

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>KIMBER NOYES, et al.,</b>	)	
	)	
<b>Plaintiffs</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 97-211-B</b>
	)	
<b>KEN-BAR, INC., et al.,</b>	)	
	)	
<b>Defendants</b>	)	

**ORDER<sup>1</sup>**

Kimber and Cynthia Noyes, and their insurer, York Insurance Group of Maine, as subrogee, [referred to hereinafter as "the Plaintiffs"] bring this action against Defendants, Ken-Bar, Inc. ["Ken-Bar"] and Griffin Greenhouse Supply, Inc. ["Griffin"]. The plaintiffs allege that they purchased a defective Agri-Tape Propagation Device ["Agri-tape heater"], from Griffin, which was manufactured by Ken-Bar, and that the device caused a fire resulting in extensive damage to the Noyes' flower shop and greenhouse. The plaintiffs now seek compensation for damage sustained to the flower shop and greenhouse. Defendant Ken-Bar moves to exclude the plaintiffs' expert testimony on the cause and origin of the fire on the grounds that the plaintiffs destroyed the fire scene and failed to properly preserve evidence for Ken-Bar's expert to examine. The plaintiffs filed a memorandum opposing the motion and Ken-Bar filed a Reply. The motion is now ripe for decision.

***Background***

On January 22, 1995, a fire spread through a flower shop and greenhouse owned and operated by Cynthia and Kimber Noyes in Caribou, Maine. The Caribou Fire Department fought the fire and

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<sup>1</sup> Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

after several hours, subdued the flames. The flower shop and greenhouse suffered extensive damage. Caribou Fire Chief Jack Woods conducted an informal inspection of the fire damage and concluded that the fire was electrical in nature.

York's insurance adjuster, Michael Henderson, investigated the fire scene the day after the fire. Henderson took several photos of the Agri-tape heater and other areas of the fire scene. Henderson contacted Gustavus Currie to investigate the scene. Currie took several photos of the fire scene before and during his investigation. Currie also videotaped the scene and removed evidence from the scene including remnants of the Agri-tape heater. Currie later concluded that the Agri-tape heater ignited the fire.<sup>2</sup>

Anxious to have the business running by Valentine's Day, the plaintiffs acted quickly to clean up the fire damage, which inevitably meant altering the scene of the fire. Although minor alterations were done to the fire scene before Valentine's Day, construction began to completely repair the fire damage in April 1995 and lasted to August 1995. The plaintiffs notified Defendant Ken-Bar of this claim in 1997.

### *Discussion*

Ken-Bar argues that the plaintiffs spoiled relevant evidence by failing to preserve the fire scene and by failing to properly preserve evidence taken from the fire scene. Spoilation is the "intentional, negligent or malicious destruction of relevant evidence." *Corales v. Sea-Land Service, Inc.* 172 F.R.D. 10, 13-14 (D. P.R. 1997). When a party spoils evidence, the sanctions most

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<sup>2</sup> Months after the fire the plaintiffs hired Richard Hill, a professional engineer and former professor of engineering at the University of Maine, and James Eddy, a cause and origin expert, to examine evidence preserved from the fire by Currie. After examining the evidence both Hill and Eddy determined that the Agri-tape heater likely caused the fire.

frequently used by courts are "dismissal of the case, the exclusion of evidence, or a jury instruction on the 'spoilage inference.'" *Corales*, 172 F.R.D. at 13, 14 citing *Howell v. Maytag*, 168 F.R.D. 502, 505 (M.D. Pa. 1996)).

Courts generally consider five factors to determine what type of sanction to impose if a party spoils potentially relevant evidence. Those five factors include: (1) whether the absence of the destroyed evidence prejudices the defendant; (2) whether the prejudice, if any exists, can be cured; (3) the practical importance of the evidence; (4) whether the plaintiff acted in good faith or bad faith; (5) the potential for abuse if the evidence is excluded. *Northern Assurance Co. v. Ware*, 145 F.R.D. 281, 283 (D. Me. 1993). Courts have particularly focused on the degree of prejudice suffered by the party who is unable to examine the evidence and the culpability of the party that destroyed the evidence. *See, Northern Assurance*, 145 F.R.D. at 283-84; *Schmid v. Milwaukee Elec.Tool Corp.*, 13 F.3d 79 (3<sup>rd</sup> Cir. 1994). Having delineated the law regarding the spoliation of evidence by a litigant, the Court will now examine whether the Court should impose sanctions on the plaintiffs.

