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File No. 7415-JPS

MAUREEN POMYKACZ, Plaintiff, vs. BOROUGH OF WEST WILDWOOD, JACQUELINE FERENTZ, CHRISTOPHER FOX AND JOHN DOES, Defendant.	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY CAMDEN COUNTY DOCKET NO. 03 CV 5677(JEI) CIVIL ACTION BRIEF IN SUPPORT OF MOTION TO SEEK LEAVE TO AMEND ANSWER TO INCLUDE COUNTERCLAIM FOR INTENTIONAL SPOILIATION OF EVIDENCE AND BAD FAITH AND NEGLIGENT SPOILIATION
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Comment [T1]: Describe the Pleading

PROCEDURAL HISTORY AND OPERATIVE FACTS

On or about November 25, 2003, Plaintiff filed her Complaint alleging, inter alia, violation of her Constitutional rights under 42 U.S.C. §§ 1983 and 1985. In short, Plaintiff alleges she was deprived of her right to monitor the activities of her local government, was falsely arrested under N.J.S.A. 2C:12-10(a)(1) ("stalking"), charged and prosecuted without adequate basis and as a result, suffered physical, Mental and emotional distress. A true and accurate copy of Plaintiff's Complaint is attached hereto and marked as Exhibit "A".

In her Complaint, at paragraph 12, Plaintiff sets forth that "During the year 2002, [she] became aware of facts suggesting that Borough Mayor Christopher Fox and Borough police officer Jacqueline Ferentz were maintaining a romantic relationship, and were pursuing this relationship during times when Ferentz was supposed to be on duty

as a police officer." At paragraph 15, Plaintiff states that she "began to observe and monitor the activities of Ferentz and Fox when Ferentz was on duty as a police officer. [She] Pomykacz did this on occasions when she was driving past the West Wildwood Police Department or by Fox's and Ferentz's house during those times when Ferentz was ostensibly on duty, and occasionally when Ferentz was in her police patrol car. On occasion, Pomykacz would take a photograph." (Underlining added.)

At paragraph 16, Pomykacz claims that "At all times during her observations, [she] was lawfully on public property, acted peaceably, and violated no laws." At paragraph 18, Plaintiff alleges that Ferentz was on duty on October 7, 2002, "however, she spent most of her time at the police station, working on the renovation and expansion of the offices." At paragraph 19, Plaintiff claims that she drove by the station twice, once at 7:00pm and again at 9:30pm. At paragraph 21, Plaintiff sets forth that she returned to the station "shortly before 11:00pm" and from an adjacent public parking lot, "took a photograph of it." Plaintiff then claims at paragraph 23 that Defendants Fox and Ferentz filed criminal charges "based entirely" on the above conceded actions of Plaintiff. (See Exhibit "A").

On or about March 11, 2004, Defendants Borough of West Wildwood and Christopher Fox filed an Answer to the Complaint. Inter alia, Defendants denied the factual claims set forth by Plaintiff at paragraphs 12 through 23, except at paragraph 13, to which the Defendants answered that "Admitted that the Borough was in the process of renovating its Municipal Building. Admitted that many individuals, including police officers, volunteered to perform renovation work. The remaining allegation[s] sic are denied." The Answer filed by the Defendants did not include a counterclaim for

intentional spoliation of evidence or negligent spoliation. A true and accurate copy of Defendants' Answer is attached hereto and marked as Exhibit "B".

On or about March 11, 2004, the Defendants served upon Plaintiff a Notice to Produce that at paragraph 5 demanded production of "any and all photographs, videotapes, audiotapes, or other reproductions of the incident, plaintiff's alleged injuries, the defendants, the defendants' property or any other depictions relevant to the claims alleged in plaintiff's complaint". A true and accurate copy of Defendants' Notice to Produce is attached hereto and marked as Exhibit "C".

On or about August 31, 2004, Plaintiff responded to Defendants' Notice to Produce. With respect to paragraph 5, Plaintiff answered: "Plaintiff is not in possession of any photographs or videotapes." Though Plaintiff knew she had taken measures to destroy the photographs, she did not notify the Defendants of this fact in her responses. A true and accurate copy of Plaintiff's Responses to Defendants' Notice to Produce is attached hereto and marked as Exhibit "D".

On or about October 7, 2002, the Defendants, Christopher Fox and Ferentz contacted Michele Berenotto DeWeese, their local prosecutor on call, for an evaluation of the conduct of the Plaintiff and whether her conduct was criminally actionable. Following the conversation, on the morning of October 8, 2002, Plaintiff was arrested at the West Wildwood Police Department and charged with New Jersey Statute 2C:12-10, "stalking."

N.J.S. 2C:12-10 provides under

b. A person is guilty of stalking, a crime of the fourth degree, if he:

(1) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to

himself or a member of his immediate family or to fear the death of himself or a member of his immediate family; and

(2) Knowingly, recklessly or negligently places the specific person in reasonable fear bodily injury to himself or a member of his immediate family or in reasonable fear of the death of himself or a member of his immediate family.

Part a. of the statute defines a "course of conduct" as "repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person." "Repeatedly" means on two or more occasions." A true and accurate copy of N.J.S. 2C:12-10 is attached hereto and marked as Exhibit "E".

