
44. *Id.* at 367; *see* FED. R. CIV. P. 37(b).
45. FED. R. CIV. P. 37(b).
46. *See, e.g.*, Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 394, 396 S.E.2d 369, 371 (1990) (involving court order directing plaintiff schools not to remove any asbestos without notifying the defendant).
47. *Unigard*, 982 F.2d at 367.
48. *Id.*
49. *Id.*

destroyed.'"[50] The Ninth Circuit rejected this analysis, refusing to allow such a broad interpretation of Rule 37(b).[51] However, the Ninth Circuit did not reverse the trial court's decision, choosing instead to exclude the testimony of the plaintiff's expert under a different authority.[52]

The Ninth Circuit noted that the court has an inherent power to control the parties and proceedings before it.[53] The court referred to its commonly-recognized authority to exclude testimony and evidence that would be too prejudicial to an opposing party.[54] It held that the sanction imposed by the trial court could properly be levied pursuant to this authority.[55] Therefore, the court needed no extrinsic statutory authority to impose sanctions for spoliation.

The court's inherent power is, by definition, broader than any statutory authority. It is not restricted by the language of Rule 37. Thus, it would allow remedies in a wider range of situations. In *Unigard*, the trial court wished to sanction the plaintiff but was constrained by the plain language of Rule 37. However, the trial court's decision to ignore the limited language of the rule was improper.[56]

While the scope of the court's inherent authority is broader than that of statutorily-based authority, the range of remedies remains the same. The three main sanctions listed under Rule 37(b)—an adverse inference, exclusion of evidence, and dismissal—are the same that have been applied in the spoliation context.[57]

The source of authority may at first appear unimportant. When a situation not covered by Rule 37 arises, the court can simply turn to its inherent power to impose sanctions. However, the *Unigard* opinion demonstrates why the issue is relevant. The trial court in *Unigard* apparently felt constrained by the discovery rules, as demonstrated by the great lengths to which it went to stretch Rule 37 to justify sanctions.[58] Additionally, the only authority from the South Carolina Supreme Court discussing spoliation sanctions did so in the context of discovery sanctions.[59] A South Carolina trial court could easily interpret the *Kershaw* opinion as limiting its authority to impose sanctions. Thus, to properly understand the spoliation issue, it is important to understand the source of the court's authority.

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50. *Id.* (quoting Synanon Church v. United States, 579 F. Supp. 967, 976-77 (D.D.C. 1984)).

51. *Id.* at 367-68.

52. *Id.*

53. *Unigard*, 982 F.2d at 368.

54. *Id.*

55. *Id.*

56. *Id.*

57. *See infra* Part III.

58. *Unigard*, 982 F.2d at 367.

59. Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990).

B. Tests For Imposing Sanctions

The destruction of evidence does not necessarily indicate that sanctions will be imposed against the spoliator. Courts have adopted many tests for determining when sanctions are appropriate. One of the most widely-accepted standards was formulated by the Third Circuit in *Schmid v. Milwaukee Electric Tool Corp.*[60] The *Schmid* court found it appropriate to impose sanctions by weighing the following factors:

> (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.[61]

The *Schmid* test highlights the two most important considerations to be weighed in spoliation claims—the conduct of the destroyer and the resultant prejudice suffered by the other party.[62] The elements of the test also demonstrate the difficulty in striking a balance between these two considerations.

The difficulty in managing these two sometimes contrary considerations was acknowledged by the *Schmid* court when it stated that "we consider it more prudent to rely on the traditional case by case approach" rather than adopt a uniform rule which could result in injustice in many situations.[63] While the first two factors are the most important in deciding whether to impose sanctions, the third factor merely speaks to determining the appropriate remedy. Thus, while the *Schmid* test consists of three factors, the court really weighs the first two and subsequently applies the third to determine the appropriate remedy.

With such a fact-specific approach, disparate results can occur from application of the same test. In both *Schmid* and *Schroeder v. Commonwealth*,[64] the courts applied the three factors to reverse trial court dismissals for spoliation.[65] The courts felt dismissal was too harsh under the circumstances.[66]

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60. 13 F.3d 76 (3d Cir. 1994).

61. *Id.* at 79; *see also* Moyers v. Ford Motor Co., 941 F. Supp. 883, 885 (E.D. Mo. 1996) (applying the *Schmid* test to justify granting summary judgment); Anderson v. Nat'l R.R. Passenger Corp., 866 F. Supp. 937, 945 (E.D. Va. 1994) (applying the blameworthiness requirement from the *Schmid* test); Schroeder v. Commonwealth, 710 A.2d 23, 27 (Pa. 1998) (adopting the *Schmid* test for judging whether sanctions are appropriate).

62. *Schmid*, 13 F.3d at 79.

63. *Id.* at 81.

64. 710 A.2d 23 (Pa. 1998).

65. *Id.* at 27; *Schmid*, 13 F.3d at 81.

66. *Schroeder*, 710 A.2d at 28; *Schmid*, 13 F.3d at 81.

