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Legal Currents

The lawsuit that shoulda, coulda been

This column, featured every Monday, tackles timely issues important to the local legal community.

"All The Woulda-Coulda-Shouldas
Layin' In The Sun,
Talkin' 'Bout The Things
They Woulda-Coulda-Shoulda Done."
— Shel Silverstein

BY NICOLE BLACK
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Nearly two weeks ago, in *Ortega v. City of New York*, 2007 N.Y. Slip Op. 07741, the New York State Court of Appeals considered the unresolved issue of whether New York State recognizes the tort of third-party negligent spoliation of evidence.

At issue in *Ortega* was whether a passenger who was severely injured as a result of a vehicular fire could maintain a spoliation claim against the City of New York for failure to prevent the destruction of the damaged vehicle.

The city was not involved in the original incident, but the plaintiff alleged the city nevertheless was liable for the full amount of damages she would have recovered in a civil action against the underlying tortfeasor because an agent of the city, for unknown reasons, destroyed the vehicle in violation of a court order directing its preservation.

In reaching its determination, the court weighed judicial and social policy concerns, including the public policy issue of the potential and significant liability claims for third-party spoliation could impose on municipalities.

The court also examined traditional remedies available to spoliation victims in New York, such as discovery sanctions and civil contempt sanctions. The plaintiff in *Ortega* asserted such sanctions were insufficient since the negligent destruction of the vehicle posed fatal obstacles to determining the fire's cause and prosecuting claims against the likely tortfeasors.

After careful consideration of the competing interests, the court concluded existing New York remedies are sufficient, and declined to follow the minority of jurisdictions that permit tort of third-party negligent spoliation: "In New York, while the desire to provide an avenue to redress wrongs is certainly an important consideration underlying our tort jurisprudence, the recognition that there has been an interference with an interest worthy of protection has been the beginning, not the end, of our analysis. 'While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world.' … As a general rule, New York courts have been reluctant to embrace claims that rely on hypothetical theories or speculative assumptions about the nature of the harm incurred or the extent of plaintiff's damages. … For all of these reasons, we join the majority of jurisdictions to consider the issue … and decline to recognize spoliation of evidence as an independent tort claim." (Citations omitted.)

In other words, an innocent, injured person is out of luck if a third party negligently performs his or her job.

Arguably, it is of little consolation to the potential plaintiff that funds may be recovered from a negligent third party to pay for expert expenses and additional investigation as to whether a claim is feasible.

Furthermore, it is unlikely any plaintiff's attorney would be willing to expend the time and resources needed to investigate a claim where the end result of the fishing expedition doubtlessly would be an expert opining there is no way to determine whether negligence caused the accident in question, where the object alleged to have caused injury cannot be examined.

It is, most assuredly, an unfortunate decision from the plaintiff's perspective.

That being stated, given the speculative and hypothetical nature of the imbedded claims inherent in a third-party spo-

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liation claim — in which the plaintiff alleges that, if a jury was convened in the matter, it might reach a different conclusion if destroyed evidence was preserved — it is difficult to imagine another result.

Central to negligence claims are allegations of shoulda, coulda, woulda. But, assertions of shoulda, coulda, woulda, once removed from the negligence claim itself, lead to hypothetical findings too equivocal to prove.

While this result may seem tinged with injustice it is, lamentably, the only logical conclusion.

Nicole Black is of counsel to Fiandach & Fiandach. She also publishes a popular New York law blog, Sui Generis, *nylawblog.typepad.com and a blog devoted to legal humor,* Legal Antics, *nylawblog.typepad.com/ legalantics.*