(SC 17310)

SULLIVAN, C. J., dissenting. I disagree with part I B of the majority opinion, in which the majority concludes that this state should recognize a tort for intentional first party spoliation of evidence when, as a result of the spoliation, the plaintiff is unable to establish a prima facie case in the underlying action. The majority concludes that recognition of this tort is necessary to compensate victims of spoliation and to deter future spoliation. I would conclude that existing remedies are sufficient to deter and punish acts of spoliation and that it is against public policy to provide compensation for damages when liability cannot be established.

The majority of jurisdictions that have considered whether to recognize a tort for first party spoliation of evidence have concluded that such claims are not cognizable.[1] The California Supreme Court's analysis in *Cedars-Sinai Medical Center* v. *Superior Court*, 18 Cal. 4th 1, 8, 954 P.2d 511, 74 Cal. Rptr. 2d 248 (1998), is typical of these cases. The court in that case recognized that the crux of the question before it was "whether a tort remedy for the intentional first party spoliation of evidence would ultimately create social benefits exceeding those created by existing remedies for such conduct, and outweighing any costs and burdens it would impose." Id.; see also *Perodeau* v. *Hartford*, 259 Conn. 729, 759, 792 A.2d 752 (2002) (balancing social costs against social benefits in considering whether to recognize tort of negligent infliction of emotional distress in ongoing employment context). The court noted that "[t]hree concerns in particular stand out here: the conflict between a tort remedy for intentional first party spoliation and the policy against creating derivative tort remedies for litigation-related misconduct; the strength of existing nontort remedies for spoliation; and the uncertainty of the fact of harm in spoliation cases." *Cedars-Sinai Medical Center* v. *Superior Court*, supra, 8.

After reviewing the cases in which it repeatedly had refused to create new torts to remedy litigation related misconduct; id., 9; and the existing nontort remedies for spoliation, including evidentiary inferences, discovery sanctions, procedural sanctions, attorney disciplinary sanctions, and criminal penalties; id., 11–13; the California court concluded that "existing remedies are generally effective at deterring spoliation." Id., 13. The court also concluded that "in a substantial proportion of spoliation cases the fact of harm will be irreducibly uncertain." Id. " 'It would seem to be sheer guesswork, even presuming that the destroyed evidence went against the spoliator, to calculate what it would have contributed to the plaintiff's success on the merits of the underlying

lawsuit. . . . The lost evidence may have concerned a relevant, but relatively trivial matter. If evidence would not have helped to establish [the] plaintiff's case an award of damages for its destruction would work a windfall for the plaintiff.' " Id., 14, quoting *Petrik* v. *Monarch Printing Corp.*, 150 Ill. App. 3d 248, 260–61, 501 N.E.2d 1312 (1986). Accordingly, the court concluded that, although "the intentional spoliation of evidence by a party to the litigation to which it is relevant is an unqualified wrong . . . it is the rare case in which a tort remedy for an intentionally caused harm is not appropriate." *Cedars-Sinai Medical Center* v. *Superior Court*, supra, 18 Cal. 4th 17.

Like California, Connecticut disfavors derivative torts.[2] In addition, in Connecticut, as in California, the rules of evidence, procedure and attorney conduct and the criminal law provide a wide range of sanctions for spoliation. The majority does not dispute these facts and, indeed, apparently accepts the reasoning of the court in *Cedars-Sinai Medical Center* as it applies to cases in which the plaintiff is the spoliator or in which the defendant is the spoliator and the plaintiff can establish a prima facie case in the underlying action. The majority concludes, however, that when a plaintiff is unable to meet his burden of production as a result of the defendant's bad faith destruction of evidence, the plaintiff should be able to bring a spoliation action against the defendant. I disagree.

