

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RICKY TEEL, Individually and as Personal  
Representative of the Estate of LILLIAN TEEL,  
Deceased,

Plaintiff-Appellant,

v

DORIS MEREDITH,

Defendant,

and

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

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FOR PUBLICATION  
July 2, 2009

No. 280215  
Wayne Circuit Court  
LC No. 06-604695-NO

Advance Sheets Version

Before: Saad, C.J., and Davis and Servitto, JJ.

DAVIS, J. (*dissenting*).

I respectfully dissent. As the majority explains, our system of government allocates the development of new rights to the legislative branch. However, the majority gives inadequate recognition to the judiciary's traditional and proper role of developing new *remedies* for violations of established rights. That distinction is everything at this stage of this case.

“Wherever there is a valuable right and an injury to it, with consequent damage, the obligation is upon the law to devise and enforce such form and mode of redress as will make the most complete reparation.” Cooley, A Treatise on the Law of Torts, § 4, pp 7-8 (J. Lewis ed, 3d ed, 1907), quoting *Foot v Card*, 58 Conn 1, 9; 18 A 1027 (1889), citing *Lynch v Knight*, 9 HL Cas 577 (1861). This principle is not foreign in Michigan. “Where there is a person negligently

injured by another, normally there is recovery therefor. *Ubi injuria, ibi remedium.*” *Williams v Polgar*, 391 Mich 6, 11; 215 NW2d 149 (1974). As applied, our Supreme Court has, in the past, upheld a tort action for destruction of a will—which could not then be proven in probate court—because no applicable statute covered “the distinct wrong of spoliation, or provide a remedy for the varied damages which may result therefrom.” *Creek v Laski*, 248 Mich 425, 430; 227 NW 817 (1929). Our Supreme Court explained that ““whenever the law gives a right or prohibits an injury, it will also afford a remedy,”” irrespective of the existence of any precedent for any specific action necessary to obtain that remedy. *Id.*, quoting 11 C J, p 4.

As noted by my colleagues, a wholly new right must be crafted by the Legislature, but a novel application thereof is within the competence and authority of the courts. ““Where the case is new in principle, the courts have no authority to give a remedy, no matter how great the grievance; but where the case is only new in instance, and the sole question is upon the application of a recognized principle to a new case, it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago.”” Cooley, *supra* at p 9 n 13, quoting *Pavesich v New England Life Ins Co*, 122 Ga 190, 193-194; 50 SE 68 (1905) (additional quotation marks and citation omitted). This general principle has been adopted by our Supreme Court from yet another of Justice Cooley’s treatises, observing that a ““right cannot be recognized until the principle is found which supports it,”” but ““when a right is found, a remedy must follow of course.”” *Harvey v Harvey*, 239 Mich 142, 147; 214 NW 305 (1927) (overruled in part on changed statutory grounds in *Hosko v Hosko*, 385 Mich 39, 44-45; 187 NW2d 236 [1971]), quoting 1 Cooley on Torts (3d ed), p 22.

Relevant to this case, in addition to the spoliation action upheld in *Creek*, Michigan law has long recognized that destruction of evidence by a party to a suit gives rise to a presumption

that the evidence would have been harmful to that party's case. *Pitcher v Rogers' Estate*, 199 Mich 114, 121; 165 NW 813 (1917). If a party knowingly makes it impossible for the other party to prove some injury, "the law will supply the deficiency of proof thus caused by the misconduct of the party by making every reasonable intendment against him, and will give weight and force to every presumption which the nature and extent of the wrong will justify and the circumstances will permit." *Bethel v Linn*, 63 Mich 464, 475; 30 NW 84 (1886). The maxim *omnia præsumentur contra spoliatorem*, "said to be a favorite one of the law," was translated as "all things are presumed against a wrong-doer." *Id.* and n 1.

In *Brenner v Kolk*, 226 Mich App 149; 573 NW2d 65 (1997), the plaintiff was injured in a motor vehicle accident while driving a car borrowed from the defendants. The plaintiff stored the vehicle for a time, then had it demolished, only later to decide to commence suit, alleging that the now-demolished vehicle had been defective. This Court considered "the proper analysis for a trial court to apply when, although no discovery order has been violated, a party has failed to preserve vital evidence." *Id.* at 156. This Court agreed with federal precedent that a rebuttable presumption against the plaintiff would have been simply inadequate, and in the absence of a discovery order violation, there was no applicable court rule, either; the remedy must come from the court's "inherent powers." *Id.* at 157-160. The trial court therefore possessed the inherent power and authority to impose a sanction tailored to prevent the wrongdoer from reaping any benefit from the wrongdoing. *Id.* at 160-161.

Critically, this Court recognized that "[e]ven when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action." *Brenner, supra* at 162, citing *Fire Ins Exch v Zenith Radio Corp*, 103 Nev 648, 651; 747 P2d 911 (1987). It was significant that in

*Brenner* the plaintiff knew that she was contemplating a lawsuit, and that the actions and omissions that resulted in the vehicle's going unpreserved and the defendants' going unaware of the potentially pending suit were intentional. *Brenner, supra* at 162. The Court of Appeals concluded that dismissal had been inappropriate in that case because it was too drastic without the trial court first considering whether lesser sanctions would be sufficient or, at least, placing on the record a finding that dismissal was the only way to "deny plaintiff the fruits of her misconduct." *Id.* at 164. Six years later, this Court reaffirmed the principles set forth in *Brenner* and concluded that, on the facts before it, dismissal was indeed the appropriate sanction for failing to preserve evidence. *Bloemendaal v Town & Country Sports, Inc*, 255 Mich App 207, 211-215; 659 NW2d 684 (2003).

