

COURT OF APPEALS REJECTS TORT CLAIM FOR THIRD-PARTY NEGLIGENT
SPOILIATION OF EVIDENCE

In New York State, a traditional method for dealing with spoliation of evidence has been application of CPLR 3126, which permits sanctions against a party, including dismissal, for 'violations of disclosure orders. Recently, however, many states have recognized a separate tort claim for negligent spoliation of evidence against non-parties to an action.

The Court of Appeals, in *Ortega v. City of New York*, 9 N.Y.3d 69 (2007), declined to adopt this cause of action. Plaintiff Ortega was traveling in a van in Brooklyn, which burst into flames, leaving both her and the owner badly burned. Ortega's attorney was initially unable to inspect the van, as her client was not the owner. In a special proceeding, Ortega's lawyer obtained a court order precluding the towing municipality from destroying the vehicle. Due to an antra-city communication error, however, the car was crushed for scrap before it could be inspected. Plaintiff sought damages against the City for injuries incurred to her client from the explosion, including pain and suffering, alleging that the city prevented the plaintiff from proving responsibility for the accident.

In an opinion by Judge Graffeo, the Court held that New York does not recognize "the tort of third-party negligent spoliation of evidence." In so ruling, the court resolved a question left unanswered in its 2004 decision *MetLife Auto & Home v. Joe Basil Chevrolet*, 1 N.Y.3d 478. There, the court reached a narrow result that precluded such a remedy when the spoiler was under no duty to preserve evidence.

Judge Graffeo noted several policy reasons against recognizing this new tort where the spoiler was bound by such a duty. Among them, she noted that the cause of action would expose New York municipalities that provide towing and warehousing services to liability for the pain and suffering of accident victims.

Damages sought against these entities would be speculative and would require determining original liability for the accident without the destroyed evidence.

The court distinguished cases where a plaintiff could show that the evidence was deliberately destroyed in order to prevent an examination." It also left open the possibility that a contempt claim could be pursued before the judge who issued the preservation order.