However, in *Moyers v. Ford Motor Co.*, a different court applied the same factors to a similar set of facts and found that dismissal of the plaintiff's case was appropriate.[67]

A second test, applied by some district courts in the First Circuit, focuses on five factors: "1) prejudice to the defendant, 2) whether the prejudice can be cured, 3) the practical importance of the evidence, 4) whether the plaintiff [acted] in good faith or bad faith, and 5) the potential for abuse."[68] The only significant difference between *Schmid* and the First Circuit test is the latter's specific reference to the notion of bad faith. In many jurisdictions, such as the Fourth Circuit, bad faith has been regarded as a prerequisite to obtaining dismissal.[69] Bad faith is a higher standard than the fault-based test articulated in *Schmid*, which a court could use to allow sanctions whenever a party is guilty of destroying evidence regardless of the party's intent. Therefore, the First Circuit test seems to place more emphasis on the conduct of the spoliator rather than on the spoliation's effect on the other party. However, the First Circuit Court of Appeals has not yet adopted this test, so it is unclear if it is the definitive test for spoliation in that circuit.[70]

The Tenth Circuit has adopted still a third test for imposing sanctions for spoliation.[71] This test takes into account the following: (1) the degree of prejudice to the defendant's case, (2) whether the spoliation interfered with the judicial process, (3) the plaintiff's culpability, (4) whether the plaintiff was warned that noncompliance with discovery could result in dismissal, and (5) the efficacy of imposing a lighter sanction.[72] By its very language, this test applies specifically to the remedies available for violations of Rule 37.[73] Thus, the two basic considerations present in the other tests—the spoliator's conduct and the prejudice to the other party—must also be weighed against the effect the destruction of evidence has had on the discovery process.

While the language of the tests may vary slightly, the underlying considerations are the same. Despite any semantic differences, all courts weigh the negative impact on the defendant against the nature of the plaintiff's conduct to determine an appropriate sanction on a case-by-case basis. Various jurisdictions may emphasize one factor over another, such as a specific

67. Moyers v. Ford Motor Co., 941 F. Supp. 883, 885 (E.D. Mo. 1996).

68. Vazquez-Corales v. Sea-Land Serv., Inc., 172 F.R.D. 10, 13 (D.P.R. 1997).

69. Cole v. Keller Indus., Inc., 132 F.3d 1044, 1047 (4th Cir. 1998). The same court has recently backed away from a strict bad-faith requirement in *Silvestri v. General Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001), which recognizes that in some circumstances the prejudice to the defendant is so extreme that bad-faith need not be clear, but limits its holding to the facts of the case. By limiting the holding in *Sivestri*, the Fourth Circuit still requires bad-faith conduct to justify dismissal in most spoliation cases. *Id.* at 593.

70. *Vazquez-Corales*, 172 F.R.D. at 13.

71. Ehrenhaus v. Reynolds, 965 F.2d 916, 921 (10th Cir. 1992).

72. *Id.*

73. *See Ehrenhaus*, 965 F.2d at 920.

reference to bad faith or the discovery process, but all take the same considerations into account.

III. SANCTIONS AVAILABLE FOR SPOLIATION

A. Adverse Instruction

After a court determines that sanctions are appropriate, it must then decide on an appropriate penalty. The sanction imposed in *Vodusek* was an adverse jury instruction against the plaintiff.[74] Relevant sections of the jury instruction were as follows:

> The defendants contend that their access to relevant and potentially relevant evidence was substantially hindered by the actions of plaintiff's counsel and agents . . . . [I]t is the duty of a party, a party's counsel and any expert witness, not to take action that will cause the destruction or loss of relevant evidence where that will hinder the other side from making its own examination and investigation of all potentially relevant evidence.
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> If you find in this case the plaintiff's counsel and agents . . . failed to fulfill this duty, then you may take this into account when considering the credibility of [the plaintiff's expert] and his opinions and also you are permitted to, if you feel justified in doing so, assume that the evidence made unavailable to the defendants by acts of plaintiff's counsel or agents, including Mr. Halsey, would have been unfavorable to the plaintiff's theory in the case.[75]

An adverse inference is the minimum penalty that can be imposed upon a spoliator.[76] It is also the most common sanction imposed for spoliation.[77] However, some courts have limited the availability of an adverse instruction by requiring that it not be granted when the plaintiff was merely negligent in destroying evidence.[78] Following this trend, the *Vodusek* court held that some "willful conduct" must exist to grant such an instruction.[79]

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74. Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 157 (4th Cir. 1995).
75. *Id.* at 155 (second alteration in original).
76. *See* FED. R. CIV. P. 37(b)(2)(A).
77. Losavio, *supra* note 11, at 862.
78. *Vodusek*, 71 F.3d at 156.
79. *Id.*

To the jury, the adverse instruction may seem contradictory or even meaningless.[80] The jury has already been presented with testimony from the plaintiff relating to the destroyed evidence which supports the plaintiff's theory of the case. Then, at the conclusion of the trial, the jury is instructed to somehow hold the plaintiff accountable for destroying the evidence. Using *Vodusek* as an example, how does a juror reconcile the expert's testimony that the condition of the boat supported the plaintiff's case with the instruction that there should be a presumption that the boat's condition would have been adverse to the plaintiff's case? Even a juror with the best of intentions would find it difficult to effectively counter the impact of such concrete evidence with the abstract notion of a negative inference.

Adverse instructions also fail to curtail the temptation for dishonesty "in light of the tremendous benefit a spoliator can obtain by [the] destruction [of evidence]."[81] Spoliation cases often involve insurance companies pursuing subrogation claims against manufacturers.[82] In such a situation, an insurance company may be tempted to have an expert inspect the insured item to compile some credible scientific evidence to support its subrogation claim and then to destroy the evidence. As a result, the defendant cannot counter the evidence and the spoliatior's position at trial is greatly strengthened. If the worst sanction the insurance company will face from such behavior is an adverse instruction, then there is no real incentive against misbehavior. Additionally, the prospect of recouping at least a portion of the claims the company has had to pay off to its policyholders provides a strong financial incentive to create or strengthen dubious claims against manufacturers through dishonest means. As the court noted in *Chapman v. Auto Owners Insurance Co.*, "in certain circumstances, allowing the case to proceed or an expert to testify about destroyed evidence . . . may result in trial by ambush which cannot be cured by a jury instruction."[83]

B. Dismissal

For the reasons listed above, courts have resorted to a variety of measures other than the adverse jury instruction to sanction parties for destroying

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80. *See* Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49, 51-52 (1997) (discussing the inability of many jurors to understand the judge's instructions).

