**Rel: December 7, 2018**

**Notice:** This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter**.

# SUPREME COURT OF ALABAMA

**OCTOBER TERM, 2018-2019**

---

**1170482**

---

**Hartung Commercial Properties, Inc.**

**v.**

**Buffi's Automotive Equipment and Supply Company, Inc.**

**Appeal from Mobile Circuit Court**
**(CV-11-901557)**

BRYAN, Justice.

Hartung Commercial Properties, Inc. ("Hartung"), appeals from a summary judgment entered by the Mobile Circuit Court ("the circuit court") in favor of Buffi's Automotive Equipment

and Supply Company, Inc. ("Buffi's Automotive"). For the reasons set forth herein, we reverse and remand.

Facts and Procedural History

Hartung was formed in early 2003 by Wayne Hartung, and, around that time, Hartung bought a piece of commercial property that had an auto-body collision, repair, and paint shop ("the body shop") on the premises. Wayne also formed Har-Mar Collisions, Inc. ("Har-Mar"), in late 2003 or early 2004 to operate the body shop. Hartung subsequently entered into a lease with Har-Mar pursuant to which Har-Mar leased the body shop. Wayne had a custom-built paint booth installed in the body shop and hired Buffi's Automotive to make the paint booth operational once it was installed. On January 24, 2011, the body shop was completely destroyed by a fire.

On July 8, 2011, Hartung sued Har-Mar, Buffi's Automotive, and several fictitiously named defendants in the circuit court asserting claims of negligence and wantonness related to their alleged roles in causing the fire that destroyed the body shop. Specifically, Hartung alleged that, on or about January 5, 2011, Buffi's Automotive performed repairs to the paint booth located in the body shop that

required "bypassing and/or overriding the safety cutoff and/or control regarding the heating system" of the paint booth; that Har-Mar continued to use the paint booth through January 24, 2011; and that, on or about January 24, 2011, a fire destroyed the body shop as a result of the negligence and wantonness of Har-Mar and Buffi's Automotive. Hartung subsequently amended the complaint to add Ira Lewis as a defendant.

On September 6, 2013, Buffi's Automotive moved for a summary judgment as to all claims pending against it.[1] Buffi's Automotive alleged that, sometime after the fire destroyed the body shop, Hartung ordered what remained of the body shop and all the equipment inside it -- including the paint booth and all its electrical components -- to be demolished without notifying Buffi's Automotive that the body shop was going to be demolished and without giving Buffi's

[1]Buffi's Automotive's motion for a summary judgment indicates (1) that Hartung had filed an amended complaint alleging claims of negligent and wanton entrustment, training, and supervision against Buffi's Automotive, and (2) that Har-Mar had filed cross-claims against Buffi's Automotive alleging claims of negligent and wanton entrustment, training, and supervision. Those pleadings are not included in the record on appeal. However, it appears that Hartung and Har-Mar both alleged that Buffi's Automotive was liable for improper repairs to the paint booth made by Ira Lewis, an agent or employee of Buffi's Automotive.

Automotive the opportunity to inspect the body shop or the paint booth before they were demolished. Buffi's Automotive argued that Hartung allowed the body shop to be demolished even though it believed at that time that Buffi's Automotive had caused the fire; that Buffi's Automotive "was named as a defendant only after the evidence was destroyed"; and that Buffi's Automotive "should have been placed on notice of the claim and allowed to inspect the premises with its own experts prior to destruction of the evidence."

Har-Mar and Hartung filed separate motions opposing Buffi's Automotive's motion for a summary judgment, and they each adopted the arguments made in the other's opposition. See note 1, supra. Citing the fact that the fire scene "had already been inspected by a large group of experts" and that some of the experts who had examined the fire scene had not concluded that the cause or origin of the fire implicated Buffi's Automotive, Har-Mar argued that "Buffi's has offered no showing that with the information and resources available to it ... Buffi's [Automotive's] defense of this case is impaired in any manner by the clearing of the property." Hartung argued that Ira Lewis was "an agent, servant and/or

employee of Buffi's [Automotive]" and that, because Lewis "inspected the fire loss and spoke with various law enforcement and fire experts" before the body shop was demolished, there was no "spoliation problem."

