

A Synopsis of Remedies, Meaning & Implications

Rosenblit v. Zimmerman, 166 N.J. 391 (2001)

1. “Spoliation,” as a term of art, “...is used to describe the hiding or destroying of litigation evidence, generally by an adverse party.”
2. New Jersey does not recognize “intentional ‘spoliation’” as a separate cause of action. Rather, the claim, in terms of semantics, is one of “fraudulent concealment of evidence.”
3. Civil remedies, within the subject litigation:
 - (a) “an adverse inference,” that is, a presumption the evidence the spoliator destroyed or otherwise concealed would have been unfavorable to that party.
 - (b) discovery sanctions in the form of a court order:
 - (i) designating established facts;
 - (ii) barring the spoliating party from supporting or opposing certain designated claims or defenses;
 - (iii) prohibiting the introduction of designated matters into evidence;
 - (iv) dismissing an action;
 - (v) entering judgment by default; and/or
 - (vi) requiring the spoliating party to pay “reasonable expenses” resulting from the acts or omissions resulting in the spoliation, including attorney fees.
4. Civil remedies, *either* within the subject litigation *or* ancillary thereto:
 - (a) fraudulent concealment of evidence cause of action, i.e., intentional destruction of evidence
 - (i) prima facie case:
 - 1) spoliating party had a legal obligation to disclose evidence in connection with an existing or pending litigation;

- 2) evidence was material to the litigation;
- 3) other party could not reasonably have obtained access to the evidence from another source;
- 4) spoliating party intentionally withheld, altered or destroyed the evidence with the purpose to disrupt the litigation; and
- 5) other party was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence the spoliating party concealed.

(b) Claimants or Respondents: Is the separate tort action of “fraudulent concealment of evidence” limited to a party-claimant in the underlying action?

(i) At footnote 3 of the Rosenblit decision, the New Jersey Supreme Court comments that they were:

“...not called upon here to determine what circumstances, if any, would entitle a defendant who has suffered destruction of evidence in the underlying litigation to invoke the fraudulent concealment tort remedy.”

(ii) At footnote 3, “*See*” introductory signal citation to Hewitt v. Allen Canning Co., 321 N.J. Super. 178, 184-85 (App. Div.), *certif. denied*, 161 N.J. 335 (1999).

In Hewitt, consumer plaintiff brought suit against canner, distributor and retailer of Farm Flavor brand spinach alleging personal injuries from the partial consumption of a grasshopper found in the spinach can. The plaintiff law firm stored the can and its contents with the grasshopper therein in the firm’s refrigerator. The stored can began to smell and, consequently, upon confirmation that “clear and vivid” pictures of the can, spinach and offending grasshopper were secured, a firm partner authorized the disposal of this tangible evidence. The case settled on the direct claim for \$3,000, but, the defendants nevertheless reserved and pursued a third-party claim against the plaintiff law firm for the tort of spoliation of evidence and breach of a duty owed to the defendants.

In its opinion, the Appellate Division noted that a “tort action for spoliation affords damages to a ‘plaintiff’” whereas when evidence is concealed or destroyed by a plaintiff prejudicing a defense, the defendant’s recourse is limited to sanctions per the Rules of Court.

The Appellate Division nevertheless concluded that a separate tort action by a defendant may exist against a “third-party” relative to the plaintiff and defendant.

But, the Appellate Division went on to conclude that the plaintiff law firm in this matter did not breach a duty owed to a non-client or third party, but, rather, simply committed a discovery violation. In other words, there was neither misrepresentation by the plaintiff law firm to the defendants nor any reliance by the defendants on the law firm's conduct relative to the evidence.

The defendants then sought certification by the Supreme Court, and, this was denied.

- (iii) Quote from Fox case in Hewitt:

“Both the spoliation and concealment torts are designed to remediate tortious interference with a prospective economic advantage. The prospective economic advantage being protected is a plaintiff's opportunity to bring a cause of action for which damages may be awarded.”

- (iv) At footnote 3, then, a “*But See*” introductory signal citation to Fox v. Mercedes-Benz Credit Corp., 281 N.J. Super. 476 (App. Div. 1995).

In Fox, Mercedes brought a deficiency action consequent to a sale of collateral against Fox. Fox attempted to amend his Answer in the deficiency action to include a counterclaim for “concealment of evidence” by Mercedes in the form of “some six hundred pages of business records.” The motion to amend was denied. Thus, in this subsequent action as a plaintiff, Fox filed a complaint against Mercedes for “concealment of evidence.” The Appellate Division, characterizing this claim as perhaps a “paroxysm¹ of advocacy,” held that Fox (as essentially a defendant-debtor) failed to state a cause of action for such an affirmative tort claim because the concealment claim related only to his ability to defend against the initial creditor's claim in the deficiency action.