The Cape May County Prosecutor's Office ultimately downgraded the offense to the charge of "harassment" under N.J.S. 2C:33-4(c). Plaintiff was tried to a verdict of guilty at the municipal level. N.J.S. 2C:33-4 provides:

Except as provided in subsection e., a person commits a petty disorderly persons offense if, with purpose to harass another, he:

a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;

b. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or

c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

A communication under subsection a. may be deemed to have been made either at the place where it originated or at the place where it was received.

d. (Deleted by amendment, P.L.2001, c. 443).

e. A person commits a crime of the fourth degree if, in committing an offense under this section, he was serving a term of imprisonment or was

on parole or probation as the result of a conviction of any indictable offense under the laws of this State, any other state or the United States.

A true and accurate copy of N.J.S. 2C:33-4 is attached hereto and marked as Exhibit "F".

On November 22, 2004 and November 29, 2004, the Plaintiff was deposed. Some relevant portions of the depositions are attached hereto and marked as Exhibit "G". From the Plaintiff's November 22, 2004 deposition:

14 Q. You remember reading something in the
15 complaint where there was a reference about you
16 being in a parking lot?

17 A. Yes.

18 Q. And that was you being in a parking
19 lot, taking photographs, correct?

20 A. Taking photographs of the borough
21 hall.

22 Q. Okay. And where were you -- actually,
23 where were you on that evening?

24 A. I was in the -- I was in the street.

25 Q. Were you ever in the parking lot?

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1 A. No.

2 Q. And we're talking about the municipal
3 parking lot, correct?

4 A. Yes.

5 MR. GRASSI: And we're talking about
6 that evening, correct?

7 BY MS. DOUGLASS:

8 Q. And as far as I can tell, that would
9 have been October 7th, 2002, correct,
10 Mrs. Pomykacz?

11 A. Yes.

12 Q. By the way, what was your purpose in
13 standing in the street at either 7 p.m., 9:30 p.m.
14 or 11 p.m. on October 7th, 2002, taking photographs
15 of the municipal building?

16 A. I wasn't standing in the street at 7
17 or 9:30 p.m.

18 Q. You were standing in the street at 11
19 p.m.?

20 A. In that time frame, yes. In that
21 area, yes.

22 Q. Well, we'll stick with that time
23 frame.

24 A. Mmm-hmm.

25 Q. And your purpose in standing in the

1 street at 11 o'clock at night, taking a photograph
2 of the municipal building, was?

3 A. Because I believe that they were
4 working on the building -- the police officers were
5 working on the building while on duty, not just off
6 duty.

7 Q. Which police officers?

8 A. At that particular time, Jacqueline
9 Ferentz.

10 Q. That would have been the only police
11 officer that you believed was working at the
12 building -- I'm sorry -- in the building at the
13 time she was supposed to be on duty?

14 A. When she was on duty, yes.

15 Q. Okay. And this was shortly before the
16 election in November, 2002, correct?

17 A. Yes.

18 Q. What was your purpose in capturing
19 this on film?

20 A. Because I believed, if it was wrong,
21 that we'd have a record of something that they were
22 doing that was not proper.

23 Q. So, you were trying to catch them in a

24 bad act, correct?

25 A. Catch them doing something that was

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1 wrong, yes.

2 Q. And what was it that you believed that

3 they were doing wrong?

4 A. Working on the building -- not they.

5 Working on the building when --

6 instead of patrolling the streets while on duty.

7 Q. Well, what work were they doing on the

8 building?

9 A. They were doing renovations.

10 Q. And this was the municipal building?

11 A. Yes.

12 Q. And what was it that was improper

13 about doing renovations or helping to assist in the

14 renovations of the Municipal Court building by a

15 police officer while on duty?

16 MR. GRASSI: Objection.

17 MS. DOUGLASS: Well, you know what?

18 I'll strike it, because it was a bad question

19 anyway.

20 MR. GRASSI: I just want to explain.

21 It's just the Municipal Court part,

22 because I don't think that really --

23 MR. SAVIO: Off the record.

24 (Discussion held off the record.)

25 BY MS. DOUGLASS:

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1 Q. I'm going to disregard the last

2 question, Mrs. Pomykacz, --

3 A. Okay.

4 Q. -- and ask you, in your mind, what it

5 was that you thought was wrong about that conduct.

6 A. I thought it was wrong for them to be

7 working on duty and the --

8 Off duty doesn't matter. If you want

9 to volunteer your time off duty, that's fine.

10 Anybody can volunteer to help, as long as it's

11 permissible.

12 But, on duty, you expect --

13 If you're hired to be a police

14 officer, I don't understand why they're in there,

15 doing this, when they should be out in the streets,

16 especially when houses had gotten broken into, when

17 a young boy committed suicide up at the playground.

18 Maybe if they had been out in the -- out in the

19 streets, patrolling the streets the way they always
20 did, maybe some of the stuff could have been
21 deterred. But, you know what? You'll never know.
22 I thought it was a shame.

23 Q. Where are the photographs that you
24 took?

25 A. I got rid of everything.

Maureen Pomykacz (By Mr. Savio)

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1 Q. Why?

2 A. Because I got scared.

3 Q. Of what?

4 A. That I'd done something wrong because
5 I got yelled at.

6 MS. DOUGLASS: All right. We'll
7 conclude for today's date.

8 MR. SAVIO: Wait a minute.

9

10 EXAMINATION BY MR. SAVIO:

11 Q. Who yelled at you?

12 A. Mayor Fox.

13 Q. When did Mayor Fox yell at you?

14 A. After I took the picture.

15 Q. Were there other pictures that you
16 took, other than the pictures at 11 o'clock at
17 night, of work going on in the borough hall?