81. Losavio, *supra* note 11, at 862.

82. *See, e.g.*, Smith v. Atkinson, 98 F. Supp. 2d 1334, 1335 (M.D. Ala. 2000) (involving an insurance company that took possession of the plaintiff's car and disposed of it before bringing subrogation claim); Hoffman v. Ford Motor Co., 587 N.W.2d 66, 68 (Minn. Ct. App. 1998) (dealing with an insurance company which demolished plaintiff's house and sent the allegedly defective car to the salvage yard before filing suit).

83. Chapman v. Auto Owners Ins. Co., 469 S.E.2d 783, 786 (Ga. Ct. App. 1996).

evidence.[84] The most extreme measure is dismissal of the case.[85] By dismissing a case, the court denies the plaintiff his day in court. For this reason, the courts require some intentional misbehavior on the part of the spoliator to impose this ultimate sanction. However, the exact level of conduct necessary to trigger sanctions varies.[86] This divergence is due to the underlying tension between the plaintiff's rights and the prejudice to the defendant. While courts feel compelled to dismiss cases in certain circumstances due to the extreme prejudice suffered by the defendant coupled with misconduct by the plaintiff, they seem very hesitant to apply such a severe sanction.[87] The cases dealing with dismissal easily can be categorized into those which require bad faith and those which require some lesser malfeasance on the part of the spoliator.

Vodusek was the first case dealing with spoliation of evidence in the Fourth Circuit.[88] However, it discussed only an adverse instruction, thus leaving the question of stricter sanctions unsettled.[89] *Cole v. Keller Industries*, another Fourth Circuit case, was argued just two months after *Vodusek*, yet it was not decided for another three years.[90] In *Cole*, the plaintiff was injured while using a ladder manufactured by the defendant.[91] In a now familiar scenario, the plaintiff's expert took the ladder apart during his inspection.[92] The trial court granted the defendant's motion to dismiss, but the Fourth Circuit reversed.[93] The Fourth Circuit surveyed many spoliation cases and concluded that "the vast weight of authority . . . holds that absent bad-faith conduct applying a rule of law that results in dismissal on the grounds of spoliation of evidence is not authorized."[94]

The Fourth Circuit has recently relaxed its requirement of bad-faith in *Silvestri v. General Motors Corp.*,[95] finding that in some circumstances the defendant suffers such extreme prejudice that it is not an abuse of the trial

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84. *See, e.g.*, Moyers v. Ford Motor Co., 941 F. Supp. 883, 885 (E.D. Mo. 1996) (granting dismissal for spoliation).

85. *See, e.g.*, Vazquez-Corales v. Sea-Land Serv., Inc., 172 F.R.D. 10, 13 (D.P.R. 1997) (discussing the harshness of dismissal and the limited circumstances where such a sanction would be appropriate).

86. *See, e.g.*, Cole v. Keller Indus., Inc., 132 F.3d 1044, 1047 (4th Cir. 1998) (requiring bad faith by the spoliator to impose dismissal); *Vazquez-Corales*, 172 F.R.D. at 15 (finding suspicious behavior by party in destroying evidence did not demonstrate bad faith conclusively enough to justify dismissal); *Chapman*, 469 S.E.2d at 786 (allowing trial court to impose dismissal, with bad faith being an element to be considered by the court in determining the appropriate sanction).

87. *See Cole*, 132 F.3d at 1047.

88. Vodusek v. Bayliner Marine Corp., 71 F.3d 148 (4th Cir. 1995).

89. *Cole*, 132 F.3d at 1047.

90. *Id.* at 1044.

91. *Id.* at 1045.

92. *Id.* at 1046.

93. *Id.* at 1048.

94. *Id.* at 1047.

95. 271 F.3d 583 (2001).

court's discretion to dismiss the case due to the plaintiff's spoliation.[96] The plaintiff in *Silvestri* claimed that the airbag in his vehicle was defective and thus aggrevated his injuries in a car wreck.[97] After the plaintiff's experts investigated the crash and advised the plaintiff's lawyer that Silvestri did not have a case, they opined that the vehicle should be preserved so that General Motors could conduct an investigation.[98] However, this advice was not heeded and the car was sold before the defendant was able to inspect the vehicle.[99] Furthermore, the plaintiff's experts performed incomplete investigations that reached contradictory conclusions as to the speed and severity of the crash.[100] While the holding in *Silvestri* initially may seem to severely limit the scope of *Cole*, the *Silvestri* court's decision to affirm dismissal was limited to the "peculiar circumstances of this case."[101] Thus, in the Fourth Circuit, dismissal is still "usually justified only in circumstances of bad-faith."[102]

While all the tests weigh to some degree the plaintiff's conduct, the jurisdictions that require a showing of bad faith have chosen to emphasize the plaintiff's right to recover. In such jurisdictions, a high level of misconduct must exist for a court to prevent the plaintiff from pursuing its suit.

