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OF NOTE

NCBA Member Benefit – I.D. Card Photo
Obtain your photo for court identification cards at NCBA Tech Center. Cost $10.
February 1, 2, & 3 • 9 a.m.-4 p.m.

EVENTS

Suddenly Solo-What do I need?
Information Service Fair
Feb. 1, 2011
See insert

WE CARE Children's Holiday Party
Feb. 23, 2011 at Domus

Moot Court Competition
March 22 & 23 at Domus

Law Day
Thursday Evening, April 28, 2011
at Domus

WHAT'S INSIDE

Robert Nigro Named Administrator for Nassau County Assigned Counsel Defender Plan (18B)

By Valerie Zurblis

Robert M. Nigro, former chief of the Civil Forfeiture Bureau of the Nassau County District Attorney's Office, has been named the new administrator of the Nassau County Assigned Counsel Defender Plan (18B). The Administrator oversees more than 260 attorneys who are assigned by the courts to represent clients in criminal cases when they cannot afford an attorney.

The office oversees more than 6,000 cases a year and is based at the Nassau County Bar Association headquarters in Mineola.

Last year, Robert Nigro retired from the position of Chief of the Civil Forfeiture Bureau, of the Nassau County District Attorney's Office. He had been a Co-chair of the Forfeiture Law Advisory Group (FLAG) of the NYS District Attorney's Association from 1997 until 2007, and is presently the Association's outgoing Treasurer. Nigro was an Assistant in the Nassau County District Attorney's Office from 1976 to 1982 and worked in the Rackets Bureau, the District Court Bureau and the Appeals Bureau. From 1982 to 1987, he was Principal Law Clerk to the Honorable Abbey L. Boklan, Nassau County Court Judge. After a short sojourn in private practice, Nigro returned to the Nassau County District Attorney's Office in 1989 to work in the County Court Trial Bureau, and later to head the Civil Forfeiture Bureau.

Robert Nigro lectures on forfeiture at numerous state and

Robert M. Nigro

local bar association programs in Nassau and Suffolk Counties, has participated as both a lecturer and panelist in numerous FLAG and the New York State Prosecutors' Training Institute (NYPTI) seminars from 1993 to the present, and has lectured to both local and state police agencies and the State Division of Criminal Justice Services. He was invited as a speaker and panelist at the Ontario Attorney General's Conference on Organized Crime in Toronto and appeared before the Provincial Legislature to speak in support of proposed forfeiture legislation in Canada.

Nigro received his BA from Fordham College and his JD degree from Fordham Law School. He has taught at Hofstra Law School as a Special Professor of Law and in the Criminal Justice Program at Nassau Community College. The Bayville resident replaces Patrick McCloskey, who retired in December.

NCBA's BOLD Initiative Wins 2010 Innovation Award

By Valerie Zurblis

For the second year in a row, the Nassau County Bar Association has won statewide recognition for its leadership and foresight, this time for its creative BOLD Initiative, which incorporates foreign languages into NCBA's community outreach to better serve the increasingly diverse Nassau County population whose primary language is not English.

"This year we received a large number of nominations," said Earamichia Brown, Executive Council Chair of the New York State Conference of Bar Leaders, NYS Bar Association, in her letter announcing the news. "Your nomination was one that stood apart from the others."

The NYS Conference of Bar Leaders Innovation Award, formerly known as the Award of Merit, was renamed to recognize how bar associations adapt to the needs of their members and the community at large by introducing new programs, ideas and methodologies that benefit everyone involved. The award program also serves to provide information to all bar leaders on new activities and projects that promote the public good, public understanding of the law and the professional responsibilities of attorneys. Judging is based on ingenuity and creativity in planning the project, overall quality of the execution, and the effect of the project on the bar and/or the public. The Nassau County Bar Association won in the Large Association category, 2,000-plus members.