18 A. Yes.

19 Q. Where are those pictures?

20 A. They were on the same camera.

21 Q. So, you destroyed all the pictures?

22 A. Mmm-hmm.

23 MR. GRASSI: "Yes"?

24 THE WITNESS: Yes.

25 BY MR. SAVIO:

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1 Q. And you did this, you said, because
2 Mayor Fox yelled at you?

3 A. (Witness nods head in the
4 affirmative.)

5 MR. GRASSI: "Yes"?

6 THE WITNESS: Yes.

7 BY MR. SAVIO:

8 Q. And when did he yell at you?

9 A. After I took the pictures of the
10 borough hall and I walked down the street and
11 Jacqueline Ferentz said that I was outside, he said

12 -- she said Maureen's out there. And Mayor Fox
13 came to the door and he yelled I have to stop what
14 I'm doing.

15 And I continued walking home, down the
16 street and around the corner. And he said if you
17 don't stop this, we're taking papers out on you.
18 End of conversation, as far as I remember.

19 And I went in the house and that was
20 it.

21 Q. Based upon Mayor Fox's statement that
22 if you don't stop doing this, we're going to take
23 out papers, you destroyed all the photographs you
24 took?

25 A. Can I add more to it?

Maureen Pomykacz (By Mr. Savio)

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1 Q. Sure.

2 A. The following morning, two police
3 officers showed up at my door.

4 Q. But, by that time, you destroyed the
5 photographs?

6 A. No.

7 I destroyed them after the two police

8 officers showed up at the door. And I got scared
9 and thought what did I do wrong.

10 Q. Well, were some of the photographs
11 that you took taken of Mayor Fox's residence with
12 Jackie Ferentz?

13 A. No.

14 Q. Were you ever in the back yard of
15 Mayor Fox's residence, taking photographs of the
16 home?

17 A. No.

18 Q. Were there other occasions when you
19 followed Mayor Fox and/or Jackie Ferentz, taking
20 photographs of either one of them?

21 A. No.

22 Q. What were the photographs that you
23 took other than on October 7, 2002? What else was
24 in that film canister?

25 A. The police cruiser from West Wildwood

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1 parked on Schellenger Avenue, at a Wildwood -- I
2 believe it was a Wildwood police substation, in a
3 public housing facility where I believe Mayor Fox
4 was working and Jacqueline Ferentz had gone to
5 visit.

6 Q. How did you know that Mayor Fox and
7 Jacqueline Ferentz were in a public housing project
8 on Schellenger Avenue?

9 A. Because I drove -- I drove down
10 Schellenger Avenue and observed Jacqueline Ferentz
11 get out of the police -- the West Wildwood police
12 car and go in the gate to the police substation.

13 Q. Did you just happen to be driving down
14 Schellenger Avenue?

15 A. Yes. Yes.

16 Q. So, you didn't follow Jacqueline
17 Ferentz out of West Wildwood, into Wildwood, at
18 Schellenger Avenue, right?

19 A. No, I did not.

20 Q. Other than the picture of the West
21 Wildwood police cruiser on Schellenger Avenue, by
22 the Wildwood police substation, and the pictures of
23 the borough hall as the work was being done on
24 October 7, 2002, did you take any other pictures?

25 A. One.

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1 Q. Of what?

2 A. Of a West Wildwood police cruiser

3 parked on Q Avenue, across the street from the
4 residence of Mayor Fox and -- or -- Mayor Fox and
5 Ferentz, Jacqueline Ferentz.

6 Q. When did you take the photograph of
7 the police cruiser outside the Wildwood police
8 substation?

9 A. I can't give you an exact date.

10 Q. About. Approximately.

11 A. I'd have to say sometime in the --
12 approximately May or June of 2000 -- I'm sorry.
13 Approximately June or July of 2002.

14 Q. And when did you take the photograph
15 of the police cruiser on Q Street?

16 A. After I took the picture on
17 Schellenger Avenue. But, I don't remember exactly
18 when. Sometime in that same time frame, but after
19 I took the picture on Schellenger Avenue.

20 Q. So, sometime between June or July of
21 2002 and October 7, 2002, you took a picture of the
22 police cruiser on Q Avenue?

23 A. Yes.

24 Q. Those are the only three photographs
25 that were in this roll of film that you had in the

1 camera?

2 MR. GRASSI: Objection.

3 MR. SAVIO: I'm sorry. The witness is

4 shaking her head yes.

5 MR. GRASSI: In terms of the roll of

6 film -- it's probably a stupid objection and may be

7 nitpicking, but I don't know if you've established

8 it was a roll of film or what kind of camera it

9 was.

10 BY MR. SAVIO:

11 Q. Okay. Was it a digital camera or was

12 it a film camera?

13 A. A film.

14 Q. So, other than these three

15 photographs; one on October 7, 2002, one in June or

16 July of 2002, and one sometime in between, there

17 were no other photographs on that roll of film, is

18 that your testimony?

19 A. Yes.

20 Q. And you destroyed all three after two

21 police officers knocked on your door on November 8,

22 2002, because Mayor Fox, the night before, told

23 you, the night before, he was going to take out

24 papers on you, is that your testimony?

25 A. He said he could take out papers.

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1 Q. So, you destroyed these photographs
2 because the night before, Mayor Fox said he could
3 take out papers on you, correct?

4 A. And then the police officers came to
5 arrest me.

6 Q. And then you destroyed the film?

7 Q. After that, I did, yes, at some point
8 after that.

From the Plaintiff's November 29, 2004 deposition:

Maureen Pomykacz (By Mr. Venneman)

13 Q. Okay. Now, you've indicated, very
14 early on as we were talking about this, that the
15 three pictures that you took were all on the same
16 disposable camera. Correct?

