



## Alerts

### Narrow Interpretation of Spoliation of Evidence Tort Offset By Potential Ethical, Criminal and Other Civil Liability

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*Lawyers for the Profession® Alert*

*Kearney v. Foley & Lardner, LLP*, 582 F.3d 896 (9TH Cir. 2009)

#### Brief Summary

Although alleged suppression of evidence will not necessarily establish a viable spoliation of evidence tort claim, lawyers who help clients suppress material evidence could, nonetheless, be subject to potential ethical or criminal charges, or subject to other civil liability despite the immunities contained in the *Noerr-Pennington* doctrine and anti-SLAPP statutes.

#### Complete Summary

Plaintiff Joan Brown Kearney, following a state court eminent domain trial against a school district represented by Foley & Lardner LLP, brought this federal action against both the school district and Foley & Lardner alleging violations of federal RICO, 42 U.S.C. § 1983, and state common law claims, including spoliation of evidence, fraud and prima facie tort.

Kearney's claims all were based on the allegation that defendants had improperly withheld the results of a percolation test, which would have increased the value of Kearney's condemned land at the valuation trial. Specifically, Kearney alleged that Foley & Lardner agreed to disclose the testing report as a condition of plaintiff's consent to the test; the district's expert completed the test, which was not favorable to the district, but did not prepare a formal report; the district produced no test results in discovery despite documents and testimony that suggested that testing had been done; and a lawyer from Foley & Lardner at trial had said that no new percolation testing had been performed.

The federal district court granted a motion to strike plaintiff's state law claims under California's anti-SLAPP statute, and granted a motion to dismiss Kearney's federal claims under the *Noerr-Pennington* doctrine. Kearney appealed.

The Ninth Circuit affirmed the dismissal of the state law claims, and vacated the dismissal and remanded the federal claims. The appeals court affirmed the dismissal of the state common law claims because the spoliation allegations failed to state a claim, and the other claims were barred by California's litigation

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privilege. The court vacated the dismissal of Kearney's federal statutory claims because the allegations in the complaint, taken as true for purposes of the motion to dismiss, fell within the "sham" exception to *Noerr-Pennington*.

The *Noerr-Pennington* doctrine derives from the First Amendment and generally immunizes from statutory liability conduct that involves petitioning the government for redress. The court held that such petitioning immunity applied to the school district because, by suing to exercise the right of eminent domain over Kearney's property, the school district was acting on behalf of the people. The court also held that the immunity extends to both the school district's agents (i.e., Foley & Lardner) and to conduct incidental to the petitioning activity (i.e., allegedly withholding the results of the percolation test during discovery in the litigation).

However, *Noerr-Pennington* immunity will not be granted when, *inter alia*, the petitioning party makes an intentional misrepresentation to the court that deprives the litigation of legitimacy, one of three so called "sham" exceptions to *Noerr-Pennington*. The court held that the suppression of evidence alleged by Kearney would constitute such an intentional misrepresentation, and that the exception thus applied. The court accordingly vacated the dismissal and remanded Kearney's federal claims.

Nonetheless, the Ninth Circuit also affirmed the district court's ruling granting the defendants' anti-SLAPP motion to strike plaintiff's state law claims. The anti-SLAPP statute, much like *Noerr-Pennington*, is designed to protect petitioning and free speech that is connected with a public issue from meritless and harassing claims. To overcome an anti-SLAPP motion, a plaintiff who had exercised such rights nonetheless must establish a probability of prevailing on the merits.

The court held Kearney had not met this burden for her spoliation of evidence claim because of the narrow scope of this tort. Notably, this section of the opinion was amended. The court, in a prior opinion, held that Kearney's spoliation claim could go forward. But upon further review, the court concluded that Kearney had merely alleged that defendants failed to commit the percolation test to writing rather than the required allegation of failure to preserve or destruction of evidence. The effects of a narrow rendering of the spoliation tort, the court noted, were mitigated by the existence of other deterrents to the alleged conduct, including potential criminal and ethical sanctions, as well as the potential for civil liability under federal law in this particular case.

### **Significance of Opinion**

This opinion suggests that narrowing of the reach of the spoliation tort may be an inevitable incident of the recognition that other provisions in the law and effective regulation of lawyers' professional conduct provide adequate deterrents and alternative remedies for the alleged wrongful conduct. This also is in keeping with the generally expansive scope of protection for the litigation process contained in both the *Noerr-Pennington* doctrine and state anti-SLAPP statutes, coupled with a recognition that both *Noerr-Pennington* and anti-SLAPP statutes also contain safety valves to permit liability for certain alleged misconduct.

At the end of the day, this opinion of the Ninth Circuit demonstrates that in addition to sanctions for discovery misconduct in an action at bar, there remains a range of potential post-hoc ethical sanctions and civil or criminal liability for misconduct that should deter and can hold lawyers accountable for allegations of discovery misconduct.

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