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**Evidence—Withholding Original Documents and Producing Copies for Trial Constitutes Spoliation Warranting Adverse Inference—*Bull v. United Parcel Service, Inc.*, 665 F.3d 68 (3d Cir. 2012)**

When a party to litigation destroys relevant evidence, the judge may issue sanctions under the court’s inherent and statutory authority to punish spoliation of evidence.<sup>1</sup> The adverse inference sanction permits or compels the jury to conclude the destroyed evidence would have harmed the party responsible for its loss.<sup>2</sup> In *Bull v. United Parcel Service, Inc.*,<sup>3</sup> the Court of Appeals for the Third Circuit confronted the issue of whether the production of copies in lieu of original documents constitutes spoliation of evidence, and whether such action warrants the harsh sanction of dismissal, or a lesser sanction such as an adverse inference.<sup>4</sup> The Third Circuit held that Bull spoliated evidence by producing

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1. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-47 (1991) (stating inherent power of courts to sanction not displaced by Federal Rules of Civil Procedure); *Anderson v. Dunn*, 19 U.S. 204, 226-27 (1821) (concluding courts vested, by creation, with power to impose “silence, respect, and decorum”). Additionally, the Federal Rules of Civil Procedure authorize courts to impose specific sanctions, at the judge’s discretion, for failure to comply with certain discovery orders. See FED. R. CIV. P. 37(b)(2)(A) (setting forth list of available sanctions).

2. See *Beaven v. U.S. Dep’t of Justice*, 622 F.3d 540, 553-54 (6th Cir. 2010) (providing definition and requirements of adverse inference). The party requesting the adverse inference must show the spoliator had an obligation to preserve the destroyed evidence, the spoliator acted with the requisite culpability, and the evidence was relevant to the moving party’s claim. See *id.* The inference may be permissive or mandatory. See Dale A. Nance, *Adverse Inferences About Adverse Inferences: Restructuring Juridical Roles for Responding to Evidence Tampering by Parties to Litigation*, 90 B.U. L. REV. 1089, 1134-35 (2010) (discussing presumption of permissive, rather than mandatory, inferences). The duty to preserve evidence arises when a party reasonably foresees litigation, or receives actual notice of such. See *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998) (asserting preservation obligation arises when party knows or should know of litigation). The circuits are split regarding what level of culpability is required on behalf of the spoliator; the minority allows the inference for negligent destruction of evidence, while the majority requires willful or bad-faith destruction. Compare *Beaven v. U.S. Dep’t of Justice*, 622 F.3d 540, 553 (6th Cir. 2010) (recognizing negligent spoliation severely prejudiced plaintiff and justified adverse inference), and *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 780 (2d Cir. 1999) (claiming inference, rather than dismissal, properly remedies severe prejudice caused by negligent spoliation), with *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) (issuing inference only when destruction predicated on bad faith (citing *Vick v. Texas Emp’t Comm’n*, 514 F.2d 734, 737 (5th Cir. 1975))), and *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995) (requiring intentional destruction before issuing adverse inference). Moreover, the minority emphasizes the heightened-relevance requirement for mere negligent destruction of evidence—the moving party must show relevance such that a reasonable trier of fact could infer the destroyed evidence would support the moving party’s claim. See *Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998) (requiring “some evidence” supporting moving party’s version of what destroyed evidence would prove). To avoid subverting the prophylactic and punitive rationales behind the spoliation doctrine, the Second Circuit cautions against requiring too specific a level of proof by the moving party. See *id.* (reasoning too strict standard would allow profit from destruction of evidence).

3. 665 F.3d 68 (3d Cir. 2012).

4. See *id.* at 72-73 (outlining issue before court); see also *Gumbs v. Int’l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983) (explaining nonproduction or destruction of relevant evidence justifies spoliation inference).

copies in place of originals because the authenticity of such documents cannot be evaluated; dismissal of the plaintiff's claim, however, was determined too harsh a sanction.<sup>5</sup>

In December 2005, Lauren Bull was injured on the job.<sup>6</sup> United Parcel Service, Inc.'s (UPS) doctor diagnosed Bull with contusions and strains to her shoulder and neck, and the specialist to whom she was referred restricted her lifting to twenty pounds.<sup>7</sup> UPS assigned Bull to a less strenuous assignment; at its conclusion, she ceased work and began collecting workers' compensation.<sup>8</sup> On March 29, 2006, having achieved seventy-percent recovery, Bull's orthopedic specialist claimed she had "reached maximum medical improvement."<sup>9</sup> Her lifting limit further restricted to ten pounds, Bull returned to work with the specialist's note.<sup>10</sup> After five days on a new assignment, her supervisor informed her that her medical restrictions prevented UPS from assigning her work, and advised her to pursue permanent disability.<sup>11</sup>