17 A. Yes.

18 Q. When did you purchase that camera?

19 A. The day when I was going to 7-Eleven
20 to pick up the rolls and I saw Jacqueline Ferentz
21 get out of the police car at the Wildwood
22 substation on Schellenger Avenue.

23 Q. And at the time you purchased it, what
24 was the reason why you chose that time to purchase
25 a camera?

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1 A. I just thought --
2 I went -- I left 7-Eleven, I went to
3 Rite Aid and purchased the camera to take a picture
4 of the police car on Schellenger Avenue, at the
5 substation.

6 Q. Were you trying -- strike that.
7 Did you make any attempt to get a
8 picture which showed the car and Officer Ferentz at
9 the substation at the same time or was it your
10 intent just to take a picture of the police car?

11 A. The police car.

12 Q. And, I'm sorry, just remind me.
13 Roughly when was it that you purchased that camera?

14 A. I'm not sure. It may have been late
15 spring, early summer.

16 Q. Of 2002?

17 A. 2002, yes.

18 Q. You did recall that it was a weekday,
19 correct?

20 A. Yes.

21 Q. Okay. To the best of your
22 recollection, when did you get rid of the camera?
23 A. The day I was arrested.
24 Q. Okay. So, my understanding is, you
25 were arrested on October 8th, 2002. You purchased

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1 the camera in early spring, and, therefore, it's
2 fair to say that you had that camera in your
3 possession for a period of roughly four to six
4 months, is that fair?
5 A. Yes.
6 Q. Okay. Where did you keep that camera?
7 A. I left it in the car.
8 Q. Where in the car?
9 A. In the center console box, I believe.
10 Q. And other than those three pictures
11 that you took with that camera, were there any
12 other pictures of anything --
13 A. No.
14 Q. -- on that camera?
15 A. No.
16 Q. So, is it fair to say you kept that
17 camera for that six month period of time in your

18 console for the sole purpose of your public
19 activism, with respect to what was going on in the
20 borough?

21 A. Yes.

22 Q. Now, previously you indicated that
23 Mrs. Fox had taken some pictures, correct?

24 A. That's what she told me, yes.

25 Q. And you had made the recommendation to

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1 her that she keep those pictures to help her in the
2 future with anything regarding the borough,
3 correct?

4 A. Yes.

5 Q. Would you please explain to me, having
6 instructed Mrs. Fox to do that, why it is that you
7 chose to dispose of your camera?

8 A. Because I got scared the day I was
9 arrested.

10 Q. What were you scared of?

11 A. That I did something terribly wrong by
12 taking the pictures.

13 Q. Did anybody direct you to dispose of
14 the pictures?

15 A. No.

16 Q. Where did you dispose of the camera?

17 A. In a trash can at a shopping center
18 parking lot, at a shopping center in front of the
19 CVS at 26th and Delaware.

20 Q. Okay. When did you do that?

21 A. It was disposed of that morning, after
22 I came back from the police station.

23 Q. Okay. After you came back from the
24 police station.

25 Did you go from the police station to

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1 that parking lot and dispose of the camera or did
2 you go from the police station, back home, and then
3 out, where later you disposed of it?

4 A. No. I went home, I ripped the camera
5 apart and I handed -- I think I put it in a bag and
6 I handed it to the kids and said, throw this in the
7 trash can on your way to school, I don't want any
8 parts of it.

9 Q. I'm confused. I thought you told me
10 that you disposed of the camera at the CVS, in the
11 garbage.

12 A. No. I said it was disposed of.

13 Q. Which one of your children disposed of
14 the camera?

15 A. I don't know if it was Jill or Alison.

16 They both left for school together.

17 Q. And that was on October 8th, 2002?

18 A. Yes.

19 Q. Did you ever ask either one of them
20 where they disposed of the camera?

21 A. Yes.

22 Q. When did you ask them?

23 A. When they came home from school.

24 Q. And who told you what?

25 A. I don't remember which one told me,

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1 but they indicated that it was tossed in the trash

2 can over at CVS, in front of CVS.

3 Q. Well, what was it about the
4 photographs that you were scared of?

5 A. I don't know what I was scared of
6 other than I was scared, other than that I was
7 afraid that I had done something horribly wrong.

8 Q. And, I'm sorry, I just don't
9 understand what the photos -- how they related to
10 what you did wrong.

11 A. Because I took a picture the night
12 before at the borough hall, from the street, and
13 after I took the picture, Jackie told Chris Fox
14 that I was out there and that I took a picture and
15 -- or Maureen's out here or something like that.
16 And I walked home. I thought, okay,
17 and I just walked home.
18 And he came to the door and he yelled
19 to me. And I just kept on walking.
20 And then when I got home, I just
21 thought did I do something wrong by taking the
22 picture at the borough hall.
23 And then, the next day, when the
24 police officers came over to arrest me, when I went
25 home, I thought, oh, this is horrible, and I just

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1 took the camera and ripped it apart, said to the
2 kids, throw it away, please, just throw it away.
3 Q. Did Officer Novsak or Officer Pladek
4 indicate to you that the basis -- any part of the
5 basis of the stalking charge was you taking
6 photographs?
7 A. No, they did not.

8 Q. Did you make that assumption based on
9 the fact that you were arrested the following day
10 from taking a photograph on the night of October
11 7th, 2002?