Not all courts have agreed with the requirement of bad faith to justify dismissal. In *Moyers v. Ford Motor Co.*, the plaintiff claimed that a defective seatbelt caused him injury.[103] The plaintiff's lawyer asked the salvage yard to preserve the belts, which it did.[104] However, plaintiff's counsel never picked up the belts, and the salvage yard eventually discarded them.[105] The court held that dismissal was appropriate because the spoliation "render[ed] a full defense impossible."[106]

However, the *Moyers* opinion is flawed in one crucial aspect. The court cites *Dillon v. Nissan Motor Co.*[107] for the proposition that, even absent any evidence of bad faith, sanctions can be imposed.[108] It also cites *Unigard Security Insurance Co. v. Lakewood Engineering & Manufacturing Corp.* for the idea that dismissal is an appropriate sanction to cure the prejudice to the defendant in spoliation cases.[109] However, in *Unigard* the spoliation was

96. *Id.* at 595.
97. *Id.* at 585.
98. *Id.* at 587.
99. *Id.*
100. *Id.* at 587.
101. *Silvestri*, 271 F.3d at 595.
102. *Id.* at 593.
103. Moyers v. Ford Motor Co., 941 F. Supp. 883, 884 (E.D. Mo. 1996).
104. *Id.*
105. *Id.*
106. *Id.* at 885-86.
107. 986 F.2d 263 (8th Cir. 1993).
108. *Moyers*, 941 F. Supp. at 884 (citing *Dillon*, 986 F.2d at 266-69).
109. *Id.* at 885 (citing Unigard v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 369 (9th Cir. 1992)).

actually remedied by excluding the evidence.[110] The case was dismissed only because without the evidence, the plaintiff could not meet its burden of proof.[111] *Dillon* presented a similar situation—the court excluded the plaintiff's testimony, which then caused the plaintiff to lose his case.[112] The *Moyers* court failed to distinguish between exclusion of evidence and outright dismissal.[113] The *Moyers* decision was not based on the plaintiff's inability to prove his case once he was stripped of the evidence; his case was simply dismissed.[114] *Moyers* provides a very harsh result which, coupled with the misreading of *Unigard*, makes the decision somewhat suspect.

The distinction between exclusion and dismissal is crucial, as there are many situations where the plaintiff can continue to pursue claims without evidence about the exact product that injured him. For example, if the complaint alleges a design defect, then the plaintiff can still meet its burden of proof by looking to other identical products.[115] If the complaint alleges that the gas tank of a particular car model is unreasonably dangerous, then the plaintiff can prove this claim by using another car of the same make and model as evidence. There is nothing unique to the car that injured the plaintiff. Therefore, excluding testimony relative to the plaintiff's particular car would not be fatal to his case.

The *Moyers* court's loose interpretation of *Unigard* demonstrates the tendency of courts to employ strained interpretations of previous authority or to create new theories to justify dismissal in the spoliation context.[116] In fact, the trial court in *Unigard* was guilty of the same pro-defendant attitude.[117] The trial court in *Unigard* employed a rather strained interpretation of Rule 37 to justify imposing sanctions.[118] Consistent with these cases, the trial court in *Cole v. Keller Industries, Inc.* also dismissed the case due to the plaintiff's spoliation.[119] In the latter two cases, appellate courts corrected the legal reasoning of the trial courts.[120] The *Moyers* decision has not been reviewed at the appellate level, so its precedential value is questionable.

Appellate courts generally require a showing of some intentional misconduct or bad-faith conduct to impose a sanction as drastic as dismissal.[121] Among the few appellate-level decisions affirming dismissal without an

110. *Unigard*, 982 F.2d at 368.
111. *Id.* at 366, 369.
112. *Dillon*, 986 F.2d at 266.
113. *See Moyers*, 941 F. Supp. at 884-85.
114. *See supra* notes 103-06 and accompanying text.
115. Vazquez-Corales v. Sea-Land Serv., Inc., 172 F.R.D. 10, 12 (D.P.R. 1997).
116. *See Moyers*, 941 F. Supp. at 884-85.
117. Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 367-68 (9th Cir. 1992).
118. *Id.* at 367.
119. Cole v. Keller Indus., Inc., 132 F.3d 1044, 1046 (4th Cir. 1998).
120. *Id.* at 1047; *Unigard*, 982 F.2d at 368.
121. *Cole*, 132 F.3d at 1047.

express requirement of bad faith are *Silvestri*[122] and *Chapman v. Auto Owners Insurance Co.*[123] The *Chapman* court authorized the trial judge to impose stronger sanctions than an adverse inference, up to and including dismissal.[124] In response to the plaintiff's argument that bad faith must be present before dismissal could be granted, the court only stated that "the plaintiff's good or bad faith is an issue for the trial court's consideration."[125] The main focus of spoliation sanctions, according to the court of appeals, is to avoid "trial by ambush."[126] This focus suggests an emphasis on protecting the rights of the non-spoliating party.

Bad faith is the more pervasive legal standard for dismissal, notwithstanding outlying trial-level decisions like *Moyers*. Such a standard may be needed to protect plaintiffs possessing legitimate grounds for recovery. A standard allowing dismissal for less severe or unintentional conduct would be too harsh in many situations.

However, a bad-faith requirement makes it very difficult to prove that the plaintiff's conduct justifies dismissal. The destruction usually (excepting the discovery sanctions cases) takes place before trial under circumstances unknown to the defendant. Moreover, the lesser sanction of an adverse jury instruction hardly remedies the prejudice to the defendant. Some middle ground is needed to balance both parties' interests.

C. Exclusion of Evidence

The courts have applied a third sanction, exclusion of the spoliated evidence, which aims to balance the parties' conflicting interests. The *Unigard* court applied this sanction and excluded testimony relating to the destroyed evidence.[127] This prohibition applies not only to direct testimony by the plaintiff's expert but also to any reports or secondary evidence, such as photos of the scene, taken by the expert.[128] Exclusion is a sanction that has been approved in other jurisdictions.[129]

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122. *See supra* notes 95-102 and accompanying text.