Bull desired continued employment and sought help from her union representative, who encouraged a second opinion that ultimately led to an authorization to lift fifty pounds or more.<sup>12</sup> The collective bargaining agreement covering Bull's employment, however, required the ability to lift

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Typically, courts interpret nonproduction or destruction (spoliation) of evidence as allowing the "spoliation inference," more commonly referred to as the adverse inference, a sanction brought against the offending party. *See Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995) (explaining rationale behind allowing adverse inference against spoliating party). The inference allows the jury to draw conclusions about what the missing evidence would prove had the offending party preserved it and made it discoverable. *See Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994) (defining "evidentiary rationale" behind spoliation doctrine). The *Schmid* court explained that spoliation warrants allowing the jury to draw conclusions based on a lack of evidence because it amounts to "nothing more than the common sense observation that a party who has notice that [evidence] is relevant to litigation and who proceeds to destroy [evidence] is more likely to have been threatened by [that evidence] than is a party in the same position who does not destroy [the evidence]." *Id.* (first, second, and third alterations in original; fourth alteration added) (quoting *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982)). This commonsense observation is less clear when the evidence is not destroyed or unavailable, but is rather produced as a duplicate or facsimile for trial, leaving open the question of authenticity. *Cf. Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995) (stating nonproduction or destruction of evidence indicates nonproducing party acted out of guilt). At least one other court has, however, justified drawing the adverse inference when the spoliator does not destroy evidence, but simply makes the discovery process more difficult than necessary. *See Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 110 (2d Cir. 2002) (reasoning acts causing "sluggish" discovery also warrant adverse inference).

5. 665 F.3d at 79-80 (determining district court's imposition of spoliation sanction misplaced because Bull lacked bad faith).

6. *Id.* at 70. Bull promptly reported injuries to her neck and shoulder and requested medical attention the following day, but two weeks passed before she met with the company doctor. *Id.* Bull also alleged that her supervisors "ignored, downplayed and misrepresented" her injuries. *Id.*

7. *Id.* She also received physical therapy for two months. *Id.*

8. *Id.*

9. 665 F.3d at 70.

10. *Id.*

11. *Id.*

12. *Id.*

seventy pounds or more.<sup>13</sup> UPS rejected the note from Bull's specialist for inconsistencies, and, after Bull obtained a second note from the specialist and faxed it to UPS, rejected the second note for similar reasons.<sup>14</sup> UPS then contacted Bull's union representative, requesting the original notes from the specialist.<sup>15</sup> The representative contacted Bull, who did not respond and instead filed a workers' compensation lawsuit in April 2007.<sup>16</sup> During discovery, Bull responded to UPS's request for the specialist's notes by providing photocopies.<sup>17</sup>

During direct examination at trial, Bull's counsel sought to introduce the photocopied first note, insisting the original was no longer available.<sup>18</sup> Yet, in response to the district court's direct question, Bull stated, "[t]he original note is in my home."<sup>19</sup> Bull's counsel, taken by surprise at Bull's admission, maintained that he had repeatedly requested the original and Bull had insisted it no longer existed.<sup>20</sup> After a brief sidebar, Bull's attorney, as well as the district court judge, questioned Bull in open court, revealing Bull's belief that the original note was in her home, although she had not previously searched for the note.<sup>21</sup> UPS sought to remedy Bull's discovery misconduct by excluding all copies and producing only those already in UPS's possession.<sup>22</sup> The district court decided instead to declare a mistrial, inviting UPS to file a motion for sanctions that ultimately resulted in dismissal with prejudice.<sup>23</sup> The Third

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13. 665 F.3d at 70-71.

14. *Id.* at 71. UPS rejected the first note, dated June 13, 2006, for providing conflicting dates and contradictory answers, calling into question whether the injuries were, in fact, work-related. *See id.* at 71 n.1. UPS also took issue with the specialist's statement that Bull could "lift '50 pounds or more,'" claiming ambiguity. *Id.* Finally, UPS pointed to illegible portions of the note and observed that part of the note was missing. *Id.* Regarding the second note of August 14, 2006, UPS raised the following concerns: "inconsistent dates; a signature differs from the June note; inconsistent answers on the issue of whether the medical condition was work-related; and, an ambiguous instruction that 'Patient is not able to lift over 70 pounds.' The note was also cut off at the bottom." *Id.* at 71 n.2. Finally, portions of the note were illegible. *Id.*

15. *Id.* at 71.

