May 4, 2001

Honorable Bette E. Uhrmacher, JSC
MONMOUTH COUNTY SUPERIOR COURT
Court & Monument Streets
Freehold, New Jersey 07728

RE: VETTER v. PATHMARK/O'CONNELL
Docket No:MON-L-3997-00
***Motion Returnable: 5/11/01***

Dear Judge Uhrmacher:

We represent plaintiffs Anne Marie and Vincent Vetter in the above referenced matter. Please accept the following ***reply brief*** in support of plaintiff's motion to amend the complaint for spoliation of evidence in connection with defendant's loss or destruction of the surveillance videotape of the accident in question.

Defendant's first argument that this motion should be denied on statute of limitations grounds is entirely without merit for at least two reasons. First, the amended complaint relates back under Rule 4:9-3 because it arises from the same transaction or occurrence set forth in the original complaint.

Second, the statute of limitations argument is without merit because plaintiff first learned defendant lost or destroyed the surveillance video tape on March 13, 2001 at the deposition of Charles O'Connell. Therefore, under the discovery rule, this claim is brought well within the statute of limitations. Martinez v. Cooper Hospital-University Medical Center, 163 N.J. 45, 52 (2000); Vispisiano v. Ashland Chem. Co., 107 N.J. 416, 426, 527 A.2d 66 (1987); Fernandi v. Strully, 35 N.J. 434, 449-50, 173 A.2d 277 (1961); Lopez, 62 N.J. at 273. The discovery rule provides that a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered the basis for an actionable claim." Id.

In this case plaintiff has been diligently seeking the videotape literally from the first day of the accident. It has been sought via notice to produce, subpoena, motion to enforce and even by Anthony Grande on the date of the accident (*Exhibit A,* Grande certification). Defendant simply ignored plaintiff's requests and refused to turn it over. Finally, with a motion to dismiss pending, defendant produced a representative most knowledgeable of defendant's video surveillance system and videotape retention policy, Charles O'Connell.

Mr. O'Connell testified defendant indeed had a surveillance videotape system and its purpose was, "[I]f there was an accident, to check on the video to see if it actually happened." *(Exhibit B*, O'Connell deposition at 31). For the first time at this deposition plaintiff learned the videotape of this accident has been lost and/or destroyed. O'Connell testified as follows:

> Q What did you do with the tape?
> A I saved the type, put "save" on it, and put a plastic band around it and left it in the office, the security room.
>
> Q Where is it today?
> A I don't know.
>
> Q What happened to it?
> A I don't know.
> ...
>
> Q You wrote "save" on them?
> A Correct.
>
> Q Why did you do that?
> A I knew it was going to be an issue because Mr. Grande was talking about security tapes, so I knew it was going to be an issue that I'm sure I would be asked for.

*(Exhibit B*, O'Connell deposition at 36-37). Indeed, this is the first time plaintiff ever learned these facts. Defendant now seeks to have the Court endorse this cat and mouse game of refusing to respond to discovery requests and then once plaintiff finally learns its has been lost or destroyed, arguing it is now too late to advance the claim.

Defendant next argues the motion to amend should be denied because negligent spoliation of evidence has not been recognized in New Jersey. The remedies a litigant has when a party such as Pathmark in the instant matter loses or destroys evidence has very recently been set forth in two cases. The claim of negligent destruction of evidence is set forth in Gilleski v. Community Medical Center, 336 N.J.Super. 646 (App.Div. 2001). While it is true there no longer is a claim for "negligent spoliation of evidence," there is a claim for negligence in connection with the loss or destruction of evidence. Id. at 652-53 (applying traditional negligence principles to the negligent destruction of evidence). The relief for a victim of intentional destruction of evidence is set forth in Rosenblit v. Zimmerman, 166 N.J. 391 (2001). Again, while there no longer is a claim for "intentional spoliation of evidence," there is one for fraudulent concealment of evidence.

The undersigned learned of these two cases after the instant motion was filed. Attached please find a revised amended complaint which more specifically sets forth these two causes of action. (*Exhibit C,* revised amended complaint). Defendant also argues against the merits of the amended complaint. Since this is clearly not a proper line of inquiry on a motion to amend, the undersigned will not respond in detail. City Check Cashing v. Nat. State Bank, 244 N.J.Super. 304, 308-09 (App.Div. 1990) (motions for leave to amend are to be liberally granted in the interest of justice and without consideration of the ultimate merits).

