

Spoliation of Evidence in Personal Injury Claims: Mitigation and Prevention

Identifying and Responding to Potential Evidence Spoliation and Drafting Spoliation Letters

WEDNESDAY, NOVEMBER 12, 2014

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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PRESERVING EVIDENCE AND SPOILIATION IN TRUCKING LITIGATION

November 12, 2014

Rena M. Leizerman
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01 02 20 08
 (Month) (Day) (Year)
 if multiple off-duty days, enter the end date here:
 (Month) (Day) (Year) 20

USA Truck, Inc.
 3200 Industrial Park Rd.
 Van Buren, AR 72956

00E
 Driver's LAST name - Printed
 Driver's FIRST name - Printed
 JOHN

1 2 3 4 5 6 7 8 9
 (Employee Number)

1 2 3 4 5 6 7 8 9
 (Co-Driver's LAST name - Printed)
 (Co-Driver's FIRST name - Printed)

NO.	1	2	3	4	5	6	7	8	9	10	11	NOON	1	2	3	4	5	6	7	8	9	10	11	Hours Worked Last 7 Days
1: OFF DUTY																								3
2: SLEEPER																								0
3: DRIVING																								10
4: ON DUTY (OFF-SLEEPER)																								0.5
REMARKS	LITTLE ROCK, AR PT1																						10.5	
	DALLAS, TX LUNCH																						0.5	
	CORSIKANA, TX LOADING																						24	
	HOUSTON, TX DINNER																						7.25	
	ORANGE, TX OFF DUTY																						6	
																							Total Hours	
																							Yesterday	
																							Total Hours	
																							30.75	
																							24 Hours Limit	
																							Total Hours	
																							39.25	
																							Hours Worked Today	
																							11	

1 2 3 4 5 6 7 8 9 (Tractor Number)
 6 7 8 8 (Tractor Number)
 5 4 3 2 1 (Trailer Number 1)
 6 5 1 (Trailer Number 2)
 JOHN DOE (Driver's Signature in Full)
 I certify these entries are true and correct.

DATE 1-2-08
 (Tractor Number) 6 7 8 8
 (Trailer Number 1) 5 4 3 2 1
 (Trailer Number 2)

● Driver's Daily Vehicle Inspection Report ●
 I detect no defect or deficiency in this motor vehicle as would be likely to affect the safety of its operation or result in its mechanical breakdown.
 I detect and list defects or deficiencies in this motor vehicle as would be likely to affect the safety of its operation or result in its mechanical breakdown.

Remarks
 Driver Making Report
 Defects corrected.
 Defects need not be corrected for safe operation of vehicle.

spoliation

3 MOST TIME-SENSITIVE TASKS

- Send Preservation Letter
- Find and Secure the Truck
- Find and Secure Plaintiff's Vehicle

Why is Preserving Evidence Different in Tractor-Trailer Accidents?

- Federal Motor Carrier Safety Regulations
- Document Retention Timelines
- Department of Transportation
- Multiple Defendants
- Technology and Government Databases
- Third Party Vendors

FMCSR

- Regulations that pertain to all Interstate motor carriers operating in the USA
- State the minimum documents that a company must maintain in order to operate
- State the minimum time specific documents must be kept
- **SIZE DOESN'T MATTER!**

49 C.F.R. 379

- Records to be retained
- Protection and storage of records
- Preservation of Records
- SCHEDULE A: SCHEDULE OF RECORDS AND PERIODS OF RETENTION

APPENDIX A TO PART 379

KEY ITEMS

- Property and equipment records: 3 years after disposition of property
- Maintenance records: 6 months
- Personnel and payroll records: 1 year
- Shipping and Agency documents (including bills of lading): 1 year
- Logs, daily inspection sheets: 6 months
- Driver Qualification File: 3 years after last date of employment
- Qualcomm, GPS, ECM: **NONE!**

MULTIPLE DEFENDANTS

- Driver
- Motor Carrier
- Tractor Owner
- Trailer Owner
- 3rd Party Maint./Repair
- Yard Owner
- Loader/unloader
- Broker
- Shipper
- Freight Forwarder
- Consignee
- Logistics Company
- Insurer

They Can All Have Independent Liability and Evidence!

THIRD PARTY VENDORS

- Eg.: QualComm, Log Audits, GPS Tracking, Fuel Monitoring, VORAD
- Trucking companies use outside vendors to help run their companies
- Information created by these vendors is not always stored on company servers
- You don't know who the trucking company uses, but they do.
- No requirements to maintain this information by law

Why Act Immediately?