16. *Id.*

17. 665 F.3d at 71.

18. *Id.* at 72. UPS maintained that it requested the originals throughout the discovery process, but never received them before trial. *Id.* The company objected to the introduction of photocopies under the best evidence rule; however, the court overruled its objection. *Id.*; *see also* *Minor v. Tillotson*, 32 U.S. 99, 102 (1833) (holding copies, when originals lost, satisfied best evidence rule). As Bull's counsel was about to repeat his request to admit the photocopied note, the district court interrupted and questioned Bull regarding the location of the original note. 665 F.3d at 71.

19. 665 F.3d at 71.

20. *Id.* at 72.

21. *Id.* Bull's counsel began by asking if she had been able to find the original note, to which she responded that she had looked for it, but that things with her apartment were hectic and she was still willing to try to find it. *Id.* The court interrupted, pointing out that Bull had unhesitatingly admitted the note was in her home, to which Bull replied: "It should be." *Id.* The court then asked Bull if she had previously searched for the note, to which Bull responded in the negative. *Id.*

22. *Id.*

23. 665 F.3d at 72. Bull sent the original June 13th and August 14th notes to the district court five days after the mistrial. *Id.* In October 2010, the court accepted UPS's motion for sanctions by dismissing the case with prejudice. *Id.*

Circuit held that production of copies in lieu of originals did constitute spoliation, but that the court abused its discretion by dismissing the case with prejudice and issuing an overly harsh sanction in a case where both parties failed to conduct the discovery process with utmost integrity.<sup>24</sup>

Spoliation traditionally refers to the destruction or material alteration of evidence that pending or reasonably foreseeable litigation obligates the party to preserve.<sup>25</sup> Because the harm addressed by sanctioning this conduct is the hardship incurred by the opposing party who can no longer use the evidence at trial, and not the destruction of evidence itself, the Third Circuit has described spoliation as also encompassing mere nonproduction of evidence.<sup>26</sup> Regardless

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24. See *id.* at 83 (reasoning dismissal unwarranted because UPS's counsel encouraged district court's misunderstanding of record).

25. See, e.g., *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (citing BLACK'S LAW DICTIONARY 1401 (6th ed. 1990)); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (deferring to definition noted in *West*); *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 219 (1st Cir. 1982) (discussing authority for power to sanction destruction of evidence). To sanction a party for spoliation, the moving party must demonstrate to the court that the spoliator had an obligation to preserve the evidence; the spoliator acted with the requisite level of culpability; and the evidence was relevant to the claim such that a reasonable trier of fact could infer it would be unfavorable to the party responsible for its loss. See, e.g., *Scalera v. Electrograph Sys., Inc.*, 262 F.R.D. 162, 166 (E.D.N.Y. 2009) (reiterating factors of obligation to preserve, culpability, and relevance to claim or defense); *Port Auth. Police Asian Jade Soc'y of N.Y. & N.J. Inc. v. Port Auth. of N.Y. & N.J.*, 601 F. Supp. 2d 566, 569 (S.D.N.Y. 2009) ("[T]he party seeking the sanction must show: (1) the party to be charged with spoliation was under an obligation to preserve the evidence; (2) the destruction was done with a 'culpable state of mind,' and; (3) the destroyed evidence was 'relevant' to the moving party's claim or defense." (quoting *Byrnie v. Cromwell Bd. of Educ.*, 243 F.3d 93, 109-10 (2d Cir. 2001))); *Teague v. Target Corp.*, No. 3:06CV191, 2007 WL 1041191, at \*2 (W.D.N.C. Apr. 4, 2007) (recognizing three elements required to warrant adverse inference instruction). The duty to preserve arises when litigation is pending or reasonably foreseeable to the party. See, e.g., *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (citing BLACK'S LAW DICTIONARY 1401 (6th ed. 1990)); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) ("Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." (adopting definition used in *West*)); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (examining timing and scope of duty to preserve evidence). Courts disagree on what level of culpability is required to issue an adverse inference sanction for spoliation. See *supra* note 2 (discussing whether mere negligence, or greater level of culpability, necessary prerequisite to spoliation sanction).