12 A. Yeah. Yes.

13 Q. Okay. So, you assumed that the taking
14 of the photograph had something to do with why you
15 were arrested, is that fair?

16 A. Yes.

17 Q. Okay. Did it occur to you that the
18 photograph would be evidence of what you had done
19 the night before?

20 A. I would say yes.

21 Q. Okay. Why didn't you personally
22 dispose of the camera rather than giving it to your
23 daughters?

24 A. Because they were on their way out and
25 I just wanted it out. At that point, I was too

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1 upset to drive anywhere, and I wanted it out.

2 Q. You were discussing the time that you
3 took the photograph, at 11 p.m. Do you recall
4 that? Much, much earlier in the deposition.

5 A. I don't know. Do you want to refresh
6 my memory on this?

7 Q. Okay. You indicated to Ms. Douglass
8 that you had taken a photograph at approximately 11
9 p.m. at night one day, correct?

10 A. Correct.

11 Q. Okay. And I believe your testimony
12 was that you did this --

13 You had walked from your house to take
14 this photograph, correct?

15 A. Yes.

16 Q. Was the sole purpose of you leaving
17 your house that night at 11 o'clock to take that
18 photograph?

19 A. I wasn't sure. I wasn't sure if I was
20 going to --

21 I took the camera with me. I think I
22 believed -- if I thought the opportunity was there
23 to take the picture, I would. Did I go out to take
24 the picture? I'm not sure. It's very possible.

In summary of the relevant portions of the deposition of the plaintiff in this matter, Plaintiff purchased a disposable camera in the Spring of 2002 for the sole purpose of taking photographs of what she claims were wrongdoings of the Borough of West

Wildwood, Mayor Fox, and Officer Ferentz. She admits using this camera for at least three photographs. She stored this camera in her SUV in the console from the Spring of 2002 until after her arrest on charges of stalking on October 8, 2002. Rather than disposing of the camera at her own home, under her own hand, she rips the camera apart and has her daughters dispose of it off the premises of the personal residence. All pictures were destroyed.

On or about April 30, 2003, Jacquelyn Ferentz testified in the municipal trial of Maureen Pomykacz. A true and accurate copy of the cited portions of the transcript are attached hereto and marked as Exhibit "H".

The prosecutor asked Ms. Ferentz to testify to the first time she took notice of Pomykacz' presence. Ms. Ferentz testified that "in or around the latter part of May 2002 and June of the same year." Transcript, p. 35. To the question of what generally happened during May and June of 2002, Ms. Ferentz testified:

I notice a more physical presence, especially while I was on duty. Quite a number of times, I noticed her driving where I was parked in the patrol vehicle looking to see who was in the vehicle. I also noticed her a number of times going by my residence while I was off duty.

See Transcript, p. 35, lines 9-13.

The Prosecutor asked Ms. Ferentz to explain why brought Pomykacz conduct to the attention of her supervisors:

I was becoming alarmed because the behavior was a little bit - - I would like to say nor - - not normal. It led me to believe that - - I felt I was being singled out of all officers. We only have six of them. That she was keying in on me for whatever reason and I - - I didn't understand being that I've never had any contact with her.

See Transcript, p. 36, lines 9-15.

The Prosecutor also asked Ms. Ferentz to describe an evening in July 2002 when she identified Pomykacz on her property:

Q. Back, Officer, in July of 2002, where did you live? Where was your residence.

A. Well, early July I was still partially living in Wildwood Crest with my father. I was in the process of buying a house in West Wildwood on Q Avenue.

Q. Did there come a point in time in - - in July of 2002 when you saw the defendant on your - - your property?

A. Yes, sir, there was.

The Court: Which property?

The Witness: That would be the Q Avenue residence in West Wildwood, sir. That was after I had purchased the house.

By Mr. Birchmeier (Prosecutor):

Q. Can you tell the Court about that - - that incident you observed?

A. It was approximately 7:00 at night and I observed the defendant, Mrs. Pomykacz, walks toward my back yard. I have a vacant lot towards - - on the other side of me. I had a dumpster which I was removing trash from the back of my house. I was in the bathroom at the time. I was alerted by a noise out in the yard and I looked out and saw the defendant. I positively identified her walking out and getting into her vehicle. It looked like she took a picture of my dumpster for whatever reason and walked off and drove away before I was able to get to the front of the house.

Q. Did you actually see the defendant physically on your property?

A. Yes, sir, I did.

Q. Did the defendant have permission to be on your property on that particular evening?

A. No, sir, she did not.

Q. And -- And you told us you saw her do what, take a picture?

A. I -- I believe take a picture, sir. I don't want to speculate, but, you know, I -- it looked like she had that in her hand, some kind of --

See Transcript, pages 37, line 7 to page 38, line 21.

The Prosecutor also elicited testimony from Ms. Ferentz regarding a separate incident where Pomykacz surveilled Ms. Ferentz at her father's residence. See Transcript page 38 line 22 through page 39 line 15. Ms. Ferentz also testified that Pomykacz repeatedly drove by Ms. Ferentz during her duties as an officer under surveillance of a criminal case. See Transcript page 40, line 2 through 42, line 23.