Suffice to say that defendant's self-serving statement that he looked at the tape and did not see anyone fall is not only of no legal consequence, and , for reasons to be aired later, it is factually ludicrous and of no probative value. Indeed, defendant's behavior in destroying this evidence creates the inference that defendant knows the tape is damaging to their case. Rosenblit, 166 N.J. at 409. Also, in this case not only was there a specific request to preserve the tape, there was the warning from an attorney that if it was "lost" there would be a spoliation claim. (*Exhibit A,* Grande certification). Defendant clearly recognized this duty and in fact saved it. It has since been lost or destroyed. Defendant is liable and justice requires the motion to amend be granted.

Plaintiff should be entitled to this important evidence. Defendant Jesnel admits they pulled the video tape. But since then, it has disappeared; this is "fishy" to say the least. Accordingly, the Court should order it be produced. If it is not, the only appropriate remedy would be a spoliation of evidence jury charge. *See, e.g. Sea Coast Builders v. Rutgers*, 358 N.J. Super. 524 (App. Div. 2003); *Weeks v. ARA Services,* 869 F.Supp. 194 (S.D.N.Y. 1994) Where relevant information, as in the case of plaintiff's shoes, is in the possession or control of one party and not provided, then an adverse inference may be drawn that such information would be harmful to the party who fails to provide it. *Id., citing, Baxter v. Palmigiano,* 425 U.S. 308, 316-20 (1976); *Gray v. Great American Recreation Ass'n.,* 970 F.2d 1081, 1082 (2d Cir.1992); *United States v. Torres,* 845 F.2d 1165, 1169 (2d Cir.1988). *Rosenblatt v. Zimmerman*, 166 N.J. 391 (holding that a party aggrieved by another's intentional destruction of evidence relative to litigation between the two has a claim for fraudulent concealment against the other); *Marinelli v. Mitts and Merrill*, 303 N.J. Super. 61 (App. Div. 1997)(recognizing tort of spoliation of evidence); *Manorcare Health Services, Inc. v. Osmose Wood Preserving, Inc.*, 336 N.J.Super. 218, 232, 236 (App. Div. 2001) (The courts endeavor to level the playing field short of "dismissal with prejudice" by ordering sanctions such as excluding evidence at trial or by giving an adverse jury charge); *Mosaid Techs, Inc. v. Samsung Elecs. Co.,* 348 F.Supp.2d 332 (D.N.J. 2004) (holding spoliation inference, allowing jury to conclude that destroyed evidence would have been harmful to offending party, would be given to jury.)

Even if defendants try to say this was not important evidence would be of no legal consequence, Indeed, defendant's behavior in destroying this evidence creates the inference that defendant knows the tape is damaging to their case. *Rosenblit*, 166 N.J. at 409. Defendant clearly recognized the importance of this evidence and had a duty to preserve it. If it has since been lost or destroyed, defendant would be liable and justice requires an appropriate remedy.; *Id.*; *see also Mosaid Techs, Inc. v. Samsung Elecs. Co.,* 348 F.Supp.2d 332 (D.N.J. 2004) (holding spoliation inference, allowing jury to conclude that destroyed evidence would have been harmful to offending party, would be given to jury.)

Respectfully submitted,

GERALD H. CLARK

Court Orders. In fact, *Rule* 4:23-2 specifically provides that one of the remedies available to the Court is to preclude the disobedient party from asserting any claims or defenses in the matter. In this case the trial date is impending. The Hovnanian defendants have demonstrated a systemic refusal to comply with not only their discovery obligations, but at least two Court Orders compelling them to do so. This failure is in line with their conduct throughout the case.

Aside from what is clear above, the Hovnanian defendants have further engaged in particularly egregious conduct. For example, they have not produced a single photograph in discovery. Not only does the record indicate they took pictures of this very dangerous condition that resulted in Lopes' injury, but they have produced no progress photos of the site. As the Court is no doubt aware, progress and other similar photos on a site such as this were most certainly taken. The fact that they have produced some documents which would obviously be part of the project files shows they have access to the very documents they were supposed to make available to us pursuant to basic discovery rules and the <u>two</u> orders of the Court. Also, the very 4/9/01 Memorandum specifically references prior audits done that document this dangerous condition and none were produced to us.