26. See *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995) ("When the contents of a document are relevant to an issue in a case, the trier of fact generally may receive the fact of the document's nonproduction or destruction as evidence that the party that has prevented production did so out of the well-founded fear that the contents would harm him." (emphasis added)); *Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983) (stating unexplained failure to produce evidence for trial warrants adverse inference). Although sanctions may be applied for simple nonproduction of evidence, in addition to actual destruction or material alteration, some level of culpability on behalf of the spoliator is required before the court may impose harsher sanctions. See *Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983) ("Further, it must appear that there has been an actual suppression or withholding of the evidence; no unfavorable inference arises when the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for."). Circuit courts disagree on whether the level of culpability necessary to issue an adverse inference sanction is satisfied by mere negligence, or whether intentionality or bad faith is required. See Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683, 683 (2009) ("In order to issue such an adverse inference instruction, some courts require a showing of bad faith or intentionality, while others require only negligence.").

of what triggers this nonproduction, courts have inherent and statutory authority to sanction parties for spoliation.<sup>27</sup> Judges enjoy broad discretion in fashioning appropriate sanctions for the damage incurred by spoliation.<sup>28</sup>

A judge may sanction a party for loss of evidence that threatens the integrity of the judicial process.<sup>29</sup> Sanctions range from mild to harsh.<sup>30</sup> The harshest sanctions—those that terminate trial rather than allow it to proceed—are typically reserved for only the most egregious conduct.<sup>31</sup> As for adverse

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27. See FED. R. CIV. P. 11(c) (authorizing court to sanction party for noncompliance with FED. R. CIV. P. 11(b)); FED. R. CIV. P. 37(b)(2) (allowing court to sanction party for failure to comply with discovery order); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) (qualifying courts' inherent ability to sanction fills "interstices" left by Federal Rules of Civil Procedure).

28. See *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (discussing range of sanctions available). While lower court judges enjoy broad discretion in crafting appropriate sanctions for a party's misconduct, that discretion is tempered. See *id.* ("Although a district court has broad discretion in crafting a proper sanction for spoliation, we have explained that the applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine."); see also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) ("Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion."). Judges must also consider which sanction will best serve the prophylactic, punitive, and remedial rationales of the spoliation doctrine. See *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) ("The sanction should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore 'the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.'" (quoting *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998))).

29. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 33 (1991) ("In invoking the inherent power to punish conduct which abuses the judicial process, a court must exercise discretion in fashioning an appropriate sanction, which may range from dismissal of a lawsuit to an assessment of attorney's fees."). Federal Rule of Civil Procedure 37(b)(2) allows the judge to impose the following sanctions for noncompliance with a discovery order: issuing an adverse inference, prohibiting the spoliator from supporting or opposing designated claims or defenses, partially or wholly striking pleadings, staying proceedings, dismissing the action in whole or in part, issuing default judgment against the spoliator, and treating as contempt of court the spoliator's failure to comply with the judicial process. See FED. R. CIV. P. 37(b)(2)(A).

30. See A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 *FORDHAM L. REV.* 2005, 2018 (2011) ("The choices include—from least harsh to most harsh—further discovery, cost-shifting, fines, special jury instructions, preclusion, and the entry of default judgment or dismissal (terminating sanctions)."). "Special jury instructions" refer to the adverse inference, which may be issued as permissive—inviting, but not demanding, an inference from the jury—or mandatory. See *id.*

31. See *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 469-70 (S.D.N.Y. 2010) ("[A] terminating sanction is justified in only the most egregious cases, such as where a party has engaged in perjury, tampering with evidence, or intentionally destroying evidence by burning, shredding, or wiping out computer hard drives."), *abrogated by Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012). Because the American judicial system focuses on uncovering the truth and addressing the merits of the case, those sanctions that terminate the case before trial are reserved for intentional conduct. See, e.g., *United States v. Kaye*, 243 F. App'x 763, 767 (4th Cir. 2007) (requiring bad faith on behalf of spoliator to warrant dismissal); *Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002, 1006 (8th Cir. 2006) ("[T]o warrant dismissal as a sanction for spoliation of evidence 'there must be a finding of intentional destruction indicating a desire to suppress the truth.'" (quoting *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004))); *Wade v. Tiffin Motorhomes, Inc.*, 686 F. Supp. 2d 174, 196 (N.D.N.Y. 2009) (indicating dismissal appropriate only if party acted in bad faith or intentionally); see also David A. Bell et al., *Let's Level the Playing Field: A New Proposal for Analysis of Spoliation of Evidence Claims in Pending Litigation*, 29 *ARIZ. ST. L.J.* 769, 785 (1997) ("Dismissal and default judgment are probably the harshest

inference, courts disagree on the propriety of issuing the inference when evidence is destroyed negligently, rather than intentionally or with bad faith, because an adverse inference may have the same effect as a terminating sanction.<sup>32</sup>