123. 469 S.E.2d 783 (Ga. Ct. App. 1996).

124. *Id.* at 786.

125. *Id.*

126. *Id.*

127. Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 368-69 (9th Cir. 1992).

128. Hoffman v. Ford Motor Corp., 587 N.W.2d 66, 72 (Minn. Ct. App. 1998).

129. *See, e.g.*, N. Assurance Co. v. Ware, 145 F.R.D. 281, 284 (D. Me. 1993) (finding that while dismissal would be too severe, exclusion of the evidence was appropriate despite the lack of any showing that plaintiff acted deliberately); Headley v. Chrysler Motor Corp., 141 F.R.D. 362, 365-66 (D. Mass. 1991) (excluding plaintiff's expert evidence due to the prejudice to defendant and the advantage plaintiff would obtain otherwise); *Hoffman*, 587 N.W.2d at 72 (excluding the testimony of the plaintiff's expert regarding the cause of the fire in plaintiff's garage after the evidence was destroyed).

In *Hoffman v. Ford Motor Co.*, two fires erupted in Daniel Hoffman's garage in the space of three days.[130] He filed a claim with his insurance company, which sent two different experts to perform a cause-and-origin investigation of the fires.[131] The experts determined the fires were caused by Hoffman's new Ford Taurus.[132] The insurance company then sent the car to a salvage yard and demolished the garage and house without providing the defendant an opportunity to inspect the evidence.[133]

The Minnesota Court of Appeals affirmed the trial court's decision to exclude the plaintiff's expert testimony as an appropriate sanction for spoliation of evidence.[134] As the court noted, "[A] fire scene itself is the best evidence of the origin and the cause of a fire."[135] Furthermore, the court stated that "[t]he propriety of a sanction for the spoliation of evidence is determined by the prejudice resulting to the opposing party."[136]

While excluding the plaintiff's expert testimony is a less severe sanction than dismissal, the practical result is often the same.[137] When the plaintiff alleges that a product contains a manufacturing defect, the product itself is often the only evidence that can prove the defect.[138] If the plaintiff cannot introduce expert testimony relating to the condition of the product, then it is nearly impossible to meet the burden of proof. The court will grant summary judgment to the defendant because there is not enough evidence to proceed.

However, in certain circumstances, excluding testimony relating to the missing evidence as opposed to granting dismissal will still leave room for the plaintiff to recover for his injuries. The plaintiff may have other relevant evidence or may attempt to prove an alternative theory for the cause of the accident. The *Vodusek* case is a perfect example.[139] In *Vodusek*, the plaintiff alleged that the explosion was caused by a faulty bilge pump and a leaking fuel system.[140] What if the plaintiff's expert had destroyed the boat but retained the bilge pump? Dismissal would seem inappropriate under those circumstances. The defendant would still have the opportunity to inspect the bilge pump to determine whether it was defective. Therefore, there would be no unfairness in litigating the claims regarding the bilge pump.

In contrast, the defendant would be unable to investigate the claims relating to the fuel line. Extreme prejudice would result if the court allowed the plaintiff

130. Hoffman v. Ford Motor Co., 587 N.W.2d 66, 68 (Minn. Ct. App. 1998).
131. *Id.*
132. *Id.* at 69.
133. *Id.* at 68.
134. *Id.* at 72.
135. *Id.* at 71.
136. *Hoffman*, 587 N.W.2d at 71.
137. *See* Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 369 (9th Cir. 1992).
138. Headley v. Chrysler Motor Corp., 141 F.R.D. 362, 366 n.18 (D. Mass. 1991).
139. Vodusek v. Bayliner Marine Corp., 71 F.3d 148 (4th Cir. 1995).
140. *Id.* at 151.

to introduce any evidence relating to the fuel line. This evidence would need to be excluded from trial to protect the defendant from unfair prejudice. While exclusion of this evidence might make recovery slightly more difficult for the plaintiff, recovery would be far from impossible. If in fact the bilge pump was defective, the plaintiff would be entitled to some measure of damages. The amount might be less than would be available with all of the evidence, but the plaintiff would be responsible for the loss of the evidence and would be forced to suffer the consequences. The foregoing analysis shows how spoliation remedies can be applied in a manner which is judicious and equitable to both plaintiffs and defendants.

Gentry v. Toyota Motor Corp.[141] demonstrates the plaintiff's ability to pursue alternative theories to avoid dismissal in a spoliation case. In *Gentry*, the plaintiff alleged that her car's temperature control cable interfered with the accelerator rod and caused the car to accelerate suddenly, thereby causing an accident.[142] In the course of inspecting the car, the plaintiff's expert removed both parts, thus making it impossible for the defendant's expert to determine if the cable did in fact interfere with the accelerator rod.[143] The defendant moved to dismiss based on this spoliation.[144] To avoid this result, the plaintiff had a second expert inspect the car, and this expert determined that the carburetor caused the accident.[145]

The Supreme Court of Virginia reversed the trial court's decision to dismiss the case for spoliation because the missing evidence, namely the accelerator rod and temperature control cable, no longer formed the basis for the plaintiff's claim.[146] The defendant had access to the carburetor and thus could effectively counter the plaintiff's claims and avoid prejudice arising from the spoliation.[147] However, if the missing parts had remained crucial to the plaintiff's case, the defendant might have been entitled to a dismissal of the plaintiff's claims.

