**Superior Court of New Jersey, Appellate Division.**

# MERRI N. CHAPIN, Plaintiff–Appellant, v. KATHLEEN SAMARAS, Defendant–Respondent.

**A–0237–12T3 DOCKET NO.**

**Decided: March 24, 2014**

Before Judges Waugh and Accurso. Michael D. Fitzgerald, attorney for appellant. Marks, O'Neill, O'Brien & Courtney, P.C., attorneys for respondent (Melissa J. Brown and Sean X. Kelly, on the brief).

Plaintiff Merri N. Chapin appeals the Law Division's August 3, 2012 order granting summary judgment to defendant Kathleen She also appeals the denial of her motion to suppress Samaras. We reverse Samaras's answer on the grounds of spoliation of evidence. the denial of the motion concerning spoliation and remand for further As a consequence, we vacate the order for consideration of the issue. summary judgment without prejudice to its renewal following disposition of the spoliation issue.

I.

We discern the following facts and procedural history from the record on appeal.[1]

On September 28, 2009, Chapin was driving on Sycamore Avenue in Tinton At the time, it was rainy and "very Falls on her way home from work. At her deposition, Chapin estimated that the winds were forty windy." A tree limb suddenly came through her to fifty miles per hour. She was taken to a windshield and pierced her left arm and abdomen. hospital and required surgery.

Although Chapin was unable to identify the property from which the tree branch came, her attorney identified two trees on Samaras's property from which it might have On December 29, the attorney wrote to Samaras's homeowners' come. carrier asking for confirmation of the amount of the policy and whether He stated that he was continuing an there was an excess policy. investigation "to confirm that the tree [that] fell [was] on property That request was renewed in located and owned by your insured." January 2010.

In December 2009, Chapin's attorney notified Samaras's homeowners' insurance carrier that Chapin's personal injury protection (PIP) carrier would be making a subrogation claim against it In February 2010, the PIP to recover over $80,000 in PIP payments. carrier notified the homeowners' carrier directly that it would be making the subrogation claim.

In March, Chapin's attorney again contacted the homeowners' carrier, asked about the status of the claim, The homeowners' carrier and demanded the policy limit of $300,000. In June, Chapin's attorney responded in May and denied liability. expressed disappointment with the denial of liability, adding: "It is Even a unfortunate that an inspection was not done of the subject tree. cursory inspection would have determined that the tree had had prior It is not damage and it was not properly maintained by [Samaras]." clear from the record whether that assertion was based on the attorney's own observations or some additional evidence.

The complaint in this action was filed on September 14, 2010, almost a year after the accident.[2] In addition to Samaras, the complaint named several fictitious defendants, who were identified as property owners on whose property the The complaint alleged that the tree tree might have been located. limb that injured Chapin came from a "tree located on the north side of Sycamore Avenue" in front of Samaras's residence and that "[i]t is believed the tree was located on the property of one or all of the The complaint was personally served on November 10. defendants."

On February 16, 2011, Chapin's attorney happened to drive past the scene of the accident and observed that the trees on Samaras's property were being trimmed and in some cases cut down.[3] He immediately faxed a letter to Samaras's attorney, followed up by a It is not clear telephone call, demanding that the work be stopped. from the record how much of the work had been completed by that time or whether the severed limbs and tree trunks had been cleared before or after Samaras's attorney was contacted.

On February 23, Chapin filed a motion seeking the suppression of Samaras's answer for Following oral argument on May 13, the motion spoliation of evidence. The motion judge attached a written statement of reasons was denied. At the conclusion of the discovery period, Samaras filed to his order. a motion for summary judgment which was denied by a separate motion Samaras filed a motion to reconsider, and judge

on June 15, 2012. summary judgment was granted in her favor on August 3. Chapin's This complaint and all cross-claims were dismissed with prejudice. appeal followed.

II.

On appeal, Chapin argues that the first motion judge should have found that Samaras spoliated evidence and imposed sanctions and that the second motion judge erred in determining Our review of a that an expert witness was required to prove liability. Manalapan Realty, L.P. motion judge's conclusions of law is de novo. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.").