Courts precluding the issuance of the negligent spoliation inference do so with the belief that the adverse inference prejudices the spoliator by branding him as a bad actor.<sup>33</sup> Conversely, those that allow the inference for a broader range of culpability, encompassing negligence, focus not on the spoliator, but on the harm done to the other party.<sup>34</sup> If the spoliation has greatly burdened the nonspoliator, who cannot prove his case without the missing evidence, harsher penalties such as the adverse inference or dismissal become necessary.<sup>35</sup> But if the nonspoliating party is not overly prejudiced by the loss of evidence, the need for harsh sanctions decreases, even if spoliation results from an intentional

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sanctions imposed by courts for spoliation. Given their severity and the desire to decide cases on the merits, courts are reluctant to resort to these sanctions.”). The circuits are split on what level of culpability is required not only for terminating sanctions, but also for the adverse inference. See Spencer, *supra* note 30, at 2018-19 (noting some circuits issue harsh sanctions based on some culpability, while others require bad faith); see also *supra* note 2 (discussing circuit split regarding whether negligence or greater culpability required before adverse inference issued).

32. See *supra* note 2; see also Lauren R. Nichols, Notes, *Spare the Rod, Spoil the Litigator? The Varying Degrees of Culpability Required for an Adverse Inference Sanction Regarding Spoliation of Electronic Discovery*, 99 KY. L.J. 881, 885-91 (2011) (contrasting circuits allowing inference for negligence with circuits requiring higher culpability). Those circuits that require something more than negligence vary in their descriptions of what level of culpability on behalf of the spoliator is necessary before the inference may be issued. See Nichols, *supra*, at 886 n.47 (recognizing precise terminology describing culpable conduct varies by courts).

33. See *Morris v. Union Pac. R.R.*, 373 F.3d 896, 900-01 (8th Cir. 2004) (recognizing adverse inference instruction “brands one party as a bad actor”). “An adverse inference instruction is a powerful tool in a jury trial. . . . It necessarily opens the door to a certain degree of speculation by the jury, which is admonished that it may infer the presence of damaging information in the unknown contents of an erased audiotape.” *Id.*; see also Rachel K. Alexander, *E-Discovery Practice, Theory, and Precedent: Finding the Right Pond, Lure, and Lines Without Going on a Fishing Expedition*, 56 S.D. L. REV. 25, 82-83 (2011) (discussing courts’ willingness to issue inference despite prejudicial effect on spoliator); James T. Killelea, Notes, *Spoliation of Evidence: Proposals for New York State*, 70 BROOK. L. REV. 1045, 1060-61 (2005) (exploring potential prejudicial effect on jury after hearing evidence of spoliation).

34. See *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 75 (S.D.N.Y. 1991) (“It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently.”); *Farley Metals, Inc. v. Barber Colman Co.*, 645 N.E.2d 964, 968 (Ill. App. Ct. 1994) (recognizing dismissal appropriate for negligent spoliation when other party disadvantaged by loss); *Hamann v. Ridge Tool Co.*, 539 N.W.2d 753, 756-57 (Mich. Ct. App. 1995) (“Whether the evidence was destroyed or lost accidentally or in bad faith is irrelevant, because the opposing party suffered the same prejudice . . . .”); see also Bell et al., *supra* note 31, at 800 (proposing judges focus solely on prejudice to nonspoliator, disregarding intent of spoliator).

35. See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 532 (D. Md. 2010) (“Spoliation of evidence causes prejudice when, as a result of the spoliation, the party claiming spoliation cannot present ‘evidence essential to its underlying claim.’” (quoting *Krumwiede v. Brighton Assocs., L.L.C.*, No. 05 C 3003, 2006 WL 1308629, at \*10 (N.D. Ill. May 8, 2006))). Only when the nonspoliating party cannot prove its case without the spoliated evidence or expert testimony may dismissal be appropriate. See Phoebe L. McGlynn, Note, *Spoliation in the Product Liability Context*, 27 U. MEM. L. REV. 663, 666 (1997) (discussing liability for spoliation).