The following evidence was presented to the circuit court. In early January 2011, approximately one week before the fire, Har-Mar telephoned Buffi's Automotive seeking a repair to the paint booth because the "oven" in the paint booth would not turn on. It is undisputed that Lewis came to the body shop that day and that, after speaking on the telephone with the company that had manufactured the paint booth, Lewis determined the cause of the problem in the paint booth. Although Lewis had to order a replacement part for the paint booth, there was evidence indicating that Lewis "hot-wired" the paint booth so that Har-Mar could continue using it until the replacement part arrived. The body shop was destroyed by the fire before Lewis was able to install the part.

One of the insurance companies involved in investigating the fire hired Cam Cope to determine the origin and cause of

the fire.[2] Cope inspected the scene on February 10 and 11, 2011. His initial assessment was that the fire occurred "within the heat exchanger that was used for the painting booth." Cope spoke to Lewis during his investigation, and Lewis told him that he had removed a faulty part from the paint booth and that he, essentially, "hot-wired" that component so Har-Mar could continue using the paint booth. Apparently, based on that conversation, Cope concluded that Lewis's faulty repairs to the paint booth caused the fire. Cope indicated that he believed the fire was caused by some type of electrical failure in the paint booth, but he admitted that he did not have an electrical engineer examine any part of the fire scene and that it was not within his area of expertise to determine exactly which electrical component had failed. Cope testified that he expected either Buffi's Automotive or Har-Mar "to get an electrical person there" and that he made that recommendation to the insurance company that had initially hired him.

---

[2]Although Cope's initial investigation of the fire scene was done at the behest of an insurance company, Wayne later hired Cope to serve as his expert in the underlying litigation.

Lewis went to the body shop the day after the fire, and the manager of the body shop told Lewis that it could not have been the paint booth that caused the fire because the manager had turned off the breakers, i.e., the power, to the paint booth before he left the body shop the night of the fire. Lewis went to the body shop a second time a day or two after the fire to speak with certain individuals who were investigating the cause of the fire. A couple of weeks after the fire, Lewis went to the body shop with a camera because he thought he needed a picture of the breakers in the "off" position, but the breakers had already been removed from the scene. There is no indication in the record that Lewis actually took any photographs of the fire scene.

Once Wayne's insurance companies informed him that their investigation of the fire scene was complete, Wayne hired someone to demolish the body shop and to clear the property. Wayne did not direct anyone to save any part of the paint booth or any electrical components that were still in the body shop. No part of the fire scene was preserved except the breaker box, which had already been removed; however, Wayne did not know where the breaker box was at the time of the

underlying litigation. After the fire scene was cleared, Wayne was left "with a big vacant piece of property" with no structures remaining.

There was undisputed evidence that the fire was investigated by the Mobile Fire Department, the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), Cope, and Cliff Carlisle, who investigated the fire on behalf of an insurance company. Wayne testified that "a lot of pictures were taken" of the fire scene and that he knew that there were pictures of all the electrical components in the paint booth, although he conceded that the components themselves had not been preserved. Wayne testified that the fire marshal believed that the fire began in one of the vehicles parked inside the body shop but that the fire marshal ultimately held that the cause of the fire was undetermined.

Wayne testified that the possibility that Lewis had "hot wired" the paint booth had come to his attention before the body shop was demolished. Wayne also testified that in his last conversation with Lewis after the fire, before the body shop was demolished, he told Lewis that Lewis "did something [he] shouldn't have done and [he] put me out of business."

Buffi's Automotive, through Beth "Buffi" Peter, one of the owners, testified that Buffi's Automotive had no employees and that Buffi's Automotive had not done business with Wayne or Har-Mar since approximately September 2008. Beth stated that an entity known as "Ira Lewis Contracting" performed the repair work to the paint booth in January 2011. However, Lewis testified that he and Beth had been partners working on paint booths for approximately 10 years, that he and Beth shared office space, and that they worked on several jobs together after the fire at the body shop in January 2011. Lewis stated that both he and Beth referred to one another as partners in front of people they did business with and that, if the part needed to fix the paint booth had been delivered on time and was installed, Lewis would have expected to split the profits from that job with Beth. Wayne testified that "there hasn't ever been any separation between Buffi's [Automotive] and Ira, other than the woman's name being Buffi[, i.e., Beth]. We would call Buffi's [Automotive], we would get her and Ira, or her coming by for a bill."