While there exist numerous distinctions between the spoliation cases, such as the source of the authority or the test used to impose sanctions, the courts have levied only three sanctions for the destruction of evidence. The adverse inference is the most widely used and is easily obtained.[148] However, as discussed above,[149] its practical effect is highly questionable. The defendant is left in the unenviable position of defending the case with no concrete evidence. At the other extreme lies dismissal. It is rarely granted, or at least rarely upheld at the appellate level, absent some evidence of intentional or bad-faith

141. 471 S.E.2d 485 (Va. 1996).
142. *Id.* at 486.
143. *Id.*
144. *Id.* at 487.
145. *Id.*
146. *Id.* at 488.
147. *Gentry*, 471 S.E.2d at 487.
148. Losavio, *supra* note 11, at 862.
149. *See supra* notes 80-83 and accompanying text.

destruction of evidence by the plaintiff. The requisite intent is very difficult to prove.[150] Exclusion of the plaintiff's expert testimony remains as a middle ground for balancing the right of the plaintiff to a day in court and the defendant's right to a fair trial.

IV. SOUTH CAROLINA LAW ON SPOLIATION

South Carolina courts have not dealt extensively with the issue of spoliation. Even the cases that address the issue do so in a limited manner. No appellate court in South Carolina has attempted to provide an overview of the law on spoliation in this state or to explore the remedies available to a non-destroying party.

Despite this limited common-law authority, it is clear that South Carolina has long recognized the court's power to sanction parties for mishandling evidence.[151] In *Welsh v. Gibbons*, the plaintiff claimed to have purchased a bottle of soda containing a "deleterious substance."[152] The defendant asked for the bottle so that it could be tested, but the plaintiff refused to turn it over.[153] The South Carolina Supreme Court stated that while the plaintiff had the legal right not to turn over the evidence, his failure to do so should be a factor in the jury's determination of his good faith and the likely impact of the missing evidence on his case.[154]

Wisconsin Motor Corp. v. Green[155] involved a situation similar to *Welsh*. In *Wisconsin Motor*, a retailer testified that it paid a manufacturer for certain goods but was unable to produce any records to support this testimony.[156] The supreme court noted the following:

> It is well settled that if a party fails to produce the testimony of an available witness or witnesses on a material issue in the case, or produce available records, it may be inferred that the testimony, or the contents of the records, if presented, would be adverse to the party who fails to call the witness or present the records.[157]

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150. *See supra* notes 123-26 and accompanying text.

151. *See* Wisconsin Motor Corp. v. Green, 224 S.C. 460, 464, 79 S.E.2d 718, 720 (1954) (allowing an adverse inference for failure to produce records); Welsh v. Gibbons, 211 S.C. 516, 526, 46 S.E.2d 147, 151-52 (1948) (affirming imposition of an adverse inference against plaintiff for withholding evidence).

152. *Welsh*, 211 S.C. at 517-18, 46 S.E.2d at 147.

153. *Id.* at 518, 46 S.E.2d at 148.

154. *Id.* at 523, 46 S.E.2d at 150. Of course, the plaintiff is no longer allowed to withhold evidence under the modern liberal rules of discovery. *See* S.C. R. CIV. P. 26.

155. 224 S.C. 460, 79 S.E.2d 718 (1954).

156. *Id.* at 465-66, 79 S.E.2d at 720-21.

157. *Id.* at 464, 79 S.E.2d at 720.

While these cases deal specifically with the failure of a party to produce evidence and not with the destruction of evidence, they demonstrate the availability of sanctions when a party mishandles evidence. They also parallel the typical fact situation in a spoliation case. A party brings a claim based upon a certain piece of evidence and introduces testimony regarding the evidence, but the evidence is not made available to the defendant. Whether the defendant is unable to inspect the evidence because the other party simply withheld it or actually destroyed it, the practical effect and prejudice are the same. For this reason, cases like *Welsh* and *Wisconsin Motor* provide excellent insight into South Carolina's method for dealing with mishandling evidence, and their logic can easily be imported into the spoliation context.

Nearly fifty years after *Welsh* and *Wisconsin Motor*, the South Carolina Supreme Court affirmed a sanction for spoliation.[158] In *Kershaw County Board of Education v. U.S. Gypsum Co.*, the supreme court affirmed the trial court's sanctioning of the plaintiff with an adverse jury instruction.[159] *Kershaw* involved an asbestos suit brought by several Kershaw County schools.[160] During discovery, the trial judge entered an order prohibiting any of the school boards from removing asbestos from their buildings until the defendant was given an opportunity to inspect the material.[161] However, for unknown reasons the Kershaw County School Board did remove some asbestos without notifying the defendant.[162] The defendant then filed a motion to dismiss due to spoliation of evidence.[163] The court denied this motion, deciding instead to "include a jury instruction on the destruction of evidence," instructing the jury that it could infer that the evidence would have been adverse to the school board.[164] *Kershaw* presents the first language in a South Carolina appellate-level decision affirming a sanction against a party specifically for destroying evidence.

While the use of an adverse instruction for spoliation appears similar to an instruction for withholding evidence, *Kershaw* still represents a drastic departure from cases like *Welsh* and *Wisconsin*. First, *Kershaw* involved a situation where a party actually discarded a crucial piece of evidence rather than simply refusing to disclose it.[165] Second, in *Kershaw*, the trial court had entered a discovery order not to destroy any of the evidence, and the Kershaw

158. Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990).

159. *Id.* at 394-95, 396 S.E.2d at 372.

160. *Id.* at 392, 396 S.E.2d at 370.

161. *Id.* at 394, 396 S.E.2d at 371.

162. *Id.* at 394, 396 S.E.2d at 371.

163. *Id.* at 394, 396 S.E.2d at 372.

164. *Kershaw*, 302 S.C. at 394, 396 S.E.2d at 372.

