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The Duty Dilemma: When the Duty to Mitigate Damages and the Duty to Preserve Evidence Collide

Collen L. Steffen

COMMENT

The Duty Dilemma: When the Duty to Mitigate Damages and the Duty to Preserve Evidence Collide

I. Introduction

Much has been made about the importance of moral duty in contract law. For philosophical titans like David Hume[1] and Emmanuel Kant,[2] a contract is a device that binds men to the obligatory affects of their Word.[3] The ill-advised contractual renege evinces the moral turpitude of a society fallen asunder. For those who subscribe to Kant's view, the law of contracts is permeated by the transcendent concept of duty.[4] Because a contract creates duties where none previously existed, it is therefore the underlying promise to take some action that is the essence of a contract.[5] Contemporary American contract law borrows much from the moralistic lineage of Kantian ethics and Hume's social contract.[6] Accordingly, the breach of the modern contract invites an application of these ancient duty constructs, especially where two competing duties arise simultaneously.

Twenty-first century American contract law is a fertile ground for the application of Kant and Hume's approaches to duty. Nearly 270,000 civil

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1. Regarded as the greatest English philosopher, Hume made salient contributions to the philosophy of human nature. TERENCE PENELHUM, DAVID HUME: AN INTRODUCTION TO HIS PHILOSOPHICAL SYSTEM ix, 11 (1992). Although he spoke to "contracts" in the social sense, Hume posited that the obligations of contract are necessary to support a civilized society. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 1-2 (2d ed., Oxford Univ. Press 2015).

2. A highly revered moral philosopher, Kant developed the *categorical imperative*, a "formula of universal law" which states that individuals ought to "[a]ct as if the maxim of [one's] action were to become by [one's] will a universal law of nature." Mark Timmons, *The Philosophical and Practical Significance of Kant's Universality Formulations of the Categorical Imperative*, 13 JAHRBUCH FÜR RECHT UND ETHIK 313, 313 (2005). The imperative governs duties created via contract by appealing to the universal strictures of moral duty. *See id.* at 319.

3. FRIED, *supra* note 1, at 1.

4. *See* IMMANUEL KANT & H.J. PATON, THE MORAL LAW OR KANT'S GROUNDWORK OF THE METAPHYSICS OF MORALS 13-14 (H.J. Paton ed., 3d ed. reprt. 1958) (stating Kant's view that "[d]uty is the necessity to act out of reverence for the law").

5. FRIED, *supra* note 1, at 1.

6. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 128-29 (1989) (ebook) (explaining how the legal thought of Oliver Wendell Holmes, Jr. was influenced by the musings of Kant and thus shaped *Lochner*-era jurisprudence).

actions were filed in the United States District Courts in 2017, of which 23,523 sounded in contract.[7] In the Oklahoma District Courts, approximately 2,700 civil suits were filed in 2017—410 were breach of contract actions.[8] Breach of contract is a cause of action that covers a wide variety of matters, ranging from the Hannah Montana creator's suit against Disney[9] to a buyer's complaint against Kold-Serve alleging receipt of a defective ice cream machine.[10] Because the most complex breaches of contract are spawned in the backwater of undeveloped law, it is paramount that all parties understand the full extent of the duties they owe in order to mitigate legal risk. Unfortunately for the unfettered flow of business, this is easier said than done. It is not uncommon, due to the nature of contractual relationships and the unpredictable nature of business, for common law duties to arise simultaneously and appear to be mutually exclusive. It is in these situations that the legal risk to the contracting parties is at its highest.

A hypothetical illustrates the conundrum. Suppose Buyer *B* purchases a double-offset disc plow[11] from seller *S* to pull behind his tractor. The contract contains provisions expressly warranting its fitness as a farm implement in Midwestern wheat country. After several weeks, *B* discovers that the disc does not work properly and barely penetrates the soil. He originally purchased the disc because his old disc was saddled with ineffective hydraulic connections that made using it for more than a few hours impossible. Now, *B* has two useless discs. Pursuant to the sale contract, *S* makes several efforts to fix the implement but never gets it to function as promised. Eventually, *B* loses the luxury of time and begins to remove hydraulic pumps and hoses from the new disc and transplant them onto the old disc. Before long, *B*'s farm operation is up and running and he is back to work. But as the legal system is all too aware, this is not the end of the story. When poor weather conditions catch up with *B* and render him unable to finish his fields, he is furious—if *S* had not sold him a defective

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7. *Federal Court Management Statistics,* UNITED STATES COURTS (Sept. 30, 2017), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2017.pdf. Additionally, in 2005, United States state courts disposed of nearly 30,000 civil trials. LYNN LANGTON, M.A. & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 1 (2009). Of those, nearly one-third were breach of contract actions. *Id.* at 2.

8. *Federal Court Management Statistics*, *supra* note 7.

9. Applebarry, Inc. v. Bigwood Films, Inc., No. B281327, 2018 WL 1149541, at *1-2 (Cal. App. Dep't Super. Ct. Mar. 5, 2018).

10. Kold-Serve Corp. v. Ward, 736 S.W.2d 750, 752 (Tex. App. 1987).

11. Offset/Tandom Disc-Type Tillage Implement, U.S. Patent No. 5,881,820 (filed Feb. 21, 1997).

product back when the weather was fair, his work would be complete. Subsequently, *B* files a complaint in the local county court alleging breach of contract. *S*, preparing to defend the claim, seeks to establish the character of the disc as it was when he sold it. He finds, however, that this is nearly impossible—the disc has been stripped of all its hydraulic equipment and barely resembles what he originally sold to *B*.

Enter: the Duty Dilemma. While *S* has a viable defense to the breach of contract claim—*B*'s failure to preserve evidence—*B* has a compelling rebuttal. In anticipation of economic damages, he altered the equipment to salvage his business operations and continue production. He was merely performing his duty to mitigate damages. This forces upon the court the unenviable task of determining which duty is superior—the duty to mitigate or the duty to preserve evidence. When a plaintiff-buyer materially alters equipment it purchased from the defendant-seller in order to mitigate its damages, and the seller asserts that the buyer breached its duty to preserve evidence, how should the law resolve these competing duties?

The duty to preserve evidence and the duty to mitigate damages are not mutually exclusive. When a buyer anticipates bringing a breach of contract claim, it must give the seller an adequate opportunity to inspect the defective product. However, the opportunity to inspect is finite. The plaintiff-buyer has the last clear chance to avoid the collision of duties by granting the defendant-buyer a legally sufficient inspection prior to a foreseeable breach of contract claim. Failure by the defendant-seller to make such an inspection produces an inference in favor of the plaintiff-buyer, rebuttable by negating the contract via traditional principles of contract law or a showing that the opportunity to inspect was inadequate.

This Comment explores the history of the duty to mitigate and the duty to preserve evidence in the United States—specifically Oklahoma—and explains how parties that are susceptible to this clash of common law canons can minimize their legal risk. Part II illustrates the development and legal significance of evidence spoliation, exposing the issues that arise when the duty to preserve evidence is actionable in tort as the breach of a substantive duty, rather than just the violation of a court order. It then takes a similar look at the legal framework of the duty to mitigate and explains how the primordial "last clear chance rule" can help frame the issue. Part III addresses the conflict of law problem that has infiltrated the duty to preserve evidence and explains why the analysis confronts a crossroads; is the duty procedural, springing from the inherent authority of the courts to police themselves, or substantive, grounded in a fundamental duty to anticipate litigation and preserve material evidence? Part IV resurrects the

incomplete dicta in *Mariposa Farms, LLC v. Westfalia-Surge, Inc.*, and articulates a standard for measuring the sufficiency of a defendant-seller's inspection opportunity, the significance of when alterations were made, and how the duties can be reconciled and performed simultaneously. Part IV then posits a solution to the Duty Dilemma and explains what to do when a plaintiff-buyer has been sold a defective product but is uncertain how to traverse the Duty Dilemma tightrope.

II. Spoliation and the Duty to Mitigate

A. The Duty to Preserve Evidence

The breach of the duty to preserve evidence has gone by many names, but the most common is "spoliation,"[12] a term that drips with negativity and legal fortunes gone awry. The underlying doctrine dates back nearly three hundred years ago to the case of *Armory v. Delamirie*.[13] Considered by many as the mother of the spoliation doctrine, *Armory* encapsulated the affectionate melodrama of a chimney sweep who discovered a valuable jewel in the course of his work.[14] When he took it to the goldsmith, a deceitful apprentice traded out the jewel and misled the chimney sweep to believe that his treasure was worth merely three halfpence.[15] Unsatisfied with the amount, the chimney sweep demanded his jewel be returned.[16] When the apprentice fetched nothing but an empty socket, the sweep brought an action in trover to recover the missing jewel. At trial, "the Chief Justice directed the jury, that unless the [goldsmith] did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did."[17] The court then coined the now familiar axiom *Contra spoliatorem omnia praesumuntur*, meaning, "all things are presumed against a spoliator."[18]

Spoliation is the "destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or

12. *See* Patel v. OMH Med. Ctr., Inc., 1999 OK 33, ¶ 46, 987 P.2d 1185, 1202.

13. (1722) 93 Eng. Rep. 664, 1 Strange 505 (K.B.).

14. Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 517-18 n.12 (D. Md. 2009).

15. *Id.* at 517 n.12.

16. *Id.* at 517-18 n.12.

17. *Id.* (emphasis omitted) (quoting *Armory*, 93 Eng. Rep. 664).

18. MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE xv (Daniel F. Gourash ed., Am. Bar Ass'n 3d ed. 2013); *Armory*, 93 Eng. Rep. 664; *see also* Welsh v. United States, 844 F.2d 1239, 1246 (6th Cir. 1988) (articulating the modern application of *Armory*), *overruled by* Adkins v. Wolever, 554 F.3d 650 (6th Cir. 2009).

reasonably foreseeable litigation."[19] A great bane to the scholars of the field, the term is commonly mispronounced as "spoilation" as a result of its uncertain etymology.[20] What is certain, however, is that spoliation is a pervasive issue that continues to undermine the judicial system.[21] According to early surveys of litigators, half surveyed "believe that 'unfair and inadequate disclosure of material information prior to trial [is] a "regular or frequent" problem . . . [and] 69% of surveyed antitrust attorneys [have] encountered unethical practices,' including, most commonly, destruction of evidence."[22] The temptation to spoliate evidence is great—the civil discovery regime "make[s] spoliation the bad man's choice."[23]

At bottom, the duty to preserve evidence compels the maintenance and protection of admissible evidence when litigation is on the horizon.[24] This duty does not manifest itself solely at the twilight of litigation, but frequently extends "to that period *before* the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."[25] Thus, constructive notice is often the crux of the spoliation contention in civil litigation, requiring sensitive, case-by-case analysis of the facts to determine whether such a duty existed.[26]

The duty to preserve evidence is a two-man game. A party with reason to believe that certain documents or tangible items might have evidentiary value in impending litigation must give the other party an adequate opportunity to inspect them.[27] It must provide this opportunity even if it is not in control or possession of such evidence when litigation becomes foreseeable or when an alteration is about to be made.[28] Because evidence is

19. Barnett v. Simmons, 2008 OK 100, ¶ 21, 197 P.3d 12, 20 (citing West v. Goodyear Tire, 167 F.3d 776, 779 (2d Cir. 1999)).