As a preliminary matter, I note that there simply is no need to reach this issue in the present case because, contrary to the majority's statement, the plaintiff, Leandro Rizzuto, has not alleged that he was unable to make a prima facie case in his product liability action as the result of the destruction of the ladder by the defendants, Davidson Ladders, Inc.,[3] and Home Depot, Inc. Rather, the plaintiff alleged in his complaint that his "case has been damaged to the point where no expert can *conclusively* establish the mechanism of the defect which caused the plaintiff's injuries" and, therefore, he "*may* not be able to prove his case . . . ."[4] (Emphasis added.) Similarly, in his memorandum in opposition to the defendants' motion to strike the spoliation claims, the plaintiff did not suggest that he was unable to make out a prima facie case, but argued only that, under *Beers* v. *Bayliner Marine Corp.*, 236 Conn. 769, 675 A.2d 829 (1996), if a *hypothetical* plaintiff were unable to establish a prima facie case, then that plaintiff would have no remedy.[5] It is hardly surprising that the plaintiff failed either to allege or to argue to the trial court that he could not make out a prima facie case because: (1) he has never argued that the tort of first party intentional spoliation should be limited to cases in which the plaintiff cannot meet his burden of production; and (2) no court that I am aware of has imposed such a limitation on the tort.[6] More importantly, this court and numerous other courts have recognized that, in a product liability

lawsuit, the destruction of the allegedly defective product does not necessarily prevent the plaintiff from proving his case. See id., 778 ("the spoliation of a machine may raise an adverse inference with respect to a claim that that particular machine was defective"); *Miller* v. *Allstate Ins. Co.*, 650 So. 2d 671, 674 (Fla. App. 1995) (evidence that product malfunctioned during normal operation constitutes prima facie case that product was defective); see also *Beil* v. *Lakewood Engineering & Mfg. Co.*, 15 F.3d 546, 553 (6th Cir 1994) (reversing District Court's granting of summary judgment in favor of defendant on ground that plaintiff had destroyed evidence because, in product liability case based on design defect, plaintiff can demonstrate design defect without specific product); *Columbian Rope Co.* v. *Todd*, 631 N.E.2d 941, 944 (Ind. App. 1994) (when plaintiff claimed design defect in rope and then lost rope, testimony of plaintiff's expert witness based on exemplar rope was admissible).

In my view, evidence that the ladder collapsed when the plaintiff stood on it, together with evidence that the defendants intentionally destroyed the ladder, clearly would be sufficient to support an inference under *Beers* that physical examination of the ladder would have been unfavorable to the defendants. See *Beers* v. *Bayliner Marine Corp.*, supra, 236 Conn. 775. It is also possible that the plaintiff could demonstrate that the ladder was defective by using exemplar ladders. It is ironic that, although the majority opinion purportedly is premised on the unfairness to the plaintiff of disallowing a claim for spoliation, the majority not only fails to view the plaintiff's product liability action in the light most favorable to him, but takes precisely the opposite tack. I cannot fathom why the majority is so eager to adopt a new tort for first party intentional spoliation of evidence—in a form that no other jurisdiction in the country has recognized—that it is willing to distort the record to suggest that the plaintiff in the present case could meet the elements of that tort.

Even if this were an appropriate case for this court to consider adopting the tort in the form proposed by the majority, however, I would conclude that we should not do so. First, although the majority purports to rely on this court's decision in *Beers* as mandating the recognition of an independent tort for intentional spoliation, its decision is entirely inconsistent with that case. We stated in *Beers* that the inference that destroyed evidence would have been unfavorable to the spoliator "does not supply the place of evidence of material facts and 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 . . . ."[7] (Internal quotation marks omitted.) Id., 779. The majority now concludes that, because the *Beers* inference is not available when the plaintiff has failed to make out a prima facie case, a plaintiff who cannot do so must receive something

much more valuable, namely, the benefit of a *rebuttable presumption* that he would have *prevailed* if not for the destruction of the evidence. The majority attempts to justify this departure from *Beers* by pointing out that we specifically stated in that case that we were leaving "to another day the determination of the appropriate remedy when the spoliator's intent had been to perpetrate a fraud . . . ." Id., 777 n.11. Nothing in *Beers*, however, remotely suggests that, in direct contradiction to the limitation on the adverse inference that we expressly adopted in that case, and to the well established evidentiary principles and public policy considerations underlying that limitation, we might in a future case require the trial court to create a rebuttable presumption that the plaintiff would have prevailed if not for the destruction of the evidence when, and only when, the destruction of the evidence prevents the plaintiff from establishing a prima facie case.

