

The Saiber Construction Law Column: October/November 2023

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The duty to preserve litigation evidence arises when a party in possession of evidence knows that litigation by a party seeking the evidence is pending or probable, and the party in possession of the evidence can foresee the harm that would be caused to the party seeking the evidence if the evidence were to be discarded. “Spoliation of evidence” occurs when a party having a duty to preserve the evidence fails to preserve it. Sanctions can be imposed by the court against a party who spoliates evidence.

In *Toman Engineering Co. v. Koch Construction, Inc.* – a construction case decided last year by the Supreme Court of North Dakota – Toman sued Koch to collect fees for unpaid engineering services related to the design of a detention pond; the defendant filed a counterclaim, suing Toman for negligently designing the pond and seeking damages because it had to hire and pay others to correct the design of the pond. In the course of the litigation, Toman sought sanctions against Koch for modifying the detention pond before Toman could have its expert inspect the pond. In response, Koch argued that although it did not preserve the evidence, Toman was nevertheless aware for some time that the detention pond was going to be modified and could have easily inspected it prior to its modification.

The trial court agreed with Toman that Koch had spoliated evidence by modifying the pond before the plaintiff’s expert court inspect it and, as a sanction, the court dismissed Koch’s counterclaim. Koch appealed. On appeal, the Supreme Court of North Dakota agreed that Koch had destroyed evidence it had a duty to preserve. However, under the specific facts of the case, the Court held that dismissing Koch’s counterclaim was too severe as a sanction. Accordingly, the Court reversed the trial court’s decision, instructed it to consider a less severe sanction, and ordered a new trial.

New Jersey courts will also impose sanctions if a party spoliates evidence. These sanctions can include, among others, dismissing a claim (or counterclaim), entering judgment for the other party, suppressing evidence, giving the jury an adverse inference charge, imposing a fine, and/or awarding the other party attorneys’ fees and costs. To avoid sanctions for spoliation of evidence, parties should preserve all evidence that might be relevant to a pending or probable lawsuit because the consequences of spoliating evidence could prove costly.

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Each issue’s Saiber Construction Law Column will discuss a recent decision by New Jersey courts or, like here, courts from other states which may be of interest to people in the construction industry.

The information in each article is not intended to be legal advice and may not be used as legal advice. Legal advice must be tailored to the specific circumstances of each case. Every effort has been made to ensure this information is up to date. The article is not intended to be a full and exhaustive explanation of the law in any area, nor should it be used to replace the advice of your own legal counsel.

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