20. KOESEL & TURNBULL, *supra* note 18, at xv n.1.

21. Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991).

22. *Id.* (footnote omitted) (quoting Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 598-99 (1985)).

23. *Id.* at 795.

24. *Barnett*, ¶ 20, 197 P.3d at 20.

25. *Id.* (emphasis added) (quoting Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 1991)).

26. *See, e.g.*, Henning v. Union Pac. R.R. Co., 530 F.3d 1206, 1219 (10th Cir. 2008) (noting that the determination whether a dispatcher's tapes are relevant and thus subject to the duty to preserve is a fact-specific inquiry); Jamie Weissglass & Rossana Parrotta, *The Duty to Preserve and the Risks of Spoliation*, N.Y. ST. B.J., Sept. 2014, at 27, 28 ("Unfortunately, there is no bright-line test to determine when the duty is triggered.").

27. *Silvestri*, 271 F.3d at 591.

28. *Id.* (citing Andersen v. Schwartz, 687 N.Y.S.2d 232, 234-35 (N.Y. Sup. Ct. 1999)).

often discarded innocently in the course of business, the term "spoliation" encompasses the entire spectrum of intent, ranging from "intentional [to] negligent destruction or loss of tangible and relevant evidence which impairs a party's ability to prove or defend a claim."[29] The level of intent determines the extent to which the court will employ its sanctioning power.[30] Intentional spoliation of evidence is treated most harshly.[31] While severe sanctions are generally reserved for willful, bad faith conduct, Oklahoma also permits sanctions for *negligent* alterations that precede foreseeable litigation.[32] This assessment often comes down to the procedural posture of the litigation and whether a motion to compel has been filed.[33] A motion to compel eliminates the need to find intent—the language of title 12, section 3237(B)(2) of the Oklahoma Statutes does not require it.[34]

Although the period immediately prior to the commencement of litigation is the most heavily scrutinized for spoliation,[35] it is not the only time that the duty presents itself. The alteration of evidence after a motion to compel has been filed is most conspicuous.[36] In the spirit of Federal Rule of Civil Procedure 37, Oklahoma law explicitly provides for its courts' sanctioning authority when a motion to compel has been violated:

> If a party or an officer, director or managing agent of a party or a person designated under . . . this title to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection A of this section or Section 3235 of this title, or if a party fails to obey an order entered under subsection F of Section 3226 of this title, the court in which the action is pending may make such orders in regard to the failure as are just.[37]

Subsection (A), in relevant part, describes the options for moving parties with regards to enforcing discovery:

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29. *Barnett*, ¶ 21, 197 P.3d at 20 (citing United States *ex rel.* Koch v. Koch Indus., 197 F.R.D. 488, 490 (N.D. Okla. 1999)).

30. *See* Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997).

31. *Barnett*, ¶ 18, 197 P.3d at 19.

32. *Id.* ¶ 19, 197 P.3d at 19.

33. *See id.*

34. *Id.* ¶ 17, 197 P.3d at 19.

35. *See id.* ¶ 17-18, 197 P.3d at 19.

36. *See id.*

37. 12 OKLA. STAT. § 3237(B)(2) (2011).

> [I]f a party, in response to a request for inspection and copying submitted under Section 3234 of this title, fails to produce documents or respond that the inspection or copying will be permitted as requested or fails to permit the inspection or copying as requested . . . , the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection and copying in accordance with the request or subpoena. The motion must include a statement that the movant has in good faith conferred or attempted to confer either in person or by telephone with the person or party failing to make the discovery in an effort to secure the information or material without court action.[38]

Oklahoma has interpreted section 3237 to require a motion to compel before invoking sanctions.[39] Moreover, sanctions arising under the general grant of section 3237 must spring from a party's failure to obey an order of the court.[40] It is important to note that a violation of a court order is not the only basis on which the court can sanction spoliation.[41] Because courts have "inherent authority to impose sanctions for abuse of the discovery process," they have "the power to sanction for abusive litigation practices or for abuse of judicial process, even if an order compelling discovery has not

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38. *Id.* § 3237(A)(2).

39. *See, e.g.*, Barnett v. Simmons, 2008 OK 100, ¶¶ 14, 17, 197 P.3d 12, 18, 19 (citing Helton v. Coleman, 1991 OK 43, ¶¶ 10-11, 811 P.2d 100, 101 (indicting the trial court's decision to sanction the defendant's conduct when there had been no violation of an order under the discovery regime)) (holding that "[a] motion to compel is a prerequisite to sanctions being imposed under § 3237" and that intent speaks merely to the severity of the sanction, not whether one should be imposed).

40. *Id.* In *Barnett*, the court ordered the spoliator to produce his hard drive for examination. *Id.* ¶ 22, 197 P.3d at 20. Wasting no time, he hired a computer expert to "work on the computer" and perform other maintenance activities, all without informing the moving party's counsel. *Id.* He insisted that the computer was simply undergoing a routine "check-up" and that he was a novice computer user with no intent to alter evidence. *Id.* ¶ 9, 197 P.3d at 16. At no point was the expert notified that the computer and its hard drive were the subject of a court order. *Id.* ¶ 22, 197 P.3d at 20. The court ultimately found this conduct to be a textbook violation of section 3237(B)(2), explaining that intent is irrelevant and that failure to obey a court order is a strict liability offense. *Id.* ¶ 24, 197 P.3d at 21. Furthermore, it noted that the act of turning the computer over to an expert was "reasonably foreseeably destructive of evidence" and "d[id] in fact destroy evidence that [prejudiced] the opposing party's right to a fair trial." *Id.* ¶ 25, 197 P.3d at 21 (quoting Holm-Waddle v. William D. Hawley, M.D., Inc., 1998 OK 53, ¶ 10, 967 P.2d 1180, 1182).

41. *See id.* ¶ 14, 197 P.3d at 18.

been made."[42] When a party engages in this abusive conduct, there are a number of sanctions at the courts' disposal.[43] These include "refusing to allow the disobedient party to support or oppose designated claims or defenses, prohibiting the party from introducing designated matters in evidence, treating the failure to obey as contempt of court, dismissing the case or entering default judgment."[44]

It is important to note that the duty to preserve evidence extends to the parties' agents as well.[45] Because a corporation operates at the direction of its many human agents, spoliation presents unique issues in complex organizational structures.[46] When spoliation occurs, and the defending party attempts to shift the blame by arguing that a *third party* destroyed the evidence, such a defense will not shield it from sanctions if that third party is deemed the spoliator's agent.[47] In one such case, plaintiffs were held responsible for the spoliation of an allegedly defective vehicle back seat when a third party repair garage discarded it, due to the fact that "plaintiffs retained counsel before repairs were begun and that they were fully aware that any potential lawsuit against Nissan would revolve around alleged defects in the driver's side seat."[48] Not surprisingly, the application of agency principles to the duty to preserve evidence has a substantial impact on parties with document retention policies.[49] In circumstances where documents have been lost as a result of haphazard, willfully negligent retention policies, courts have invoked their inherent powers to sanction the spoliating conduct.[50]

Agency law suggests that a litigant's preservation obligations are shaped by the size of the organization.[51] When litigation becomes reasonably

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42. *Id.* (citing Bentley v. Hickory Coal Corp., 1992 OK CIV APP 68, ¶ 15, 849 P.2d 417, 420 (holding that the court's broad sanctioning power allowed it to hold the plaintiff's lawyer in contempt even after a voluntary dismissal)).

43. *Id.* ¶ 15, 197 P.3d at 18.

44. *Id.*

45. N.J. Mfrs. Ins. Co. v. Hearth & Home Techs., Inc., Civil Action No. 3:06-CV-2234, 2008 WL 2571227, at *7 (M.D. Penn. June 25, 2008).

46. *See id.* at *6-9.

47. *Id.* at *7.

48. *Id.* (quoting Austin v. Nissan Motor Corp., U.S.A., Civ. A. No. 95-1464, 1996 WL 117472, at *2 (E.D. Pa. Mar. 12, 1996)).

49. *See In re* Prudential Ins. Co. of Am. Sales Practices Litig., 169 F.R.D. 598, 615 (D.N.J. 1997).