The circuit court conducted a hearing on the motion for a summary judgment on March 7, 2014. At that hearing, counsel

for Hartung argued that Buffi's Automotive had not produced any expert testimony indicating that the information available, which was essentially the reports written and photographs taken by individuals who had investigated the fire, was insufficient for a defense. Buffi's Automotive argued that it was denied the opportunity to hire its own expert to investigate the cause and origin of the fire and that, because of Wayne's actions, it was left with no physical evidence to examine.

On November 4, 2014, the circuit court entered a summary judgment in favor of Buffi's Automotive based on spoliation of the evidence. The circuit court found: (1) that "the evidence leaves no doubt that the evidence destroyed by Hartung and Har-Mar is essential to Buffi's [Automotive's] ... defenses in this case"; (2) that, given that Hartung and Har-Mar believed that Buffi's Automotive and/or Lewis was responsible for the fire, "the importance of preserving the scene should have been readily apparent"; (3) that "[f]undamental fairness dictates that Buffi's [Automotive] ... should have been placed on notice of the claim and allowed to inspect the premises with its own experts prior to the destruction of the evidence"; (4)

that it was "convinced that there exist no alternative sources of the information contained in the destroyed evidence"; and (5) that "[t]here are no other possible sanctions less severe than dismissal that would be effective in this case."[3]

Hartung filed a motion to reconsider the summary judgment, arguing that "countless pages of photographs and documents generated by state, local, and federal agencies more than provide sufficient alternative sources of information for [Buffi's Automotive] to dispute that the fire started with the paint booth." After conducting a hearing, the circuit court, on March 23, 2015, denied Hartung's motion to reconsider. On February 12, 2016, Hartung and Har-Mar filed a second motion to reconsider the summary judgment in favor of Buffi's Automotive. On September 7, 2016, the circuit court denied Hartung and Har-Mar's second motion to reconsider. On January 12, 2018, the circuit court certified the summary judgment in favor of Buffi's Automotive as a final judgment pursuant to

---

[3]The summary judgment was entered as to all claims against Buffi's Automotive filed by both Hartung and Har-Mar. The order did not address Hartung's and Har-Mar's claims against Lewis or Hartung's claims against Har-Mar.

Rule 54(b), Ala. R. Civ. P. Hartung filed a notice of appeal on February 22, 2018.[4]

Standard of Review

> "'In reviewing the disposition of a motion for summary judgment, "we utilize the same standard as the trial court in determining whether the evidence before [it] made out a genuine issue of material fact," Bussey v. John Deere Co., 531 So. 2d 860, 862 (Ala. 1988), and whether the movant was "entitled to a judgment as a matter of law." Wright v. Wright, 654 So. 2d 542 (Ala. 1995); Rule 56(c), Ala. R. Civ. P. When the movant makes a prima facie showing that there is no genuine issue of material fact, the burden shifts to the nonmovant to present substantial evidence creating such an issue. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989). Evidence is "substantial" if it is of "such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." Wright, 654 So. 2d at 543 (quoting West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)). Our review is further subject to the caveat that this Court must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant. Wilma Corp. v. Fleming Foods of Alabama, Inc., 613 So. 2d 359 (Ala. 1993); Hanners v. Balfour Guthrie, Inc., 564 So. 2d 412, 413 (Ala. 1990).'

[4]Har-Mar did not appeal.

> "Hobson v. American Cast Iron Pipe Co., 690 So. 2d 341, 344 (Ala. 1997). Further, in determining whether the summary judgments for the defendants were proper on the ground of spoliation of the evidence, we consider whether the trial court exceeded its discretion in entering the summary judgments. See, e.g., Cincinnati Ins. Co. v. Synergy Gas, Inc., 585 So. 2d 822 (Ala. 1991); Iverson v. Xpert Tune, Inc., 553 So. 2d 82 (Ala. 1989); and Copenhagen Reinsurance Co. v. Champion Home Builders Co., 872 So. 2d 848 (Ala. Civ. App. 2003)."

Vesta Fire Ins. Corp. v. Milam & Co. Constr., 901 So. 2d 84, 88-89 (Ala. 2004).