Accordingly, we respectfully request the Court find a matter of law that the Hovnanian defendants were negligent in connection with this accident. *See, e.g., Sea Coast Builders v. Rutgers*, 358 N.J.Super. 524 (App. Div. 2003).

In the alternative, we request permission to bring these matters before the jury together with an adverse inference charge that the destroyed and/or withheld evidence would have been unfavorable to defendant. *See, e.g., Weeks v. ARA Services,* 869 F.Supp. 194 (S.D.N.Y. 1994) Where relevant information, as in the case of plaintiff's shoes, is in the possession or control of one party and not provided, then an adverse inference may be drawn that such information would be harmful to the party who fails to provide it. *Id., citing, Baxter v. Palmigiano,* 425 U.S. 308, 316-20 (1976); *Gray v. Great American Recreation Ass'n.,* 970 F.2d 1081, 1082 (2d Cir.1992); *United States v.*

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"In many circumstances the failure to produce relevant evidence may result in an inference the evidence is harmful." 2B N.J. Prac., Evidence Rules Annotated R 101[I] (3d ed. 2005)New Jersey

In general, failure to produce favorable witness or other evidence when it is peculiarly within party's power to do so creates inference that witness' testimony will be unfavorable. United States v. Wright, 845 F.Supp. 1041 (D.N.J.1994).Court may draw adverse inference in civil matter where party refuses to testify in response to probative evidence offered against it. Chase Manhattan Bank, N.A. v. Frenville, 67 B.R. 858 (Bkrtcy.D.N.J.1986). Generally, the failure to produce evidence or present witnesses available to a party gives rise to inference that such evidence or testimony would be unfavorable to that party. U.S. v. Walker Co., 152 F.2d 612 (3d Cir.1945).

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FROM Jerista v. Murray:

Spoliation typically refers to the destruction or concealment of evidence by one party to impede the ability of another party to litigate a case. See Rosenblit v. Zimmerman, 166 N.J. 391, 400-01, 766 A.2d 749 (2001). In civil litigation, depending on the circumstances, spoliation of evidence can result in a separate tort **366
action for fraudulent concealment, discovery sanctions, or an adverse trial inference against the party that caused the loss of *202 evidence. Id. at 401-06, 766 A.2d 749. In this case, we deal only with

the propriety of a spoliation inference.

[19] "Since the seventeenth century, courts have followed the rule 'omnia praesumuntur contra spoliatorem,' which means 'all things are presumed against the destroyer.' " Id. at 401, 766 A.2d 749. The spoliation inference permits the jury to infer that the evidence destroyed or concealed would not have been favorable to the spoliator. Id. at 401-02, 766 A.2d 749 (citing cases in which evidence was intentionally or deliberately destroyed). The inference serves the purpose "of evening the playing field where evidence has been hidden or destroyed." Id. at 401, 766 A.2d 749. Notably, a number of jurisdictions have crafted remedies in cases in which parties lost or destroyed critical trial evidence, even when the loss was not willful. See, e.g., Reilly v. Natwest Mkts. Group Inc., 181 F.3d 253, 267-68 (2d Cir.1999) (holding that "[t]rial judges should have the leeway to tailor sanctions to insure that spoliators do not benefit from their wrongdoing" and "that a finding of bad faith or intentional misconduct is not a sine qua non to sanctioning a spoliator with an adverse inference instruction"), cert. denied, 528 U.S. 1119, 120 S.Ct. 940, 145 L.Ed.2d 818 (2000); Sweet v. Sisters of Providence in Wash., 895 P.2d 484, 490-92 (Alaska 1995) (holding that defendant's negligent or intentional spoliation of evidence relevant to plaintiff's medical malpractice claim shifted burden of proof of legal causation and negligence away from plaintiffs); Velasco v. Commercial Bldg. Maint. Co., 169 Cal.App.3d 874, 215 Cal.Rptr. 504, 506 (1985) (concluding "that a cause of action may be stated for negligent destruction of evidence needed for prospective civil litigation"); Pub. Health Trust v. Valcin, 507 So.2d 596, 599-601 (Fla.1987) (adopting rebuttable presumption of negligence where defendant health care provider could not produce key records in malpractice action).

