

## WHEN EVIDENCE DISAPPEARS: WHAT HAPPENS WHEN KEY PROOF IS LOST IN A LAWSUIT?

When a serious accident happens, the evidence surrounding the event becomes critically important. Documents, emails, text messages, and electronic records can reveal what happened and who may be responsible.

Courts expect parties to preserve that evidence once they know a lawsuit is likely. But what happens when important evidence disappears?

A case involving the tragic death of a construction worker illustrates how “lost” evidence can affect litigation—and how, sometimes, parties may avoid serious consequences even when evidence is lost.

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### **The Duty to Preserve Evidence**

Under Ohio law and the rules of civil procedure, parties have a duty to preserve evidence once they know—or reasonably should know—that litigation is likely. This duty can arise before a lawsuit is even filed.

Once an accident occurs that could lead to legal claims, people are expected to preserve relevant information, including:

- Emails
- Text messages
- Paper documents
- Electronic records
- Accounting data
- Phones and computers used to communicate about the project

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### **Consequences of Destroying Evidence**

If a court determines that a party destroyed relevant evidence after being placed on notice of potential litigation, the court has several possible remedies.

These can include:

- **Adverse inference instructions**  
A jury may be told that it can assume the destroyed evidence would have been unfavorable to the party responsible.
- **Excluding testimony or evidence**  
A court may prevent the responsible party from introducing certain evidence.

- **Monetary sanctions**

The court may order the party to pay attorney fees or other costs.

- **Case-ending sanctions**

In extreme situations, courts may dismiss claims or enter judgment against the party that destroyed the evidence.

The purpose of these sanctions is not just punishment. They are meant to restore fairness when evidence that could reveal the truth is no longer available. A plaintiff may even be able to assert a claim called “spoliation of evidence.” Courts take this obligation seriously because destroyed evidence can prevent the truth from ever being discovered.

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### **When Evidence Is Lost — But No Serious Penalty Follows**

Despite the concerns raised about missing evidence, courts do not always impose severe sanctions.

Judges typically evaluate several factors before imposing penalties, including:

- Whether the party had a duty to preserve the evidence
- Whether the destruction was intentional or accidental
- Whether the missing evidence was important to the case
- Whether the loss of evidence unfairly harmed the other party

In some cases, courts determine that the evidence loss does not justify severe sanctions. As a result, even when evidence disappears, the responsible parties may avoid major consequences if the court finds the circumstances do not warrant harsh penalties.

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### **The Background of the Case**

The case arose from a tragic construction accident. In June 2016, James Rogers, a 33-year-old worker and father of two young children, was working in a trench approximately twelve feet deep when the trench collapsed. The collapse crushed and suffocated him, resulting in his death.

Trench collapses are well-known hazards in the construction industry, and safety rules exist specifically to prevent this type of accident. Because of this, the incident immediately raised questions about whether proper safety procedures had been followed.

Following the accident, Rogers’ estate filed claims seeking to determine how the collapse occurred and who may have been responsible.

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## **The Lawsuit**

The lawsuit was filed in the Montgomery County Court of Common Pleas. As the case progressed, the parties began gathering documents, electronic records, and witness testimony related to the construction project where the accident occurred.

Discovery—the process where both sides exchange information and evidence—is a critical part of any civil lawsuit. It allows each side to obtain records that may explain what happened. But during the discovery process in this case, a serious issue arose: cell phones had been lost.

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## **Evidence That Disappeared in This Case**

In the Rogers’ case, the plaintiff alleged that several categories of evidence related to the construction project had not been preserved by certain defendants (“the defendants”).

The plaintiff argued the missing evidence included:

- Emails related to the project
- Paper records
- QuickBooks accounting data
- Text messages about the project

Perhaps most concerning, five cell phones used by individuals involved in the project were reportedly “lost.”

Witnesses acknowledged that text messages were used to communicate about the project. Those messages could have revealed important information about what was happening at the construction site before the fatal trench collapse.

Without the phones, however, those messages could not be recovered.

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## **A Motion for Sanctions**

Because of the missing evidence, the plaintiff filed a motion for sanctions, asking the court to impose penalties for the failure to preserve evidence.

The motion argued that:

- The defendants were on notice that litigation was likely after the fatal accident.
- Despite that notice, relevant evidence was not preserved.
- The loss of that evidence prejudiced the plaintiff’s ability to prove the case against one of the defendants.

The plaintiff asked the court to impose sanctions to address the destruction of evidence. The plaintiff hired an expert who calculated the probability of “losing” five cell phones. The expert

concluded that the probability that the defendants truly “lost” five cell phones would be an occurrence of 2.43 out of ten billion. The expert compared that probability with the probability of winning the Mega Millions lottery, which is an occurrence of 1 out of 302.6 million. The expert opined that “. . . it is virtually impossible that all 5 mobile phones were lost.”

The court found that the defendants had a duty to preserve relevant evidence, including text messages exchanged about the construction project. However, the court concluded that the most severe sanction—a judgment on liability against the defendants—was not appropriate. The court also stated that it could not determine whether the loss of the phones was intentional or the extent to which the missing evidence harmed the plaintiff’s case. Because of these unanswered questions, the court postponed deciding whether the jury should be allowed to draw negative conclusions from the missing evidence.

After additional briefing and a hearing, the court ultimately declined to impose the strongest sanctions requested by the plaintiff, including a jury instruction that the lost text messages would have supported the plaintiff’s claims about responsibility for the trench collapse.

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### **The Conclusion of the Case**

In the Rogers’ case, the trial court dismissed the case as to the remaining defendant because the plaintiff did not present evidence that one of the defendants actively participated in the construction project. (Claims against other defendants were dismissed for other reasons.)

In the appeal filed by the plaintiff, the court of appeals upheld the trial court’s decision. In doing so, the court of appeals did not even address the argument about the destruction of evidence. The court of appeals described the history of the case and made one statement that “. . . there was no evidence in the record that the missing cell phones had any text messages on them.” This statement from the court of appeals seems to ignore legal precedent that the inability to prove what was lost can lead to a sanction against the party who lost the information. *See Stratacache, Inc. v. Wenzel*, 2d Dist. Montgomery No. 28060, 2019-Ohio-3523, ¶ 32.

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### **Why Evidence Preservation Matters**

Cases involving lost evidence highlight an important reality: once key information disappears, it may never be recovered. That can make it significantly harder to determine what really happened.

For businesses and individuals, the lesson is simple: When a serious incident occurs and litigation may follow, preserving evidence is critical. Failing to do so can expose a party to sanctions, damage credibility in court, and undermine the search for the truth.

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