## Analysis

This Court has evaluated the entry of a summary judgment on the ground of spoliation of the evidence as essentially imposing the sanction of dismissal. See Vesta Fire, supra; see also, e.g., Story v. RAJ Props., Inc., 909 So. 2d 797, 802 (Ala. 2005). In reviewing such a judgment, this Court has approved a trial court's consideration and weighing of five factors in analyzing a spoliation-of-the-evidence issue: "(1) the importance of the evidence destroyed; (2) the culpability of the offending party; (3) fundamental fairness; (4) alternative sources of the information [that would have been available] from the evidence destroyed; and (5) the possible effectiveness of other sanctions less severe than dismissal."

Story, 909 So. 2d at 802-03. Hartung argues that the evidence presented as to the five factors does not support the summary judgment dismissing Hartung's claims against Buffi's Automotive. We agree.

Hartung first argues that "Buffi's [Automotive] failed to show the importance of the evidence [destroyed]. Nowhere in the record does it appear as to why the evidence is important or that [Buffi's Automotive has] an expert testifying to the importance of the lost evidence." Hartung's brief, at 23. Buffi's Automotive presented evidence indicating that every piece of physical evidence relevant to this case was either lost or destroyed. However, although that fact clearly carries some weight, that fact alone is not necessarily decisive. This Court has held that the first factor, the importance of the evidence destroyed, "must be evaluated in the context of the importance of the evidence that was preserved or otherwise available." Vesta Fire, 901 So. 2d at 95 (emphasis added). In that regard, Hartung argues that Buffi's Automotive failed to present evidence that would support a finding in its favor as to factor four, i.e., the inadequacy of "alternative sources of the information"

available to Buffi's Automotive; specifically, the investigations performed by the Mobile Fire Department, ATF, and Cope, which produced "reports, diagrams, photographs and other documents" regarding the cause of the fire and the fire scene. Hartung's brief, at 23-24. Further, Hartung argues, Buffi's Automotive failed to establish that factor three, fundamental fairness, required dismissal of Hartung's claims, particularly in light of the lack of evidence as to factor one and factor four.

After carefully reviewing the record, we agree that Buffi's Automotive failed to present evidence to support a finding in its favor as to factors one, three, and four. We note that Buffi's Automotive had at its disposal several individuals who had investigated the fire and had taken photographs and written reports detailing their findings, and it very well could be that, after deposing those individuals or hiring its own expert, Buffi's Automotive is able to present evidence from which the circuit court could conclude that the available evidence is not an adequate alternative to the destroyed evidence and that it would not be fundamentally fair to allow Hartung's claims to proceed in light of its

destruction of evidence. However, the circuit court was not presented with evidence to support such a conclusion at this stage of the proceedings.

Notably, in each of the three cases Buffi's Automotive primarily relied upon as analogous cases in its motion for a summary judgment and in its appellee's brief before this Court, the defendants presented expert testimony as to the relative importance of the destroyed evidence and the insufficiency of the alternative sources of information available to the non-spoliating party. See Story, 909 So. 2d 797; Capitol Chevrolet, Inc. v. Smedley, 614 So. 2d 439 (Ala. 1993); and Cincinnati Ins. Co. v. Synergy Gas, Inc., 585 So. 2d 822 (Ala. 1991).

In Story, the trial court entered, and this Court affirmed, a summary judgment against the plaintiff based on the plaintiff's spoliation of the evidence. The plaintiff filed a claim against a home builder and other defendants alleging defects in the material used in the construction of the plaintiff's house. Approximately two or three months after he filed his complaint, the plaintiff began extensive repair work on his house. The plaintiff took photographs of the

alleged damage and had an expert inspect his house and prepare a report of his findings before the repairs were made, but the plaintiff did not notify the defendants that he was making repairs to his house. The defendants moved for a summary judgment based on spoliation of the evidence and argued that their experts were unable to investigate the plaintiff's house before the repairs were made; the experts testified, among other things, that they were "unable to determine the extent or cause of the damage to [the plaintiff's] house based on the existing photographs." Story, 909 So. 2d at 803. After discussing the evidence submitted by the defendants that refuted the plaintiff's evidence indicating that the photographs provided a sufficient alternate source of information for the defendants, this Court held that "[t]he trial court had before it evidence indicating that the evidence destroyed was important, if not essential, to the ... defendants' defense," and this Court concluded that the trial court did not exceed its discretion in entering a summary judgment for the defendants on the ground of spoliation of the evidence. 909 So. 2d at 804 (emphasis added).