The public policy considerations underlying *Beers* were explained in *Cedars-Sinai Medical Center*. In that case, the California court pointed out that, when a plaintiff is unable to present evidence in support of his underlying action, "the fact of harm will be irreducibly uncertain. In such cases, even if the jury infers from the act of spoliation that the spoliated evidence was somehow unfavorable to the spoliator, there will typically be no way of telling what precisely the evidence would have shown and how much it would have weighed in the spoliation victim's favor. Without knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action. The jury could only speculate as to what the nature of the spoliated evidence was and what effect it might have had on the outcome of the underlying litigation." *Cedars-Sinai Medical Center* v. *Superior Court*, supra, 18 Cal. 4th 13–14; see also *Goff* v. *Harold Ives Trucking Co.*, 342 Ark. 143, 149, 27 S.W.3d 387 (2000) (same); *Gribben* v. *Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 354–55 (Ind. 2005) (same); *Federated Mutual Ins. Co.* v. *Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 439 (Minn. 1990) (declining to recognize tort for first party spoliation of evidence in absence of evidence that plaintiff would have prevailed in underlying action if evidence had not been destroyed because, not only extent, but also existence of harm was purely speculative). When the plaintiff is unable even to establish a prima facie case, these principles apply all the more strongly.

In support of its conclusion that the irreducible uncertainty of harm does not militate against adopting a tort for first party intentional spoliation of evidence when the plaintiff cannot establish a prima facie case, the majority relies on *Holmes* v. *Amerex Rent-A-Car*, 710 A.2d 846, 853 (D.C. 1998), and *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51

S. Ct. 248, 75 L. Ed. 544 (1931). In *Holmes*, the court stated that "there would be an inequity in preventing a plaintiff from recovering because of his inability, allegedly caused by the defendant, to prove his underlying case. [T]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." (Internal quotation marks omitted.) *Holmes* v. *Amerex Rent-A-Car*, supra, 850. In *Story Parchment Co.*, the court stated that "[w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise." (Internal quotation marks omitted.) *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, supra, 563.

In *Story Parchment Co.*, however, the court specifically found that the evidence at trial supported a finding that the defendant unlawfully had interfered with the plaintiff's business and that the interference had injured the plaintiff. Id., 560. Only the amount of damages was uncertain. Id., 561. In *Holmes*, the court held that, in order to receive damages, the plaintiff was required to prove at least that it "enjoyed a significant possibility of success" in the underlying claim. *Holmes* v. *Amerex Rent-A-Car*, supra, 710 A.2d 852. In contrast, in the present case, the majority would allow the recovery of damages only in cases where the plaintiff cannot even make a prima facie case of liability in the underlying action. Thus, "the issue [here] is proof of the *existence*, not merely the *extent*, of an injury." (Emphasis added.) *Federated Mutual Ins. Co.* v. *Litchfield Precision Components, Inc.*, supra, 456 N.W.2d 438. Because the reasoning of the court in *Story Parchment Co.* does not apply when there is no evidence of causation, I believe that the majority's reliance on that case is entirely misplaced.

The majority may respond, however, that under the version of the tort that it adopts, the plaintiff must prove that the defendant caused an injury because he must establish that the defendant destroyed the evidence in bad faith, i.e., with an intent to deprive the plaintiff of his cause of action. This is mere sleight of hand. The majority cannot, simply by conjuring up a new derivative tort in which the element of bad faith substitutes for the element of causation, change the basic fact that any finding of liability and damages without a finding

that the injury was in fact caused by the defendant must be entirely speculative. Bad faith, in and of itself, cannot injure anyone.[8]

The majority engages in a similar sleight of hand when it concludes that the plaintiff is entitled to the full amount of his damages. The majority implicitly argues that when a defendant's destruction of evidence prevents the plaintiff from presenting even a prima facie case, the defendant's conduct is so "egregious" that it is fair to place on him the entire risk of the uncertainty of harm. The majority does not allow the tort, however, in all cases where the defendant has engaged in egregious, bad faith conduct, but only in those cases where the plaintiff cannot present a prima facie case. Thus, another defendant could engage in equally egregious conduct and incur no liability whatsoever because, although he did not prevent the plaintiff from establishing a prima facie case, he did prevent the plaintiff from proving his case.

Consider the following examples. Driver A drives his new lawnmower off a cliff and incurs severe injuries. He claims that the steering became inoperable just before the crash, but the manufacturer of the lawnmower destroys the lawnmower in bad faith before trial. Because the jury reasonably could believe A's testimony that the steering malfunctioned, he has a prima facie case of product liability. See *Miller* v. *Allstate Ins. Co.*, supra, 650 So. 2d 674 (evidence that product malfunctioned during normal operation constitutes prima facie case that product was defective). Without the lawnmower, however, the jury is not convinced that it is more likely than not that the lawnmower was defective and finds for the defendant.[9] A has *no* recourse against the manufacturer.