Case: Jerista v. Murray

Excerpt from: 185 N.J. 175, *201, 883 A.2d 350, **365 to 185 N.J. 175, *202, 883 A.2d 350, **366 (2005)

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Last, we address plaintiffs' argument that because defendant's alleged negligence and dishonesty led to the loss of evidence *201

necessary to prove their claim against Shop Rite (the "suit within a suit") and, ultimately, their malpractice claim against him, defendant should not benefit from his own wrongdoing. Plaintiffs first maintain that for nine years defendant intentionally deceived them into believing that their lawsuit was proceeding forward, when in fact he knew that it had been dismissed due to his non-compliance with discovery demands. By the time plaintiffs learned of their suit's dismissal,

twelve years had passed since the accident. They further contend that defendant's prolonged concealment of the truth resulted in the destruction or loss of critical records kept by Shop Rite and NJAD concerning the identity, nature, and servicing of the automatic door that malfunctioned.

Indeed, both Shop Rite and NJAD successfully opposed the reinstatement of the original complaint, in which they were named parties, precisely because they were hampered in their defenses due to loss of records, long-faded memories, and changed conditions at the accident site.

Defendant counters that plaintiffs' lack of cooperation with him led to the dismissal of their lawsuit, that he never misled them, and that they should have been aware of the disposition of their lawsuit. We express no opinion concerning where the truth lies between the competing claims. That is a matter for the jury. At trial, if the jury believes that plaintiffs were responsible for the lawsuit's dismissal, then their malpractice suit will fail. On the other hand, if the jury finds that defendant's professional defaults caused the dismissal, the jury must consider the other elements of the malpractice action and, in doing so, should consider whether defendant's conduct led to the spoliation of evidence.

[17][18] Spoliation typically refers to the destruction or concealment of evidence by one party to impede the ability of another party to litigate a case. See Rosenblit v. Zimmerman, 166 N.J. 391, 400-01, 766 A.2d 749 (2001). In civil litigation, depending on the circumstances, spoliation of evidence can result in a separate tort **366
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749. In this case, we deal only with the propriety of a spoliation inference.

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Maint. Co., 169 Cal.App.3d 874, 215 Cal.Rptr. 504, 506 (1985) (concluding "that a cause of action may be stated for negligent destruction of evidence needed for prospective civil litigation"); Pub. Health Trust v. Valcin, 507 So.2d 596, 599-601 (Fla.1987) (adopting rebuttable presumption of negligence where defendant health care provider could not produce key records in malpractice action).

Assuming arguendo that defendant misled plaintiffs about the true status of the Shop Rite case and failed to conduct discovery in that case, such dishonesty and dereliction created a high probability that records would be purged and evidence lost, making it *203
difficult, if not impossible, for plaintiffs to prosecute the "suit within a suit" malpractice action. By deliberately deceiving plaintiffs for nine years about the status of their case, defendant can be said to have consciously disregarded a substantial risk that key evidence would not be available when needed by plaintiffs.

[20][21] If plaintiffs can make a threshold showing that defendant's recklessness caused the loss or destruction of relevant evidence in the underlying personal injury lawsuit, the jury should be instructed that it may infer that the missing evidence would have been helpful to plaintiffs' case and inured to defendant's detriment. The jury is free to accept or reject that inference--just like the permissive inference of negligence that jurors may draw under the doctrine of res ipsa loquitur. See Buckelew, supra, 87 N.J.

at 526, 435 A.2d 1150. The spoliation inference will ensure that one party will not benefit by recklessly depriving another party of the evidence needed to present a claim or a defense. Needless to say, if the jury were to accept defendant's account, the spoliation inference would be rejected.

Case: Jerista v. Murray

Excerpt from: 185 N.J. 175, *200, 883 A.2d 350, **365 to 185 N.J. 175, *203, 883 A.2d 350,

