

Nassau Lawyer



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October 2021

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NCBA COMMITTEE MEETING CALENDAR

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SAVE THE DATE

JUDICIARY NIGHT

Thursday, October 21, 2021

5:30 p.m. at Domus

See insert and page 6

OPEN HOUSE

Thursday, October 28

3:00 PM to 7:00 PM

Volunteer lawyers needed to give virtual consultations. See pg. 6

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OF NOTE

NCBA Member Benefit—I.D. Card Photo

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UPCOMING PUBLICATIONS

COMMITTEE MEETINGS

Thursday, November 4, 2021, at 12:45 PM

A Little Rain Won't Stop Us! — NCBA BBQ at the Bar 2021



After over a year of being unable to hold in-person events, a little wind and rain was not going to stop the NCBA from holding its Annual BBQ at the Bar celebration, where attorneys, judges, paralegals, legal administrators, law school students, and recent graduates gather for an evening of socializing and traditional BBQ favorites like hot dogs, hamburgers, and sliced watermelon. After an unforeseen weather forecast showed wind and rain for the duration of the day, the event was promptly moved indoors. Face masks with the NCBA logo were made available to all attendees.

The Great Hall of the NCBA was transformed into a buzzing networking area, where NCBA Corporate Partners, including AssuredPartners Northeast, Champion Office Suites, Investors Bank, MPI Business Valuation & Advisory, Opal Wealth Advisors, PrintingHouse Press, Realtime Reporting, Inc., Tradition Title Agency, and vdiscovery, set up marketing booths with fun giveaways like wine openers and goodie bags with chocolate bars and pretzels, and information about their companies and the services they can offer members and prospective members. Familiar faces were also found in the Great Hall, as each department of the NCBA was there to greet attendees, promote upcoming NCBA programs and events, and provide information about each department.

The BBQ is the perfect opportunity to reconnect with colleagues and meet new ones. For law students and recent graduates, the BBQ is a chance to make a first impression on potential future bosses and colleagues and make professional connections. Despite the weather, the BBQ was nothing short of a valuable networking experience for NCBA Corporate Partners, Members, prospective members, law students, and graduates alike.

This year's featured event sponsor, represented by Director of Business Development Kerri Winans Kaley, was Encore Luxury Living—a brand-new independent living community for those 55 and over, where residents can experience a country club atmosphere; services such as housekeeping, meals served daily, transportation via private car, and a calendar of social events are included in monthly rent.

After a fun evening of networking, attendees were invited into the recently re-opened dining room to enjoy BBQ favorites, beverages, and snacks prepared by the NCBA in-house caterer Esquires Catering, Inc. The dining room is now open again for lunch daily from 12:00 PM to 2:00 PM serving a variety of a la carte and buffet items with health standards in place—a great place to take clients and colleagues for lunch. Esquires Catering, Inc. is also available to cater private events at the Nassau County Bar Association for NCBA Members and sponsored guests. For questions or to cater a private event, call (516) 414-0879.

The NCBA would like to thank this year's BBQ at the Bar Sponsor Encore Luxury Living, Corporate Partners, Members, and Prospective Members who attended the BBQ despite the weather, and those who donated nonperishable food items that were donated to Island Harvest for families in need.

We look forward to seeing you at our upcoming events this year, including Judiciary Night on October 21. See details in the insert of this issue.

If you are not a member of the NCBA and would like to join, contact Membership Coordinator Donna Gerdik or Membership Coordinator Stephanie Pagano at (516) 747-4070 ext. 1206 or 1230. You can also join online at www.nassaubar.org. We look forward to seeing you at the NCBA!

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FOCUS:
LITIGATION

Andria Simone Kelly

Video surveillance can often make or break a premises liability case. Surely, the best proof that an accident occurred and how it occurred is the video surveillance. Video surveillance, however, could potentially show that no accident occurred at all, that the accident was staged, that someone other than the defendant created the alleged condition, or that the defendant did not have notice of the alleged condition.

In *Savino v. The Great Atlantic and Pacific Tea Co., Inc.*,¹ which involved the disclosure and potential spoliation of video surveillance by the defendant supermarket, the lower court recognized that “[i]n a fast-developing technological age, where cell phones and texting devices are used handily not only to talk and send messages, but also to

Preserve Video or Face the Consequences in Premises Liability Cases

photograph, the usefulness of a video surveillance tape to help get at the truth of a disputed factual issue is undebatable and undeniable.”² Clearly, a case that on its face appears defensible, can quickly become “a loser” if the video surveillance is not preserved or not preserved properly.

The penalty for failure to preserve video can be serious and can, as indicated, impact a viable defense. “Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126.”³ The responsible party may be sanctioned by the striking of its pleading. However, where the evidence lost is not vital to the case or its destruction is not prejudicial, the sanction of striking a pleading would be extreme. In that instance, a lesser penalty or no sanction at all may be appropriate.⁴ The cases are fact sensitive, and the sanction ordered is in the discretion of the court.⁵

On a Motion for Spoliation Sanctions, the moving party must establish that: (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a “culpable state

of mind,” which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party’s claim or defense.⁶ “[I]n the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices.”⁷ The problem, of course, is determining when a premises owner is on notice of specific claim.