Driver B drives his new lawnmower off a cliff and incurs severe injuries. He does not recall what happened just before the crash and the manufacturer destroys the lawnmower in bad faith before trial. B has no prima facie case of liability and, therefore, can seek the *entire amount* of damages from the manufacturer in a spoliation action.

I simply do not understand why the majority believes that, although Driver A is not entitled to receive anything from the spoliator in spite of the fact that the defendant's bad faith destruction of the evidence severely impaired his ability to recover damages, Driver B is entitled to recover the *entire amount* of his damages, even though there is *no* evidence that his injuries were caused by a defective lawnmower. The spoliator's conduct was equally egregious in each instance. If the majority believes that the bad faith destruction of evidence requires a harsher approach to spoliators than this court's approach in *Beers*, it would make much more sense to create a mandatory rebuttable presumption that the spoliated evidence would have favored the

plaintiff in all cases where the defendant destroyed the evidence in bad faith, *except* those in which the plaintiff is unable to establish even a prima facie case of causation.[10] I cannot perceive why a plaintiff who has presented some evidence in support of each element of his underlying claim, but ultimately cannot meet his burden of proof without the destroyed evidence, should be in a worse position than a plaintiff who cannot even meet his burden of production.[11]

Finally, I would point out that we have not hesitated to require plaintiffs to prove causation in other contexts where a plaintiff's ability to establish liability and damages has been impaired by the defendant's conduct. In legal malpractice actions, the plaintiff is required to prove that "the defendant attorney's professional negligence caused injury to the plaintiff by presenting evidence of what would have happened in the underlying action had the defendant not been negligent. This traditional method of presenting the merits of the underlying action is often called the 'case-within-a-case.' " *Margolin* v. *Kleban & Samor, P.C.*, 275 Conn. 765, 775 n.9, 882 A.2d 653 (2005). We do not excuse the plaintiff from making a showing of causation merely because the attorney has made it difficult for the plaintiff to establish what would have happened in the underlying action in the absence of the malpractice, regardless of the nature and severity of the attorney's misconduct.

To the extent that the majority believes that a completely arbitrary damage award is preferable to no award at all when the defendant has engaged in bad faith spoliation, the establishment of a civil fine payable to the spoliation victim would be better left to the legislature. See *Mendillo* v. *Board of Education*, 246 Conn. 456, 486–87, 717 A.2d 1177 (1998). There simply is no precedent for allowing a jury to award damages for an injury when there is no evidence that the defendant caused the injury.

I recognize the unfairness of denying recovery to a plaintiff when, as the possible result of the defendant's wrongful conduct, he cannot establish a prima facie case. The plain fact remains, however, that the causal connection between the plaintiff's inability to recover damages and the defendant's conduct must be irreducibly speculative in such cases. I also recognize that there may be cases where the defendant will prefer the risk of sanctions, a default judgment, contempt penalties, criminal fines and even imprisonment to the risk of a civil judgment against him. This proves only that human systems of justice will not be perfect until human behavior is perfect. I would conclude that, in our imperfect world, the well-defined costs of allowing claims for first party intentional spoliation of evidence outweigh the speculative benefits. Accordingly, I dissent.

[1] See *Christian* v. *Kenneth Chandler Construction Co.*, 658 So. 2d 408, 413 (Ala. 1995); *Goff* v. *Harold Ives Trucking Co.*, 342 Ark. 143, 150, 27 S.W.3d 387 (2000); *Cedars-Sinai Medical Center* v. *Superior Court*, 18 Cal.