"Spoliation [of evidence] is the concealment or destruction of evidence relevant to State v. Cullen, 424 N.J.Super. 566, 587 (App.Div.2012) litigation." (citing Rosenblit v. Zimmerman, 166 N.J. 391, 400–01 (2001)), certif. The first motion judge determined that denied, 213 N.J. 397 (2013). He Samaras had no duty to preserve evidence concerning the trees. cited Gilleski v. Community Medical Center, 336 N.J.Super. 646, 653 (App.Div.2001), for the proposition that there is no duty to preserve evidence unless an agreement, contract, or statute requires the owner to do so or the owner assumes the duty to preserve evidence by affirmative Relying upon Gilleski, the motion judge reasoned that conduct. Samaras had no duty to preserve the trees given that there was no He further agreement, contract, or statute requiring her to do so. noted that Chapin did not know from which tree the branch fell, did not request an inspection of Samaras's trees, and waited approximately The judge eighteen months after the accident to raise the issue. underscored that there was "no proof as to which tree caused the injury" and denied the motion for spoliation sanctions.

The motion Gilleski addressed the judge's reliance upon Gilleski was misplaced. question of whether a third party owes an injured party a duty to preserve evidence for potential litigation against another party.[4] Id. at 652–53 ("The dispositive issue in this case is whether defendant owed plaintiffs a duty to preserve the chair in question as evidence in a potential law suit by plaintiffs against the chair In addition, the Gilleski defendant destroyed the manufacturer."). evidence in question — a chair that was the cause of the plaintiff's injuries — four weeks after the accident and before receiving any notice Id. at 649–50. of the possibility of litigation.

In this case, the owner of the property at issue, Samaras, was the defendant in the action brought by the injured party and Chapin gave notice of the potential claim to the homeowners' carrier within a few weeks of the accident and actually served the complaint on Samaras more than three A potential tortfeasor, such as months before the alleged spoliation. Samaras, has a duty to preserve evidence when (1) litigation is pending or likely, (2) the alleged spoliator has knowledge of such litigation, (3) the evidence is relevant, and (4) the non-spoliating party is Aetna prejudiced by the concealment or destruction of the evidence. Life and Cas. Co. v. Imet Mason Contractors, 309 N.J.Super. 358, 366 (App.Div.1998) (quoting Hirsch v. Gen. Motors Corp., 266 N.J.Super. 222, That the spoliation is negligent is not 250–51 (Law Div.1993)). dispositive, although it is " 'a factor to be considered when Id. at 368 determining the appropriate remedy for the spoliation.' " With respect to the (quoting Hirsch, supra, 266 N.J.Super. at 256). scope of the duty to preserve evidence, however, "a potential spoliator Hirsch, need do only what is reasonable under the circumstances." supra, 266 N.J.Super. at 251 (citation and internal quotation marks omitted).

When spoliation is found to have occurred, the judge may fashion a civil remedy to serve the purposes of making the non-spoliating party whole, punishing the wrongdoer, and deterring Robertet Flavors, Inc. v. others from engaging in such activity. Tri–Form Constr., Inc., 203 N.J. 252, 273 (2010); see also Tartaglia v. UBS PaineWebber, Inc., 197 N.J. 81, 122 (2008) ("[T]he time when an act of spoliation is discovered will indeed strongly suggest the appropriate course of action in that case ").

We recognize that Hirsch, "the scope of the duty to preserve evidence is not boundless." Nevertheless, the duty to preserve supra, 266 N.J.Super. at 250–51. evidence related to the trees, or at least to give notice of the proposed tree work, arose at the latest when Samaras was personally By that time she was certainly aware of served on November 10, 2010. the four factors enumerated in Aetna Life, supra, 309 N.J.Super. at 366. Depending upon when she had notice of the likelihood of litigation and the other factors, it may have arisen earlier.