- (v) What is a defendant to do if a case has been fully adjudicated and, thereafter, spoliation by the plaintiff is uncovered? A cause of action at that point in time must exist. And, if such spoliation is discovered during the conduct of the underlying case, for entire case and controversy reasons, a party-defendant may be best served to assert such a cause of action at that time rather than as a separate tort action thereafter.
- (vi) Tartaglia v. UBS PaineWebber Inc., 197 N.J. 81 (2008), at footnote 5, the New Jersey Supreme Court *theoretically* comments:

“Although the court in Hirsch, supra, 266 N.J. Super. at 245, 628 A.2d 1108, presumed that an act of spoliation by a plaintiff can best be addressed through use of a discovery or evidentiary

¹ a sudden outburst of emotion or action, a sudden attack, recurrence or intensification of a disease, a spasm or fit, a convulsion

sanction, there is nothing *in theory* that would preclude an adversely affected defendant from proceeding on the independent fraudulent concealment theory as we describe it herein.” (emphasis added)

(c) Can evidence be negligently spoliated as a matter of law and is there a cause of action for negligent destruction of evidence?

(i) Tartaglia v. UBS PaineWebber Inc., 197 N.J. 81 (2008), at footnote 6, the New Jersey Supreme Court comments:

“Although not directly raised by the parties, we are constrained to comment that spoliation claims, as between parties to a particular litigation, are technically claims for fraudulent concealment. *See Rosenblit, supra*, 166 N.J. at 406, 766 A.2d 749. Because they continue to be a type of fraud claim, we have not in the past recognized, and we do not now recognize, any separate tort for negligent spoliation.”

(ii) If there is a “duty” to preserve evidence, then, presumably, a party may act negligently as well as intentionally relative to that “duty.”

(d) Outside the Box: To the extent that the subject document or tangible thing arguably may or may not constitute “material” evidence in the underlying matter or, as a matter of law, a litigant as a party-defendant is precluded from asserting a fraudulent concealment of evidence cause of action and/or there is no cause of action for negligent destruction of evidence, plead in the alternative intentional and/or negligent destruction of “property.”² This is a viable option only for a party that may claim spoliation as to its proprietary document or tangible thing. In this scenario, nevertheless seek the damages that flow from destruction or withholding, e.g., expert and related attorney fees and costs incurred in performing court ordered computer forensics attempting to recover a permanently deleted electronic file that is subsequently determined immaterial to the litigation.

5. Bifurcation: If the spoliation of evidence is discovered before the final adjudication of the underlying litigation, a fraudulent concealment of evidence or negligent concealment of evidence claim may be brought as an amendment to the underlying pleadings. But, the claims require bifurcation pursuant to Rule 4:38-2(a) because such remedies are dependant on a jury’s assessment of the underlying cause of action.

² If a matter becomes so esoteric as to address the issue of whether a document or tangible thing is or is not “property,” see N.J.S.A. 1:1-2, Words and phrases defined, for statutory definitions of either “personal” or “real” property.

6. Entire Case & Controversy: Although the Rosenblit decision expressly recognizes that an act of spoliation may not be made known until after the underlying litigation so as to give rise to a subsequent cause of action for fraudulent concealment of evidence and, if there is any suspicion of spoliation during the conduct of litigation, be certain to nevertheless strongly consider seeking an application for an amendment of the underlying pleadings with the prayed for alternative relief of an express reservation of such a constituent claim from the constraints of the entire case and controversy doctrine and Rule 4:30A. In this regard, see the cases of Brown v. Brown, 208 N.J. Super. 372, 382-83 (App. Div. 1986), and, Lake Lenore v. Parsippany-Troy Tp., 312 N.J. Super. 409, 427 (App. Div. 1998).