NCBA's BOLD Initiative, launched in August 2009, evolved into several distinct projects, including installing a telephone Language Line, demonstrations for the public of U.S. Citizenship interviews, incorporating attorneys fluent in foreign languages into the monthly Mortgage Foreclosure and Senior Citizen legal consultation clinics, and hosting for the first time, foreign consuls at a CLE seminar at Domus relating to the arrest of foreign nationals. In addition, BOLD was able to quickly mobilize after the devastating earthquake in Haiti last year to offer seminars in Haitian Creole on Temporary Protected Status.

"The BOLD Initiative has created an awareness of the untapped resources at the Bar and underscored all the Bar offers for our members and the community," said NCBA President Marc Gann. "Through BOLD, the NCBA is strengthening its reputation as a place where all citizens can gain an understanding of legal issues that are often complicated but that affect their lives – now in their native tongue."

This is the fifth time NCBA has been recognized by the NYS Bar Association with its top award. Last year, NCBA was recognized for its groundbreaking Mortgage Foreclosure Pro Bono Project, and in previous years for its innovative public education program, "Murder in the Library"; the extensive attorney-student mentoring program for at-risk middle school students, and the creation of the WE CARE Fund, which allows Bar Association members to raise funds for the community's

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UPCOMING PUBLICATIONS COMMITTEE MEETINGS

Tues., Feb. 15, 2011 • Thurs., March 10, 2011 – 12:45 at Domus

The Lawyer Assistance Program provides confidential help to lawyers and judges for alcoholism, drug abuse and mental health problems. Call 1-888-408-6222. Calls are completely confidential.

Personal Injury & Workers' Compensation Focus

Adding insult to injury

When the product that allegedly injured the plaintiff has been destroyed before trial

The best evidence in a products liability case is almost always the product itself. The plaintiff uses it to prove that the defective product caused plaintiff's injuries, and that it was manufactured by the defendant. The defendant uses the actual product to prove that it had not manufactured the product, or that the product was not defective. But what happens when the product has been destroyed before trial? Can the case proceed to trial without the most critical piece of evidence? As discussed below, court opinions vary widely based upon a variety of factors. This article will discuss cases involving a party's intentional or negligent destruction of evidence, known as spoliation, as well as cases in which evidence was innocently destroyed, and suggest public policy reasons for allowing a case to proceed to trial despite the innocent destruction of the product in question.

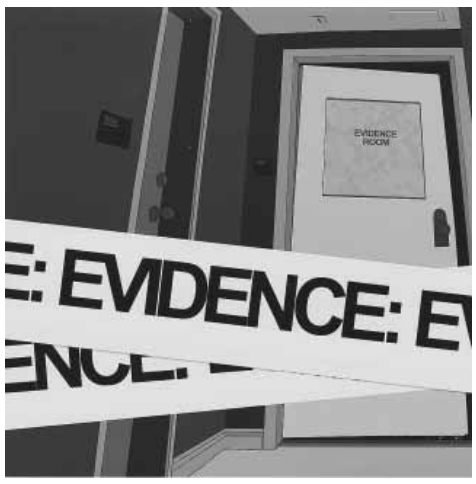
Madeline Klotz

The Status of the Law of Spoliation

When evidence is destroyed, it is usually destroyed by a party to the case. When this happens, the party who has not destroyed the evidence may seek sanctions against the destroyer. Sanctions for the destruction of evidence are provided under Section 3126 of the CPLR. They are also available under the common law doctrine of spoliation.

The CPLR: When a party has destroyed the product, it is unable to disclose the product as evidence. Section 3126 provides three possible remedies for the failure of a party to disclose evidence: first, that the issues will be resolved in favor of the party moving for sanctions; second, an order preventing the destroying party from supporting or defending claims or defenses, and from producing evidence; or, third, an order striking the pleadings, dismissing the action, or rendering a default judgment against the disobedient party. But, for a court to strike a party's pleading pursuant to the statute, the failure to produce the evidence must be "willful, contumacious or in bad faith." *Foncette v. LA Express*, 295 A.D.2d 471, 472 (2d Dept. 2002).

