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Spoliation Aftermath

What will the court do when your evidence is gone?

New Jersey courts impose severe penalties for intentional or negligent destruction of evidence. An attorney must impress upon a client the importance of preserving evidence and the consequences for failing to do so. And, an attorney whose client is injured by spoliation of evidence should proceed cautiously to ensure the appropriate relief is obtained.

Spoliation refers to the hiding or destroying of litigation evidence, usually by an adverse party, that interferes with the pending action's administration and disposition. *Rosenblit v. Zimmerman*, 166 N.J. 391, 400-01 (2001) (citing *Black's Law Dictionary* 1409 (7th ed. 1999)); *Hirsch v. General Motors Corp.*, 266 N.J. Super. 222, 234 (Law Div. 1993) (citing Nancy Melgaard, "Note, Spoliation of Evidence — An Independent Tort?" 67 N.D.L.Rev. 501 (1991)). Key issues once evidence is lost are: (1) the manner in which the courts can and will address concerns of the parties; (2) how courts will protect the rights of innocent parties; and (3) the manner in which

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wrongdoers will be penalized.

New Jersey courts have not recognized negligent spoliation as an independent tort. Rather, in *Hirsch*, the Law Division held there is a duty to preserve evidence apart from any court order, and the sanctions of R. 4:23-2, including the award of attorney fees, are applicable where evidence is not preserved. This duty arises when there is: (1) pending or probable litigation; (2) knowledge of the existence or likelihood of litigation; (3) foreseeability of harm; and (4) evidence relevant to the litigation.

Once a court finds evidence was negligently destroyed or hidden, there are several remedies that can be invoked. For example, the Appellate Division in *Nerney* equated negligent loss of evidence with a failure to comply with discovery obligations. *Nerney v. Garden State Hosp.*, 229 N.J. Super. 37 (App. Div. 1988) (citing R. 4:23-2(b)(2)). As such, pursuant to case law and R. 4:23-2, a trial court is given discretion to impose sanctions when a party fails to obey an order to provide or permit discovery. Upon failure to make discovery, R. 4:23-2(b) permits the court to enter an order that: (1) matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (2) refus-

es the disobedient party the opportunity to support or oppose designated claims or defenses, or prohibiting it from introducing designated matters into evidence; (3) dismisses the action or proceeding, or any part thereof, or renders a judgment by default against the disobedient party. Pressler, *Current N.J. Court Rules* (1993 ed.); R. 4:23-2(b)(2) and (3).

New Jersey courts have consistently held it is fundamental that trial courts have the inherent discretionary power to impose sanctions for failure to make discovery. *Calabrese v. Trenton State College*, 82 N.J. 32 (1980). The limitation imposed on the trial courts is that they be just and reasonable under the circumstances. As such, the Appellate Division in *Nerney* concluded civil litigants are entitled to their day in court. Testimony regarding evidence a party negligently lost should not be barred unless there is a comparable showing of substantial prejudice to the nondelinquent party from the loss of evidence.

Procedurally, trial courts will determine the issue of substantial prejudice after full consideration of the applicable circumstances, plaintiff's claims, defendant's defenses and the evidence that will be presented by each party. Accordingly, discovery should be completed before the trial court decides the issue of prejudice and, if appropriate, an evidentiary hearing should be held.

While a court may also dismiss a party's cause of action, dismissal of a party's claim with prejudice is generally not

invoked except where the order for discovery goes to the foundation of the cause of action, or where refusal to comply is deliberate and contumacious. New Jersey courts have generally taken the federal approach to imposing sanctions for discovery violations. As such, dismissing a cause of action with prejudice will normally be ordered by a New Jersey Court only when no lesser sanction will suffice to erase the prejudice suffered by the nondelinquent party.

With regard to intentional acts, New Jersey courts recognize a tort of fraudulent concealment as a remedy for intentional spoliation of evidence. See *Viviano v. CBS, Inc.*, 251 N.J. Super. 113 (App. Div. 1991). When fraudulent concealment occurs in a litigation context, the Supreme Court of New Jersey set forth the elements that must be established by a plaintiff for a cause of action. These criteria are: (1) defendant in the fraudulent concealment action had a legal obligation to disclose evidence in connection with an existing or pending litigation; (2) the evidence was material to the litigation; (3) plaintiff could not reasonably have obtained access to the evidence from another source; (4) defendant intentionally withheld, altered or destroyed the evidence with the purpose to disrupt the litigation; and (5) plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed. *Rosenbilt*, 166 N.J. at 406-407.

According to the *Rosenbilt* court, if the above elements are met, the aggrieved party should be made whole with compensatory damages, and punitive damages if the elements of the Punitive Damages Act, N.J.S.A. 2A:15-5.12, are

met. A common remedial option is the "spoliation inference," that comes into effect when a litigant is made aware of the destruction or concealment of evidence during the underlying litigation. With this remedy, all relevant issues regarding the lost evidence are presumed against the destroyer of the evidence. This inference is designed to even the playing field and creates the presumption that the evidence the spoliator destroyed or otherwise concealed would have been unfavorable.

Under certain circumstances, the trial court may also impose criminal sanctions for intentional spoliation of evidence. For instance, New Jersey's falsification statute, N.J.S.A. 2C:28-6(1), provides in pertinent part:

A person commits a crime of the fourth degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:

(1) Alters, destroys, conceals or removes any article, object, record, document or other thing of physical substance with purpose to impair its verity or availability in such proceeding or investigation...

During an existing action, there are two ways a plaintiff can present a spoliation claim to the court.

First, plaintiff may file a motion with the court requesting sanctions for destruction of evidence in accordance with R. 4:23-2. Depending on the facts of the case, the following relief may be appropriate:

- Precluding defendant from offer-

ing any evidence in opposition to plaintiff's claims as a result of defendant's destruction of evidence;

- Precluding defendant from offering any evidence supporting any of defendant's affirmative defenses as a result of defendant's destruction of evidence;

- Striking defendant's answer and affirmative defenses;

Entering default judgment against defendant as to liability on all of plaintiff's claims;

- Precluding defendant from presenting evidence rebutting plaintiff's damages proofs;

- Awarding plaintiff all of his or her costs and attorneys' fees in the matter;

- Awarding any other or further relief as the court may deem appropriate under the circumstances; and

- In cases of intentional spoliation, plaintiff may also request an award for punitive damages.

Or, plaintiff may request leave to file an amended complaint to add a cause of action for intentional spoliation of evidence.

If spoliation is discovered after the underlying action has been lost or otherwise seriously compromised, plaintiff may file a separate tort action in which he may be required to prove the elements of fraudulent concealment.

Accordingly, attorneys whose clients are injured by spoliation of evidence must proceed cautiously. The first step is to identify the type of spoliation claimed and then determine not only the timing of the application for relief, but the relief that best serves to undo the harm caused to their clients. ■