- Trucking company is notified immediately and activates well-oiled plan to defend
 - 1 hour response
 - Immediate Response Teams
 - Lawyer Directed Investigation – is it privileged?
- Police are usually not trucking experts
- Evidence can be lost
 - ECM
 - Logs and support
 - Documents are how you build additional theories of liability

Act Immediately to Prevent Spoliation

- Act immediately to preserve what can be preserved:
 - Activate your Immediate Response Team
 - Secure all scene evidence
 - Secure vehicles and ECM evidence
- Write Preservation/Spoliation Letter for everything else

Preservation/Spoilation Letters

A spoliation letter should be sent as soon as possible to the **driver, trucking company and insurer** requesting the preservation of evidence.

- Trucking companies have routine document destruction policies.
- Describe items of evidence and explain to the other side that this evidence is crucial to your case.
- Remember to request that the company preserve the Electronic Control Module (ECM)
- Ethical considerations require that you give no legal advice.
- The purpose of the spoliation letter is to ensure the most severe sanctions available.

How to Write a Spoliation Letter

- Two Competing Theories
 - General Topics:
 - Pros:
 - Provides specific items that you can cite later in brief
 - No confusion in what you are asking for
 - Can list as many items as you want
 - Cons
 - You don't know their business
 - Can be viewed as over burdensome
 - Gives the defense an excuse for not preserving relevant evidence

Send by certified mail!

Proving Spoliation in Litigation

- Anticipation of Litigation
- Control Over Evidence
- Evidence Not Available
- Plaintiff Prejudiced
- Evidence Relevant to Claims

Proving Spoliation in Litigation

- Anticipation of Litigation
 - Knowledge of an accident not enough
 - Must show they had reason to believe claim would be filed
 - Proof of service of spoliation letter
 - Knowledge of insurance company not enough
 - Depose person who received letter to prepare for motion

Proving Spoliation in Litigation

- Control over evidence
 - Must show they had the ability to preserve the evidence
 - Owner-Operators control their tractor-trailer, not the company
 - DOT and Police may take evidence from company
 - Must show they had control or possession of evidence at the time they received notice of potential claim.
 - Destroying evidence prior to required retention time can be grounds for sanctions without notice of claim

Proving Spoliation in Litigation

- Evidence not available
 - Documents or evidence must not be available for you to inspect
 - Cannot force a company to store a vehicle indefinitely (unreasonable)
 - Can evidence be obtained from another source?
 - Must show that evidence actually existed at one time
 - What would the ECM show if we could have downloaded it?

Proving Spoliation in Litigation

- Plaintiff Prejudiced
 - Plaintiff must be prejudiced in the prosecution of their case by lack of evidence
 - What would the evidence have proved?
 - Can you prove this another way?
 - Could skid marks show speed without ECM?
 - Could GPS data show time driving if logs are gone?

Proving Spoliation in Litigation

- Evidence Relevant

- Evidence must be relevant to the reasons the accident happened

- What are all your theories of negligence?
 - Who are your Defendants?
 - What do you need to prove to support these claims?
 - How would this evidence have helped me?
 - Is there other evidence that supports my position?
 - Eg. Driver said he was tired at the scene could support claim he was over hours, so log books would be relevant.

Sanctions

- Sanctions against offending party in underlying negligence action
 - Most Popular: A negative inference that evidence would have harmed the spoliating party.
 - Most states have this sanction
 - Inference given is based on destroyed evidence
 - Exclusion of Expert Testimony
 - If material reconstruction evidence is destroyed, then offending party cannot have expert testimony about cause of accident. (Can be as bad a striking answer)
 - Exclusion of other evidence
 - Striking of Pleading (Most severe)
 - This can be the striking of an Answer or Dismissing a Complaint
 - Bad Faith Requirement in some jurisdictions

THE WORST CASE SCENARIO

EVIDENCE INVOLVED IN
THE BATTLE:

- DRIVER QUALIFICATION
FILE
- LEASE AGREEMENT
- PLACARDS



- PN EXPRESS v. ZEGEL
- Vicarious Liability
- Missing Documents
- Jury Instruction
- Applied Statutory
Employment
- The absence of evidence
WAS the evidence





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Spoliation and its Impact on Personal Injury Lawsuits

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Our Objective Today

- ◆ **Inform you as to how spoliation impacts the role of an expert witness and in-turn raises the level of difficulty by which a Plaintiff's can prove their claim of negligence**

The Role of an Expert Witness

◆ **Expert Witnesses:**

- **Are subject matter experts who bring their unique education, training, and experience into the legal system**
- **Are directly involved in industry standards and research all relevant industry consensus standards as a part of their case evaluation**
- **Conduct investigations**
- **Review relevant documents related to their area of expertise**
- **Author detailed reports as to their opinions**