50. *See id.*

51. *See* Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (explaining how the size of the organization contributed to counsel's difficulty gaining compliance with a litigation hold by the organization's many agents).

foreseeable, counsel is responsible for imposing a "litigation hold" on its corporate client to "ensure the preservation of relevant documents."[52] As a general rule, this hold extends to accessible forms of evidence existing at the cusp of litigation as well as evidence that surfaces during litigation.[53] The institution of a litigation hold is only the beginning.[54] Counsel has a continuing duty to preserve access to relevant evidence, monitor compliance with the hold, and maintain an appropriate level of communication with the client.[55] This ensures "(1) that all relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party."[56]

The litigation hold is only the tip of the iceberg—counsel then has a continuing duty to find and preserve relevant evidence.[57] This requires becoming intimately familiar with the client's document retention policies.[58] Such knowledge is best taken from the source; key players in the litigation as well as agents responsible for the relevant evidence must be adequately informed of their continuing duty to preserve it.[59] "Because these 'key players' are the 'employees likely to have relevant information,' it is particularly important that the preservation duty be communicated clearly to them [and they] should be periodically reminded that the preservation duty is still in place."[60]

The court's sanctions against the apprentice in *Delamirie* established the adverse inference as a staple of spoliation claims.[61] And it is no easy sanction to elicit from the courts.[62] Spoliation sanctions are appropriate when "(1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence."[63] It is well settled that

52. *Id.* at 431.
53. *Id.*
54. *Id.* at 432.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 433-34 (quoting Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)).
61. Armory v. Delamirie, (1722) 93 Eng. Rep. 664, 1 Strange 505 (K.B.).
62. Turner v. Pub. Serv. Co. of Colo., 563 F.3d 1136, 1149-50 (10th Cir. 2009).
63. *Id.* (quoting Burlington N. & Santa Fe Ry. Co. v. Grant, 505 F.3d 1013, 1032 (10th Cir. 2007)); *see also* Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv., No. 97-5089,

an adverse inference is appropriate only if the moving party can show bad faith.[64] Mere negligence is not enough.[65] Failure to prove bad faith effectively takes dismissal off the table and compels the court to consider softer sanctions.[66] Courts narrowly tailor sanctions to match the conduct.[67] On appeal, a district court's findings of bad faith or negligence are reviewed for clear error, and its decision regarding the extent of sanctions is reviewed for abuse of discretion.[68]

The district courts have broad discretion to craft a spoliation sanction,[69] and they have shown their creativity.[70] The extent of sanctions, however, depends on the severity of the conduct. Outside of involuntary dismissal, an adverse inference is the most severe sanction at the court's disposal.[71] The conduct receiving an adverse inference must be proportionate to the severity of the sanction, and thus, courts generally save dismissal and adverse inferences for intentional conduct.[72] The "bad faith destruction of a document [or tangible object] relevant to proof of an issue at trial gives rise to an inference that production of the document would have been unfavorable to the party responsible for its destruction."[73] The conduct must also give rise to an inference that the spoliating party likely destroyed

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1998 U.S. App. LEXIS 2739, at *13 (10th Cir. Feb. 20, 1998) (finding that two primary factors control the determination of spoliation sanctions: "(1) the degree of culpability of the party who lost or destroyed the evidence, and (2) the degree of actual prejudice to the other party").

64. *See Turner*, 563 F.3d at 1149-50.

65. *Id.* at 1150; *see also* Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997) (holding that a showing of bad faith is a prerequisite to awarding an adverse inference because negligence "does not support an inference of consciousness of a weak case").

66. *Turner*, 563 F.3d at 1149.

67. *See Jordan F. Miller Corp.*, 1998 U.S. App. LEXIS 2739, at *20-21.

68. *Turner*, 563 F.3d at 1149-50.

69. West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

70. *See, e.g.*, Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422, 439-40 (S.D.N.Y. 2004) (ordering the defendant to bear the cost of re-depositions, restoration of documents from backup tape, attorney's fees, and instructing the jury to make an adverse inference on other material documents).

71. *See id.* at 437-38.

72. *Id.* at 436-37. Although the district courts have the broad power to effect an outright dismissal, they are frugal. Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991). A wise use of the inherent power seeks to restrict its reach only to the extent of the harm, "vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy." *Id.* at 46.

73. Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997).

evidence in an effort to avoid the exposure of what would have inevitably been unfavorable information.[74]

Courts have traditionally used a three-step analysis for determining the appropriate sanction.[75] First, the sanction must be designed prophylactically, with the ultimate purpose to deter the conduct.[76] Second, because the spoliator increased the risk of an erroneous judgment, the sanction should be formulated to require the spoliator to bear that risk.[77] Finally, the sanction should "restore 'the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.'"[78] The United States Supreme Court has established that the district courts have discretion to dismiss lawsuits, explaining that the inherent powers of the court enable it to craft sanctions necessary to effectuate its purposes.[79] By way of these implied powers, the "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."[80] These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[81]

While intent drives a large part of the consideration for sanctions, courts look to see whether the movant was provided a reasonable opportunity to inspect the evidence before it was materially altered. Thus, a plaintiff that asserts a breach of contract claim for damage to a machine must give the defendants a reasonable opportunity to inspect the subject parts.[82] In *Jordan F. Miller Corp.*, for example, the plaintiff brought a breach of contract action when the aircraft it had purchased from the defendant malfunctioned

74. Vick v. Tex. Emp't Comm'n, 514 F.2d 734, 737 (5th Cir. 1975).

75. *See* West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

76. *Id.*

77. *Id.*

78. *Id.* (quoting Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998)).

79. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991).

80. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821); *see also Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1874) (holding that "[t]he law happily prescribes the punishment which the court can impose for contempts" and can exercise this authority "in any cause or hearing before them").

81. Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962).

82. *See* Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv., No. 97-5089, 1998 U.S. App. LEXIS 2739, at *6 (10th Cir. Feb. 20, 1998) (holding that, prior to making an alteration to relevant evidence, the movant was entitled to a hands-on inspection and testing of the landing gear).

and caused $55,000 in damage.[83] After the claim was submitted to insurance, the aircraft was inspected and the defective parts were removed and destroyed.[84] On appeal, the Tenth Circuit held that while the plaintiff had an opportunity to inspect the aircraft's components and develop a theory of liability ahead of litigation, the defendants had no such opportunity.[85] Finding the defendant's argument persuasive that a visual, hands-on inspection was essential to their defense, the court affirmed the sanctions.[86]

But the duty to provide reasonable inspection is finite.[87] While the duty to preserve arises only when the party "knows or should know that the evidence is relevant in imminent or [pending] litigation,"[88] a party may destroy relevant evidence "after [it] discharges [its] duty to preserve evidence by 'giving the other side notice of a potential claim and a full and fair opportunity to inspect relevant evidence.'"[89] For an inspection to be sufficient, it must occur when the inspecting party essentially has constructive notice of litigation.[90] Otherwise, the inspection will be for naught.[91]

Not all evidence lost prior to or during foreseeable litigation gives rise to actionable spoliation—the movant must suffer some material detriment. If the court does not find that the moving party was prejudiced as a result of the spoliating conduct, then there is no basis for imposing sanctions.[92] In *Turner*, the plaintiff brought a gender discrimination suit against her potential employer, Public Service Company of Colorado (PSCo), after she was denied an entry-level position in the company.[93] During discovery, PSCo produced thousands of documents but failed to include the interview notes from several of the relevant hiring years.[94] The plaintiff filed a motion to compel in the district court, seeking an adverse inference as a result of

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83. *Id.* at *4-7

84. *Id.* at *6.

85. *Id.* at *19.

86. *Id.* at *20.

87. Brassfield v. State Farm Fire & Cas. Co, No. CIV-11-1316-F, 2012 WL 12864942, at *11 (W.D. Okla. Dec. 13, 2012).

88. *Id.* at *8 (quoting *Jordan F. Miller Corp.*, 1998 U.S. App. LEXIS 2739, at *5).

89. Miller v. Lankow, 801 N.W.2d 120, 129 (Minn. 2011) (quoting Am. Family Mut. Ins. Co. v. Golke, 768 N.W.2d 729, 737 (Wis. 2009)).

90. *Id.*

91. *See id.*

92. *See* Turner v. Pub. Serv. Co. of Colo., 563 F.3d 1136, 1150 (10th Cir. 2009).

93. *Id.* at 1140-42.

94. *Id.* at 1148.

the missing interview notes.[95] Characterizing her argument as a "spoliation of evidence" claim, the district court granted summary judgment for PSCo, citing the plaintiff's failure to prove bad faith.[96] On appeal, the Tenth Circuit scolded the plaintiff for failing to assert Rule 37 sanctions and returned a decision for PSCo, explaining that there was no evidence that the plaintiff was "actually, rather than merely theoretically" prejudiced by its loss.[97] In addition, the court pointed to the myriad other interview-related documents, as well as the deposition of her interviewer, as evidence tending show a lack of bad faith.[98] As a result, summary judgment was affirmed.[99]

In order to effectuate the power of the federal courts, parties with viable spoliation claims are advised to seek sanctions under Federal Rule of Civil Procedure 37.[100] A party who is not "diligent in the defense of [its] own interests" and fails to invoke Rule 37 to remedy the alleged prejudice "forecloses access to the substantial weaponry in the district court's arsenal" and leaves sanctions under a "spoliation of evidence" theory as the only remaining option.[101] Rule 37(a), in relevant part, allows a party to "move for an order compelling disclosure or discovery" and "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."[102] If a court order to compel disclosure or inspection is ignored or obstructed, subsection (b) provides that:

> If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders.[103]

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95. *Id.* at 1148-49 (quotation marks omitted).

96. *See id.* at 1149.

97. *See id.* at 1150.

98. *Id.*; *see also* Burlington N. & Santa Fe Ry. Co. v. Grant, 505 F.3d 1013, 1032-33 (10th Cir. 2007) (rejecting the plaintiff's claim that the removal and destruction of waste on his property constituted actionable spoliation because the parties had "generated extensive documentation of the condition of the land before and during remediation").

99. *Turner*, 563 F.3d at 1150.

100. *Id.* at 1149.

101. *Id.* (quoting Mathis v. John Morden Buick, Inc., 136 F.3d 1153, 1155-56 (7th Cir. 1998)).

102. FED. R. CIV. P. 37(a)(1).

103. FED. R. CIV. P. 37(b)(2)(A).

The Rule also provides that failure to respond to a request for inspection can itself justify sanctions, stating that the court may order sanctions if "a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response."[104]

B. Spoliation in Other Jurisdictions

The complexity of the Duty Dilemma becomes evident when cast in terms of non-Oklahoma spoliation law.[105] In contract actions, Oklahoma adheres to a choice of law rule that states "the nature, validity and interpretation of a contract is governed by the law where the contract is made."[106] However, it is only where a contract is silent as to the applicable state law that the rule arises.[107] This is codified in title 15, section 162 of the Oklahoma Statutes.[108] The Oklahoma Supreme Court has established that the state substantive law specified in a contract will control "as long as the selected law is not contrary to Oklahoma's established public policy."[109] And a particular state law may be selected either explicitly or implicitly in a contract.[110] Thus, it is important to understand the variety of approaches to spoliation and how they depart from the Oklahoma approach.

Suppose a contract specifies that New York law controls. Further, assume there is nothing about this choice of law provision that offends the public policy goals of Oklahoma—the location where the bulk of the contract was performed. In contrast to Oklahoma's approach, New York

104. FED. R. CIV. P. 37(d)(1)(A)(ii).

105. *See, e.g.*, Hazen v. Municipality of Anchorage, 718 P.2d 456, 463 (Alaska 1986) (finding, contrary to Oklahoma, an independent action for spoliation); Holmes v. Amerex Rent–A–Car, 710 A.2d 846, 849 (D.C. 1998) (finding that the same may be found, given proper circumstances); Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1038 (Ohio 1993) ("A cause of action exists in tort for interference with or destruction of evidence . . . .").