We reverse the denial of Chapin's motion for spoliation sanctions because the motion That does not, however, judge applied the wrong legal standard. In determining whether there actually was resolve the matter. spoliation in this case and, if so, what, if any, remedy to apply, the motion judge will have to consider at least the following questions: (1) when the duty to preserve the evidence arose and whether the trees were significantly altered before that time; [5] (2) whether a third party performed tree work that significantly altered

the trees before the tree work performed by Samaras; [6] (3) whether, absent spoliation, Chapin would have been able to prove that the trees were "negligently maintained" without an expert; (4) whether Chapin waited an unreasonably long time to obtain evidence of the purported negligence and, if necessary, to have an expert examine the trees, given the possibility that their condition could change in the interim either because of necessary tree work or merely by the passage of time; (5) whether Chapin should have had the tree stumps and any remaining portions of the trees examined by an expert to determine if there was evidence of rot or disease; and (6) whether there was a sufficient factual basis to conclude that the trees on Samaras's property were the cause of Chapin's injury for the purpose of imposing any spoliation sanctions.

With respect to whether Chapin required Chapin has alleged that an expert, we make the following observations. Samaras's trees were diseased or otherwise dangerous and that they were The motion judge must first establish the negligently maintained. nature of the duty owed by a landowner such as Samaras to a motorist on a McGlynn v. State, 434 N.J.Super. 23, street adjacent to her property. 33 (App.Div.2014) (citing Narsh v. Zirbser Bros., 111 N.J.Super. 203, 208 (App.Div.1970)) ("The private land owner bears the principal responsibility to exercise due care over trees that might pose a hazard Then the judge must consider to travelers on an adjoining highway."). whether an expert is required to prove either the condition of the tree or the negligence of any maintenance, or both.

Expert testimony is required when "the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment." Expert testimony Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982). is permissible when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to N.J.R.E. 702. determine a fact in issue." [7] The issue to be determined here is whether an expert was required.

Although the need to remove or prune a completely diseased or rotting tree might be readily apparent to a juror, the subtleties of determining whether a tree is so weakened by disease or otherwise in a state that poses a dangerous condition sufficient to impose liability on a property owner Once the may be sufficiently "esoteric" to require expert testimony. motion judge reaches a determination on the issue of spoliation and determines what, if any, sanctions are warranted, the judge will be in a That would position to consider the motion for summary judgment. include a determination of whether Chapin's inability to present evidence of negligence, including expert testimony, is substantially the result of spoliation by Samaras or Chapin's failure to obtain the required evidence in a timely manner.

We do not retain jurisdiction. Reversed and remanded for further consideration consistent with this opinion.

FOOTNOTES

1. FN1. The parties' appendices do not clearly state how or when the documents It is R. 2:5–4. contained in them came before the Law Division. apparent, however, that many of the documents, including the deposition transcripts, were not available at the time the spoliation motion was decided.

2. FN2. The subrogation action against Samaras was filed by the PIP carrier in It was subsequently dismissed on the grounds that the October 2010. PIP carrier did not have a direct right of action against Samaras, but had to make a claim against her homeowners' carrier.

3. FN3. According to Samaras, Jersey Central Power & Light (JCP & L) had cut back some of the limbs in early 2011, prior to the work she had done on February 16, 2011.

4. FN4. The motion judge also relied on Callahan v. Stanley Works, 306 N.J.Super. 488, 493 (Law Div.1997), which also considered the issue of whether a third party owed a duty to preserve evidence for the purpose of suit against another party.

5. FN5. Given the circumstances of the accident and the likelihood that there would be some cleanup immediately thereafter, Chapin may have had an The duty to obligation to have an expert perform an early inspection. preserve evidence must be balanced against the homeowner's obligation to In addition, it is not clear when remediate a dangerous condition. Samaras actually learned of the threatened litigation.

6 There is evidence in the record that JCP . FN6. & L, and perhaps the municipality, performed tree work before Samaras did.

7. FN7. the intended Three requirements are present within the rule:(1) testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art

such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.[State v. Jenewicz, 193 N.J. 440, 454 (2008).]