DISTRICT COURT, WELD COUNTY, COLORADO 901 9th Avenue, P.O. Box 2038, Greeley, CO 80632 (970) 475-2400	DATE FILED: July 7, 2016 11:19 AM CASE NUMBER: 2015CV30425
Plaintiff: **My Roofer, Inc**. *v.* *Defendant:* **State Farm Fire and Casualty Company**	▲ COURT USE ONLY ▲ Case No. 2015 CV 30425 Division 4

Order on Defendant State Farm's Motion in Limine re: Spoliation of Evidence

The defendant, State Farm, moves for an order providing that State Farm is entitled to an adverse inference instruction to be given at trial as a remedy for the plaintiff's intentional destruction of physical evidence related to the roof decking that the plaintiff, My Roofer, alleges needed to be replaced. My Roofer concedes that the roof decking was destroyed when it was thrown in the trash as part of its routine procedures, but objects to the adverse inference instruction on the grounds that My Roofer simply did what it would do in every situation—so it was not "willful" destruction.

I am unpersuaded by My Roofer's argument. A trial court may give the jury an adverse inference instruction if it finds that a party has willfully destroyed evidence and that the evidence would have been relevant and introduced into evidence had it been available. *Aloi v. Union Pacific Railroad Corp.*, 129 P.3d 999, 1004-05 (Colo. 2006). And the failure to preserve evidence may be deemed willful if it knew that another party intended to file suit and that the evidence would be relevant to litigation, but nonetheless destroyed the evidence. *See id.* at 1003.

In *Castillo v. Chief Alternative, LLC*, 140 P.3d 234 (Colo. App. 2006), a division of the Court of Appeals extended the principle in *Aloi* to pre-complaint destruction of evidence. *Id.* at 236. It concluded that destruction of evidence before a complaint has been filed could be deemed willful "so long as the party knew or should have known that the destroyed evidence was relevant to pending, imminent, or reasonably foreseeable litigation." *Id.* The *Castillo* division described three circumstances in which courts typically impose sanctions for pre-complaint destruction of evidence: (1) "where a clear showing has been made that the defendant knew litigation would be filed and willfully destroyed evidence it knew or should have known would be relevant to the case"; (2) where a party destroys evidence after litigating the first lawsuit in a series of lawsuits before another lawsuit has been filed; and (3) where the plaintiff in an upcoming lawsuit destroys the evidence. *Id.* at 237 (citing Jamie S. Gorelick et al., *Destruction of Evidence* § 3.12 (1989) (noting that imposition of sanctions for pre-complaint destruction of evidence is rare)).

A court may give a spoliation instruction to serve both punitive and remedial purposes. *Pfantz v. Kmart Corp.*, 85 P.3d 564, 567 (Colo. App. 2003). "With respect to the inference's remedial purpose, it does not matter whether a party destroyed evidence in bad faith or whether a party destroyed evidence willfully because, regardless of the destroying party's mental state, the opposing party will suffer the same prejudice." *Aloi*, 129 P.3d at 1003.

It is undisputed here that My Roofer destroyed the roofing material it had replaced by throwing it away. And My Roofer alleges in its *Complaint* that its agent, Kyle Larson, (1) contacted State Farm's adjuster, Jared Howerton, about replacing the roof decking and that (2) the adjuster requested to be present to observe the damage to the roof decking. Larson testified at this deposition in

this case that he had been involved in more than ten insurance disputes before this case on behalf of prior My Roofer customers. Larson had also been a plaintiff in a case involving a dispute with an insurance company over providing coverage for roofing repairs. *See Kyle W. Larson Enterprises, Inc. v. Allstate Ins. Co.*, 2012 COA 160.

With this background, I am satisfied that the plaintiff (through its agent) could have reasonably foreseen that a lawsuit likely would be filed when it destroyed the roofing materials, and that the roof decking it threw away would be relevant to a contested issue—namely, whether the decking needed to be replaced, as My Roofer alleges. Simply because this destruction was part of My Roofer's routine procedures does not mean that the destruction was not willful. *See Aloi*, 129 P.3d at 1003 (affirming adverse inference instruction where documents were destroyed under a corporation's 92–day document retention policy). Nor does it mitigate the prejudice to State Farm—which is unable to examine the roof decking even though its adjuster requested to do so before the decking was destroyed.

Accordingly, *Defendant State Farm's Motion in Limine re: Spoliation of Evidence* is GRANTED and an adverse inference instruction will be given.

So Ordered:
July 7, 2016

BY THE COURT:

Todd Taylor
District Court Judge

DISTRICT COURT SEAL WELD COUNTY, COLORADO