106. Bohannan v. Allstate Ins. Co., 1991 OK 64, ¶ 17, 820 P.2d 787, 793; *see also* Telex Corp. v. Hamilton, 1978 OK 32, ¶ 8, 576 P.2d 767, 768 ("[T]he general rule of law is that the law where the contract is made or entered into governs with respect to its nature, validity, and interpretation.").

107. SFF-TIR, LLC v. Stephenson, 250 F. Supp. 3d 856, 972 (N.D. Okla. 2017).

108. *See* 15 OKLA. STAT. § 162 (2011).

109. *Stephenson*, 250 F. Supp. 3d at 973; *see also* Dean Witter Reynolds, Inc. v. Shear, 1990 OK 67, ¶ 6 & n.12, 796 P.2d 296, 299 & n.12 (finding that a choice of law provision is invalid if the chosen law violates a fundamental policy of a state with a greater interest in the issue, and that state's law would govern absent the choice of law provision).

110. *Stephenson*, 250 F. Supp. 3d at 973.

has entertained independent causes of action in tort for spoliation.[111] Under New York law, the tort of intentional spoliation is established by showing (1) pending or imminent litigation; (2) that the plaintiff-buyer had knowledge of the pending or imminent litigation; (3) willful destruction of evidence or destruction designed to frustrate the defendant-seller's case; (4) actual disruption of the case; and (5) the plaintiff-buyer's acts proximately caused the seller's damages.[112]

Negligent spoliation follows the typical duty-breach-damage model.[113] The cause of action must evidence "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof."[114] Many courts look to the West Virginia Supreme Court of Appeals to articulate a negligent spoliation action, which requires the moving party to prove (1) that litigation is either pending or reasonably foreseeable; (2) the plaintiff-buyer had actual knowledge of the pending or imminent litigation; (3) "a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances;" (4) spoliation of the evidence; (5) the evidence that was spoliated by the plaintiff-buyer was essential to the defendant-seller's defense in the pending or imminent action; and (6) damages.[115]

Although a handful of states have recognized an independent action in tort for breaching the duty to preserve evidence, most refuse to acknowledge it. The Tenth Circuit—and Oklahoma specifically—joins the majority.[116] States that have refused to adopt a cause of action in tort for

111. *Compare* Fada Indus. v. Falchi Bldg. Co., L.P., 730 N.Y.S.2d 827, 840-41 (N.Y. Sup. Ct. 2001) (holding that both intentional and negligent spoliation can be brought in tort), *with* MetLife Auto & Home v. Joe Basil Chevrolet, Inc., 753 N.Y.S.2d 272, 279 (N.Y. App. Div. 2002) (holding that independent actions in tort for spoliation contain too many pitfalls and are prone to abuse).

112. *Fada Indus.*, 730 N.Y.S.2d at 840.

113. *See* Ortega v. City of New York, 876 N.E.2d 1189, 1194 (N.Y. 2007).

114. *Fada Indus.*, 730 N.Y.S.2d at 841.

115. *Ortega*, 876 N.E.2d at 1193-94 (quoting Hannah v. Heeter, 584 S.E.2d 560, 569 (W. Va. 2003)).

116. *See, e.g.*, Estate of Trentadue *ex rel.* Aguilar v. United States, 397 F.3d 840, 862 (10th Cir. 2005) (finding that Oklahoma does not recognize an independent tort for negligent spoliation); *cf.* Hazen v. Municipality of Anchorage, 718 P.2d 456, 463 (Alaska 1986) (recognizing the tort of "intentional interference with prospective civil action by spoliation of evidence"); Smith v. Howard Johnson Co., 615 N.E.2d 1037, 1038 (Ohio 1993) (recognizing a cause of action against primary and third parties for spoliation); Patel v. OMH Med. Ctr., Inc., 1999 OK 33, ¶ 46, 987 P.2d 1185, 1202 ("[M]ost of the courts which

spoliation have done so for a number of reasons.[117] First, they have a variety of alternative mechanisms by which to deter and compensate for spoliation, including discovery sanctions and adverse inferences.[118] Second, it is not uncommon for third parties to be the perpetrators of alleged spoliation, thereby complicating the apportionment of fault.[119] Third, and consistently cited, an independent cause of action in tort interferes with an individual's right to dispose his property how he chooses, bringing an individual and his property within the purview of the court's enforcement power.[120] Finally, courts explain that an independent tort would likely fail to recognize exigent circumstances demanding the disposition of the property, not least of which may include compelling safety justifications.[121]

Recognition of an independent tort also raises a poignant procedural issue.[122] Despite a general agreement amongst state and federal courts on its negative implications, it is unsettled whether a claimant must bring and lose the underlying suit before asserting an independent spoliation claim or whether the two claims should be brought in the same action.[123] For some, the issue is one of collateral estoppel.[124] However, others suggest that once the merits of the underlying civil action have been ascertained, and the extent of prejudice caused by the spoliation is revealed, the operative facts regarding a subsequent action for intentional spoliation are substantially

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have considered the issue have refused to recognize spoliation as an independent cause of action in tort.").

117. *See, e.g.*, Foster v. Lawrence Mem'l Hosp., 809 F. Supp. 831, 837 (D. Kan. 1992) (listing six reasons why courts refuse to recognize an independent tort).

118. *See e.g.*, *id.*; Edwards v. Louisville Ladder Co., 796 F. Supp. 966, 971 (W.D. La. 1992) (noting that an adverse presumption was a sufficient sanction against the spoliator); Headley v. Chrysler Motor Corp., 141 F.R.D. 362, 365 (D. Mass. 1991) (deciding to exclude the evidence rather than dismiss the case and applying these five factors: "(1) whether the defendant was prejudiced as a result of the [unilateral inspection by the plaintiff]; (2) whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether the plaintiff was in good faith or bad faith; and (5) the potential for abuse if the evidence is not excluded").

119. *See Foster*, 809 F. Supp at 837.

120. *Id.*

121. *Id.*

122. *See id.*

123. *Id.* at 837-38. *Compare* Kent v. Costruzione Aeronautiche Giovanni Agusta, S.p.A., CIV. A. No. 90–2233, 1990 WL 139414, at *7 n.12 (E.D. Pa. Sept. 20, 1990) ("Not until there is a disposition with respect to the underlying civil action can it be determined whether the destruction of evidence has prejudiced plaintiff.") *with* Smith v. Super. Ct., 198 Cal. Rptr. 829, 837 (Cal. Ct. App. 1984) (noting that a spoliation action should be heard in conjunction with the underlying claim).

124. *Kent*, 1990 WL 139414, at *7 n.12.

different—thus, collateral estoppel is not a bar.[125] Nevertheless, many remain skeptical and insist that a spoliation claim should be juxtaposed alongside the underlying claim in order to prevent "needless duplication of effort" and reproduction of the same evidence in subsequent litigation.[126]

To illustrate the utility of an independent tort for spoliation, courts have distinguished a "first-party" and "third-party" action.[127] Whereas "[t]hird-party spoliation refers to spoliation by a non-party" to the principal litigation,[128] a first-party spoliator "is a party to the underlying action who has destroyed or suppressed evidence relevant to the plaintiff's claims against [that] party."[129] The key distinction is that a third-party spoliator is "not alleged to have committed the underlying tort as to which the lost or destroyed evidence related."[130] Jurisdictions that recognize independent actions for spoliation have found that such actions are necessary to pin liability on third parties that would otherwise be beyond reach.[131] They are designed to fill the "open space in the law where a plaintiff otherwise would be left without a remedy."[132]

Even outside of Oklahoma, protecting the moving party's right to inspect the evidence and prepare a defense for trial is the fundamental purpose of spoliation sanctions.[133] In *Kirkland,* the plaintiff's sued the New York City Housing Authority (NYCHA) and a stove manufacturer when an allegedly defective stove caused the plaintiff's death.[134] NYCHA impleaded a third-party defendant and subsequently had the stove removed from the unit.[135]

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125. *Id.*

126. See, e.g., *Smith*, 198 Cal. Rptr. at 837.

127. Cook v. Children's Nat'l Med. Ctr., 810 F. Supp. 2d 151, 157 (D.D.C. 2011) (citing Holmes v. Amerex Rent-A-Car, 710 A.2d 846, 848-49 (D.C. 1998)).

128. Howard Reg'l Health Sys. v. Gordon, 952 N.E.2d 182, 188 (Ind. 2011).

129. Mendez v. Hovensa, L.L.C., Civil No. 02–0169, 2008 WL 803115, at *7 (D. V.I. Mar. 24, 2008) (quoting Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1173 n.5 (Conn. 2006)).

130. *Id.* at *7 n.1 (quoting *Rizzuto*, 905 A.2d at 1173 n.5).

131. *Cook*, 810 F. Supp. 2d at 157-588.

132. *Id.* at 157 (citing *Holmes*, 710 A.2d at 849). The court in *Holmes* went on to explain that "[b]ecause sanctions may not be levied upon a disinterested, independent third party, an independent tort action for negligent spoliation of evidence is the only means to deter the negligent destruction of evidence and to compensate the aggrieved party for its destruction." *Holmes*, 710 A.2d at 849 (quoting John K. Stipancich, Comment, *The Negligent Spoliation of Evidence: An Independent Tort Action May Be the Only Acceptable Alternative*, 53 OHIO ST. L.J. 1135, 1141-42 (1992)).

133. *See* Kirkland v. N.Y.C. Hous. Auth., 666 N.Y.S.2d 609, 611 (N.Y. App. Div. 1997).

134. *Id.* at 610.