**367 (2005)

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At the motion hearing on February 17th, Judge Curran was clear that either they produce the evidence or the spoliation relief plaintiffs were requesting would be granted at trial; namely, that they be precluded, among other things, from disputing plaintiff's version of events. *Rule* 4:23-2 (specifically providing that one of the remedies available to the Court is to preclude the disobedient party from asserting any claims or defenses in the matter); *Sea Coast Builders v. Rutgers*, 358 N.J. Super. 524 (App. Div. 2003); *Weeks v. ARA Services,* 869 F.Supp. 194 (S.D.N.Y. 1994); *Rosenblatt v. Zimmerman*, 166 N.J. 391 (holding that a party aggrieved by another's intentional destruction of evidence relative to litigation between the two has a claim for fraudulent concealment against the other); *Marinelli v. Mitts and Merrill*, 303 N.J. Super. 61 (App. Div. 1997)(recognizing tort of spoliation of evidence); *Manorcare Health Services, Inc. v. Osmose Wood Preserving, Inc.*, 336 N.J.Super. 218, 232, 236 (App. Div. 2001) (The courts endeavor to level the playing field short of "dismissal with prejudice" by ordering sanctions such as excluding evidence at trial or by giving an adverse jury charge); *Mosaid Techs, Inc. v. Samsung Elecs. Co.,* 348 F.Supp.2d 332 (D.N.J. 2004) (holding spoliation inference, allowing jury to conclude that destroyed evidence would have been harmful to offending party, would be given to jury.) Indeed, defendant's behavior in destroying this evidence creates the inference that defendant knows the tape is damaging to their case. *Rosenblit*, 166 N.J. at 409. Defendant clearly recognized the importance of this evidence and had a duty to preserve it. If it has since been lost or destroyed, defendant would be liable and justice requires an appropriate remedy. *Id.*; *see also Mosaid Techs, Inc. v. Samsung Elecs. Co.,* 348 F.Supp.2d 332 (D.N.J. 2004) (holding spoliation inference, allowing jury to conclude that destroyed evidence would have been harmful to offending party, would be given to jury.)

Therefore, given all these factors, as the record currently stands, there is a jury question as to punitive damages. Accordingly, defendants' motion for summary judgment as to plaintiffs' claim for punitive damages should be denied at this juncture.

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To: Gerald Clark

From: Mark Morris
Re: Spoliation Brief Blurb
Date: April 25, 2014

Spoilation is the "concealment or destruction of evidence relevant to litigation." *State v. Cullen*, 424 N.J.Super. 566, 587 (App. Div. 2012) (*citing*, *Rosenblit v. Zimmerman,* 166 N.J. 391, 400-01 (2001)). The duty to preserve evidence attaches to a potential tortfeasor when, "(1) litigation is pending or likely, (2) the alleged spoliator has knowledge of such litigation, (3) the evidence is relevant, and (4) the non-spoliating party is prejudiced by the concealment or destruction of the evidence." *Aetna Life and Cas. Co. v. Imet Mason Contractors,* 309 N.J.Super. 358, 366 (App. Div. 1998) (*quoting, Hirsch v. Gen. Motors Corp.*, 266 N.J.Super. 222, 250-51 (Law Div. 1993)). The Appellate Division in *Chapin v. Samaras*, 2014 WL 1125016 (N.J. Super. Ct. App. Div. Mar. 24, 2014) held that sanctions for spoilation were warranted when a potential tortfeasor removed a key piece of his evidence from his property before plaintiff had a chance to inspect it. *Id.* at *3.

In *Chapin*, a plaintiff was injured when a tree limb fell on her vehicle while driving. *Id.* at *1. Investigations by defendant's insurance company were ongoing to determine if the limb that injured plaintiff came from the homeowner's property. *Id.* Ultimately, before plaintiff could

inspect the subject tree, defendant's carrier denied liability and defendant had the tree at issue removed from his property. *Id.* As a result, plaintiff filed a motion to impose sanctions on defendant for spoilation of evidence. *Id.* The Appellate Division, in finding that sanctions were warranted, held that:

> [Plaintiff] gave notice of the potential claim to the homeowners' carrier within a few weeks of the accident and . . . served the complaint on [defendant] more than three months before the alleged spoliation . . . the duty to preserve evidence related to the trees, or at least to give notice of the proposed tree work, arose at the latest when [defendant] was personally served [with the complaint] . . . by that time she was certainly aware of the four factors enumerated in *Aetna Life, supra,* 309 N.J.Super. at 366. Depending upon when [defendant] had notice of the likelihood of litigation and the other factors, it may have arisen earlier.
>
> *Id.* at *3.

Since defendant did not uphold their duty to preserve evidence related to litigation, the Appellate Division found that sanctions were appropriate and remanded the case for further consideration. *Id.* at *4.

**To**: Gerald Clark
**From**: Mark Morris
**Re**: Spoilation Research - Duty to Preserve Evidence- Sebastio Cruz v. Hitachi
**Date**: November 16, 2012

**Question Presented**: Does an insurance company have a duty to preserve evidence; when is this duty breached; what are the causes of action against a party failing to preserve evidence?