165. This difference did not seem so obvious to the *Kershaw* court, which interpreted *Welsh* as applying to situations where "evidence was lost or destroyed." *Id.* at 394, 396 S.E.2d at 372. However, the *Welsh* opinion never refers to evidence being lost or destroyed. It focuses solely upon the issue of a party's failure to produce evidence in its possession. Welsh v. Gibbons, 211 S.C. 516, 523-26, 46 S.E.2d 147, 150-52 (1948).

County School Board violated the order.[166] This fact was crucial because it provided the court with the authority to impose sanctions. Since the school board violated a discovery order, the trial court based its ruling on the rules of discovery rather than on the court's inherent power to control the parties before it.[167]

In *Kershaw*, the defendant requested that the court dismiss the case to sanction the plaintiff for removing the asbestos.[168] The plaintiff school board clearly violated a discovery order, therefore justifying sanctions under South Carolina Rule of Civil Procedure 37.[169] However, the supreme court affirmed the trial court's denial of dismissal as being "too severe under the facts of this case."[170]

The source of the court's sanctioning power becomes important when more severe sanctions are considered. For example, in *Unigard*, the Ninth Circuit Court of Appeals rejected the trial court's reliance on discovery sanctions as a means of excluding evidence offered by the plaintiff, instead finding the sanctioning authority in the court's inherent power.[171] The literal language of Federal Rule of Civil Procedure 37 authorizes only sanctions imposed by a trial judge for a violation of a discovery order,[172] and there was no such order in *Unigard*.[173] Therefore, the Ninth Circuit concluded that reliance on Rule 37 was inappropriate.[174] Since the inherent power of the court is much broader than statutorily-granted authority, the inherent power permits sanctions in a greater number of situations. If discovery sanctions are the only method to obtain a remedy for spoliation in South Carolina, *Kershaw* represents a serious limitation on parties' ability to obtain meaningful sanctions for spoliation.

Despite the possible limitation discussed above, *Kershaw* hardly forecloses the possibility of obtaining a dismissal for spoliation. The opinion itself suggests a situation where dismissal may be appropriate.[175] In support of its holding that dismissal would be too harsh, the court noted that "there was no evidence of any intentional misconduct."[176] The obvious implication of this statement is that if a party does exhibit intentional misconduct, a sanction as

166. *Kershaw*, 302 S.C. at 394, 396 S.E. 2d at 371.

167. *Id.* at 395, 396 S.E. 2d at 372. In a case involving only an adverse inference, the use of the rules of discovery rather than the court's inherent power to sanction a party would not be a terribly important distinction. An adverse inference is a minimal sanction for spoliation and is not terribly prejudicial to the spoliator. *See supra* note 81 and accompanying text. However, when a more severe sanction is at issue, the source of authority becomes more important.

168. *Kershaw*, 302 S.C. at 394, 396 S.E. 2d at 372.

169. *Id.* at 395, 396 S.E.2d at 372; *see* S.C. R. CIV. P. 37 (b)(2)(C).

170. *Kershaw*, 302 S.C. at 395, 396 S.E. 2d at 372.

171. Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 368 (9th Cir. 1992); *see supra* notes 36-56 and accompanying text.

172. *See* FED. R. CIV. P. 37.

173. *Unigard*, 982 F.2d at 367.

174. *Id.* at 368.

175. *Kershaw*, 302 S.C. at 395, 396 S.E. 2d at 372.

176. *Id.* at 395, 396 S.E.2d at 372.

severe as dismissal may be appropriate. However, the opinion gives no examples of conduct that would meet this standard.

Some guidance can be obtained by comparing the language from *Kershaw* with the bad-faith standard found in the Fourth Circuit cases and with the *Moyers* standard that aimed to protect the defendant from prejudice.[177] Because the word "misconduct"[178] is used, the standard in *Kershaw* seems more like the Fourth Circuit test, which focuses more on the conduct of the spoliator than on the prejudice to the defendant.[179] By contrast, *Moyers* emphasizes the latter factor.[180] Under a bad-faith standard, it is much more difficult to obtain sanctions. Proving the subjective intent of the party who destroyed evidence is almost impossible, especially since the destruction occurs before or shortly after the opposing party is put on notice of the claim.[181] Therefore, the opposing party is at a severe disadvantage and lacks any practical remedy.

There exists a final South Carolina case on spoliation. In *Gathers v. South Carolina Electric & Gas Co.*, the plaintiff was killed when he touched a copper water pipe under his home.[182] The defendant inspected the pipe and found an electric current flowing through it.[183] To prevent another accident, the defendant disconnected the service line leading to the house.[184] When power was restored with a new line, the current was no longer flowing through the water pipe.[185] The defendant disconnected the power line only to prevent injury, yet the court held that the fact-finder could draw an inference that the evidence would be adverse to the defendant.[186]

Gathers is significant for two reasons. First, the South Carolina Court of Appeals based its authority to order an adverse inference against the defendant on *Kershaw*, yet it made no reference to discovery sanctions.[187] Thus, the court of appeals interpreted the supreme court's *Kershaw* opinion to mean that spoliation sanctions are not limited to the rules of discovery. Second, an adverse inference was drawn against the defendant despite its relatively benign and even laudable motive of preventing further injury.[188] Sanctions are therefore available in South Carolina even when the spoliator's motives are neutral or benevolent. This holding is contrary to that of *Vodusek*, which would not allow an adverse instruction unless the spoliator exhibited willful conduct

177. *See supra* Part II.B.

178. *Kershaw*, 302 S.C. at 395, 396 S.E.2d at 372.

179. *See supra* notes 89-94 and accompanying text.

180. Moyers v. Ford Motor Co., 941 F. Supp. 883, 885 (E.D. Mo. 1996).

181. *See supra* notes 123-26 and accompanying text.