135. *Id.*

There was no evidence that NYCHA had made any attempt to preserve the evidence, and dismissal of the third-party claim was therefore deemed an appropriate sanction.[136] However, the court emphasized an important principle:[137] The purpose of sanctioning the spoliation of evidence, whether intentional or negligent, is to encourage future litigants to apprise offended parties of the evidence, give them an opportunity to inspect it, and form their defense.[138]

In situations like these, sanctions are appropriate only "inasmuch as [they] leave[] the offended party prejudicially bereft of appropriate means to confront a claim with incisive evidence and turns trials into speculative spectacles based on rank 'swearing contests.'"[139] The *Kirkland* court ultimately resolved the spoliation issue against NYCHA because its disposal of the stove made it unavailable for critical examination and analysis by the third party defendant.[140] NYCHA, as it turned out, had failed to make its own inspection for the six years after the action's commencement.[141] The failure to avail itself of the evidence was, in effect, "a problem of its own making."[142] For a party bearing the burden to prove spoliation, "[t]he gravamen of th[e] burden is a showing of prejudice."[143]

Prejudice is a steep burden to show.[144] It requires the moving party to demonstrate that the absence of the evidence "fatally compromise[s] the defense . . . or leave[s] the [party] without the means to defend the action."[145] In *Kirschen*, for example, the tenant of an apartment unit filed suit against the defendants for allegedly causing damage to his apartment.[146] Before commencing the action, the plaintiff renovated and dramatically changed portions of the unit that had allegedly been damaged by the defendants.[147] The defendants retorted that this conduct amounted to spoliation of the evidence, but the court held that the plaintiff's acts of

136. *Id.* at 611.
137. *See id.* at 612.
138. *See id.*
139. *Id.* at 612 (quoting Hoenig, *Products Liability: Impeachment Exception; Spoliation Update*, N.Y.L.J., Apr. 12, 1993, at 6).
140. *Id.* at 612.
141. *Id.* at 613.
142. *Id.*
143. Kirschen v. Marino, 792 N.Y.S.2d 171, 172 (N.Y. App. Div. 2005).
144. *See id.*
145. *Id.* (quoting Favish v. Tepler, 741 N.Y.S.2d 910, 911 (N.Y. App. Div. 2002)).
146. *Id.* at 171.
147. *Id.*

renovating the apartment were not enough to support a spoliation claim.[148] The defendants could not prove that they were significantly prejudiced by the alteration of the disputed portions of the unit because "[b]oth the plaintiff and the defendants had numerous photographs of the apartment" in its prior state.[149] The court noted that the defendants were uniquely positioned, as the prior tenants, "to testify to their version of [the unit's] condition at the time they vacated."[150] Ultimately, the circumstances were insufficient to demonstrate severe prejudice to the presentation of a defense.[151]

C. The Duty to Mitigate Damages

The United States Supreme Court set forth the modern duty to mitigate in *Warren v. Stoddart*, a breach of contract action concerning the credit terms of a book order.[152] In *Warren*, the court explained that when a buyer expects to receive the benefit of a contract, "and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent."[153] Thus, a buyer must make reasonable efforts to mitigate his injury when the seller breaches a material element of a contract of sale.[154] He will not be allowed to recover an amount beyond what his reasonable efforts would have avoided had he made such efforts.[155] Under typical pleading standards, the defendant in an action has the burden of pleading duty to mitigate as an affirmative defense.[156] The analysis employs a

148. *Id.* at 172.
149. *Id.*
150. *Id.*
151. *Id.* at 172-73.
152. Warren v. Stoddart, 105 U.S. 224, 229 (1881).
153. *Id.*; *see, e.g.*, Wicker v. Hoppock, 73 U.S. 94, 98-99 (1867).
154. *See, e.g.*, United Int'l Holdings, Inc. v. Wharf Holdings Ltd., 210 F.3d 1207, 1231 (10th Cir. 2000) (noting that the defendant has the burden of asserting and proving mitigation of damages as an affirmative defense); Hamilton v. McPherson, 28 N.Y. 72, 76-77 (1863) ("Damages for breaches of contract are only those which are incidental to, and directly caused by, the breach, and may reasonably be presumed to have entered into the contemplation of the parties; and not speculative profits, or accidental or consequential losses."); Bailey v. J.L. Roebuck Co., 1929 OK 96, ¶ 3, 275 P. 329, 330 (restating the principle of mitigation).
155. *Bailey*, ¶ 3, 275 P. at 330.
156. Oklahoma law, for example, suggests that the burden of proving that damages should have been less is on the defendant. *See* Burlington N. & Santa Fe Ry. v. Grant, 505

reasonableness test.[157] Therefore, where a seller has materially breached a contract, it is the obligation of the buyer to "render his injury as light as possible."[158] He may not recover any amount that would have been avoided had he simply acted as a reasonably prudent person faced with similar circumstances.[159]

The duty to mitigate takes on different hues depending on the timing of the mitigating conduct.[160] When the buyer's negligent conduct occurs *after* the seller has already committed an actionable breach of contract, the buyer's failure to mitigate damages is labeled "avoidable consequences."[161] On the other hand, negligent conduct that occurs *prior* to the seller's actionable breach, and contributes to the commission of the breach, is "contributory negligence."[162] This type of negligent conduct by the buyer is of the sort that, taken together with the seller's negligent conduct, is the proximate cause of the buyer's injury.[163] Avoidable consequences and contributory negligence both refer to the negligent conduct of the buyer but manifest themselves at different points in the causal timeline. When the seller of a defective machine breaches the sale contract, the buyer must take reasonable precautions to prevent causing additional damage.[164] Any

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F.3d 1013, 1028 (10th Cir. 2007) (finding that Oklahoma state law requires defendants to carry the burden under the diminution of value rule).

157. Sackett v. Rose, 1916 OK 2, ¶ 14, 154 P. 1177, 1180 ("The question in such cases is always whether the necessary acts to mitigate the damages were reasonable, having regard to all the circumstances of the particular case.").

158. *Id.* (quoting Uhlig v. Barnum, 61 N.W. 749 (Neb. 1895).

159. *Id.* (quoting *Uhlig*, 61 N.W. 749).

160. *See, e.g.*, New Mexico v. Gen. Elec. Co., 335 F. Supp. 2d 1185, 1230 (D.N.M. 2004) (emphasizing that the theory of avoidable consequences concerns the mitigation of damages that arise *after* the commission of a tort or a breach of contract (quoting Acme Cigarette Servs. v. Gallegos, 577 P.2d 885, 891 (N.M. Ct. App. 1978))); *see also* W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 458 (W. Page Keeton et al. eds., 5th ed. 1984) ("The rule of avoidable consequences comes into play after a legal wrong has occurred, but while some damages may still be averted, and bars recovery only for such damages.").

161. *Gen. Elec. Co.*, 335 F. Supp. 2d at 1230 (quoting *Gallegos*, 577 P.2d at 891 (Hernandez, J., specially concurring)).

162. Thomason v. Pilger, 2005 OK 10, ¶ 10, 112 P.3d 1162, 1166.

163. *Id.*

164. Leigh King Forstman, Mitigating Damages: Reasonable Versus Unreasonable Actions (Ass'n of Trial Lawyers of Am. Winter 2004 Convention Reference Materials, Feb. 2004), Westlaw WINTER2004 ATLA-CLE 269 ("Regardless of how the injury occurred or whose negligence caused the injury, the plaintiff must take reasonable steps after being injured; if not, the plaintiff's recovery can be barred or reduced if the plaintiff's conduct is deemed unreasonable.").

damage caused by the buyer's failure to take such precautions is unrecoverable.[165] As a result, the hypothetical buyer *B* has a compelling reason to salvage the hydraulic equipment on his new disc—failure to do so may prevent him from recovering any losses caused by his failure to timely salvage the parts and commence work before the weather turns sour.

The duty to mitigate is not exclusively the stuff of torts.[166] Such a duty also arises in breach of contract actions.[167] Moreover, when circumstances compel a plaintiff to mitigate damages, "it is the choice of the Plaintiff, not the Defendant[], as to which remedies the Plaintiff will seek."[168] When the choice of one remedy over another is the product of business judgment, courts afford deference because they "cannot willingly dictate to a business what the wise and prudent course of action would be."[169] Thus, when the defendant-seller objects to the remedy chosen by the injured buyer, courts are quick to quip, "[T]he person whose wrong forced the choice cannot complain that one rather than the other was chosen."[170] An aggrieved party is not required to exalt the interests of the breaching party merely to appease its hypocritical distaste for the plaintiff's mitigation preference.[171]

Adding further complexity to the Duty Dilemma is the last clear chance doctrine—the ancestral cousin of the duty to mitigate.[172] Although it addresses problems of proximate cause, the doctrine serves as a useful guide for non-traditional duty dilemmas—the type where the plaintiff-*buyer* is the alleged spoliator.[173] It was developed to acknowledge the principle "that the law holds liable for injury those who are responsible for the

165. *Id.*

166. *See Gen. Elec. Co.*, 335 F. Supp. 2d at 1230 (quoting *Gallegos*, 577 P.2d at 891 (Hernandez, J., specially concurring)).

167. *Id.*; *see also* Hidalgo Props., Inc. v. Wachovia Mortg. Co., 617 F.2d 196, 200 (10th Cir. 1980); *Gallegos*, 577 P.2d at 891 (Hernandez, J., specially concurring) ("It is well settled that a party must use reasonable diligence to mitigate the damages about to be suffered either from tort or breach of contract." (citing Mitchell v. Jones, 138 P.2d 522, 524 (N.M. 1943))).

168. Walshe v. Zabors, 178 F. Supp. 3d 1071, 1086-87 (D. Colo. 2016) ("[T]he choice of remedies belongs to the one who has been defrauded, and may not be forced upon him by the wrongdoer." (citing H & K Auto. Supply Co. v. Moore & Co., 657 P.2d 986, 988 (Colo. App. 1982))).

169. *In re* WPRV-TV, Inc., 102 B.R. 231, 234 (Bankr. E.D. Okla. 1988).

170. *Id.* (quoting *In re* Kellett Aircraft Corp., 186 F.2d 197, 198–99 (3d Cir. 1950)).

171. *Id.* (quoting *Kellett*, 186 F.2d at 199).

172. *See* Okla. Ry. Co. v. Overton, 1932 OK 353, ¶ 7, 12 P.2d 537, 538 (quoting Pa. R.R. v. Swartzel, 17 F.2d 869, 870 (7th Cir. 1927)).

173. *See id.*

proximate cause of the injury."[174] Nevertheless, the doctrine speaks to situations where a party, not initially privy to another's negligent conduct, finds himself in a position where injury to the other can be avoided by his own reasonable conduct.[175] Put another way, when party *X* finds party *Y* "in a place of danger" resulting from *Y*'s own negligent conduct, and *X* has the "last clear chance" to prevent *Y* from incurring harm, *X* must use ordinary care to prevent that harm.[176] It is irrelevant how *Y* found himself in danger; the doctrine notes that *X*'s failure to use ordinary care to prevent *Y*'s injury is the proximate cause of *Y*'s injury.[177] Although the doctrine was embraced as an answer to specific problems of proximate cause in complex causation fact patterns, it provides a unique lens through which to view the Duty Dilemma.