The Prosecutor elicited testimony about the incident that "cemented" the [need for a complaint]. Ms. Ferentz testified that on October 7, 2002 at approximately 10:00 or 11:00pm she

heard a loud bang coming from the parking lot area and saw a flash and I was not sure at that point in time what the flash was. I alerted Mayor Fox and Officer Pladek. I don't recall what exactly I said. I can review my notes if you'd like me to. And we saw -- I saw her -- the defendant walked towards a street light towards her home, which is located on -- in or around the corner of Poplar and Arion, which is just around the corner from the police department. After she got in the light I was able to identify it as the defendant, Maureen Pomykacz. She was carrying something in her hand. I was not sure -- I was assuming it was a camera, but I could not swear to the fact that that's what that was. I did call out to her to come back, but by the time I was outside she already was able to retrieve to her home.

The prosecutor confirmed that the "bang" and the "flash" came from the direction of the defendant. See Transcript, page 45 line 23 through 47, line 2.

Ms. Ferentz testified that Pomykacz' conduct of October 7, 2002 alarmed her.

She testified that her feelings from the loud bang and flash were

I'll be honest with you, with everything that was going on in October of 2002, you started to get the reaction to take defense of yourself because you really weren't sure what was going on, especially with the shootings in Virginia and those individuals with the snipers. You got to get your guard up and at that point I did not identify it as Maureen Pomykacz. So I was greatly alarmed by that instance.

See Transcript, page 47, lines 12 -22. In later testimony, Ms. Ferentz stated that the FBI had published a warning to law enforcement that persons taking photographs of government buildings were to be considered "suspicious" persons. See Transcript, page 55 lines 14-20.

On May 28, 2003, Christopher Fox testified under oath at the trial of Pomykacz on the down-graded charge of harassment. A true and accurate copy of the cited portions of the transcript of Mr. Fox' testimony are attached hereto and marked as Exhibit "I".

Having testified that he had known Ms. Pomykacz for approximately 15 years and considered her a friend, there followed colloquys between the prosecutor and Mr. Fox:

Q. Can you identify for us approximately when you identified that that relationship changed?

A. It was somewhere around April of 2002. I had separated from my wife in October of 2001 and I really didn't hear anything. I moved in this place on Q Avenue and there never was a problem until April and then Maureen more - - all of a sudden I see frequent passes by my house, stop, look in, take a few pictures out of the car, drive on, more frequent times that I would see her when I hadn't seen her at least from the

October of 2001 to April 2002 I had not seen her at all, and all of a sudden now these frequent show-ups or - - or all of a sudden coming out of nowhere.

See Transcript, page 10, lines 2-21.

Subsequent testimony elicited the extent of Pomykacz' presence and photographs of Mr. Fox at his personal residence:

Q. Can you estimate for us, Mr. Fox, how many times from that time period of April of 2002 to October of 2002, how many times she would have driven by your residence?

A. I don't know exactly the amount of times and again, I didn't document them all, but it was - - it was quite a few. I mean if I had to say more than 50, it was well over 50.

Q. And did you also mention that there - - sometimes you could see flashes coming from the vehicle?

A. Yes.

Q. Can you estimate for us how many times you - - you saw that over that course of several months?

A. You know, I - - I couldn't - - I wouldn't - - That would be a lie if I told you I don't know, but I know several times.

See transcript, pages 12 line 10 to page 13 line 1.

The Prosecutor directed Mr. Fox to the night of October 7, 2002:

Q. Why - - why don't you tell us about at least your initial contact.

A. Okay. My initial contact was - - and I don't know the exact time, but I'm going to guess somewhere around - - it was either between 10 and 10:30 or 10:30, somewhere around there, - -

The Court: P.M. this is?

By Mr. Birchmeier:

Q. At night?

A. P.M. I'm sorry. Yes. P.M. and I'm sitting there doing work. I'm down the hallway and I hear a bang out in the parking lot because we - - it's - - it's kind of warm out and you hear bang out in the parking lot. In our building we're all working. You can - - I mean it's lit up like a Christmas tree, so anybody who's out - - outside can see in. It's hard for us to see outside. So I head to the door I see a flash. I'm thinking, you know, what's this? So at that point I hear Officer Ferentz who was at the room at the time had went into another room and then she yells to me, you're - - you're not going to believe this. Maureen Pomykacz is in - - in that parking area. So as I run around the door and I look out the door, I look out into the street, and sure enough it's Maureen.

See Transcript, page 18 line 11, through page 19 line 10.

The above facts clearly show that Plaintiff destroyed all photographic evidence of her activities. The above facts also show that Plaintiff maintained the same camera for her activities from April of 2002 through October 8, 2002 and that there were other photographs, beyond those admitted to by Plaintiff, that would evidentiary on the issue of probable cause for stalking.

LEGAL ARGUMENT

I. THE COURT HAS JURISDICTION OVER THE PARTIES AND PLAINTIFFS CLAIMS, AND ACCORDINGLY, HAS THE DISCRETION TO EXERCISE PENDENT JURISDICTION OVER A STATE LAW COUNTERCLAIM.

The Plaintiff has brought her claims pursuant to 42 U.S.C. § 1983, together with pendent state law claims. Plaintiff cites 28 U.S.C. §§1331 and 1343(a)(3) and 28

U.S.C. § 1367 for jurisdictional authority for the Constitutional claims and the pendent state law claims, respectively. Venue is proper as all parties reside in this district and the events, to include those that form the basis of counterclaim, occurred in this district.

As will be shown below, fraudulent concealment ("spoliation") is a recognized claim in the State of New Jersey. As provided in 28 U.S.C. §1367, in this civil action, this Court has supplemental jurisdiction over "all other claims that are so related to claims in this action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Accordingly, the Court has the discretion to exercise jurisdiction over the fraudulent concealment counterclaim if it finds that the facts are such that they are sufficiently related to plaintiff's complaints under original jurisdiction.

