

101.39 EVIDENCE - SPOILIATION BY A PARTY.¹

When evidence has been received which tends to show that (*describe despoiled evidence*) was (1) in the exclusive possession of the [plaintiff] [defendant], (2) has been [lost] [misplaced] [suppressed] [destroyed] [corrupted] and (3) that the [plaintiff] [defendant] had notice of the [plaintiff's] [defendant's] [potential]² [claim] [defense], you may infer, though you are not compelled to do so,³ that (*describe despoiled evidence*) would be damaging to the [plaintiff] [defendant].⁴ You may give this inference such force and effect as you determine it should have under all of the facts and circumstances.⁵

[The inference is permitted even in the absence of evidence that the [plaintiff] [defendant] acted intentionally, negligently or in bad faith.]⁶

[No inference is permitted if you find that [(*describe despoiled evidence*) was equally accessible to both parties] [there is a fair, frank and satisfactory explanation for the failure to produce the (*describe despoiled evidence*)].⁷

1. "[T]he well-established principle of 'spoliation of evidence'" is described as follows: "where a party fails to introduce in evidence documents that are relevant to the matter in question and within his control . . . there is . . . an inference that the evidence withheld, if forthcoming, would injure his case." *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 183, 527 S.E.2d 712, 715 (2000), *review denied*, 352 N.C. 357, 544 S.E.2d 563 (2000) (citations omitted).

2. While notice of the importance of certain documents may ordinarily be derived from institution of suit, "the obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced," and the "spoliator [must] do . . . what is reasonable under the circumstances." *McLain*, 137 N.C. App. at 187, 527 S.E.2d at 718 (citations omitted).

3. See *Holloway v. Tyson Foods, Inc.*, 193 N.C. App. 542, 547, 668 S.E.2d 72, 75 (2008) ("[E]ven if a party presents evidence of spoliation sufficient to give rise to an adverse inference, that inference 'is permissive, not mandatory.'" (citation omitted)).

4. "[T]he inference does not . . . 'shift the burden of proof so as to relieve the party upon whom it rests of the necessity of establishing a *prima facie* case[.]'" *Panos v. Timco Engine Ctr., Inc.*, ___ N.C. App. ___, ___, 677 S.E.2d 868, 876 (2009) (citation omitted). Because the inference "is permissive, not mandatory[,]" . . . it is improper to base the grant or denial of a motion for summary judgment on evidence of spoliation. It is not an issue to be decided as a matter of law, and cannot, by its mere existence, be determinative of a claim." *Id.* at ___, 677 S.E.2d at 876-77 (citations and internal quotations omitted).

5. *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 527, 613 S.E.2d 274, 281 (2005); *McLain*, 137 N.C. App. at 184, 527 S.E.2d at 716-17.

6. *Arndt*, 170 N.C. App. at 527, 613 S.E.2d at 281.

7. See *McLain*, 137 N.C. App. at 184, 527 S.E.2d at 716.