III. Which Court? The Procedural Problem with Spoliation

State choice-of-law rules dictate the legal risk landscape between contracting parties.[178] This is because each choice-of-law determination is based largely upon the parties' expectations regarding the contract and how its choice-of-law clause will apply.[179] Thus, the essential inquiry in choice-of-law questions is whether the issue is substantive or procedural.[180] Parties are "empowered to make contractual choice-of-law provisions," and as a result, the expectation of the parties regarding the applicability of those provisions is "a significant factor in the determination of whether an issue is substantive or procedural for choice-of-law purposes."[181]

Accordingly, the Erie Doctrine is deeply embedded in spoliation doctrine.[182] It is well settled that a federal court sitting in diversity applies the substantive law of the forum state,[183] but there is disagreement among the courts as to whether spoliation is a substantive or procedural issue.[184] If spoliation is conclusively procedural in nature, the Erie Doctrine requires

174. *Id.*
175. *See id.*
176. *Id.*
177. *Id.*
178. *See* Boyd Rosene & Assocs., Inc. v. Kan. Mun. Gas Agency, 174 F.3d 1115, 1126 (10th Cir. 1999).
179. *Id.*
180. *Id.*
181. *Id.*
182. *See* Vitkus v. Beatrice Co., 127 F.3d 936, 941 (10th Cir. 1997).
183. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).
184. *See generally* KOESEL & TURNBULL, *supra* note 18.

that federal courts in diversity apply federal procedural rules.[185] However, making a proper distinction between "substance" and "procedure" can present a daunting task, as "[t]he line between [the two] shifts as the legal context changes."[186] The majority of circuits, however, hold that spoliation is procedural in nature and apply federal law for spoliation sanctions.[187]

The law of spoliation is primarily considered procedural because it draws upon the inherent powers of the courts. In *Adkins*, the Sixth Circuit Court of Appeals found that federal law prevailed in spoliation cases because the authority to impose sanctions for spoliated evidence arises "from a court's inherent power to control the judicial process," rather than from the forum state's substantive law.[188] Also, a spoliation determination is inherently evidentiary in nature, and federal courts generally apply their own evidentiary principles in diversity.[189] Where the bad faith of a litigant is in question and the imposition of sanctions is looming, such a determination "reaches a court's inherent power to police itself" and brings it within the purview of federal law.[190] Of course, if a federal court determines that the outcome would be the same whether federal or state law is used, the choice of law analysis is inconsequential.[191]

Conversely, some courts have held that the pre-litigation duty to preserve evidence is substantive.[192] In *State Farm*, a defective dishwasher was alleged to be the proximate cause of a fire.[193] The court found that State Farm breached its duty to preserve material evidence when it allowed the dishwasher to be destroyed, and ordered the exclusion of all evidence related to the dishwasher.[194] Relying on *Guaranty Trust Co. v. York*, a key

185. Hanna v. Plumer, 380 U.S. 460, 465 (1965).

186. *Id.* at 471.

187. *See, e.g.*, Adkins v. Wolever, 554 F.3d 650, 652 (6th Cir. 2009); Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) (applying the federal law of spoliation despite the fact that both parties agreed that the law of New York—where the incident occurred—applied).

188. 554 F.3d at 652 (quoting *Silvestri*, 271 F.3d at 590).

189. King v. Ill. Cent. R.R., 337 F.3d 550, 556 (5th Cir. 2003).

190. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991); Peshlakai v. Ruiz, 39 F. Supp. 3d 1264, 1343 (D.N.M. 2014) (noting that the Tenth Circuit has not directly addressed whether federal law governs spoliation issues and deciding to err with the majority).

191. *See* KOESEL & TURNBULL, *supra* note 18.

192. *See, e.g.*, State Farm Fire & Cas. Co. v. Frigidaire, 146 F.R.D. 160, 162 (N.D. Ill. 1992).

193. *Id.* at 161.

194. *Id.* at 163.

component of the Erie doctrine, the *State Farm* court found that the duty to preserve evidence is substantive, and therefore applied Illinois state law.[195]

Because allegations of spoliation in the context of the Duty Dilemma generally point to conduct that occurred prior to litigation, the court's sanctioning power must extend to the pre-commencement period if spoliation is to be treated as procedural. Without a court order or pending discovery request, the court's authority to police itself is potentially limited. Reaching early-stage spoliation may require the courts to enter the substantive realm. If, however, courts can maintain that the power to police itself extends to that period when litigation is reasonably foreseeable, then a procedural classification of spoliation remains defensible.

Thus, the substantive problem of spoliation: if a jurisdiction does not recognize an independent duty to preserve evidence, must it conclude that spoliation is purely procedural? The refusal to recognize a tort action for failure to preserve evidence may infer that the courts' ability to police itself is limited to conduct already within the purview of litigation. Such a result would further complicate the Duty Dilemma, especially where the plaintiff is the spoliator. Because the plaintiff-buyer brings suit and is the first to reasonably foresee litigation, the law, as it is, would require the defendant to get a court order against the buyer *when litigation hasn't even commenced yet*. This absurdity illustrates the choice of law issue. For spoliation to be procedural, the courts must have clear authority to police the conduct. If the circumstances appear to limit the courts' authority—because the conduct occurred before the matter was brought within the court's jurisdiction—then that form of spoliation may warrant substantive treatment. Resolving the choice of law problem is beyond the scope of this Comment, but it is important to note that the Duty Dilemma presents spoliation in a context that may demand substantive rather than procedural classification. Regardless, the applicable law governing the spoliation claim will turn on the choice of law classification, and the Duty Dilemma must be resolved just the same.

IV. Mariposa Farms and the Unresolved Duty Dilemma

A plaintiff-buyer may successfully invoke the "duty to mitigate" as a defense to spoliation as long as the spoliator gives the moving party a sufficient opportunity to inspect the evidence prior to making an

195. *Id.* at 162.

alteration.[196] In *Mariposa*, the plaintiff's complaint alleged deficiencies in a cow-milking system manufactured by the defendants, and brought an action for financial losses resulting from the equipment's failure to function properly.[197] After the commencement of the suit, the plaintiff significantly altered the system in response to an expert's recommendations, hoping to make it operational. These alterations occurred nearly six weeks after they were recommended, but at no point was the defendant provided an opportunity to inspect the system itself.[198] The court, frowning upon the plaintiff's conduct, reasoned that its unilateral alterations deprived the defendant of the opportunity to "gather direct evidence with which to support its defense," thereby preventing it from formulating an argument for trial that it otherwise would have been able to make.[199]

It is important to note, however, that the plaintiff preserved the parts and major components of the milking system, took photographs of the alterations, and directed its own expert to test the system before the change.[200] Nevertheless, the court held that this was not enough to avoid a spoliation sanction.[201] "[S]uch evidence," it held, "is insufficient to preserve [defendant's] right to inspect and to have its own expert test the system as it existed prior to any alterations being made."[202]

The plaintiff rebutted the defendant's subsequent spoliation claim by arguing that the alterations were made in performance of its duty to mitigate

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196. *See* Mariposa Farms, LLC v. Westfalia-Surge, Inc., No. CIV 03-0779 JC/LAM, 2005 U.S. Dist. LEXIS 49951, at *9 (D.N.M. Feb. 3, 2005).

197. *Id.* at *4-5.

198. *Id.*

199. *Id.* at *6-7.

200. *Id.* at *7.

201. *Id.*

202. *Id.*; *see also* Barnett v. Simmons, 2008 OK 100, ¶ 19, 197 P.3d 12, 19 (finding that "an examination reasonably foreseeably destructive of evidence done without notice to opposing counsel which does result in destruction of evidence should expose a party to severe sanction" (citing Holm-Waddle v. Hawley, 1998 OK 53, ¶ 10, 967 P.2d 1180, 1182)). Addressing a plaintiff-buyer's own use of an expert, the court in *Holm-Waddle* stated that:

> When an expert employed by a party or his attorney conducts an examination reasonably foreseeably destructive without notice to opposing counsel and such examination results in either negligent or intentional destruction of evidence, thereby rendering it impossible for an opposing party to obtain a fair trial; it appears that the Court would not only be empowered, but required to take appropriate action, either to dismiss the suit altogether, or to ameliorate the ill-gotten advantage.

Holm-Waddle, ¶ 10, 967 P.2d at 1182 (quoting Barker v. Bledsoe, 85 F.R.D. 545, 547-48 (W.D. Okla. 1979)).

damages.[203] The court rejected this argument, stating that the plaintiff's "duty to mitigate damages and its duty to preserve evidence [were] not mutually exclusive."[204] It further reasoned that the plaintiff could have mitigated damages while still allowing the defendant to inspect the system before it was changed.[205] In response, the plaintiff argued that the defendant's personnel who visited the dairy farm before the alterations were made to the milking system had ample opportunity to inspect it on those visits.[206] The court rejected this argument as well, stating that the personnel visits were for routine service and maintenance rather than for litigation purposes.[207]

Because the plaintiff could not show that the defendant should have known to use these visits to inspect and test the system prior to impending litigation and alterations, the mitigation defense was denied.[208] Nevertheless, the timing of the alterations was a significant factor in the court's decision.[209] Because the alterations occurred *after* the suit was commenced rather than before, the court noted that spoliation that occurs after commencement is inherently more blameworthy.[210]

The court also resolved the prejudice element of the spoliation analysis against the plaintiff.[211] Although the plaintiff had kept the component parts, the court found that the complexity of the milking system required that it be maintained in its original state to facilitate a fair inspection by the defendant.[212] Ultimately, the alterations to the milking system "depriv[ed] [the defendant] of direct, objective and independent evidence of the vacuum pressure in the system prior to the modification."[213] Despite the severity of the plaintiff's spoliation, the court chose to exclude the evidence rather than dismiss the suit.[214]

This is the first and only case in the Tenth Circuit to visit—albeit in an unpublished opinion—the competing duties issue. Although it purports to resolve the conflict by pronouncing them not mutually exclusive, its

203. *Mariposa Farms*, 2005 U.S. Dist. LEXIS 49951, at *9.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *See id.*
210. *Id.* at *9-10.
211. *Id.* at *10-12.
212. *Id.* at *10.
213. *Id.* at *11.
214. *Id.* at *13.

holding leaves many aspects of spoliation and tort law largely unexplored. The time is ripe to resolve the Duty Dilemma.