In Smedley, supra, an insurance company filed a claim against the seller of a vehicle that caught fire as it was being operated by the insurance company's insured. Soon after the fire, the insurance company hired an investigator to determine the cause and origin of the fire; the investigator took photographs of the vehicle and wrote a report detailing his findings. The insurance company had the vehicle destroyed before it filed suit against the seller of the vehicle. The seller's expert testified that the investigator's photographs and report were inadequate for various reasons and that he could not make a determination as to the cause and origin of the fire without inspecting the vehicle. On appeal of a judgment in favor of the plaintiffs, this Court held that the trial court should have dismissed the case based on spoliation of the evidence.

Similarly, in Synergy Gas, supra, another spoliation-of-the-evidence case, the trial court was presented with evidence from an expert hired by the defendant who testified that she was "'unable to draw any conclusions as to the cause of the fire due to [the] lack of preservation of the evidence by the plaintiffs.'" 585 So. 2d at 824. The trial court dismissed

the claims against the defendant, and this Court reversed that judgment only to extent that physical evidence related to one of the plaintiffs' claims had been preserved; however, the judgment was affirmed as to all claims based on evidence that had not been preserved.

Thus, each case relied upon by Buffi's Automotive is distinguishable from the present case in that, in each of those cases, the party seeking the sanction of dismissal presented actual evidence to support its allegations that the evidence destroyed was important or essential to its claims or defense, even in the context of evidence otherwise available, and that the alternative sources of information still available were not an adequate substitute for the destroyed evidence. Further, without any evidence indicating that the alternate sources of information were not an adequate substitute for the destroyed evidence or any evidence indicating the extent of the prejudice Hartung's actions have caused, Buffi's Automotive did not demonstrate that it would be fundamentally unfair to require it to defend against Hartung's claims. See Chancellor v. White, 34 So. 3d 1270, 1274 (Ala. Civ. App. 2008) (holding that, although there was

evidence indicating that the plaintiff was culpable in destroying relevant evidence, the summary judgment in favor of the defendant based on the plaintiff's spoliation of the evidence was due to be reversed because the defendant failed to present any evidence indicating that it would be impossible to determine the extent or cause of any damage to the plaintiff based on photographs and an inspector's report detailing the damage to the plaintiff's house).

Our analysis thus far has touched on the factors related to the importance of the evidence, fundamental fairness, and alternative sources of information. Our review of the evidence in light of the two remaining factors -- culpability of the offending party and the possibility of sanctions less severe than dismissal -- does not convince us that Buffi's Automotive has nevertheless established that it was entitled to the sanction of dismissal. As to the culpability factor, Hartung argues that there was "[n]o evidence ... presented to the trial court that Hartung willfully or maliciously destroyed evidence." Hartung's brief, at 23. However, evidence of malicious intent in the destruction of relevant evidence is not required. "In cases in which parties

destroyed relevant evidence before filing their complaints, our supreme court has considered, as evidence of the factor of culpability, the fact that the parties knew or should have known that litigation would ensue and that the evidence would be relevant to that litigation." Thompson v. Gardner, 889 So. 2d 596, 607 (Ala. Civ. App. 2004) (citing Smedley and Synergy Gas, supra). Compare Vesta Fire, 901 So. 2d at 95 ("[W]illfulness is not shown where the party disposing of an item neither knew or should have know that the item would be key evidence in the case." (citing Wal-Mart Stores, Inc. v. Goodman, 789 So. 2d 166, 176 (Ala. 2000))). In the present case, Wayne conceded that he believed that Lewis, who he alleged was acting on behalf of Buffi's Automotive, was responsible for the fire before he allowed the body shop, including the paint booth, to be demolished. Thus, there was evidence that would support a finding that Wayne appreciated that he was destroying evidence that would be relevant in future litigation, even if he did not destroy the evidence with malicious intent. Nevertheless, in light of the lack of evidence as to factors one, three, and four, we cannot

conclude that Wayne's culpability is in itself sufficient to support the sanction of dismissal of Hartung's claims.