7. Case Strategy, Motion Practice & Trial Strategy:
 - (a) On consultation with a potential client, be certain to explore and advise a potential client of the duty to preserve evidence and the concept of spoliation with its ramifications. If the duty to preserve and/or potential spoliation are spotted as an issue in consultation, one should consider reducing the advisement to writing.
 - (b) Pre-suit or immediately upon the filing of suit, consider placing an opposing party on written notice of the duty to preserve evidence and the concept of spoliation.
 - (c) Either on defense or on an affirmative claim consider filing a motion to enforce litigant's rights to compel or impose a specific order on an opposing party to preserve evidence. This is particularly of concern relative to documentation in electronic form, also referred to as electronically stored information or ESI, under the Rules of Court.
 - (d) As a party who has suffered spoliation by an opposing party, if spoliation is an issue in the case, as soon as enough discovery is developed to *confirm* the spoliation, file an appropriate motion application for sanctions whether it be a motion to dismiss or a motion to enforce litigant's rights as a form of order to show cause pursuant to Rule 1:10-3, Relief to Litigant. See Nussbaum v. Hetzer, 1 N.J. 171, 174 (1948); Department of Health v. Roselle, 34 N.J. 331, 343 (1961). Here, get the issue of spoliation and its potential consequences on the table, so to speak, before the trial court in an effort to improve settlement and trial position.
 - (e) As an accused spoliator opposing an application for remedies or sanctions, resist every pre-trial application either on the grounds that discovery is incomplete or the issues of whether spoliation has occurred and, if so, what remedy and/or sanctions should be imposed are better left for the trial judge to determine through a hearing pursuant to N.J.R.E. 104, Preliminary Questions. Subsection (a) of N.J.R.E 104 requires a trial judge on application to make preliminary determinations which affect the admissibility of proffered evidence. The object being, get to the court house doors on a trial call date by any means necessary.

- (f) New Jersey Rules of Court – Rule 4:10-2, Scope of Discovery; Treating Physician, at subsection (f) reads:

Claims that Electronically Stored Information is not Reasonably Accessible. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On a motion to compel discovery or for a protective order, the party from whom discovery is sought shall demonstrate that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court nevertheless may order discovery from such sources if the requesting party establishes good cause, considering the limitations of R. 4:10-2(g). The court may specify conditions for the discovery.

- (i) Press this issue: Include a specific interrogatory demand probing whether such a claim may or could be made by an opposing party and, if so, the factual basis for that claim. Here, take the opportunity to force the other party to disclose that it has either spoliated or potentially spoliated discoverable documentation embodied in electronic form. In other words, the discoverable electronically stored information may “not be reasonably accessible” to the opposing party because that party has potentially spoliated the documentation by “deleting” it and does not want to bear the cost of computer forensics to retrieve such documents from the unallocated space of a hard drive, for example.
- (g) Federal - L.Civ.R. 26.1(d)(3)(a), Discovery of Digital Information Including Computer-Based Information, Duty to Meet and Confer.
- (i) Subsection (a) of the Local Rule specifically holds that counsel shall meet and confer and discuss the “preservation” of digital information and “whether restoration of deleted digital information may be necessary.” This discussion must also concern “who will bear the costs of preservation, production, and restoration (if necessary) of any digital discovery.”

8. Spoliation hypotheticals relative to the sale of residential and commercial real estate.

- electronically stored financial documents concerning the due diligence on a purchase of land and business thereon have been “deleted” by the seller and, subsequently, litigation is filed regarding misrepresentations in the due diligence process
- condition of real property purchased, seller purposefully omits a response on a seller’s disclosure form and that condition of property is subsequently remediated by the purchaser before the seller has an opportunity to examine such post closing or subsequent to the filing of suit by the purchaser

9. Rosenblit's Hidden Gem: an intentional act of spoliation constitutes an admission.

(a) The court in Rosenblit recognized that the alteration of the medical record in that case was admissible as a statement of a party opponent under Rule 4:16-1(a) and N.J.R.E. 803(b) and as evidence that the defendant chiropractic doctor perceived that the actual, true records of treatment did not support his defense in the malpractice action.

(i) From the Rosenblit decision at page 409:

The problem with that narrow view is that Dr. Zimmerman was not just a witness. He was a party to the action, and subject to N.J.R.E. 803(b) that provides that a statement made by a party opponent may be offered against him or her in evidence. The alteration of Rosenblit's medical records constituted a verbal act, Ringwood Assocs. v. Jack's of Route 23, Inc., 166 N.J.Super. 36, 42-43, 398 A.2d 1315 (App.Div.1979), by Dr. Zimmerman tantamount to a statement that was evidential against him under the rule. That is “no more than an *application of the general proposition that the behavior of a litigant with respect to relevant evidence may permit an inference that his behavior was prompted by a conscious appreciation that the evidence would or might be hurtful to ... his position.*” State v. Council, Div. of Resource Dev., 60 N.J. 199, 202, 287 A.2d 713 (1972). A jury could infer from Dr. Zimmerman's behavior that he believed that Rosenblit's medical records would prejudice his position in the litigation. That belief could be significant to a jury faced with expert evidence in equipoise. (emphasis added)