4th 1, 17, 954 P.2d 511, 74 Cal. Rptr. 2d 248 (1998); *Lucas* v. *Christiana Skating Center, Ltd.*, 722 A.2d 1247, 1249–50 (Del. Super. 1998); *Martino* v. *Wal-Mart Stores, Inc.*, 908 So. 2d 342, 347 (Fla. 2005); *Gardner* v. *Blackston*, 185 Ga. App. 754, 755, 365 S.E.2d 545 (1988); *Gribben* v. *Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 355 (Ind. 2005); *Meyn* v. *State*, 594 N.W.2d 31, 33–34 (Iowa 1999) (refusing to recognize negligent spoliation of evidence as independent tort where spoliation caused by third party and stating in dicta that first party claim also is not cognizable); *Monsanto Co.* v. *Reed*, 950 S.W.2d 811, 815 (Ky. 1997); *Miller* v. *Montgomery County*, 64 Md. App. 202, 214–15, 494 A.2d 761, cert. denied, 304 Md. 299, 498 A.2d 1185 (1985); *Fletcher* v. *Dorchester Mutual Ins. Co.*, 437 Mass. 544, 553, 773 N.E.2d 420 (2002); *Dowdle Butane Gas Co.* v. *Moore*, 831 So. 2d 1124, 1135 (Miss. 2002); *Oliver* v. *Stimson Lumber Co.*, 297 Mont. 336, 345, 993 P.2d 11 (1999); *Timber Tech Engineered Building Products* v. *Home Ins. Co.*, 118 Nev. 630, 632–33, 55 P.3d 952 (2002); *Trevino* v. *Ortega*, 969 S.W.2d 950, 951 (Tex. 1998); *Johnston* v. *Metropolitan Property & Casualty Ins. Co.*, 288 Wis. 2d 658, 707 N.W.2d 579 (2005).

A number of courts have concluded that spoliation of evidence is not a cognizable tort per se but may be actionable under other theories. See *Boyd* v. *Travelers Ins. Co.*, 166 Ill. 2d 188, 194, 652 N.E.2d 267 (1995) (claim for spoliation of evidence can be stated under existing negligence law); *Rosenblit* v. *Zimmerman*, 166 N.J. 391, 406, 766 A.2d 749 (2001) (recognizing intentional spoliation of evidence claim as form of fraudulent concealment); *Weigl* v. *Quincy Specialties Co.*, 158 Misc. 2d 753, 756–57, 601 N.Y.S.2d 774 (1993) (New York does not recognize spoliation of evidence as independent tort, but does recognize common-law action for negligently or intentionally impairing right to bring action against tortfeasor).

A number of courts have recognized first party spoliation of evidence as an independent tort. See *Hazen* v. *Anchorage*, 718 P.2d 456, 463 (Alaska 1986); *Holmes* v. *Amerex Rent-A-Car*, 180 F.3d 294, 296 (D.C. Cir. 1999) (under District of Columbia law, negligent or reckless spoliation of evidence is independent tort); *Smith* v. *Howard Johnson Co.*, 67 Ohio St. 3d 28, 29, 615 N.E.2d 1037 (1993); *Hannah* v. *Heeter*, 213 W. Va. 704, 715, 584 S.E.2d 560 (2003) (recognizing intentional spoliation of evidence as independent tort when spoliation done by party to civil action or by third party); see also *Coleman* v. *Eddy Potash, Inc.*, 120 N.M. 645, 649, 905 P.2d 185 (1995) (recognizing intentional spoliation of evidence claim against third party and not distinguishing between first party and third party claims), overruled on other grounds by *Delgado* v. *Phelps Dodge Chino, Inc.*, 131 N.M. 272, 34 P.3d 1148 (2001).

[2] See *Larobina* v. *McDonald*, 274 Conn. 394, 408, 876 A.2d 522 (2005) (allowing separate abuse of process claim against party to pending litigation "could subject the courts to a flood of . . . duplicative claims and effectively chill the vigorous representation of clients by their attorneys"); id., 409 (allowing separate civil conspiracy claim arising from alleged misconduct by party to pending litigation would "undermine an orderly and efficient judicial process and would potentially lead to inconsistent verdicts"); id., 411 (allowing negligent infliction of emotional distress claim arising from alleged misconduct by party to pending litigation "would subject the courts to a flood of collateral actions arising from aggressive litigation tactics and would effectively chill the vigorous representation of clients by their attorneys"). We also repeatedly have recognized the general public policy against increased litigation. See *Perodeau* v. *Hartford*, supra, 259 Conn. 756–57; *Jaworski* v. *Kiernan*, 241 Conn. 399, 407, 696 A.2d 332 (1997); see also *Ward* v. *Greene*, 267 Conn. 539, 558, 839 A.2d 1259 (2004) ("Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree." [Internal quotation marks omitted.]). In addition, this court, like the California court, repeatedly has recognized the "judicial policy in favor of judicial economy, the stability of former judgments and finality." (Internal quotation marks omitted.) *DaCruz* v. *State Farm Fire & Casualty Co.*, 268 Conn. 675, 686, 846 A.2d 849 (2004).