As to the fifth and final factor, the possibility of sanctions less severe than dismissal, this Court has held, in the context of a summary judgment entered in favor of a defendant based on the plaintiff's spoliation of the evidence, "'that the sanction of dismissal is the most severe sanction that a court may apply. ... Dismissal orders must be carefully scrutinized and the plaintiff's conduct must mandate dismissal.'" Vesta Fire, 901 So. 2d at 95 (quoting Iverson v. Xpert Tune, Inc., 553 So. 2d 82, 87 (Ala. 1989)). For the reasons set forth above, the summary judgment in favor of Buffi's Automotive does not pass scrutiny. Absent evidence as to factors one, three, and four, the circuit court could not properly conclude that the sanction of dismissal, as opposed to some lesser sanction, was mandated in the present case. As noted above, Buffi's Automotive might be able to present such evidence on remand. However, based on the record before us at this time, we are simply not convinced that Buffi's Automotive met its burden in this case. This Court has "a long-established and compelling policy objective of affording

litigants a trial on the merits whenever possible." Iverson, 553 So. 2d at 89 (citing Kirtland v. Fort Morgan Auth. Sewer Serv., Inc., 524 So. 2d 600 (Ala. 1988), and Jones v. Hydro-Wave of Alabama, Inc., 524 So. 2d 610 (Ala. 1988)). After considering the evidence presented in light of the five factors set forth in Story, we conclude that the circuit court exceeded its discretion in applying "'the most severe sanction that a court may apply.'" Vesta Fire, 901 So. 2d at 95 (quoting Iverson, 553 So. 2d at 87). Accordingly, the summary judgment must be reversed.[5]

## Conclusion

For the reasons set forth above, the summary judgment in favor of Buffi's Automotive is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Stuart, C.J., and Parker and Main, JJ., concur.

Mendheim, J., concurs specially.

---

[5]Because we are reversing the summary judgment based on Buffi's Automotive's failure to present evidence to support the dismissal of Hartung's claims based on spoliation of the evidence, we pretermit discussion of Hartung's remaining arguments in favor of reversal.

MENDHEIM, Justice (concurring specially).

I write separately to express my concern about the development of some of our precedent as to the pertinent standard of review in a case dismissed on the basis of spoliation of the evidence.

Courts have considered spoliation of evidence in several procedural contexts: "(1) a cause of action in tort (for either intentional or negligent spoliation of evidence); (2) a defense to recovery; (3) an evidentiary inference or presumption; and (4) a discovery sanction." Robert L. Tucker, The Flexible Doctrine of Spoliation of Evidence: Cause of Action, Defense, Evidentiary Presumption, and Discovery Sanction, 27 U. Tol. L. Rev. 67, 67 (1995) (footnotes omitted). In those contexts, this Court has acknowledged the existence of an independent cause of action in tort for spoliation only as to a third party,[6] and we have not

[6]In Smith v. Atkinson, 771 So. 2d 429, 438 (Ala. 2000), this Court noted that "jury charges that presume missing evidence weighs against the spoliator, and discovery sanctions" are "both ... available when spoliation is charged against an opposing party." See also Christian v. Kenneth Chandler Constr. Co., 658 So. 2d 408, 413 (Ala. 1995) ("Although a few jurisdictions have recognized a new independent tort based on spoliation of evidence, the majority of courts considering the issue have declined to adopt such a new cause of action. Moreover, as discussed above, the

addressed spoliation as a defense to recovery outside the context of the sanction of dismissal. Our cases have discussed spoliation in the contexts of an evidentiary inference or presumption and of a discovery sanction. The right to a jury instruction as to an evidentiary inference to be drawn from spoliation has long been acknowledged. In McCleery v. McCleery, 200 Ala. 4, 75 So. 316 (1917), this Court stated regarding an instrument of conveyance that had been destroyed:

> "To state but one of many applications of the rule of the maxim: Against a party who has purposely and wrongfully destroyed documentary evidence that the spoliator knows is pertinent and material to the interest of his opponent, whether an action is then pending or not, a rebuttable evidence presumption arises, or, as some state it, an inference is indulged, unfavorable to the spoliator. ... When the bases for this unfavorable presumption or inference are established without dispute or to the reasonable satisfaction of the jury, the jury is authorized to presume or infer that the instrument was duly executed, whatever the legal requirements to that end, and that the contents thereof was of a character and effect of the utmost favor to the

---

particular facts of this case make it inappropriate for us to consider recognizing a new cause of action [against a party] at this time." (footnotes omitted)). We further noted in Smith that those remedies "are not available to remedy the injustice caused by spoliation when the spoliator is a third party," and we recognized a cause of action against a third party for negligent spoliation of evidence. 771 So. 2d at 438.

