

DON'T THROW ANYTHING AWAY: KENTUCKY SUPREME COURT SHIFTS BURDEN RELATING TO MISSING EVIDENCE INSTRUCTIONS



In today's world of electronic documents and complex litigation, it happens in both civil and criminal cases – evidence or documents are sometimes inadvertently lost, misplaced or destroyed. When this happens, Kentucky courts have the option of providing a “missing evidence” instruction to the jury. If given, a missing evidence jury instruction directs the jury to decide whether the party who allegedly lost the evidence did so intentionally or in bad faith; if so, the jury is instructed that it may infer that the information recorded in the lost documents or evidence would be adverse to the party who lost it. Until recently, Kentucky courts consistently held that a missing evidence instruction is only appropriate where there is actually some proof that the evidence was lost intentionally or in bad faith, as opposed to being lost as the result of mere negligence or other unexplainable reason for the lost evidence.

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This rule recently changed with the Kentucky Supreme Court's decision in *University Medical Center, Inc. v. Beglin*, 2011 Ky. LEXIS 162 (Ky. Oct. 27, 2011). In *Beglin*, a young mother suffered an unexpected and substantial blood loss during surgery, causing a brain injury which left her in a permanent vegetative state, after the hospital negligently failed to obtain blood necessary for a transfusion in a timely manner. After the surgery, the nurse responsible for ordering the blood allegedly completed an “Occurrence Report,” which was an internal document the hospital required its employees to create anytime a significant event occurred so that the hospital could assess legal liability issues. During her deposition, the nurse denied creating such a report but at trial, testified that she believed she did prepare a report at the direction of her supervisor.

The supervisor denied asking the nurse to prepare a report and denied ever seeing such a report. No one else testified as to having any knowledge of the report's existence or contents. Over the hospital's objection, the trial court gave a missing evidence instruction and told the jury that if it determined the hospital lost or destroyed the report intentionally or in bad faith, the jury could (but did not have to) infer that the contents of the report would have been adverse to the hospital. The jury found for the plaintiff and awarded more than \$9 million in damages, including punitives (**Note: the punitives award was later reversed**).

On appeal, the hospital and other interested parties, including the Kentucky Hospital Association and the Kentucky Chamber of Commerce, argued that the missing evidence instruction was erroneously given because the plaintiff did not present affirmative evidence that the occurrence report, if it actually existed, was lost/destroyed intentionally or in bad faith. Both the Court of Appeals and the Supreme Court disagreed and upheld the verdict, finding that it was within the trial court's discretion to give the missing evidence instruction based upon the proof that **material evidence, which was in the exclusive possession and control of the hospital, went missing without explanation**. In other words, the *Beglin* Court placed the burden upon the hospital to prove that it lost the evidence as a result of simple negligence. Because the hospital was unable to do so, the court allowed the jury to infer bad faith and assume the report would have been harmful to the hospital's case.

The *Beglin* Court rejected the hospital's argument that this rule will encourage parties to invent evidence, in order to then claim that the evidence is “missing” and bolster an otherwise weak case. Instead, the Court reasoned that such a rule will simply encourage parties to carefully preserve evidence in anticipation of litigation. Regardless, in light of *Beglin*, attorneys should expect more requests for a “missing evidence” instruction anytime a client is unable to produce every document requested by the opposing party unless the client can explain what happened to the missing documents and why. In complex civil litigation cases, where thousands of pages may be requested and exchanged during discovery, this will likely be difficult (if not impossible) to do. It is therefore extremely important for companies, including businesses, hospitals and nursing homes, to have a thorough document retention policy and to preserve all documents which have any chance of becoming relevant in future litigation.

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