**Short Answer**: Anyone, whether they are a party to the litigation or not has a duty to preserve evidence when there is pending or probable litigation, a party has knowledge litigation is likely, it is foreseeable that the harm of destroying evidence would be damaging to litigation, and the evidence at issue is relevant to the litigation. A party breaches their duty to preserve evidence when they act unreasonably, and adversely impact a claimants's litigation.

**Discussion**: It is a well settled rule of law that any party to litigation, or any person in possession of evidence foreseeably linked to potential litigation has a duty to preserve that evidence. *See, e.g. Hirsch v. Gen. Motors Corp.*, 266 N.J. Super. 222 (Ch. Div. 1993) *holding modified by Rosenblit v. Zimmerman*, 166 N.J. 391 (2001). Destruction of evidence, or the significant alteration of documents or instruments involved in litigation results in spoilation of evidence, and hinders an "action's proper administration and disposition." *Id. at 234, See Bondu v. Gurvich,* 473 *So.*2d 1307, 1312 (Fla.Dist.Ct.App.1984); *see also* Nancy Melgaard, Note,

*Spoliation of Evidence-An Independent Tort?,* 67 *N.D.L.Rev.* 501 (1991). Because spoilation is such a daunting and lethal threat to litigation, states have sanctioned both criminal and civil penalties for destroying or altering evidence. *Id.*

New Jersey is among states that recognizes intentional spoilation of evidence as a cause of action. *Id.* 237. The remedy in New Jersey for spoilation of evidence is damages. *Id.* 245. To determine whether a party is owed this remedy, it first must be established whether the party destroying evidence had a duty to preserve the evidence. *Id.* at 249. The court in *Hirsch, supra,* stated:

> A negligent spoliation of evidence case, *Velasco v. Commercial Bldg. Maintenance Co., supra,* set out the elements to determine whether a duty to preserve evidence arises. *See id.; cf. Reid v. State Farm Mut. Auto. Ins. Co.,* 173 *Cal.App.*3d 557, 218 *Cal.Rptr.* 913 (1985). In *County of Solano v. Delancy, supra,* the court stated **the most important factor was the foreseeability of harm to the plaintiff**. *Id.,* at 729 . . . Accordingly, a duty to preserve evidence, independent from a court order to preserve evidence, arises where there is: (1) pending or probable litigation . . .; (2) knowledge . . . of the existence or likelihood of litigation; (3) foreseeability of harm to [a current or potential litigant], or in other words, discarding the evidence would be prejudicial to [a party to the pending or potential litigation]; and (4) evidence relevant to the litigation.
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> *Id.* at 249-50.

In the current matter, all of these factors are met. Defendant, BLANK INSURANCE COMPANY

was fully aware of litigation taking place against DEFENDANT LITIGATION IS AGAINST, and for their own investigation took the most crucial piece of evidence into their possession. The potential harm of mishandling this vital piece of evidence was undeniably foreseeable. Yet, INSURANCE COMPANY failed to provide Plaintiff and his counsel an opportunity to examine and record information about the nail gun responsible for Plaintiff's injuries, instead, returning the item to DEFENDANT only to have it go "missing". The relevance of this evidence to Plaintiff's suit cannot be overstated, and the loss of this item remedied only by damages from both DEFENDANT and BLANK INSURANCE COMPANY.

While the scope of duty to preserve evidence is not without limitation, "'a potential spoliator need do only what is reasonable under the circumstances.'" *Id.* 251, *quoting*, *County of Solano v. Delancy, supra,* 264 *Cal.Rptr.* at 731. In a situation paralleling the present matter (although inversed, in that the defendant, not the plaintiff is harmed by an insurance company's unreasonable destruction of evidence) the court in *American Family Ins. Co. v. Village Pontiac, GMC, Inc.*, 223 Ill. App.3d 624 noted that where only one party was allowed to look at a crucial piece of evidence before its destruction:

> plaintiffs intentionally allowed the most crucial piece of evidence in this case to be destroyed. Plaintiffs should have known that potential defendants to a case alleging

> negligence and product liability would undoubtedly want to inspect, as plaintiffs' experts had done, and perhaps test the object alleged to have caused the damage. Further, [the] Insurance Company had title to the car and, as an insurance company, unquestionably knew the importance of the car in allowing defendants to prepare a defense. Indeed, [the] [i]nsurance [company] in anticipation of a subrogation claim allowed the car to be destroyed only after its experts had thoroughly examined the car and had issued their opinions on the cause of the fire.
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> *Id.* at 627.