II. THE CONTEMPLATED COUNTERCLAIM FOR INTENTIONAL SPOILIATION IS A CLAIM THAT IS RECOGNIZED UNDER NEW JERSEY STATE LAW AS THE CIVIL REMEDY OF FRAUDULENT CONCEALMENT AND SHOULD BE APPLIED TO THE FACTS OF THIS CASE.

A. The State of New Jersey recognizes intentional spoliation as a claim best framed, in the absence of legislative action making it an independent cause of action, as fraudulent concealment, an existing independent cause of action in the State.

A review of reported cases on the claim for "intentional spoliation" reveals that most commonly, the issue is reviewed and analyzed under the factual circumstances where a plaintiff is hampered in her case by the intentional destruction of evidence by the defendant and then brings the claim for "intentional spoliation." To date, neither the legislature for the State of New Jersey, nor the Supreme Court has recognized an independent tort action for "intentional spoliation." However, the Supreme Court of the

State of New Jersey has narrowly tailored the fraudulent concealment cause of action in the leading "intentional spoliation" case, Rosenblit v. Zimmerman, 166 N.J. 391 (S. Ct. 2001). The Rosenblit Court did this to address the concerns of intentional spoliation and to identify the elements of a case of intentional spoliation of evidence. In review of Rosenblit, and those cases cited by the Rosenblit Court, it is clear that under certain facts, as here, the Supreme Court of the State of New Jersey would recognize the counterclaim for intentional spoliation contemplated by the Defendants.

As implied above, the Supreme Court of New Jersey has not ruled on the issue of whether the claim of fraudulent concealment in the intentional spoliation context should be limited to a plaintiff or equally available under the appropriate set of facts to the defendant. Accordingly, when analyzing whether to allow the counterclaim for intentional spoliation by the Defendants, this Court "must base its decision on a prediction of how the New Jersey Supreme Court would proceed." Larison v. City of Trenton, 180 F.R.D. 261, 265 (U.S.D.C.-Trenton, 1998) citing Pittston Co. Ultramar America Ltd. v. Allianz Ins. Co., 124 F. 3d 508, 516 (3d Cir. 1997).

The Rosenblit Court gave detailed consideration to the case of Viviano v. CBS, Inc., 251 N.J. Super. 113 (App. Div. 1991) *cert. denied* 127 N.J. 565 (1992). The Court noted that "Viviano properly denominated the conduct of destruction of litigation evidence as spoliation and, in so doing, cited cases and commentaries that recognized an independent tort remedy for that conduct." Rosenblit, at 405. To the praise of the Rosenblit Court, when faced with the fact that the Legislature and Supreme Court had never before recognized a new cause of action of "intentional spoliation," The Viviano Court identified a pre-existing tort remedy for that conduct: fraudulent concealment. *Id.*

at 406.

In Rosenblit, the plaintiff sued her chiropractor for malpractice in the treatment of a cervical injury from an automobile accident. Subsequently, she added a claim for fraudulent concealment after learning that the defendant physician had destroyed and altered certain medical records. Finding that the Plaintiff had a complete and unaltered copy of the medical records, and therefore was not damaged by the spoliation of the defendant, the Rosenblit Court held that "neither a spoliation inference nor a separate action for fraudulent concealment is appropriate." Id. at 411.

Here, the defendant will never be able to use the photographs taken by plaintiff on the issue of probable cause or as an attack on plaintiff's credibility without the remedy of a spoliation counterclaim.

B. Spoliation can be equally harmful whether done by a Plaintiff or a Defendant and the plaintiff in this case must be punished for destroying the photographs; allowing a counterclaim for fraudulent concealment and an adverse inference or presumption as to what the photographs would have shown is an appropriate and necessary remedy.

The Court should take note that when the Plaintiff destroyed the photographs on the morning of her arrest, October 8, 2002, she committed a criminal act. New Jersey Statute 2C:28-6 (Tampering with or Fabricating Physical Evidence) provides

A person commits a crime of the fourth degree if, believing that an official proceeding or investigation is pending or about to be instituted he:

(1) Alters, destroys, conceals or removes any article, object, record, document or other thing of physical substance with purpose to impair its verity or availability in such proceeding or investigation; or

(2) . . . (not applicable)

As set forth in the factual recitation, Plaintiff admitted in her deposition that she destroyed the disposable camera and its photographs within hours, if not minutes after returning home from her arrest on charges of stalking on October 8, 2002. In her first deposition, she states "I destroyed them [the pictures] after the two police officers showed up at my door. " p. 87 In her second deposition, she states, "It [the disposable camera] was disposed of that morning, after I came back from the police station." p. 296 To the question, "So, you assumed that the taking of the photograph had something to do with why you were arrested, is that fair?" Plaintiff's answer, "Yes." p. 299. Clearly, the plaintiff believed that there was a proceeding or investigation underway and she destroyed the disposable camera and its photographs because she expected that they would incriminate her. Plaintiff's conduct in destroying the camera was criminal.

As this Honorable Court will recall, the camera Plaintiff destroyed was in her possession from the spring of 2002 until she destroyed it in the face of criminal prosecution. During that period of approximately six months, Mr. Fox and Ms. Ferentz both testified under oath that they had observed the plaintiff photograph them at both public and private places on multiple occasions. It is also likely that the Plaintiff photographed them on occasions when they did not make observation. It is therefore all but certain that the disposable camera would have contained more photographs from the relevant period. Certainly, the photographs were evidence that would bear on the question of whether the defendants had probable cause to charge the Plaintiff with stalking, and whether the plaintiff's claim that there were only three pictures is credible.