Most defense counsel are not involved in claims pre-suit and the burden is on the premises owner to retain video upon notice of an accident claim. In this regard, the premises owner should have a clear policy as to the preservation of video and this policy should be shared with and followed by its employees.

The best practice, of course, would be to search for video immediately after an accident is reported. If video exists, the video of the actual accident, as well as a reasonable period of time before and after the accident, should be preserved. If video of the accident does not exist, the search for the video should be well documented with notes saved as to who searched for the video, what the video retention period is, when the search was conducted, how the search was conducted and what the search revealed.

An explanation as to why no video exists should also be noted (i.e., no camera coverage, camera broken, etc.).

In instances where a claimant or his attorney requests that specific portions of the video be maintained, the premises owner should best comply with the request. If the request is unreasonable and/or burdensome, a telephone call to the claimant’s attorney in an attempt to narrow the preservation request would be worthwhile. Any agreement to narrow the request should be confirmed in writing.

Even in a situation where the video is preserved pre-suit, the defendant can face a spoliation sanction. If the defendant preserved some video or establishes that it acted in good faith

See VIDEO, Page 15



Andria Simone Kelly is a partner with Cullen and Dykman LLP in Garden City in the firm’s General Tort and Insurance Litigation department. She has over 25 years’ experience handling a wide variety of cases in the New York courts, including representing large retailers in premises liability, construction, New York Labor Law, and property damage cases.



A CENTENNIAL CELEBRATION IN HONOR OF CONSTANCE BAKER MOTLEY

PRESENTED BY THE NCBA DIVERSITY & INCLUSION COMMITTEE



**Tuesday, October 19, 2021
5:30 PM to 8:00 PM
Nassau County Bar Association
15th and West Streets, Mineola, NY 11501
FREE ADMISSION for members of the NCBA
and affiliate bar associations.**

Celebrate the centennial of the Hon. Constance Baker Motley, the first African-American woman admitted to the Bar of the United States Supreme Court.

Event begins with a wine and pizza reception followed by panel discussion of academics and former law clerks to discuss Judge Motley’s impact and legacy.

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NCBA Committee Meeting Calendar October 5, 2021 - November 4, 2021

Please Note: Committee Meetings are for NCBA Members. Dates and times are subject to change. Check www.nassaubar.org for updated information.

IMMIGRATION LAW

George Terezakis
Tuesday, October 5
5:30 p.m.

ANIMAL LAW

Kristi L. DiPaolo
Tuesday, October 5
6:00 p.m.

REAL PROPERTY

Alan J. Schwartz
Wednesday, October 6
12:30 p.m.

PUBLICATIONS

Andrea M. DiGregorio/ Rudolph Carmenaty
Thursday, October 7
12:45 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION

Ira S. Slavitt
Thursday, October 7
12:45 p.m.

CIVIL RIGHTS

Bernadette K. Ford
Tuesday, October 8
12:30 p.m.

MEDICAL-LEGAL

Christopher J. DelliCarpini
Wednesday, October 9
12:30 p.m.

ALTERNATIVE DISPUTE RESOLUTION

Michael Markowitz/Suzanne Levy
Wednesday, October 9
12:30 p.m.

MATRIMONIAL LAW COMMITTEE

Jeffrey Catterson
Wednesday, October 9
5:30 p.m.

INTELLECTUAL PROPERTY

Frederick J. Dorchak
Thursday, October 14
12:30 p.m.

MUNICIPAL LAW

Judy L. Simoncic
Thursday, October 14
12:30 p.m.

PLAINTIFF'S PERSONAL INJURY

David Barry
Tuesday, October 19
12:30 p.m.

WOMEN IN THE LAW

Edith Reinhardt
Tuesday, October 19
12:30 p.m.

ELDER LAW SOCIAL SERVICES HEALTH ADVOCACY

Ariella Gasner/Suzanne Levy
Tuesday, October 19
5:30 p.m.

DIVERSITY & INCLUSION

Rudolph Carmenaty
Tuesday, October 19
5:30 p.m.

BUSINESS LAW, TAX & ACCOUNTING

Jennifer Koo/Scott Kestenbaum
Wednesday, October 20
12:30 p.m.

ASSOCIATION MEMBERSHIP

Michael DiFalco
Wednesday, October 20
12:45 p.m.

LEGAL ADMINISTRATOR

Virginia Kawochka/Linda Tierney
Thursday, October 21
8:30 a.m.

APPELLATE PRACTICE

Jackie Gross
Thursday, October 21
12:30 p.m.

DISTRICT COURT

Roberta Scoll
Friday, October 22
12:30 p.m.

NEW LAWYERS

Steven Dalton
Wednesday, October 27
5:30 p.m.