Common Law: Common law sanctions for spoliation of evidence allow striking the destroying party's pleading when the destroyed evidence is essential to the case and the non-destroying party is unable to defend itself with "incisive evidence." However, if the destroyed evidence is not essential or its destruction does not prejudice the other party, a lesser sanction of preclusion from proving the evidence's condition may be imposed. *See Mylonas v. Town of Brookhaven*, 305 A.D.2d 561, 562-63 (2d Dept. 2003); Foncette, 295 A.D.2d at 472; *Marro v. St. Vincent's Hosp.*, 294 A.D.2d 341, 341 (2d Dept. 2002).



While both the statute and common law allow the striking of a pleading, they have very different standards for imposing this drastic sanction. The distinctions are due to the different focuses of the two standards. The common law focuses its basis for sanctions on the prejudice to the party seeking sanctions, while the statute focuses on the intent or conduct of the party who caused the loss of evidence. *See Favish v. Tepler*, 294 A.D.2d 396 (2d Dept. 2002). Regrettably, many court decisions do not differentiate between them, resulting in conflicting opinions and confusing law.

For example, in *Kirschen v. Marino*, when the court considered whether to impose sanctions for spoliation, it stated:

> A party seeking a sanction pursuant to CPLR 3126 such as preclusion or dismissal is required to demonstrate that 'a litigant, intentionally or negligently, dispose[d] of crucial items of evidence ... before the adversary ha[d] an opportunity to inspect them', thus depriving the party seeking a sanction of the means of proving his claim or defense. The gravamen of this burden is a showing of prejudice.

16 A.D.3d 555, 555 (2005). While the court in *Kirschen* referred to the statute, its analysis was based on the common law standard of prejudice, rather than the statutory requirement of willful, contumacious or bad faith conduct. Because courts sometimes confuse these standards, a practitioner should clearly state the sanctions sought and the proper standard required for the imposition of sanctions.

The Rarer Case When Spoliation Is Not Involved

Most case law involves situations where one of the parties, usually the plaintiff, has either intentionally or inadvertently destroyed evidence. Under these circumstances, the court may apply either a common law spoliation analysis determining the prejudice to the party seeking sanctions or a statutory analysis determining whether a party willfully destroyed the evidence. However, there is a rare occasion when neither party is at

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New workers' compensation medical treatment guidelines create serious issues for third party personal injury attorneys

Effective December 1, 2010, the New York State Workers' Compensation Board adopted new and comprehensive Medical Treatment Guidelines for injured workers applicable to cases both prior to and after December 1, 2010. *See* 12 NYCRR §324. How will these new Medical Treatment Guidelines impact personal injury attorneys with third party liability claims and an underlying workers' compensation case? In many cases, it may mean that current and future clients will lose medical treatment long before the liability claim reaches trial.

Background

The new Medical Treatment Guidelines are the result of a Task Force created during the 2007 Spitzer Workers' Compensation Reforms. The new guidelines can be found on the Workers' Compensation Board website at this link: http://www.wcb.state.ny.us/content/main/hcpp/MedicalTreatment Guidelines/2010TreatGuide.jsp

The guidelines can also be ordered in CD format from the Board.

All personal injury attorneys should know that the new workers' compensation Medical Treatment Guidelines only apply to low back, neck, shoulder and knee injuries for the time being. Thankfully, all other injuries, illnesses or body parts come under the old workers' compensation treatment standards for the time being. Therefore, if a client's injury involves a traumatic brain injury (TBI) as a result of a fall from a ladder, the new treatment guidelines do not apply. The stated goals of the new Medical Treatment Guidelines are to:

- Establish a set standard of medical care for certain injuries;
- Improve the quality of treatment/care to injured workers;
- Improve the speed of delivery of treatment;
- Reduce costs associated with treatment dispute resolution;
- Eliminate unnecessary medical treatments that do not contribute to a positive outcome;
- Speed return to work, whenever possible, for injured workers;
- Reduce overall medical costs within the workers' compensation system. (Currently, back, neck, shoulder and knee claims amount to approximately 60 percent of all medical costs, hence the initial application of the new treatment guidelines to these body parts.)