182. Gathers v. S.C. Elec. & Gas Co., 311 S.C. 81, 82, 427 S.E.2d 687, 688 (Ct. App. 1993).

183. *Id.* at 83, 427 S.E.2d at 689.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Gathers*, 311 S.C. at 83, 427 S.E.2d at 689 (citing Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990)).

188. *Id.* at 83, 427 S.E.2d at 689.

that rose above mere negligence.[189] *Gathers* provides a remedy that is available whenever a party destroys evidence relevant to an issue at trial, regardless of the circumstances or the motives of the spoliator. However, *Gathers* does not discuss the possibility of imposing more severe sanctions absent bad-faith conduct by the spoliator.

The foregoing cases comprise the full body of South Carolina law on spoliation. It is obviously difficult to delineate clear-cut rules governing spoliation from such sparse authority. The courts' holdings provide mere suggestions as to how they approach spoliation cases. However, at the same time, the limited case law leaves a great deal of room to argue what should be done in these cases.

V. SUGGESTIONS

The only sanction for spoliation ever expressly affirmed by an appellate court in South Carolina is the adverse inference.[190] Yet the very ease with which this remedy has been obtained in both South Carolina and throughout the nation suggests that it is not a harsh penalty. Even assuming the jury understands the judge's instruction to infer that the missing evidence would have been adverse to the plaintiff, the jury is still likely to put much more stock in the physical evidence that was presented at trial on the plaintiff's behalf. Therefore, South Carolina courts should impose a more severe sanction in spoliation cases.

The *Kershaw* case suggests that dismissal may be available in circumstances where there is evidence of "intentional misconduct."[191] The use of the term intentional misconduct indicates the necessity of a higher level of malfeasance to warrant dismissal. As the heightened standard of conduct suggests, dismissal would be too harsh in many circumstances. However, it is easy to imagine circumstances where bad faith or malicious behavior has occurred, but the defendant is unable to present any evidence regarding the plaintiff's state of mind or the circumstances surrounding the destruction of the evidence. Any cunning plaintiff would make sure of this. Even if the plaintiff did not destroy the evidence intentionally, the prejudice to the defendant is still the same and must be redressed. The Fourth Circuit recently recognized this need by finding that in some instances the prejudice to the defendant is so great that dismissal is justified without actual proof of bad-faith, despite earlier rulings that bad faith must be present to justify dismissal.[192] Such a ruling demonstrates that the gap between the plaintiff's right to recovery and the defendant's right to a fair trial is so great that the two extremes of an adverse

189. Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995).
190. *Kershaw*, 302 S.C. at 395, 396 S.E.2d at 372.
191. *Id.*
192. *See supra* notes 90-102 and accompanying text.

inference and dismissal are not adequate to serve the interests of justice. Thus, a third remedy must be available to the defendant.

Excluding the testimony of the plaintiff's expert is a fair remedy which effectively balances the rights of both parties. The prejudice suffered by the defendant in a spoliation case is that the defendant is unable to view the missing evidence, while the plaintiff has been able to compile a great deal of information about it. By excluding any testimony regarding the destroyed evidence, the court places the parties on equal footing at trial. What the *Chapman* court referred to as "trial by ambush" is avoided,[193] yet the plaintiff is still able to present other evidence to prove its case.

However, in most cases the plaintiff will not be able to produce any additional evidence that will allow the lawsuit to continue. In a manufacturing defect case, the item itself is the only evidence of a defect.[194] Thus, the practical result with exclusion of evidence and dismissal is often the same. However, if a party must suffer prejudice, it stands to reason that it should be the party that made the evidence unavailable. Furthermore, there are situations where testimony relating to the destroyed evidence could be excluded and the plaintiff would be able to proceed with his case.[195] While exclusion of evidence is the one sanction which has never been applied or referred to by the South Carolina courts, it is the sanction which seems to produce the greatest amount of fairness in most situations.

In summary, when a plaintiff intentionally destroys evidence to gain an advantage at trial, he should not be allowed to proceed with his suit. However, absent "intentional misconduct," the court should exclude testimony relating to any evidence which the defendant was unable to inspect if the plaintiff was responsible for the unavailability of the evidence. This latter situation would occur more frequently than any other scenario in most spoliation cases, and thus exclusion would become the most common sanction. However, situations could arise where a third party disposed of evidence or the evidence was destroyed due to circumstances beyond the plaintiff's control. In those circumstances, the most appropriate remedy would be an adverse jury instruction.

VI. CONCLUSION

The three sanctions for spoliation discussed above provide a framework which aims to allow a plaintiff his day in court without unfairly prejudicing the defendant. The sanctions provide a remedy whenever the defendant is unable to inspect relevant evidence which was under the plaintiff's control, and as the level of misconduct rises, so does the severity of the sanction that is justified. The balancing act between these two considerations is the most difficult aspect

193. Chapman v. Auto Owners Ins. Co., 469 S.E.2d 783, 786 (Ga. Ct. App. 1996).
194. Vazquez-Corales v. Sea-Land Serv., Inc., 172 F.R.D. 10, 12 (D.P.R. 1997).
195. *See supra* note 115 and accompanying text.

of spoliation cases and requires a broad range of potential responses. It is insufficient to allow only the two extremes of dismissal and an adverse inference. Only when there is clear evidence as to the reasons, either malicious or inadvertent, why the plaintiff failed to preserve the evidence are these remedies appropriate. In the normal case, the motives and circumstances surrounding the destruction are difficult to discern. To ensure fairness in these situations, the trial court must have a third sanction at its disposal, namely the power to exclude any testimony resulting from the plaintiff's investigation of the missing evidence.

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