***Degree of prejudice suffered by Ken-Bar***

Ken-Bar asserts that their expert cannot express an opinion on what caused the fire because the plaintiffs destroyed the fire scene and failed to properly preserve evidence from the fire scene. Although the Court recognizes that Ken-Bar is prejudiced to some degree by not being able to examine the fire scene, the Court is satisfied that the plaintiffs preserved enough evidence to allow Ken-Bar's expert either to establish his own theory on what caused the fire or to discount the plaintiffs' assertion that the Agri-tape heater caused the fire. Accordingly, the Court finds that Ken-

Bar is prejudiced by not having the opportunity to examine the scene, but that the prejudice is mitigated by the plaintiffs preserving evidence from the scene.

***The plaintiffs' degree of culpability***

Ken-Bar maintains that the plaintiffs allowed the fire scene to be demolished even though they suspected that the Agri-tape heater caused the fire by February 12, 1995. However plaintiffs' suspicion that the Agri-tape heater caused a fire is not enough for the Court to conclude that the plaintiffs acted in bad faith when they destroyed the scene after February 12, 1995. Although this Court has excluded expert testimony in the past when a plaintiff acted in bad faith, the Court found that the plaintiff had information in its possession that made it *likely* that litigation would ensue. *See Northern Assurance*, 145 F.R.D. at 283. In the case at bar, the plaintiffs were not likely to litigate the matter until they received Currie's written report in October 1995 in which Currie opined that the Agri-tape heater caused the fire. In fact, even after receiving Currie's report the plaintiffs hired and reviewed the opinions of two other experts before asserting their claim. Accordingly, the Court is satisfied that the plaintiffs did not act in bad faith when they destroyed the fire scene after February 12, 1995.

***Spoilation Inference***

The Court recognizes that Ken-Bar is prejudiced to some extent by not having the opportunity to examine the fire scene. This leaves open the possibility that the Court could give a "spoilation inference" instruction to the jury.<sup>3</sup> A "spoilation inference" instruction will be entered against the plaintiffs if the Court determines during trial that Ken-Bar is severely prejudiced by not

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<sup>3</sup> The Court asks that Ken-Bar submit a proposed "spoilation inference" instruction prior to trial.

having the opportunity to examine the fire scene or if the Court determines during trial that the plaintiffs did act in bad faith when they destroyed the fire scene. The “spoilation inference” permits “the trier of fact. . . [to] infer that the party who [destroyed an item arguably relevant to this case] did so out of a realization that the [evidence was] unfavorable.” *Mayes*, 931 F.Supp. at 84 (quoting *Blinzer v. Marriot Int’l Inc.*, 81 F.3d 1148, 1158 (1<sup>st</sup> Cir. 1996)). Before the inference can apply, Ken-Bar must establish a sufficient foundation that the plaintiffs had notice of the potential claim and of the evidence’s relevance. *Id.* The inference “cannot be drawn merely from his negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.” *Id.* (quoting *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 159 (4<sup>th</sup> Cir. 1995)). If the factfinder determines that the evidence was destroyed inadvertently or accidentally then the factfinder can reject the inference. *See, Blinzer*, 81 F.3d at 1159 (other citations omitted). Whether the “spoilation inference” applies will therefore be determined by the development of the evidence to support the inference during trial.

### ***Conclusion***

Accordingly, the Court DENIES Ken-Bar’s motion to preclude the plaintiffs from introducing expert testimony on what caused the fire. The Court will reserve judgment on whether to impose a “spoilation inference” instruction on the parties during the trial.

***SO ORDERED.***

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Eugene W. Beaulieu  
U.S. Magistrate Judge

Dated on April 28, 1998.