Whether or not an independent action for spoliation exists, the buyer of a defective machine has a duty to preserve evidence as soon as litigation becomes reasonably foreseeable.[215] This is especially true of a plaintiff-spoliator who is the first party to know that litigation is in fact on the horizon. Once the buyer discovers that the machine is defective, it will presumably begin the process of rectifying the transaction, giving notice to the seller and scheduling necessary repairs. Notice is essential. If the plaintiff-buyer does not provide the seller with an adequate opportunity to inspect the defective machine, thereby failing to give the seller a sufficient reason to believe that litigation is on the horizon, the prejudice element of the spoliation claim will be almost automatic.

The duty to mitigate and the duty to preserve evidence are not mutually exclusive. However, the burden is on the plaintiff-buyer to provide the seller an adequate opportunity to inspect the evidence because it is the plaintiff-buyer that controls whether breach of contract litigation will commence. Refer back to the original hypothetical. Spoliation and mitigation issues collide in unique circumstances. When buyer *B* discovers that the disc he bought from seller *S* is defective, there is a small window for either party to make necessary repairs. Remember, the weather—and in other cases, the economy—is a limiting factor that affects whether *B* has time to seek repairs and whether *S* has time to perform them. Therefore, *B* must be wary. A strategic miscalculation resulting in the disposal or alteration of the disc before *S* has had time to inspect it will likely result in a spoliation sanction—and *B*'s duty-to-mitigate defense will fail under *Mariposa*.

Therefore, the underlying theme of the Duty Dilemma is that the duty to mitigate only becomes a viable defense if it was in fact reasonable for *B* to mitigate its damages. Because reasonableness informs the duty to mitigate, it must also inform the Duty Dilemma. The opportunity to inspect is the key determinant. Whether it was reasonable for *B* to mitigate its economic damages by altering and repurposing the hydraulic system on the new disc will depend on whether *S*'s opportunity to inspect the disc—prior to alteration—was sufficient to allow it to form a defense for future litigation.

Borrowing from long-standing tort law, the plaintiff-buyer who finds itself wrestling with the Duty Dilemma has the last clear chance to avoid a

215. *See* Henning v. Union Pac. R.R., 530 F.3d 1206, 1220 (10th Cir. 2008) (quoting Burlington N. & Santa Fe Ry. Co., 505 F.3d 1013, 1032 (10th Cir. 2007)).

spoliation issue. And the duty *not to spoliate* implies an underlying duty to provide for a proper inspection of the evidence. As long as the seller has had a reasonable opportunity to inspect, the showing of prejudice will fail and spoliation will be rendered a non-issue. As a result, the burden is on the buyer to provide a legally sufficient opportunity to inspect. What exactly does this look like? The case law analyzing inspection requirements through the spoliation lens suggests that the opportunity to inspect is best characterized as an opportunity to develop a defense for litigation.[216] In the competing duties context, this must give the inspecting party reasonable notice that the inspection should be performed with future litigation in mind.

There are several types of inspection that, despite substantial compliance and cooperation by the plaintiff-buyer, fail to apprise the seller of impending litigation. An inspection performed in the normal course of business, perhaps according to routine maintenance obligations stipulated in the contract of sale, may not give rise to the level of notice necessary to constitute proper notice. Suppose the sale contract between *B* and *S* requires that *S* perform routine maintenance inspections each quarter and conduct necessary repairs. It will be inappropriate for *B* to characterize one of these routine inspections as an adequate inspection for spoliation purposes. The determinative question is whether the opportunity for inspection is sufficient to inform the inspector of impending litigation *and* provide a meaningful opportunity to collect information necessary to support its argument at trial. Relying on a mere routine inspection to notify the seller of impending litigation, without more, is not enough to place the possibility of litigation within the reasonable foreseeability of the defendant-seller.

It is important to keep in mind that the essential element of spoliation is prejudice to the moving party.[217] Prejudice is generally cast in terms of lack of access to evidence—causing the defendant to botch its defense for trial.[218] Underlying every spoliation claim is an inherent causation element. But for the lack of access to relevant evidence, the seller would have been able to effectively controvert the allegations of the breach of contract action. In the Duty Dilemma context, the duty to mitigate damages coopts the "adequacy of inspection" issue. Suppose *B* does *not* salvage the parts

216. *See* Kirkland v. N.Y.C. Hous. Auth., 666 N.Y.S.2d 609, 612 (N.Y. App. Div. 1997) (holding that the purpose of inspections is to provide an opportunity for the inspecting party to form the defense it would have been able to make had the evidence been preserved).

217. Kirschen v. Marino, 792 N.Y.S.2d 171, 172 (N.Y. App. Div. 2005) (noting that "the gravamen of [a spoliation claim] is a showing of prejudice").

218. *Id.*

from the disc, and instead leaves it in the barn to collect dust. Production grinds to a halt, and *B* begins to incur substantial economic damages. In the subsequent breach of contract action, the issue of damages will be compounded by *B's* failure to mitigate damages. The question then will be whether it was reasonable for *B not* to salvage the parts from the new disc and cause preventable economic loss. Of course, *S*'s argument will be that it was not.

In a world where *B* has not altered the new disc to mitigate his losses, *S* will likely invoke the duty to mitigate as a defense to *B*'s claims of economic loss. In this world, *B* will be left wishing he had salvaged the parts for re-use in his old disc—but it will be too late. Who, between *B* and *S*, should be responsible for this loss? All other things equal, had *S* performed on the contract, the loss would not have occurred. *B* would have no outside cause precluding the realization of his full economic potential. The new disc would have been operable, and his farming operation would have continued unimpeded. The answer to this question relies on traditional concepts of reasonableness. It would be unreasonable for *B* to simply scrap the new disc and refurbish the old one without providing *S* an adequate opportunity to inspect it. It would also be unreasonable for *B* to rely on a contractually required maintenance inspection to justify an unannounced alteration to the disc at the cusp of litigation—when only *B* knows that it is imminent. Both situations would justify a spoliation sanction, but in neither of them would it be reasonable to mitigate damages, preemptively, by salvaging the new disc. Consequently, the reasonability of the plaintiff-buyer's conduct determines whether the duty to preserve evidence and the duty to mitigate damages are mutually exclusive or not.

Consider the following: if *B* gives *S* ample opportunity to inspect the disc and vocalizes his discontent with the conduct alleged to constitute the breach, then any subsequent alteration will be a reasonable mitigation of the damages. *S*'s failure to act upon a reasonable opportunity to inspect will shift the fault to *S* and absolve *B* of any potential spoliation claim. *B* bought the disc, *B* owns the disc, and *B* has a right to dispose of his property as he chooses. If *S* does not diligently seek his own legal protection by acting reasonably and inspecting when given the opportunity, *B* should be held harmless when his own protective conduct—salvaging the new disc and getting the farm running again—ultimately precludes *S* from forming a defense for trial.[219] The law purporting to resolve the Duty Dilemma should not allow *S* to have his cake and eat it too. The spoliation claim against *B*

219. *See Kirkland*, 666 N.Y.S.2d at 613.

for deconstructing the disc is only viable as long as *S* acts reasonably himself. A defendant-seller's unclean hands can and should render a spoliation claim untenable. Once the opportunity to inspect is given, *S* must seize it.

The duty to mitigate damages is generally an affirmative defense reserved for defendants seeking to attribute some of the total damages to the negligent conduct of the plaintiff.[220] As a result, the duty to mitigate is a sword of Damocles that shapes plaintiffs' behavior before and during litigation. Attempting to be the law's reasonably prudent person, plaintiffs seek to minimize their damages by taking reasonable steps to ensure that damages are not exacerbated. Plaintiff-buyers who have been sold a defective product should be wary. The law has conditioned them to minimize damages when prudence and reason would require it. But when a breach of contract action is imminent, plaintiff-buyers should resist mitigating damages until it is *absolutely reasonable* to do so. This 'reasonableness' standard is not, like the duty to mitigate, a reference to the plaintiff's obligation to take steps to avoid damages. Instead, reasonableness in the context of the Duty Dilemma should be couched in terms of spoliation. Providing an adequate inspection is pivotal. Only once an opportunity to inspect has been given is mitigation reasonable. It is the key that unlocks the duty to reasonably mitigate damages.

Some may suggest an alternative solution to the Dilemma. A spoliation-centric view might contend that the Duty Dilemma is resolved by relying purely on the dictates of spoliation doctrine. Such an alternative construction would posit that the duty to mitigate damages is a legal leisure that ceases to exist in the spoliation context; spoliation doctrine leaves no room for the duty to mitigate. The purpose of spoliation is to preserve essential evidence for trial at a time when a defense has yet to be made. Therefore, the duty to mitigate damages does not apply if it requires altering relevant, material evidence necessary to allow the defendant-seller to form its defense. There are a number of reasons why this alternative fails.

First, spoliation is a dormant issue in all litigation. Although hindsight successfully illuminates key moments when the duty to preserve was actually the strongest, a theory that attempts to resolve the Duty Dilemma must take into account the prospective nature of transactional negotiations. When parties agree to make a deal involving the underlying object of future spoliation litigation, it is presumed that those parties intend to benefit by the terms of the deal. They expect that the contract will be honored and that the

220. *See* Sackett v. Rose, 1916 OK 2, ¶ 14, 154 P. 1177, 1180.

opposing party will act in good faith. In some cases, unfortunately, these expectations are not met, and litigation ensues. But the commencement of litigation should not clip the plaintiff-buyer's wings. If the law expects plaintiffs to both preserve evidence and mitigate damages, something has to give. To realize the benefit of its bargain, the plaintiff-buyer should mitigate its damages, even if that means committing otherwise prima facie spoliation. Any other approach would essentially condone breaches of contract without any corresponding effort to soften the blow for the victims, amounting to forfeiture of the plaintiff-buyer's property.

Second, the duty to mitigate damages is of equivalent legal status as spoliation and should not be discarded when the two collide. Because spoliation has the potential to shape the entire landscape of litigation, there is a temptation to elevate it to a higher priority than the duty to mitigate. But there is no compelling reason to do so. The duty to mitigate damages shapes plaintiffs' conduct in all types of litigation, not just those involving spoliation issues. If a plaintiff fails to act reasonably and mitigate its damages, it will find a defendant lurking eagerly to prey on its misstep. To avoid this and protect business interests, society requires plaintiffs to minimize the damage when reasonable prudence would allow it. An approach that places the duty to mitigate on the backburner would condone economic loss in circumstances where that loss could be avoided.