Although the cases in Michigan have, thus far, only addressed spoliation of evidence by litigants, spoliation of evidence is nevertheless *recognized as a legally wrongful act*. In other words, there is *already* a well-established right of a litigant in Michigan to the integrity of evidence in a lawsuit. It follows that the courts are not only empowered, but obligated to provide a remedy for violations of that right.

The harm flowing from spoliation of evidence is, at a minimum, the inability to put on a full claim or full defense. In this case, the harm is much worse. Here, one person died, and another was hospitalized. Because the evidence was allegedly destroyed by an agency that had every reason to expect future litigation, plaintiff cannot proceed to the presentation of proofs on his claims. If the spoliator of evidence is already a party to the relevant litigation, it is straightforward matter for the court to impose a sanction as compensation. But if the spoliator of evidence is *not* a party, the same *way* of compensating for the spoliation is either impossible or unjust: the end result effectively punishes a party that has done nothing wrong. The reason why

this Court should recognize a cause of action for spoliation of evidence is that, where the spoliator is not already a party, there is simply *no other way* to provide a remedy for the invasion of the recognized right to that evidence.

I understand that relatively few other states have recognized a cause of action for spoliation of evidence. See, e.g., the cases enumerated in *Trevino v Ortega*, 969 SW2d 950, 952 n 3 (Tex, 1998), noting that at the time Alaska, New Mexico, and Ohio recognized causes of action for intentional spoliation of evidence; Florida and New Jersey recognized causes of action for negligent spoliation of evidence, and California recognized both. Since *Trevino* was decided, Montana additionally recognized the need for such a cause of action where the spoliator was not a party to the impeded litigation. *Oliver v Stimson Lumber Co*, 1999 MT 328, ¶¶ 31-60; 297 Mont 336, 345-353; 993 P2d 11 (1999). I do find persuasive and significant the reasoning in *Oliver* explaining that, as my own research has shown, the jurisdictions that have rejected a spoliation cause of action have typically done so on the ground that an adequate remedy already existed and in cases where the spoliator was a party to the action. Neither of those conditions applies here, and, in any event, this Court should strive to do justice and correct legally recognized injuries even if no one else has been called upon before to do so in the same manner.

The facts in this case are particularly compelling. Even though the insurer was not a party (and likely could not have been, given that there is no suggestion that the insurer caused the fire), the insurer or its agent had every reason to anticipate future litigation based on the nature of the occurrence and the known injury and loss of life. The insurer acted without notice to the tenants of the apartment. The landlord gave the insurer access. Mrs. Teel had died in the fire and Mr. Teel was hospitalized with injuries from the fire. Furthermore, the insurer had every reason to know that anything under inspection in the apartment would likely be relevant evidence

in impending litigation.<sup>1</sup> Critically, the majority's opinion makes it clear that Michigan law affords no remedy for this wrong unless the insured can pursue an independent action against the insurer.

The majority's analysis places would-be plaintiffs in an impossible situation if evidence is destroyed by a nonparty. There are, indeed, existing mechanisms to deal with the destruction of evidence by another party, but in this case, those mechanisms are unavailable because the injured party *cannot even get into court*. At most, the majority points out that in *some* instances, the injured party may be able to moderate the resulting harm to some extent; but even presuming the existence of criminal sanctions against whomever destroyed the evidence, imposition of those sanctions would not help the injured party bring a now-unavailable lawsuit. If the would-be plaintiff cannot even get into court because the evidence has been destroyed, none of the theoretical "remedies" suggested by the majority would be available. The *only* way to remedy such a harm is to permit this kind of a cause of action.

Furthermore, the majority arrives at a disturbing factual conclusion: that, notwithstanding the fact that Lillian Teel died in the fire and Ricky Teel was in the hospital<sup>2</sup> as a result of the fire, Ricky somehow should have won a race with the insurer of the property to be the first to send an inspector to the property or to have taken steps to preserve the scene. Even if Ricky were not hospitalized, and even if he had been informed that the insurer was sending an

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<sup>1</sup> It is worth noting that, in an action like this, some kind of scienter must be present: the individual who spoils evidence "must have had at least a fair chance of avoiding the infliction of harm before he becomes answerable for such a consequence of his conduct." See Holmes, *The Common Law* 1881, p 163. Thus, a person with no reasonable basis to know that spoiled evidence *was* evidence should not be held to an essentially unknowable duty. Although this may present a proof problem, as could demonstration of damages, such difficulties are routinely dealt with by trial courts as a matter of course.

<sup>2</sup> The inspector stated that he had been advised that Ricky "was medically not competent."

inspector to the property, it is inconceivable that someone who had recently suffered a serious injury and the loss of his wife in a fire should be expected to make the immediate logical deduction that the first order of business would be to preserve the premises from its insurer. At the same time, the majority analyzes the facts and concludes, at least by implication, that no spoliation actually took place. This latter conclusion, if true, would be a matter for the trier of fact, not us. In any event, I would not “hold Allstate liable for the spoliation of such items” outright, but rather hold that plaintiff should have the opportunity to make a claim and present proofs thereof to the trier of fact.

I would hold that, where an individual’s ability to pursue or defend an action has been impaired by a third party’s willful or negligent spoliation of evidence, that individual may pursue a tort action against the spoliator. This would not create any new rights, it would merely provide a means of protecting rights already recognized to exist in the jurisprudence of this state. Although it is the role of the Legislature to craft new rights, it is the role of the courts to ensure—by crafting new remedies if necessary—that people who suffer an invasion of their rights have a meaningful way to be made whole.

I would reverse.

/s/ Alton T. Davis