

*Appellate Decisions of Interest*  
*Prepared by Brown & Tarantino, LLC*  
*Olexa v. Jacobs*

Appellate Division, Second Department (January 23, 2007)

Guiding Principle: The defendant radiologist was entitled to obtain possession of the original mammograms, which were in plaintiff's custody, for a limited time so that defendant expert could review them. If defendant radiologist failed to return the original films the court would consider at that time the appropriate sanction for spoliation (the negligent or intentional loss or destruction of crucial evidence).

Summary of the Facts: Plaintiff Emilia Olexa brought a medical malpractice action to recover damages against defendants Betsy Jacobs and Advanced Radiological Imaging, P.C. Plaintiff was in possession of the original mammograms and resisted providing defendants access to them without a court order. The lower court granted defendants an order allowing very limited access to the mammograms and providing a conditional remedy that if the films were not returned, the defendants' answer would be stricken. The defendants appealed this order.

Ruling of the Court: A unanimous Appellate Division found that the lower court erred in placing overly restrictive limits on the defendants' time to review the original mammograms and enlarged the defendants' access to them. Further, the court struck that part of the lower court's order which provided that the defendants' answer would be stricken if they failed to return the original films as such a remedy was premature without the proper showing based on the destruction or loss of evidence.

Reasoning: This case addresses the dire results that may occur if a party is found responsible for spoliation of evidence. While the Appellate Division in *Olexa* declined to set forth conditional sanctions because spoliation of the mammograms was speculative, it is clear that either a plaintiff's complaint or a defendant's answer may be stricken, thus losing the case, as a sanction for spoliation. Further, spoliation sanctions may be appropriate even if the destruction occurred through negligence rather than willfulness, and even if the evidence was destroyed before the spoliator became a party. Physicians should bear in mind that under the New York Public Health Law and the regulations promulgated thereunder, they are required to retain patient records for at least six years. Obstetrical records and records of infants or children must be maintained until the child reaches his or her 22nd birthday. If the lost or destroyed material would have been key evidence in the medical malpractice case, severe sanctions may follow. It is also worthy to note that loss or destruction of patient records may trigger disciplinary action by the licensing authority against the physician.

Editor's Note: In medical malpractice cases, spoliation can take several forms: loss of radiographic films, pathology slides, fetal monitor strips, etc; alteration of medical notes; failure to provide the entire hospital chart or medical record. The possible loss of the right to defend your case due to spoliation merits renewed vigilance with respect to maintenance and custody of medical charts and records.

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