or bad-faith act.<sup>36</sup>

In *Bull v. United Parcel Service, Inc.*, the Third Circuit addressed whether the plaintiff's actions constituted spoliation and, if so, whether such spoliation was deserving of dismissal with prejudice, when the plaintiff at first failed to produce the evidence, and then produced a copy instead of the original.<sup>37</sup> In answering the former, the court equated nonproduction with destruction, and reaffirmed the district court in finding that spoliation occurred.<sup>38</sup> To answer the latter, the court laid out its four-factor test evaluating spoliation.<sup>39</sup> As to whether Bull intentionally withheld the original notes from UPS, the court disagreed with the district court's assertion that UPS made "multiple" requests; rather, the court focused on UPS's lackluster and indirect attempts to secure the originals.<sup>40</sup> Further, despite the exchange between Bull, the judge, and her attorney, inquiring into the location of the original notes, the court did not find intent as easily as the district court.<sup>41</sup> While the Third Circuit agreed with the

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36. See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 515 (D. Md. 2010) ("Faced with bad conduct but minimal prejudice, courts are understandably reluctant to impose the most severe sanctions, especially case-dispositive ones."); *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 647 (S.D. Tex. 2010) (issuing adverse inference for bad-faith spoliation resulting in minimal prejudice); see also Anthony C. Casamassima, Comment, *Spoliation of Evidence and Medical Malpractice*, 14 PACE L. REV. 235, 244-45 (1994) ("Sanctions may be imposed even for inadvertent spoliation if the victim is severely prejudiced; conversely, no or mild sanctions may be imposed for intentional misconduct resulting in no prejudice to the opposing party."). Although, if no real prejudice results from the spoliation, the need for sanctions to remedy an evidentiary imbalance decreases, and judges must still address the punitive rationale behind spoliation. See Rachel L. Sykes, Comments, *A Phantom Menace: Spoliation of Evidence in Idaho Civil Cases*, 42 IDAHO L. REV. 821, 842 (2006) (claiming deterrence and punitive rationales of doctrine ill-served when less harsh sanctions issued).

37. 665 F.3d at 73.

38. *Id.* Because nonproduction has the same practical effect as destruction of the evidence—in that the nonspoliating party is disadvantaged in trying to prove its claim—the court found spoliation. *Id.* Although Bull produced copies of the documents in question during discovery, nonproduction of the originals constituted spoliation because it prevented UPS from determining the authenticity of the documents. *Id.*

39. *Id.* The court considered whether the evidence was within the spoliator's control, the relevance to claims or defenses in the case, whether actual suppression or withholding of evidence occurred, and whether the duty to preserve was reasonably foreseeable to the party at the time of spoliation. *Id.* The court quickly dispensed with the first two factors, control and relevance, because Bull acknowledged her control over the evidence on the stand, and the evidence related to Bull's capacity to work, a central issue in the case. *Id.* at 74.

40. *Id.* at 74-76. The court also noted the district court's error in inferring that Bull was put on notice to produce the originals, because UPS challenged the authenticity of the copies she produced; it is Bull's counsel, and not the plaintiff herself, that should assess what "evidence best serves the case." *Id.* at 76.

41. 665 F.3d at 76. The district court inferred Bull's intentional withholding of evidence from the following statement made by her counsel:

"Your honor, I understand what she just said. I've been asking her for the originals since the very beginning when Mr. Bissinger [UPS's counsel] has been asking me for the originals. She just kept telling me that she doesn't have them, she's looked for them but she doesn't—can't find those notes anymore, they don't exist any more [sic]."

*Id.* (alteration in original). The court noted, however, that Bull disputed the attorney's statement, and the attorney moved away from this declaration of making multiple requests of Bull. *Id.* Reasoning that because the record failed to show evidence that UPS "hounded" Bull for the original documents, and that nothing in the

lower court that Bull had a reasonably foreseeable duty to preserve the originals, it determined there was abuse of discretion in ruling that Bull intentionally withheld the original documents from UPS.<sup>42</sup>

Although the court conceded that the district court acted within its discretion in determining that Bull possessed the originals, that they were relevant to the case, and that Bull breached a reasonably foreseeable duty to preserve the documents, it still condemned the lower court's ruling as an abuse of discretion.<sup>43</sup> Mere nonproduction of evidence does not indicate whether the spoliator failed to produce evidence intentionally in bad faith, or simply misplaced the evidence in question.<sup>44</sup> The court evaluated six factors to assess the propriety of dismissal with prejudice.<sup>45</sup> Conceding only that the prejudice incurred by UPS weighed in favor of dismissal, the court summarily dismissed all six factors.<sup>46</sup> Acknowledging that the district court rejected an adverse inference remedy, the Third Circuit stated that it "fail[ed] to see how an adverse inference—though itself a severe sanction—would not have been preferable to a dismissal with prejudice[,] [g]iven that dismissal with prejudice is a remedy of last resort."<sup>47</sup> UPS suffered little prejudice, the court found, negating the need for the harsh sanction of dismissal.<sup>48</sup> Because UPS attempted to cloud the district court's understanding of the record, making "less than candid" representations, the Third Circuit felt it did not deserve to benefit from dismissal with prejudice.<sup>49</sup>