> spoliator's adversary and of the utmost disfavor to the spoliator's interest. The rule's inspiration is the result of the common experience and judgment that men will not ordinarily withhold or destroy evidence beneficial to themselves."

200 Ala. at 5-6, 75 So. at 317-18; see also, e.g., May v. Moore, 424 So. 2d 596, 603 (Ala. 1982); cf. Notes on Use to Alabama Pattern Jury Instructions -- Civil § 15.12 (3d ed. 2017)("The instruction [on spoliation, which authorizes a jury to draw an inference against a party who has committed the spoliation,] should not be confused with a situation when the court imposes sanctions against a party for spoliation."). The present case (though couched in terms of a summary judgment), and my concerns, arise out of the context of a discovery sanction for spoliation, particularly the dismissal of a party's claims.

Our cases have sometimes discussed a dismissal as a sanction for spoliation of evidence using the standard of review for a summary judgment, but I am uncertain as to why this Court has concluded that the summary-judgment standard of review is proper in the context of a discovery sanction. Specifically, I note that in Vesta Fire Insurance Corp. v. Milam & Co. Construction, 901 So. 2d 84 (Ala. 2004), the trial court entered summary judgments for the defendants based on

its "determination that the plaintiffs' conduct had resulted in spoliation of the evidence." 901 So. 2d at 88. After stating the standard of review applicable to an appellate court's review of a summary judgment, this Court stated:

> "Further, in determining whether the summary judgments for the defendants were proper on the ground of spoliation of the evidence, we consider whether the trial court exceeded its discretion in entering the summary judgments. See, e.g., Cincinnati Ins. Co. v. Synergy Gas, Inc., 585 So. 2d 822 (Ala. 1991); Iverson v. Xpert Tune, Inc., 553 So. 2d 82 (Ala. 1989); and Copenhagen Reinsurance Co. v. Champion Home Builders Co., 872 So. 2d 848 (Ala. Civ. App. 2003), all discussed infra."

901 So. 2d at 89.

I note that two of the cases relied upon by this Court in support of the foregoing proposition from Milam & Co. were not cases addressing the issue whether summary judgment was proper based on spoliation of evidence, i.e., whether there was no disputed issue of material fact and a party was entitled to judgment as a matter of law. Instead, those cases addressed the issue whether a trial court had erred by dismissing claims as a discovery sanction pursuant to Rule 37, Ala. R. Civ. P. At issue in Cincinnati Insurance Co. v. Synergy Gas, Inc., 585 So. 2d 822 (Ala. 1991), was "[t]he ... question of what sanctions, if any, are appropriate where the plaintiff permits

or allows the apparatus made the subject of a lawsuit to be lost or destroyed prior to the filing of the complaint." 585 So. 2d at 824-25. This Court addressed the issue whether, pursuant to Rule 37, the trial court had exceeded its discretion in dismissing all of the plaintiff's claims as a discovery sanction for the destruction of pertinent evidence. This Court found "no abuse of discretion on the trial court's part in dismissing the plaintiffs' claims that were based on the alleged malfunction of those components of the gas system that were destroyed by the plaintiffs." 585 So. 2d at 827.

Likewise, Iverson v. Xpert Tune, Inc., 553 So. 2d 82 (Ala. 1989), involved the review of a trial court's order of dismissal entered as a discovery sanction pursuant to Rule 37, not the review of a summary judgment. The trial court in Iverson conducted an evidentiary hearing as to whether dismissal was proper for the plaintiff's alleged spoliation of evidence, and this Court even noted the application of the ore tenus rule to its review of the trial court's judgment of dismissal, a rule that does not apply to a summary judgment. See Iverson, 553 So. 2d at 86. This Court noted that "the trial court is vested with broad and considerable discretion in controlling the discovery process ..., including the

authority to make such rulings as are necessary to protect the integrity of the discovery process." 553 So. 2d at 87. We further noted that, "deeply rooted in the common law is the court's power to manage its affairs in order to achieve the orderly and expeditious disposition of cases, including the authority to impose reasonable and appropriate sanctions for failure to comply with discovery." Id. It concluded: "The choice of discovery sanctions is within the trial court's discretion and will not be disturbed on appeal absent gross abuse of discretion, and then only upon a showing that such abuse of discretion resulted in substantial harm to appellant." 553 So. 2d at 87 (citations omitted).