The Role of an Expert Witness

- ◆ **An expert has a responsibility to evaluate a case fairly and impartially**
- ◆ **The purpose of the expert is for the benefit of the jury**
- ◆ **The expert witness is not to provide legal conclusions**

Standard of Care

- ◆ **According to Black's Law Dictionary (8th Edition) the standard of care is defined “In the law of negligence, the degree of care that a reasonable person should exercise”**
- ◆ **Or to a juror means: “did the Defendant or Plaintiff do what a reasonable Defendant or Plaintiff should have done?”**

Expert Witnesses Impact

- ◆ **The expert witnesses opinions will support the position that either the Defendant or Plaintiff met the standard of care and was not negligent where the term negligent is defined as “the failure to exercise reasonable care.”**

The Expert as an Investigator

- ◆ **One of the roles of an expert witness is to be an impartial investigator of the facts which requires that they focus their investigation on all attainable evidence as it relates to the case.**
- ◆ **However, if information or evidence is intentionally withheld, the expert witnesses conclusions can become more subjective and thus open to criticism**

Real-World Theoretical Example

- ◆ **Lets assume that an expert witness is retained to represent a Plaintiff in a slip, trip and fall case where it is alleged that a 75 year old female had fell as she stepped across a carpet mat located at the entrance of a retail store.**



Theoretical Facts

- ◆ **The victim entered the store at a particular date and time**
- ◆ **The victim was wearing a specific type and pair of shoes**
- ◆ **The weather conditions at the time were known**
- ◆ **Floor mats were present at the entrance**
- ◆ **A wet floor sign was posted in the entrance**
- ◆ **Store surveillance captured the fall event as well as the placement of the wet floor sign and the condition of the floor mat**
- ◆ **Store employees completed an incident report**
- ◆ **Several customers had witnessed the event and attended to the victim up until store employees arrived**

Spoliation of Evidence

...which are also violations of the companies policies

- ◆ **Although store surveillance captured the fall event, it was “accidentally” destroyed and does not exist therefore the claim by the Plaintiff now becomes a “he-said she-said” argument**
- ◆ **Although store employees completed an incident report the report was incomplete and expressed a series of opinions and omitted factual information such as the condition of the carpet mat and the adjacent walkway.**
- ◆ **The floor mat was not retained as evidence**
- ◆ **The floor was replaced shortly after the event**
- ◆ **Eye witnesses were not mentioned in the incident report nor were they asked to provide a statement**

Spoliation of Evidence

- ◆ **Given that critical information as it relates to the case are either missing or have been altered, the expert witnesses investigation becomes significantly more difficult whereby he or she must now rely more heavily on the testimony from the Plaintiff as well as the Defendants employees**
- ◆ **The expert witness must now piece together the series of events as described by the deponents as to create the most probable cause**
- ◆ **The expert witness must then relate the probable cause to that of consensus industry standards as to establish the standard of care**

Standard of Care

- ◆ **If the Defendant failed to comply with the industry standard of care as it relates to proper floor maintenance, carpet mat usage, inspections, etc., such is noted in the experts report**
- ◆ **However, if critical information or documentation as it relates to the standard of care are intentionally omitted or withheld by the Defendant, as to weaken the Plaintiff's charge of negligence then the Plaintiff's complaint becomes significantly more difficult to prove**

Daubert Challenge of the Expert Witness

- ◆ **Under the 1993 Federal rule of evidence 702, attorneys can challenge the “general acceptance” (credibility) of a testifying expert as to their admissibility of scientific expert testimony whereby the judge as the gatekeeper has to assure that the scientific expert testimony as given to the jury proceeds from “scientific knowledge”**
- ◆ **Scientific knowledge is that which is based upon a scientific method or methodology such as empirical testing, peer reviewed publications, the existence and maintenance of a industry standard or a control or the degree by which a theory or technique is generally accepted by the relevant scientific community**

Daubert Challenge of the Expert Witness

- ◆ **Under this rule the opinions or conclusions of the expert may be restrained if they are perceived by the court as being “unscientific.” However, the spoliation of evidence was such that the elements of the case which could have be tested per a scientific method were destroyed and therefore not provided to the expert.**
 - **The floor mat was not preserved**
 - **The flooring material was changed**
 - **The actual condition of the floor mat and floor is unknown**

Conclusion

Spoliation of evidence is a technique intentionally used to reduce the effectiveness of expert witnesses and in-turn makes the Plaintiff's case much more difficult to prove and in-turn makes slip and fall cases less attractive for personal injury attorneys to take

