

**Colleen M Dyer**

**From:** Appeals Court Clerk's Office <AppealsCtClerk@appct.state.ma.us>  
**Sent:** Monday, January 30, 2023 10:02 AM  
**To:** Colleen M Dyer  
**Subject:** 2023-J-0037 - Notice of Docket Entry

-COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT CLERK'S OFFICE

January 30, 2023

RE: No. 2023-J-0037  
Lower Ct. No.: 1984CV03317-BLS2

19-3317

RECEIVED  
JAN 30 2023  
SUPERIOR COURT-CIVIL

JFF CECILIA LLC & another  
vs.  
WEINER VENTURES LLC & others

NOTICE OF DOCKET ENTRY

Please take note that on January 30, 2023, the following entry was made on the docket of the above-referenced case:

ORDER (RE #1): The plaintiffs JFF Cecilia LLC and Suffolk Construction Co., Inc. seek interlocutory review pursuant to G.L. c. 231, s. 118 (par. 1) of a January 6, 2023 order issued by a judge in the Business Litigation Session of the Suffolk Superior Court denying their motion for spoliation sanctions against the defendants Weiner Ventures LLC, and Stephen and Adam Weiner. As relief, the plaintiffs request that the single justice reverse the order or authorize the taking of an interlocutory appeal to a panel.

"The doctrine of spoliation permits the imposition of sanctions and remedies where a litigant or its expert negligently or intentionally loses or destroys evidence that the litigant (or expert) knows or reasonably should know might be relevant to a possible action, even when the spoliation occurs before an action has been commenced." *Scott v. Garfield*, 454 Mass. 790, 798 (2009).

Because the decision denying the motion notes the correct standard and also states that the "potential litigation must be probable . . . and not merely possible," and that the Weiners did not have an obligation to preserve evidence because "[a] reasonable person in the same position would, at that point, not think it very likely that they would be sued," I cannot tell if the judge applied the correct standard.

Accordingly, the matter is remanded for the judge to determine if the defendants knew or reasonably should have known that evidence might have been relevant to a possible action. If the judge determines that the defendants spoliated evidence, they should then determine if it prejudiced the defendant. If so, they should determine if sanctions are appropriate. The order after remand is requested to be transmitted to this court within 30 days at [MACClerkMatter@jud.state.ma.us](mailto:MACClerkMatter@jud.state.ma.us).

I also note that the plaintiffs request that they be permitted to present evidence of defendants' alleged spoliation to the jury. I note that even where a judge denies a party's motion for sanctions for spoliation, a plaintiff alleging spoliation is "free to argue that a trier of fact should hold the [defendant's] failure to return [the documents] against the

[defendant]." Zaleskas v. Brigham & Women's Hosp., 97 Mass. App. Ct. 55, 76 (2020). (Henry, J.) \*Notice/attest/Salinger, J.

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FILING OF CONFIDENTIAL OR IMPOUNDED INFORMATION. Any document containing confidential or impounded material must be filed in compliance with Mass. R. App. P. 16(d), 16(m), 18(a)(1)(A)(iv), 18(d), and 21.  
Very truly yours,

The Clerk's Office

Dated: January 30, 2023

To:  
Michael Bunis, Esquire  
G. Mark Edgarton, Esquire  
Kevin Patrick O'Keefe, Assistant Attorney General  
Paul Popeo, Esquire  
Kevin Cameron Quigley, Esquire  
Brian Wesley Cook, Esquire  
Kevin T. Peters, Esquire  
Mark Tully, Esquire  
Suffolk Superior Court Dept.

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If you have any questions, or wish to communicate with the Clerk's Office about this case, please contact the Clerk's Office at 617-725-8106. Thank you.