IMMIGRATION LAW

George Terezakis
Wednesday, November 3
12:30 p.m.

REAL PROPERTY

Alan J. Schwartz
Wednesday, November 3
12:30 p.m.

PUBLICATIONS

Andrea M. DiGregorio/ Rudolph Carmenaty
Thursday, November 4
12:45 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION

Ira S. Slavitt
Thursday, November 4
12:45 p.m.

Video...

Continued From Page 7

and provides a reasonable explanation for not preserving video, a lesser sanction, such as a negative inference charge at the time of trial, or no sanction at all, may be appropriate.

In *Guarisco v. King Kullen Grocery Co., Inc.*,⁸ the plaintiff sent a letter to the defendant five days after the accident requesting that all video for the 24-hour period prior to the accident be preserved. A demand for the video for that period was also made by the plaintiff after the suit was commenced. In response, the defendant exchanged video surveillance for a period of 35 minutes before the accident through approximately one hour and a half after the accident. The defendant contended that this was all the video that was preserved and that it followed its standard practice for the preservation of the video even though it was aware of the plaintiff's letter prior to preserving the video. It should be noted that this video showed the plaintiff creating the condition.

Although the plaintiff in *Guarisco* established that the full 24 hours of video should have been preserved, the court found that he failed to show that the full video was critical to the prosecution of his case. The court further found that the defendant's

actions were not willful; however, the excuse for not preserving the full video was not reasonable. Rather than striking the defendant's answer or precluding the defendant from offering evidence to refute the plaintiff's claim of notice or precluding defendant from offering the surveillance video into evidence, the court directed that an adverse inference charge be given at the time of trial as to the requested portion of the video that was not preserved.⁹

Similarly, in *Delgiorno v. Buonadonna Shop Rite LLC*,¹⁰ the court found that the defendant's preservation of 48 minutes of video footage did not comply with plaintiff's demand, but it did show the plaintiff's accident, and did not entirely deprive the plaintiff of the ability to prove her case. As such, the court found that the appropriate spoliation sanction was an adverse inference charge to be given at the time of trial with respect to the missing video.

Defense counsel are usually retained after a lawsuit is commenced which can be years after the accident occurred. Immediately upon assignment of a premises case, defense counsel should investigate whether video was preserved. If video was preserved, how much video was preserved, what was the basis for only preserving a certain amount, and what was the video preservation policy. If video was not preserved, what was the video retention period and is

it too late to obtain video, why was the video not preserved, and was there any camera that would have captured the loss location. Further, defense counsel should determine whether any video preservation letter was received and complied with by the premises owner.

While a defendant may not be able to escape a spoliation sanction for failing to preserve video, the Second Department has held that striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct and thus, the courts must "consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness."¹¹ Where a plaintiff is not prejudiced by the failure to preserve video and can prove her case by other means such as witness testimony and photographs, the likelihood of the defendant's answer being stricken is remote.¹²

Preservation of video surveillance should not be taken lightly by premises owners. As soon as the premises owner has notice of an accident it should make efforts to preserve video. Further, if presented with a letter of preservation from claimant, it should comply with the preservation request. Once a suit is started, defense counsel should immediately investigate the video preservation issue and be prepared to respond to plaintiff's demands for video.

Although acting reasonably and in good faith and following procedure may not eliminate a spoliation sanction, it will likely result in the lesser penalty, or no sanction, and greater chance of success at trial.

1. *Savino v. The Great Atlantic and Pacific Tea Co., Inc.*, 22 Misc.3d 792 (Sup. Ct., Queens Co. 2008).
2. *Id.*
3. *Holland v. W.M. Realty Mgt., Inc.*, 64 A.D.3d 627, 629 (2d Dept. 2009).
4. *Klein v. Ford Motor Co.*, 303 A.D.2d 376 (2d Dept. 2003)(citations omitted).
5. *Ortega v. City of New York*, 9 N.Y.3d 69 (2007).
6. *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543 (2015).
7. *Aponte v. Clove Lakes Health Care & Rehabilitation Ctr., Inc.*, 153 A.D.3d 593, 594 (internal quotation marks omitted).
8. *Guarisco v. King Kullen Grocery Co., Inc.*, 2014 N.Y. Slip Op. 33516(U) (Sup. Ct., Nassau Co. 2014).
9. *Id.*
10. *Delgiorno v. Buonadonna Shop Rite, LLC*, No. 600605/15, 2016 WL 10676147, at *3 (Sup. Ct., Suffolk Co. May 5, 2016).
11. *Iannucci v. Rose*, 8 A.D.3d 437 (2d Dept. 2004). See *Favish v. Teplex*, 294 A.D.2d 396, 397 (2004).
12. *Giuliano v. 666 Old Country Road, LLC*, 100 A.D.3d 960 (2d Dept. 2012) (Supreme Court improvidently exercised its discretion in striking answer of defendant based on spoliation of evidence, i.e., video of accident, where plaintiff's ability to prove her case without video was not fatally compromised.).

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