[3] After the briefs were filed in this appeal, the plaintiff withdrew his claims against Davidson Ladders, Inc., which is no longer a party to this appeal.

[4] The majority also states that it is required to assume at this stage of the proceedings that the plaintiff's purported factual allegation that he could not make out a prima facie case in the product liability action is true. See *Cotto* v. *United Technologies Corp.*, 251 Conn. 1, 42, 738 A.2d 623 (1999) (in ruling on motion to strike "the facts alleged in the plaintiff's complaint must be taken to be true"). It is well established, however, that whether

the plaintiff has made out a prima facie case is a question of law, not of fact. See *DiStefano* v. *Milardo*, 276 Conn. 416, 422, 886 A.2d 415 (2005).

It is arguable that, if the plaintiff had brought *only* a spoliation action, this court could assume the truth of any allegations made in that action about the underlying action. In the present case, however, the allegations of the underlying action are before us. Assuming the truth of *those* allegations, the plaintiff clearly, as a matter of law, has made out a prima facie case of product liability.

[5] The majority also points out that the plaintiff claimed in its memorandum in opposition to the defendants' motion to strike that "the defendants had destroyed the ladder in bad faith . . . ." The language relied on by the majority states in full: "Moreover, the [c]ourt [in *Beers* v. *Bayliner Marine Corp.*, supra, 236 Conn. 777 n.11] expressly stated that it was leaving for another day the appropriate remedy where a party destroys evidence in bad faith, as is alleged here." The plaintiff's amended complaint, however, alleged no such thing. I recognize that this court reads pleadings " 'broadly and realistically.' " *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 265 Conn. 79, 104, 828 A.2d 31 (2003). "That does not mean, however, that [we are] obligated to read into pleadings factual allegations that simply are not there . . . ." *Pane* v. *Danbury*, 267 Conn. 669, 677, 841 A.2d 684 (2004).

[6] The majority relies on *Smith* v. *Atkinson*, 771 So. 2d 429, 434 (Ala. 2000), and *Hannah* v. *Heeter*, 213 W. Va. 704, 714, 584 S.E.2d 560 (2003), in support of its conclusion that the plaintiff must be incapable of establishing even a prima facie case in his underlying action in order to bring a claim for first party intentional spoliation of evidence. See *Smith* v. *Atkinson*, supra, 434 ("in order for a plaintiff to show proximate cause, the trier of fact must determine that the lost or destroyed evidence was so important to the plaintiff's claim in the underlying action that without that evidence the claim did not survive or would not have survived a motion for summary judgment"); *Hannah* v. *Heeter*, supra, 714 (same). I would first note that the portions of those cases cited by the majority involved third party spoliation actions, in which evidentiary presumptions and rules governing litigation procedure, discovery and attorney conduct provide no deterrence to the destruction of evidence. Accordingly, the arguments for recognizing a tort for third party spoliation of evidence are much stronger than those in favor of recognizing a first party tort.

Second, it is not entirely clear to me that the court in *Smith* was limiting spoliation claims to those in which the plaintiff could not establish a prima facie case in the underlying action. Rather, *Smith* may be interpreted as concluding only that, if an underlying action cannot survive a motion for summary judgment, then the plaintiff may bring a third party spoliation action. In reaching that conclusion, the court was rejecting the defendant's argument that, in order to bring an action for third party spoliation, the plaintiff first must bring the underlying action and be denied recovery. *Smith* v. *Atkinson*, supra, 771 So. 2d 434. Thus, it is arguable that the court did *not* conclude that, if the underlying action was capable of surviving a motion for summary judgment, but judgment ultimately was entered against the plaintiff, a third party spoliation action was precluded. See id. ("[t]he plaintiff can rely upon *either* a copy of a judgment against him in an underlying action *or* upon a showing that, without the lost or destroyed evidence, a summary judgment would have been entered for the defendant in the underlying action" [emphasis added]).