The third case relied on in Milam & Co., Copenhagen Reinsurance Co. v. Champion Home Builders Co., 872 So. 2d 848 (Ala. Civ. App. 2003), did address the issue whether a summary judgment had been properly entered on the ground of spoliation, but, in so doing, the Court of Civil Appeals quoted from its earlier decision in Vesta Fire Insurance Corp. v. Sears, Roebuck & Co., 705 So. 2d 382 (Ala. Civ. App. 1996) (also a summary-judgment case), which in turn was relying on this Court's decision in Cincinnati Insurance Co. See Copenhagen Reinsurance Co., 872 So. 2d at 852-53 ("Under

similar facts in Vesta Fire Insurance Corp. v. Sears, Roebuck & Co., 705 So. 2d 382 (Ala. Civ. App. 1996), this Court stated: 'The facts of this case are indistinguishable from the facts in Cincinnati Insurance Co. v. Synergy Gas, Inc., 585 So. 2d 822 (Ala. 1991).'"). As noted above, however, Cincinnati Insurance Co. addressed the issue whether spoliation would support the sanction of dismissal under Rule 37, not whether a summary judgment might be permissible on the ground of spoliation. In addition to relying on Cincinnati Insurance Co. (a Rule 37 sanctions case) the Sears, Roebuck & Co. court relied on Capitol Chevrolet, Inc. v. Smedley, 614 So. 2d 439 (Ala. 1993). But, like Cincinnati Insurance Co., Capitol Chevrolet addressed the issue whether the sanction of dismissal was proper, and the Capitol Chevrolet Court relied on Iverson (a Rule 37 sanctions case) and Cincinnati Insurance Co. (a Rule 37 sanctions case) in addressing the spoliation issue. Although the Capitol Chevrolet Court made no reference to Rule 37, that is likely because no discovery order had been issued in that case. 614 So. 2d at 442-43 ("[I]n this case no court had ordered discovery. Rather, the destruction of evidence occurred 11 months before this action was filed. ... The stark result is

that relevant evidence was irreparably lost by the actions of Auto Owners. We conclude that the trial court abused its discretion in not dismissing the case."). Thus, Capitol Chevrolet appears to reflect an expansion of the discovery-sanction rule to situations arising outside the context of a motion filed pursuant to Rule 37; Capitol Chevrolet did not involve a summary judgment.

Based on the foregoing, I am concerned about the propriety of using our precedent reviewing a judgment of dismissal as a sanction for spoliation as a review of a summary judgment. Where a sanction of dismissal is imposed for spoliation, it appears to me that the proper standard of review is the standard discussed in Iverson and that the five factors this Court has approved in Story v. RAJ Properties, Inc., 909 So. 2d 797 (Ala. 2005), for consideration as to spoliation should be reviewed in light of that standard. Indeed, Story all but approves of that approach without attempting to clarify that using the summary-judgment standard is improper. 909 So. 2d at 802 (stating, in response to Story's argument that issues of material fact precluded the entry of a summary judgment: "The issue Story asserts to be in dispute ... is not one requiring a determination by the

factfinder; it does not go to the merits of his case. Instead, the issue Story says is in dispute goes to whether the sanction of a summary judgment entered on the ground of spoliation of the evidence was appropriate. That determination is one for the trial court to make.").

Notwithstanding my concern, Buffi's Automotive Equipment and Supply Company, Inc., filed its motion for a summary judgment using the path this Court has approved in previous cases, and neither party has requested that we clarify or overrule our precedent on this issue. Also, because I agree with the main opinion that Buffi's Automotive failed to satisfy its evidentiary burden as to the five factors at issue, the judgment of dismissal is due to be reversed, regardless of which standard should apply in the present case. Accordingly, I concur.