Finally, the last clear chance doctrine articulates the importance of mitigation in the context of spoliation and suggests that a plaintiff-buyer has more than a duty to mitigate damages; because of its unique position in litigation, it has a broad duty to avoid harm at all material stages of litigation. Recall that the last clear chance doctrine is a long-standing approach to negligence law that requires defendants to prevent harm to others even when they are the sole proprietors of their own misfortunes.[221] When the duty to preserve evidence collides with the duty to mitigate damages, the plaintiff-buyer is often saddled with the prospect of economic loss as a result of the defendant-seller's misconduct. Prior to the commencement of litigation, the buyer has the "first clear chance" to apprise the seller of impending litigation and provide an opportunity for inspection. Armed with the resources necessary to avoid imminent economic loss, the buyer also has the "last clear chance" to prevent the amplification of the harm after the defendant has breached the contract. Thus, the concept of the last clear chance (and its contrapositive—the first

221. *See* Okla. Ry. Co. v. Overton, 1932 OK 353, ¶ 7, 12 P.2d 537, 538 (quoting Pa. R.R. v. Swartzel, 17 F.2d 869, 870 (7th Cir. 1927)).

clear chance) fundamentally ties the duty to preserve to the duty to mitigate. By characterizing the Duty Dilemma as a series of legally significant events where the plaintiff-buyer has the last clear chance, at multiple stages, to avoid unnecessary harm, the resolution of the Dilemma becomes clearly a plaintiff-oriented endeavor.

Although this is a counter-intuitive result—admittedly, it *was* the defendant-seller who breached the contract—the nature of spoliation doctrine and the duty to mitigate inherently shifts the burden to the plaintiff-buyer. The buyer's decision to commence a breach of contract suit sets the stage. The foreseeability of litigation, the first prong of the spoliation analysis, is at the mercy of the buyer's whims. As a result, the point at which the duty to preserve evidence arises, a thing that is generally not precisely knowable, is *in fact* precisely knowable by the plaintiff-buyer who is contemplating the future lawsuit. This places the onus squarely on the buyer to preserve the relevant evidence and provide the seller an adequate opportunity to inspect it. No party to the litigation—besides the plaintiff-buyer—knows which evidence will be necessary, or which inspection opportunity will be the last. Accordingly, no party is better positioned to contain the amount of harm than the buyer. The inescapable conclusion is that the plaintiff-buyer has the exclusive duty to reconcile the duty to preserve and the duty to mitigate.

Mariposa Farms got one thing right. The duty to preserve evidence and the duty to mitigate are not mutually exclusive. With sufficient notice and opportunity to inspect, altering the evidence in mitigation of damages can *become* reasonable. However, the court missed on an opportunity to fully articulate the solution to the Duty Dilemma. By holding that the plaintiff's preservation of component parts, photographs and expert test results were not enough to avoid a spoliation sanction, the court effectively took the power to mitigate *spoliation damages* away from plaintiffs.[222] It had an opportunity to take the next step in resolving the Duty Dilemma but left much to be desired.

It is inevitable that plaintiff-buyers in the position of buyer *A* or Mariposa Farms will find a defendant-seller unresponsive to its opportunity

222. *See* Howell v. Maytag, 168 F.R.D. 502, 503, 507 (M.D. Penn. 1996). In *Maytag*, a fire, allegedly caused by a defective microwave, damaged a substantial part of the plaintiff's home. *Id.* at 503. While the plaintiffs preserved the microwave, the electric outlet and wiring, and took photographs of the scene, the court held that the renovation of the damaged areas precluded Maytag from examining other possible explanations for the cause of the fire. *Id.* at 507. The opportunity to cross-examine the plaintiffs on the veracity of the preserved evidence was deemed an insufficient substitute for an independent investigation. *Id.*

to inspect. Furthermore, it is also conceivable that a notice to inspect will catch a defendant-seller at a time when it cannot perform an inspection and the plaintiff-buyer has no time to wait. When time is of the essence, and economic loss is imminent, plaintiff-buyers should not be forced between a rock and a hard place. The law must bend when circumstances demand flexibility. Plaintiff-buyers who have no choice but to mitigate economic loss by altering and repurposing evidence should be encouraged to take photographs, preserve component parts, and retain an expert to test the object. In certain cases, the court may find that these efforts can adequately protect defendants and give them a sufficient basis to form a defense.[223]

Needless to say, it is likely that in certain circumstances, particular objects will not be conducive to the buyer-plaintiff's attempts to mitigate spoliation damages. The complexity or uniqueness of a machine might preclude the possibility of adequately protecting the defendant-seller's opportunity to prepare a defense. The theory upon which a party intends to base its defense may require eliminating alternative causal explanations and therefore require a comprehensive investigation of the damaged items or areas.[224]

Mariposa Farms, it seems, may have arrived at the correct conclusion despite employing limited reasoning. Although it did not consider whether buyers in the plaintiff's position could ever adequately protect the defendant-seller in the *way* it chooses to alter the evidence, the court gave a perfunctory explanation as to the insufficiency of the buyer's photos, records, and testing. This should be treated as one of the central tenets of the Duty Dilemma analysis. When the plaintiff-buyer has unilaterally altered the primary evidence in mitigation of damages, but it has preserved component parts, taken photographs, and performed before-and-after testing, has the defendant been prejudiced to an extent that warrants spoliation sanctions? This case-by-case analysis is best left for the courts to resolve. Ultimately, though, it is a question that should inform the Duty Dilemma and shape buyers' and sellers' conduct before and after litigation.

The final wrinkle in the Duty Dilemma is timing—namely, when exactly did the spoliation occur? As the case law shows, it is common for alterations to be made in violation of a discovery request after the commencement of litigation.[225] In those cases, the "foreseeability of

223. *Kirschen*, 792 N.Y.S.2d at 172 (finding that a substantial renovation of a previously damaged apartment did not prejudice the movant because photographs had been taken and the movant was the prior tenant).

224. *See Howell*, 168 F.R.D. at 507.

225. Barnett v. Simmons, 2008 OK 100, ¶ 17-18, 197 P.3d 12, 19.

litigation" prong is useless—litigation has already begun. As *Mariposa Farms* shows, spoliation that occurs after the commencement of litigation is particularly egregious.[226] The explanation is simple. Litigation has commenced and has presumably revealed to the parties which evidence will be relevant to the plaintiff's argument. Should that evidence be altered in the wake of a litigation hold or discovery request, bad faith is a likely player.

It is not quite as simple when evidence is altered prior to commencement. Should parties to future litigation become locked in negotiations over repairs or maintenance inspections due to a breach of contract, the fluidity of the legal status of such negotiations only adds to the uncertainty. Again, only the plaintiff-buyer truly knows when litigation is on the horizon. But that is precisely why the Duty Dilemma is so unique. It presents itself at the cusp of litigation after the contract has been breached and amidst the turmoil that follows. There are no discovery requests, no court orders, and in some cases, not even the necessary scintilla of evidence suggesting to the defendant-seller that litigation is approaching. There is nothing but two disgruntled parties attempting to rectify the breach of a contract of sale. That is why *Mariposa Farms* can only take the Duty Dilemma so far in its quest for reconciliation. It dealt with alterations made *after* the commencement of litigation. The timing of the spoliation considered in *Mariposa* only captured part of the picture, and only that part of the picture that was already somewhat decipherable. The Duty Dilemma's most pressing issues present themselves when litigation is *not* pending, when the possibility of litigation first blossoms in the plaintiff-buyer's mind. Thus, when parties are attempting to resolve the Dilemma outside of litigation, *Mariposa's* refusal to consider whether plaintiff-buyers may protect defendant-sellers themselves should not be controlling. *Mariposa* relied on limited facts. When parties find themselves outside of litigation, and only the plaintiff-buyer knows that a future action is imminent, the law should encourage the plaintiff-buyer to preserve components, perform tests, and take photographs. The window to mitigate damages is small. Plaintiff-buyers often find themselves under economic duress, juggling the prospect of granting an adequate opportunity to inspect without failing to mitigate damages. Accordingly, the holding of *Mariposa* should be relaxed to allow plaintiffs to protect defendants when the defendant either cannot or has failed to do so itself.

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226. Mariposa Farms, LLC v. Westfalia-Surge, Inc., No. CIV 03-0779 JC/LAM, 2005 U.S. Dist. LEXIS 49951 (D.N.M. Feb. 3, 2005).

V. Conclusion

The duty to preserve evidence and the duty to mitigate damages are not mutually exclusive. *Mariposa Farms* held as much. But the reality of the Duty Dilemma goes much deeper. When a plaintiff-buyer alters material evidence in mitigation of damages, it must first provide the defendant-seller an adequate opportunity to inspect it. "Reasonableness" guides the analysis. A plaintiff-buyer must exert reasonable effort to mitigate its damages after a breach of contract, but the duty to preserve evidence emerges as soon as litigation is reasonably foreseeable. Thus, when a plaintiff-buyer invokes the "duty to mitigate" as a defense to the defendant-seller's spoliation claim, the question will be whether the buyer provided the type of inspection that would make mitigating the damages *reasonable* in light of the spoliative conduct.

Not all forms of inspection that a buyer may provide are adequate. In order to show that an inspection opportunity was legally sufficient, and that mitigating damages was in fact a reasonable thing to do, the plaintiff-buyer must afford more than just a routine inspection. It must be the type of inspection that has its eyes on litigation. Deciding whether an inspection opportunity was sufficient is not new territory; courts should apply the same analysis involved in issues of proper notice.

The Duty Dilemma also requires that plaintiff-buyers protect defendant-sellers by preserving component parts, taking photographs, and performing expert testing before making alterations. Time is of the essence. Despite the complexity of the issues involved, there are some cases where a plaintiff-buyer's photographs, test results and remaining parts would be enough for a defendant-seller to build its defense. In those cases, courts should encourage plaintiffs to take these protective measures and mitigate their damages as quickly as possible. However, the plaintiff-buyer must absorb all the risk. If the photographs, tests, and parts are decidedly insufficient for the defendant-seller to form its defense, and no adequate inspection opportunity has otherwise been provided, the plaintiff-buyer should be sanctioned for spoliation. The Duty Dilemma is built on fine, grey lines and limited time—a deadly concoction. Although the defendant-seller breached the contract, it will never be the beast of burden—the brunt of the legal risk rests upon plaintiff-buyers with the last clear chance to avoid the Dilemma from arising in the first place.

Collen L. Steffen