IMPACT OF SPOILIATION ON PERSONAL INJURY CLAIMS

- Car Accidents – Event Data Recorders (Black Box)
- Slip and Fall Cases– Surveillance, Materials, Footwear
- Product Liability Cases– What to Preserve
- Preservation of Evidence
- Chain of Custody



CAR ACCIDENTS- EVENT DATA RECORDERS

- 90% of all vehicles manufactured today
- Often overlooked by police- law enforcement
- May be inadvertently destroyed at salvage yard
- If obtained must keep black box and all digital read outs
- T-minus 5.0 or T-minus 2.5
- Admissibility– Experts

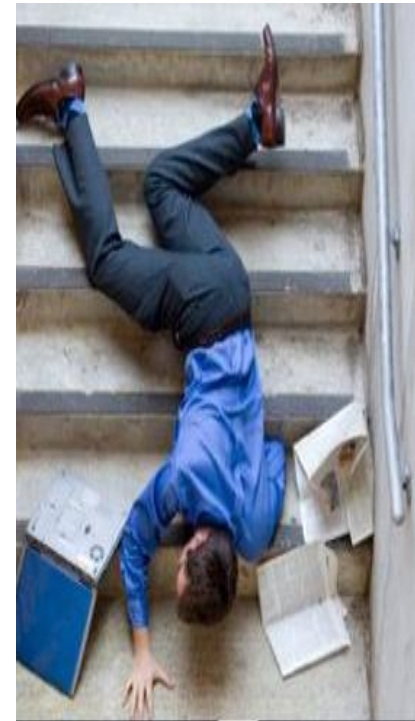


SLIP AND FALL

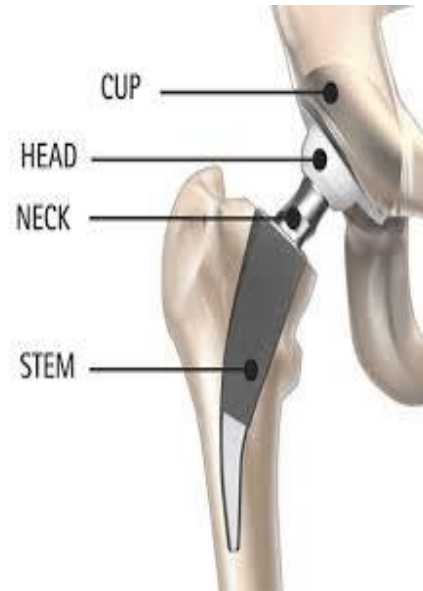
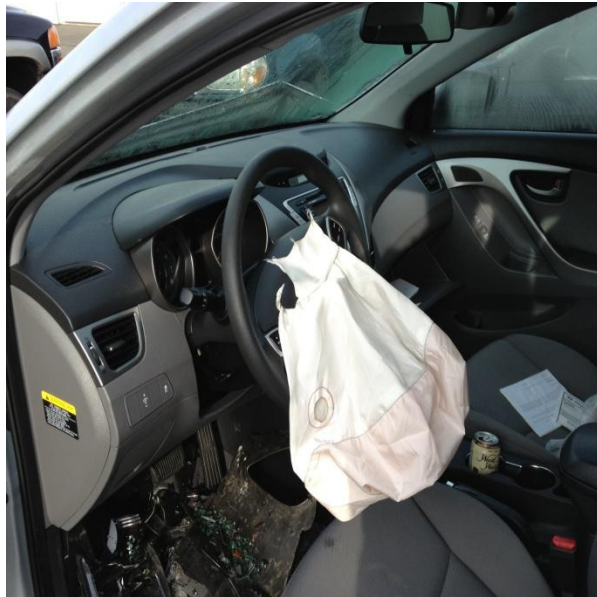


SURVEILLANCE, MATERIALS, FOOTWEAR

- In stores, factories, warehouses, work sites, drive-thru
- Neighboring locations as well
- Preservation letters
- Mats, carpeting, etc.
- Any issues with shoes— maintaining or storing until trial



PRODUCT LIABILITY



PRODUCT LIABILITY-- TYPES

- Medical Devices
- Automobiles/motorcycles
 - Ignition switches– GM
 - Tires
 - Steering column
 - Airbag deployment
 - Brakes
- Toys
- Food
- Industrial/Construction equipment



WHAT TO PRESERVE

- Steering column
- Ignition switch
- Brakes: brake shoes, brake cylinder, pads



ROLE OF EXPERTS

- Chain of custody
- Maintaining the items/ knowing how much to keep
- Deciding where to store the product
- Destruction of evidence
- Destructive testing