The Third Circuit erred in finding Bull's nonproduction of the doctor's notes

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record indicated Bull knew UPS wanted the original notes rather than copies, the court determined that UPS did not carry its burden of proving Bull intentionally withheld the documents. *Id.* at 74-75.

42. *Id.* The court adopted the test of reasonable foreseeability from the federal circuit, describing the analysis as a "flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry." *Id.* at 77-78 (quoting *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011)).

43. *Id.* at 78-79.

44. *Id.* at 79. The Third Circuit looked at: "(1) the party's personal responsibility; (2) the prejudice to the adversary; (3) a history of dilatoriness; (4) willfulness or bad faith; (5) the availability of alternative sanctions; and (6) the merit of the claim or defense." *Id.* at 80 (quoting *Doe v. Megless*, 654 F.3d 404, 411 (3d Cir. 2011)). Further, it emphasized that "a finding of bad faith is pivotal to a spoliation determination." *Id.* at 79. Therefore, because the record lacked any evidence of intentional withholding on Bull's behalf, the Third Circuit concluded that the district court not only abused its discretion in dismissing with prejudice, but also in finding a punishable act of spoliation. *Id.* Because the lower court grounded its authority to dismiss with prejudice in its inherent power, rather than its statutory authority to sanction for discovery violations, the Third Circuit took extra caution to review any other basis for which dismissal with prejudice may have been appropriate. *Id.*; see also *supra* note 27 (discussing sources of courts' authority to sanction).

45. 665 F.3d at 80; see also *supra* note 44 (explaining factors Third Circuit considered).

46. 665 F.3d at 79-84. The court reasoned that personal responsibility and prejudice weighed in favor of dismissal, while the remaining "four factors—dilatoriness, bad faith, availability of lesser sanctions, and the merits of the underlying claim—weigh against a dismissal." *Id.* at 82.

47. *Id.* at 81-82; see also *supra* notes 29-30 (discussing severity of sanctions).

48. 665 F.3d at 82. The record failed to indicate that UPS was severely impaired because it lacked information; rather, UPS suggested "sanctions short of mistrial (and therefore short of dismissal) were sufficient to address its prejudice." *Id.* at 83.

49. *Id.*

constituted spoliation.<sup>50</sup> Sanctioning a party for failing to produce evidence necessary for trial may appear to fulfill the punitive, remedial, and prophylactic rationales of the spoliation doctrine.<sup>51</sup> However, the punitive rationale focuses less on punishing the spoliator as shifting the risk of erroneous judgment to the party who acted wrongfully.<sup>52</sup> There is no risk of erroneous judgment when the evidence in question has not been lost, destroyed, or altered, nullifying sanctions' risk-shifting intentions.<sup>53</sup> Sanctioning Bull also failed to serve the remedial rationale of the spoliation doctrine; the court repeatedly pointed out that UPS was not harmed by Bull's failure to produce the originals.<sup>54</sup> Moreover, if the lower court takes the Third Circuit's advice on remand and issues an adverse inference sanction, the court will not achieve any additional prophylactic goal not already addressed by the best evidence rule.<sup>55</sup>

The Third Circuit also incorrectly analyzed Bull's intent to withhold evidence.<sup>56</sup> The court began its inquiry by defining spoliation as whether actual suppression or withholding of evidence occurred.<sup>57</sup> Instead of answering this question directly, the court overemphasized UPS's lack of fervor in attempting to obtain the originals.<sup>58</sup> Because UPS's two requests for the originals occurred during pre-litigation communications rather than during formal discovery, the court implied that intentional withholding of evidence may only occur by failing to fulfill a formal discovery request.<sup>59</sup> Bull in fact

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50. *See id.* at 73; *see also supra* note 4 (discussing what, beyond destruction or alteration, may constitute spoliation). The judge should aim to craft the lowest-level sanction that will remedy the harm done, to avoid skewing the truth-seeking process further by overly burdening one party, while overly benefitting the other. *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 534 (D. Md. 2010) (“[I]n fashioning spoliation sanctions, Courts must strive to issue orders that generate light, rather than heat, and without ignoring the magnitude of willful misconduct and prejudice, must fashion remedies that strike the appropriate balance between those that are normative and those that are compensatory.”).