In *Hannah*, the court relied entirely on *Smith* in stating that the plaintiff may rely on either a judgment against him in the underlying action or a showing that, without the lost evidence, summary judgment would have been entered for the defendant in the underlying action. Again, it is not entirely clear that the court in *Hannah* was limiting spoliation claims to those in which the plaintiff could not establish a prima facie case in the underlying action. Moreover, the court in *Hannah* discusses this requirement in the context of the tort of third party negligent spoliation of evidence and does not restate or refer to this language in the section discussing the tort of first party intentional spoliation of evidence.

[7] Citing *Doty* v. *Wheeler*, 120 Conn. 672, 679, 182 A. 468 (1936) (same); *Secondino* v. *New Haven Gas Co.*, 147 Conn. 672, 675–76, 165 A.2d 598 (1960) (rule that jury can draw adverse inference from party's failure to produce witness does not apply until opposing party has made out prima facie case), overruled on other grounds by *State* v. *Malave*, 250 Conn. 722, 737 A.2d 442 (1999) (en banc), cert. denied, 528 U.S. 1170, 120 S. Ct. 1195, 145 L. Ed. 2d 1099 (2000); *Larsen* v. *Romeo*, 254 Md. 220, 228, 255 A.2d 387 (1969) (adverse inference does not amount to substantive proof and cannot

take place of proof of fact necessary to other party's case); *DiLeo* v. *Nugent*, 88 Md. App. 59, 71, 592 A.2d 1126 (adverse inference that destroyed evidence would have been unfavorable does not in itself amount to substantive proof that evidence was unfavorable), cert. granted, 325 Md. 18, 599 A.2d 90 (1991), appeal dismissed, 327 Md. 627, 612 A.2d 257 (1992); *Burkowske* v. *Church Hospital Corp.*, 50 Md. App. 515, 523–24, 439 A.2d 40 (1982) (same), overruled on other grounds by *B&K Rentals & Sales Co.* v. *Universal Leaf Tobacco Co.*, 324 Md. 147, 596 A.2d 640 (1991); *Jakel* v. *Brockelman Bros., Inc.*, 91 N.H. 453, 455, 21 A.2d 155 (1941) (proof of alleged suppression of evidence cannot take place of proof of facts necessary to recovery); *F.R. Patch Mfg. Co.* v. *Protection Lodge No. 215, International Assn. of Machinists*, 77 Vt. 294, 329, 60 A. 74 (1905) (inference "does not relieve the other party from introducing evidence tending affirmatively to prove his case so far as he has the burden"); *Jones* v. *Lamm*, 193 Va. 506, 510–11, 69 S.E.2d 430 (1952) (fact that evidence was destroyed by defendant is not proof of primary negligence of defendant even if it is assumed that such destruction was intentional); *Jagmin* v. *Simonds Abrasive Co.*, 61 Wis. 2d 60, 81, 211 N.W.2d 810 (1973) (where destruction of evidence gives rise to adverse inference, inference cannot carry other party's burden of proof); see also C. Tait, Connecticut Evidence (3d Ed. 2001) § 4.3.2 ("[N]egative inferences cannot supply proof of any particular fact. Accordingly, negative inferences do not help a party to establish a prima facie case and can be used only by the trier in weighing the evidence and determining the ultimate burden of persuasion.").

[8] Perhaps more fundamentally, if the plaintiff were able to establish that he had a cause of action that the defendant deliberately destroyed, then he presumably would be able to make a prima facie case in the underlying action and would not be eligible to bring a spoliation claim under the majority's view. Thus, the limitation of the tort to cases where the plaintiff can prove intent to destroy the underlying cause of action would appear to be self-obviating.

[9] Under *Beers*, the jury is not required to draw an adverse inference from the intentional destruction of evidence. See *Beers* v. *Bayliner Marine Corp.*, supra, 236 Conn. 779.

[10] I see no reason to require the jury to find that the plaintiff would have *prevailed* if the defendant had not destroyed the evidence. In my view, a flexible approach, in which the jury can consider the degree of the defendant's bad faith and the importance of the spoliated evidence in determining what weight to give it, would be adequate. I note that this approach, unlike the approach adopted by the majority, might provide some relief to the plaintiff in the present case.

[11] Moreover, it is clear that the majority's new tort will create perverse incentives by encouraging plaintiffs who have weak cases to argue that they have *no* evidence to support their underlying actions. Driver A would have been better off claiming that he could not remember what happened before his accident.