Troy G. Rosasco

The Guidelines

The only way to reduce medical costs is to reduce treatment In this respect, the new Medical Treatment Guidelines do just that. Prior to December 1, 2010, it would be common for an injured worker with a herniated lumbar disc to receive months (if not years) of conservative care such as physical therapy, chiropractic, epidural injections, narcotic pain relief (or a combination of all the above) if surgery was not warranted.

Under the new Medical Treatment Guidelines, however, physical therapy is limited to a maximum of 40 visits for the life of the case, absent a "variance" (to be discussed later in this article). Chiropractic care is similarly capped for the life of the claim, absent a variance. Narcotic pain medication is limited to just two weeks. No longer will it be possible for workers' compensation attorneys to petition the Workers' Compensation Board for ongoing treatment ad infinitum while a claimant's third party lawsuit is pending trial.

In contrast to no-fault claims (in

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EVIDENCE ...

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fault for the destruction of evidence. Here, the court considers whether a plaintiff can prove its case without the crucial evidence.

In strict products liability cases, courts have recognized that a plaintiff need not prove a specific defect, but may prove the necessary facts with circumstantial evidence. *See Coley v. Michelin Tire Corp.*, 99 A.D.2d 795, 795 (2nd Dept. 1984); *Otis v. Bausch & Lomb Inc.*, 143 A.D.2d 649, 650 (2d Dept. 1988); *Yager v. Arlen Realty & Dev. Corp.*, 95 A.D.2d 853, 853 (2d Dept. 1983). "[A] product defect may [also] be inferred from proof that the product did not perform as intended by the manufacturer." *Coley*, 99 A.D.2d at 795.

For example, in *Otis v. Bausch & Lomb Inc.*, a plaintiff claimed she suffered eye injuries from contact lenses. 143 A.D.2d at 649. Although the plaintiff disposed of the lenses because they had dried out, the court permitted the case to go to trial without the lenses because the plaintiff had presented sufficient circumstantial evidence to raise a triable issue. *Id.* at 650. The court acknowledged that both the identity of a manufacturer and the existence of a product's defect can be proven with circumstantial evidence. *Id.* Thus, courts will allow a plaintiff's case to proceed without essential evidence.

Public Policy Reasons for Allowing Cases Involving Destroyed Evidence to Proceed to Trial

Unless the plaintiff has intentionally or negligently destroyed the product, it seems fundamentally unfair for the injured plaintiff to suffer a second injury – the loss of compensation for his injuries – because the product has been destroyed. Must the plaintiff bear this additional loss?

Although the answer is not clear, it appears that courts are expanding the rights of plaintiffs in missing product cases. For example, in 1973, the Court of Appeals expanded manufacturers' liability holding that manufacturers may be liable not only to users of a defective product, but also to injured innocent bystanders. *Codling v. Paglia*, 32 N.Y.2d 330, 335 (1973). In *Codling*, the Court found that a manufacturer of an automobile containing a defective steering mechanism was liable to bystanders who were injured when the defective automobile lost control and collided with the bystanders' vehicle. *Id.* The Court discussed important public policy reasons to support imposing liability.