Likewise, in the present matter, INSURANCE COMPANY'S essential destruction of the crucial piece of evidence has unreasonably burdened Plaintiff from effectively litigating his case. INSURANCE COMPANY did not act reasonably in their decision not to accord Plaintiff an oppurtunity to examine the nail gun before returning it to DEFENDANTs. As a result, Plaintiff should be entitled to damages.

Significantly, New Jersey courts have also come to recognize a claim of negligent spoilation of evidence as a cause of action as well. There are numerous policy implications satisfied by recognizing this claim. Stating these policy goals and concerns, a New Jersey court noted:

> Recognition of the tort of negligent spoliation of evidence would likely reduce the

> possibility of negligent as well as intentional destruction of evidence by putting individuals, business, and governmental entities on notice of acceptable societal behavior. The increased availability of relevant evidence would in turn further an individual's due process right to have one's grievances heard by a court of competent jurisdiction utilizing all relevant evidence. The failure to recognize negligent spoliation as a separate tort would invite destruction or suppression of relevant evidence by an opponent or third party, thus creating or continuing the perception that individual due process rights are unimportant or are somehow being trampled by the judicial system itself. *Do Not Fold Spindle Or Mutilate: The Trend Toward Recognition of Spoliation as a Separate Tort,* 30 *Idaho L.Rev.* 37, 63 (1993).
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> Recognition of negligent spoliation as a separate cause of action would also benefit litigants by reducing litigation costs. Costs associated with evidence reconstruction and identification of categories of documents requiring preservation would be avoided, as would the costs of propounding discovery to ascertain the fate of spoliated evidence. *Id.* at 65.
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> Adoption of negligent spoliation of evidence as a separate tort would also benefit society by promoting testimonial and discovery candor. If litigating parties are made responsible for preserving all relevant evidence, the number of cases in which decisions are made based on all relevant information would increase. An explicit prohibition against negligent spoliation would also tend to conserve judicial resources by reducing the number of motions to compel production of evidence and the corresponding costs of discovery. *Id.* at 67.
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> *Callahan v. Stanley Works*, 306 N.J. Super. 488, 495-96 (Ch. Div. 1997).

Recognizing these compelling policy reasons, the court in *Callahan* instructed that, along with showing a duty to preserve evidence, "to maintain a negligent spoliation of evidence claim, 'a

plaintiff must allege sufficient facts to support a claim that the loss or destruction of the evidence caused the plaintiff to be unable to prove an underlying lawsuit.'" *Id.* at 497*, quoting, Boyd v. Travelers Ins. Co.,* 652 *N.E.*2d 267, 271 (1995). Where a plaintiff gave a heater, alleged to have exploded and injured him, to a defendant's insurance carrier, only to have them misplace it, the court held:

> plaintiffs' complaint alleges that [defendant's insurance carrier] not only lost the heater, but failed to test it to determine the cause of the explosion. Plaintiffs were thereby deprived of the key piece of evidence in their products liability lawsuit against [the heater manufacturer] -the product itself. They claim that, as a result, no expert could testify without doubt whether the heater was defective or dangerously designed. These allegations are sufficient to support the theory that [defendant's insurance carrier's] loss of the heater caused plaintiffs to be unable to prove their suit against Coleman.
>
> *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 271 (1995).

Like the aforementioned facts, Plaintiff in the matter at hand was severely disabled in his efforts to bring a suit against DEFENDANTS by INSURANCE CARRIERS role in losing the most important piece of evidence in the litigation. Through INSURANCE COMAPNY'S negligent spoilation, Plaintiff's ability to prove DEFENDANTS liability was adversely impaired. As a result Plaintiff is deserving of damages for any lost value his claim suffers as a result of this

mishandling.

## CONCLUSION

New Jersey law recognizes a remedy in tort for spoilation of evidence. To bring a cause of action for intentional spoilation of evidence, a plaintiff can show that a party in possession of evidence should have foreseen that evidence would be used in litigation, and that their destruction of this evidence impaired a claim of action. Similarly, for negligent spoilation of evidence, a plaintiff can show that it was reasonable to assume the party in possession of the evidence had a duty to preserve the evidence, that this duty was breached, and caused harm to a plaintiff. In the present case both of these claims seem likely to succeed.

cc: John Camassa, Esquire
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