51. *See supra* note 27 (discussing rationales behind sanctioning spoliation).

52. *See West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (describing punitive rationale as shifting risk).

53. *See* 665 F.3d at 72 (noting Bull produced original notes).

54. *See id.* at 83 (acknowledging UPS suggested lesser sanctions, not “crippled” by lack of originals); *see also West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (describing remedial rationale as restoring prejudiced party). Because UPS did not appear to suffer much harm as a result of Bull's failure to produce originals, the remedial rationale of spoliation would not be fulfilled by issuing an adverse inference. *See* 665 F.3d at 83.

55. *See West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (advocating prophylactic rationale as preventing future misconduct); *see also* 665 F.3d at 82 (recommending adverse inference over dismissal); *supra* note 18 (discussing best evidence rule).

56. 665 F.3d at 73-77 (determining Bull did not intentionally withhold originals).

57. *See id.* at 73.

58. *Id.* (“Spoliation occurs where: the evidence was in the party's control; the evidence is relevant to the claims or defenses in the case; there has been actual suppression or withholding of evidence; and, the duty to preserve the evidence was reasonably foreseeable to the party.”).

59. *See id.* at 74 (“[W]e count a total of only two requests by UPS for the original documents in the entire span of this case—dating back to pre-litigation communications—and neither of these inquiries were discovery requests.”). Although a formal discovery request may be necessary when issuing sanctions under the Federal Rules of Civil Procedure, nothing in the court's inherent power to sanction prevents it from doing so absent formal discovery procedures. *See supra* note 27 (discussing inherent and statutory sources of courts'

intentionally withheld evidence; although UPS requested the originals and she possessed them, she did not produce them.<sup>60</sup>

Because the original evidence remained available for use in a future trial on the merits of the claim, the Third Circuit incorrectly advocated use of the adverse inference sanction.<sup>61</sup> The adverse inference is used appropriately, regardless of whether the spoliator's culpability rises higher than negligence, when the nonspoliating party is otherwise irreparably harmed by the lost evidence.<sup>62</sup> Therefore, even in those instances when carelessness results in lost or destroyed evidence, the resulting harm can warrant a judge in instructing the jury to draw conclusions about evidence not available for its evaluation.<sup>63</sup> UPS suffered no such harm here.<sup>64</sup> A proper sanction issued under the court's inherent power would assign attorney's fees and costs for Bull's failure to produce evidence, enable a new trial based on the evidence before the court, and negate the need for sanctions that manipulate the judicial process.<sup>65</sup>

The Third Circuit erred in holding the production of copies constitutes spoliation where the spoliator showed her ability to make the originals available for another trial. Although circuit courts differ on the level of culpability necessary to inflict the adverse inference sanction on the spoliator, the majority agrees that at least two factors must be present: the inability to produce relevant evidence in whole or in part; and some harm to the nonspoliating party. The adverse inference is essentially an evidentiary fabrication, asking or telling the jury to believe that unavailable evidence proves or signifies a particular fact. The jury cannot question the validity of the inference the judge requests it make; rather, the judge, in his sound discretion, must draw this inference based on at least circumstantial evidence that would usher him to such a conclusion. Here, no inference or guesswork is necessary. The evidence exists, and the judicial process should be honored by letting the jury evaluate it—not asking or telling the jury to draw fictional conclusions.

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sanctioning authority).

60. See 665 F.3d at 71-72 (detailing facts of case).

61. *Id.*

62. See *supra* note 2 (highlighting circuit split on culpability required for adverse inference).

63. See *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 780 (2d Cir. 1999) (advocating adverse inference over dismissal to remedy prejudice to defendant). In *West*, because the plaintiff destroyed the tire produced by the defendant, Goodyear was unable to raise a defense to the plaintiff's tort claim. *Id.* Noting the severe prejudice to the defendant, the Second Circuit advocated use of the adverse inference over outright dismissal, noting that this sanction served the rationales behind spoliation doctrine without terminating the claim. *Id.*

64. See 665 F.3d at 83 (noting case hardly "crippled" by Bull's nonproduction of originals).

65. See *id.* at 82 (recommending adverse inference that instructs jury to draw conclusions about missing evidence).