EXAMINERS' ANALYSIS OF QUESTION NO. 3

The examinee should recognize that, rather than a matter of substantive evidentiary proof, the fact that Perry and his lawyer knew, or should have known, they would bring a negligence claim against Dolen for failure to properly maintain the tires on his vehicle, yet failed to take any steps to notify Dolen of the need to preserve or inspect the tires, may create a spoliation of evidence issue for the court to grapple with.

I. Spoliation and the Preservation Duty

Initially, because this is a negligence case, the examinee can receive credit for recognizing the elements of a negligence claim. "To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Loweke v Ann Arbor Ceiling & Partition Co,* 489 Mich 157, 162; 809 NW2d 553 (2011). Likewise, because the procedural context is a motion to dismiss, the examinee should set forth the governing standards for such a motion. The general summary disposition rules of MCR 2.116 do not apply to dismissals as a sanction, Brenner v *Kolk,* 226 Mich App 149, 155; 573 NW2d 65 (1998), so the test to apply is simply whether the sanction was warranted under the facts and law.

Turning to the issue raised by the call, the examinee should recognize (1) the general rule that a party should not destroy evidence it knows to be relevant (or reasonably should), (2) that, because of the preservation duty, a failure to preserve crucial evidence can constitute spoliation even if the spoliation results from simple negligence rather than a deliberate act, and (3) that the preservation duty extends even to a party who is not in possession of the evidence at issue. The examinee should also recognize that the trial court's authority to sanction parties for spoliation is derived from the trial court's inherent powers.

"A trial court has the authority, derived from its inherent powers, to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation is

commenced." *Bloemendaal v Town & Country Sports Ctr, Inc,* 255 Mich App 207, 211 (2002). "[S]poliation may occur by the failure to preserve crucial evidence, even though the evidence was not technically lost or destroyed." *Id.* at 212. "Furthermore, regardless of whether evidence is lost as the result of a deliberate act or simple negligence, the other party is unfairly prejudiced because it is unable to challenge or respond to the evidence even when no discovery order has been violated." *Brenner v Kolk,* 226 Mich App 149, 160 (1997). "Even 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." *Id.* at 162. A party who is not in possession of the evidence, but is aware that the evidence is crucial to imminent litigation, has a duty to notify the party in possession of such evidence that it must be preserved or inspected before being discarded or destroyed. *Id.* ("At a minimum, plaintiff should have given defendants notice that they should preserve or inspect the tires and seat belt because she was contemplating a lawsuit.").

Here, at the time the vehicle was scrapped, Perry was aware that there would be a later lawsuit. Perry also was, or should have been, aware that the vehicle, and its tires, would be crucial evidence. Nevertheless, Perry failed to inform Dolen or Dolen's insurance company that they should preserve or inspect the vehicle, particularly its tires. Thus, the examinee should conclude that, because Perry failed to abide by his duty to notify Dolen regarding the potential for spoliation, Perry may be subject to sanctions.

The examinee may receive extra points by recognizing that, while Dolen's insurer, as a sophisticated participant in our courts of law, may have recognized the potential for Perry to consult a lawyer or subsequently bring a lawsuit alleging negligence by Dolen, it had no duty, statutory or in common law, to preserve the vehicle and its tires in anticipation of litigation, and under the facts here, made no promise to maintain the vehicle, and had no special relationship that would warrant the imposition of a duty to preserve the evidence. *Teel v Merideth,* 284 Mich App 660, 672-673 (2009). Thus, while Dolen through his insurer may have had the opportunity to preserve the vehicle and its tires in light of the potential for litigation, Dolen had no such duty and therefore, faces no sanctions for failing to do so.

II. Proper Sanction

The examinee should recognize that the appropriate sanction for spoliation falls within the sound discretion of the trial court. See *Bloemendaal,* 255 Mich App at 212, 214; see also *Citizens Ins Co of America v Juno Lighting, Inc,* 247 Mich App 236, 242 (2001) ("A trial court's imposition of sanctions for failure to preserve evidence will be reversed only upon a finding that there has been a clear abuse of discretion.") (quotation marks and citation omitted). The examinee should further recognize that "a trial court properly exercises its discretion when it carefully fashions a sanction that denies the party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence." See *Bloemendaal,* 255 Mich App at 212.

The examinee should note that, although dismissal is an appropriate sanction in certain instances, see, e.g., *id.* at 215, "[d]ismissal is a drastic step that should be taken cautiously," *Brenner,* 226 Mich App at 163. "Before imposing the sanction of dismissal, the trial court must carefully evaluate all available options on the record and conclude that dismissal is just and proper," and the trial court should consider whether a "lesser appropriate sanction" would suffice, such as "the exclusion of evidence that unfairly prejudices the other party or an instruction that the jury may draw an inference adverse to the culpable party from the absence of the evidence." *Bloemendaal,* 255 Mich App at 212, 214 (internal citation omitted). The focus of the sanction inquiry should be what steps, if any, are necessary to avoid unfair prejudice to one party arising out of spoliation caused by another party. *Brenner,* 226 Mich App at 163-164.

The examinee should recognize that, given the discretionary nature of the sanction remedy, the trial court might reasonably reach a number of different conclusions. Factors in favor of dismissal would include that Perry and his lawyer knew their theory of proximate cause was the bald tires, and it would have been very simple to preserve the tires and avoid having them scrapped by making a request to Dolen or his insurer to preserve the tires. But, despite the ease with which the request could have been made, no request was made despite the knowledge there would be a later lawsuit.

On the other hand, an examinee could argue that, although Dolen's insurer had no *duty* to preserve evidence, see Teel, *supra,* 284 Mich App at 672-673, nevertheless, Dolen's insurer had access to the vehicle for two months, and had more than ample opportunity to take pictures or otherwise anticipate that, because there had been an automobile accident, Perry would have at a minimum submitted claims for medical bills, and possibly brought a claim of some kind against Dolen as the owner of the vehicle. Thus, while it would not be appropriate to sanction Dolen for failing to preserve evidence, it may be appropriate not to dismiss Perry's action against Dolen due to Perry's failure to preserve evidence because Dolen's insurer had the opportunity to take some action to preserve the evidence or at least take pictures and keep a record of the condition of the vehicle. The examinee might also recognize that, in Dolen's defense, there are multiple possible theories of liability that may be pursued following any automobile accident, and it would be unreasonable to expect the insurer to try to anticipate each cause of action that could be pursued and investigate each possible defense without some kind of notice from the putative plaintiff as to a theory of a cause of action.

So long as the examinee recognizes the appropriate legal framework, and analyzes the question within that framework, the examinee's ultimate conclusion regarding the spoliation sanction is largely immaterial. The examinee may rationally conclude that (1) no sanction is necessary or appropriate, because both parties had the opportunity to avoid spoliation, (2) dismissal of Perry's suit is appropriate, despite the fact that it is a "drastic" measure, because Perry failed to timely notify Dolen of the imminent litigation and the fact that the tires would be crucial evidence, (3) some less drastic measure is appropriate in favor of either party (such as the exclusion of other evidence regarding whether the tires were bald), or (4) Dolen's motion should be denied because it was improperly framed as a motion for summary disposition rather than a motion for spoliation sanctions.