First, the Court recognized that the ultimate rationale for expanding warranty protection is to cast the burden on the manufacturer which sold the product on the market. Second, the Court noted that

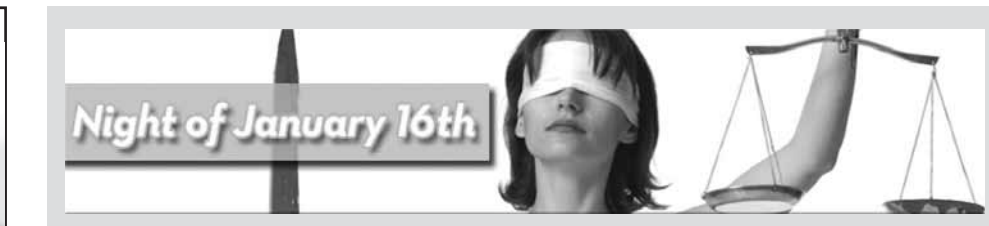
> [t]oday as never before the product in the hands of the consumer is often a most sophisticated and even mysterious article ... Advances in the technologies of material, of processes, of operational means have put it almost entirely out of the reach of the consumer to comprehend why or how the article operates, and thus even farther out of his reach to detect when there may be a defect or a danger present in its design or manufacture. In today's world, it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose. Once floated on the market, many articles in a very real practical sense defy detection or defect, except possibly in the hands of an expert after laborious and perhaps even destructive disassembly.

Id. at 340.

Finally, the Court recognized that holding manufacturers liable to non-users will pressure manufacturers to create safer products, especially since the manufacturer "alone has the practical opportunity, as well as a considerable incentive, to turn out useful, attractive, but safe products." The Court also noted that the increased price as a result of this burden on the manufacturer is acceptable because users will have the added assurance of safety. *Codling*, 32 N.Y.2d at 341.

The Court's rationale in *Codling* for expanding manufacturers' liability can be applied to the context where a product causing injury to a person is later innocently destroyed. When a product has been destroyed before trial through no fault of the plaintiff, the injured plaintiff should nevertheless be given an opportunity to seek compensation for its injuries. Since the manufacturer sold the defective product on the market, the defect was likely undetectable, and only the manufacturer was in the position to produce a safe product, the manufacturer should be held liable when its defective product causes injuries to others. The manufacturer will still have its day in court, but at least the injured plaintiff will, too.

Madeline Klotz is a recent law school graduate and valedictorian of Touro Law Center. Upon admission to the bar, she will begin her employment as an associate in Meyer, Suozzi, English & Klein's Personal Injury Department.



Art imitates life: Night of January 16th

By Joe Ryan

What would bring a sitting New York Supreme Court Judge, five lawyers, and two physicians together on stage? Ayn Rand's play: Night of January 16th at the Helene Fortunoff Theater on the Hofstra University Campus commencing on January 14th for six performances.

Night centers on a murder trial involving unscrupulous characters, a mistress and an ingenious plot. The verdict will be rendered by a jury selected from the audience, and a discussion will follow to the delight of late legendary author Ayn Rand.

All of the "professionals" have substantial acting experience and will be joined by Hofstra students and other regional actors rounding out the cast.

The cast includes: Hon. Dana F. Winslow (Justice, Nassau County Supreme Court), Marc C. Gann (NCBA President), Joe Ryan (Past President, NCBA) Jim Bradley, Esq. (as the prosecutor), Bruce Roistacher, Esq. (as defense counsel), Dan Odell, Esq. (as the handwriting expert), Ivan Goldfarb, DC (as the medical examiner), and Bert Emmett, MD (as the private eye).

Night will be directed by Hofstra's Artistic Director Robert Spiotto – well known for working with lawyers on stage from prior productions at the Nassau County Bar Association. For Tickets call 516-463-6644 or visit hofstra.edu/hofstraentertainment.

Paralegal Society of Long Island, Inc.

First Annual Paralegal Career Forum & Membership Drive

Monday, January 24, 2011 • 5:30 - 8:30 p.m.
Nassau County Bar Association, 15th & West Streets, Mineola, NY

The Paralegal Job Market: Strategies for 2011
Complimentary buffet dinner, program and panel discussion

Please fill out registration form and send to Jeffrey Bloom,
46 Oak Street, Hicksville, NY 11801 or email paralegal society.li@gmail.com Attn: Jane L. Zukaitis

Paralegal Society of Long Island, Inc. • Jan. 24, 2011

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