

OPINIONS OF THE SUPREME COURT OF OHIO

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Smith et al. v. Howard Johnson Company, Inc. et al.
[Cite as Smith v. Howard Johnson Co., Inc. (1993), Ohio St.3d .]

Torts -- Cause of action exists in tort for interference with or destruction of evidence -- Elements of claim for interference with or destruction of evidence -- Such claim recognized between parties to the primary action and against third parties -- Such claim may be brought at same time as primary action.

(No. 92-1335 -- Submitted June 1, 1993 -- Decided August 4, 1993.)

On Order from the United States District Court, Southern District of Ohio, Eastern Division, Certifying a Question of State Law, No. C-2-90-230.

Vorys, Sater, Seymour & Pease and Robert E. Tait, for respondents William R. and Kathryn W. Smith.

Squire, Sanders & Dempsey, David J. Young, David W. Alexander and Matthew G. Kallner, for petitioners Marriott Family Restaurant, Inc., Howard D. Johnson Company and Howard Johnson Company.

The United States District Court, Southern District of Ohio, Eastern Division, pursuant to S.Ct.Prac.R. XVI, has certified the following questions to us:

"1. Does Ohio recognize a claim for intentional or negligent spoliation of evidence and/or tortious interference with prospective civil litigation?

"2. If so,

"a. What are the elements of such a claim; and

"b. Does such a claim exist between the parties to the primary action (i.e., the action in which the spoliated evidence would have been used), or does it only exist against third-party spoliators?

"3. If the answer to 2(b) is that such a claim exists between the parties to the primary action, may such a claim be brought at the same time as the primary claim, or must the victim of spoliation await an adverse judgment?"

We answer the three questions as follows: (1) A cause of action exists in tort for interference with or destruction of evidence; (2a) the elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts; (2b) such a claim should be recognized between the parties to the primary action and against third parties; and (3) such a claim may be brought at the same time as the primary action. See *Viviano v. CBS, Inc.* (1991), 251 N.J. Super. 113, 126, 597 A.2d. 543, 550.

Moyer, C.J., A.W. Sweeney, Douglas, Deshler, Resnick, F.E. Sweeney and Pfeifer, JJ., concur.

Dana A. Deshler, J., of the Tenth Appellate District, sitting for Wright, J.