The Rosenblit Court noted "since the seventeenth century, courts have followed the rule "omnia praesumuntur contra spoliatores" which means "all things are presumed

against the destroyer." Id. at 401 citing Hirsch v. General Motors Corp., 266 N.J. Super. 222, 258 (Law. Div. 1993). Recapping the best-known civil remedy of the spoliation inference, the Rosenblit Court stated "it essentially allows a jury in the underlying case to presume that the evidence the spoliator destroyed or otherwise concealed would have been unfavorable to him or her." Id. at 402 (citation omitted.) On the topic of the inference, the Rosenblit Court also cited Ritter v. Meijer, Inc., 128 Mich.App. 783, 341 N.W.2d 220, 222 (1983) ("When a party deliberately destroys evidence, a presumption arises that if the evidence were produced at trial, it would operate against the party who deliberately destroyed it."). Ibid. The Rosenblit Court also discussed the availability of discovery sanctions pursuant to N.J.C.R. 4:23-4 including that "designated facts be taken as established, refuse to permit the disobedient party to support or oppose designated claims or defenses, prohibit the introduction of designated matters into evidence, dismiss an action, or enter a judgment by default. The Rosenblit Court went on to cite Manorcare Health Servs., Inc., v. Osmose Wood Preserving, Inc., 336 N.J. Super. 218, 237, 764 A. 2d 475 (App. Div. 2001) for the proposition that attorney's fees are available to a defendant for plaintiff's spoliation.

Clearly, the Supreme Court of New Jersey recognizes the severity of the problem of spoliation for any litigant, *including a defendant*. Approving of the Viviano Court's application of the elements of fraudulent concealment in the spoliation context, the Rosenblit Court further refined those elements. Id. at 406-407. The Court held that in the context of a plaintiff, the elements to be established include:

- (1) That defendant in the fraudulent concealment action had a legal obligation to disclose evidence in connection with an existing or pending litigation;
- (2) That the evidence was material to the litigation;

- (3) That plaintiff could not reasonably have obtained access to the evidence from another source;
- (4) That defendant intentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation;
- (5) That plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed.

We are satisfied that those elements properly reflect the application of fraudulent concealment principles in a litigation setting. We hold that the tort of fraudulent concealment, as adopted, may be invoked as a remedy for spoliation where those elements exist. Such conduct cannot go undeterred and unpunished and those aggrieved by it should be made whole with compensatory damages and, if the elements of the Punitive Damages Act, N.J.S.A. 2A:15-5.12, are met, punitive damages for intentional wrongdoing.

Ibid. The Supreme Court's holding quoted above demonstrates that it finds that the principles of intentional spoliation mandate that "such conduct cannot go undeterred and unpunished" regardless of whether the spoliator is the plaintiff or the defendant. Certainly, the party, be it plaintiff or defendant, can be interchanged within the elements of the tort without effecting the obligations of the claiming party under the element. As shown below, the absence of the need for a monetary harm as a result of the spoliation suggests that the Supreme Court of New Jersey would apply these elements in the context of a plaintiff who spoliates.

In contrast to Viviano's fifth element, "that plaintiff was harmed by relying on the nondisclosure", the Rosenblit Court's modification of the fifth element speaks more to the difficulties presented in litigating a case without material evidence: "that plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed." If the party substituted for the plaintiff was the defendant, the defendant need only show that the defense was made more difficult to satisfy the fifth element is.

We argue that in this case, the circumstances are such that a presumption in an adverse charge to the jury is insufficient on its own. Not only should the jury be charged that they must presume that the photographs would have showed that plaintiff photographed the defendants on more occasions than she admits, but the defendants should be able to tell the jury that the plaintiff is being counter-sued for intentional spoliation.

The Supreme Court, in footnote 3 of Rosenblit, cited two Appellate Division cases that treated a plaintiff's spoliation differently. Neither of these cases are particularly instructive on the question of what circumstances would have to be present for the Supreme Court to apply the tort of intentional spoliation to a defendant. The analysis of the cases below suggests why the Appellate Division in each instance did not reach the conclusion that a defendant could avail himself of the tort against a plaintiff.

The case of Hewitt, III v. Allen Canning Company, 321 N.J. Super. 178, 728 A.2d 319 (App. Div. 1999) involved the personal injury claim of Roland Hewitt for an illness he claimed to have sustained when he partially ingested a grasshopper contained in a can of spinach. Though the case ultimately settled for \$3,000.00, the defense moved to amend their answer to bring a separate claim against plaintiff's attorney for [what would have amounted to negligent¹] spoliation after the paralegal for plaintiff's law firm threw out the can which had been stored in the law firm refrigerator (she had noted a strong malodor emanating from the can and was advised that it could be thrown away if adequate pictures existed). The defense claimed that there expert could have tested the contents of the can to the defendant's benefit. *Id.* at 180-181.

¹ *Id.* at 182.

The trial judge denied defendant's motion in the entirety, and in barring defendant's counterclaim against plaintiff's counsel, the Appellate Division reasoned that "as a matter of policy, permitting defendants to pursue, in essence, an indemnity action against the attorney seeking to recover the settlement or judgment obtained by plaintiff would be unnecessarily disruptive of the attorney-client relationship." *Id.* at 185. Therefore, the circumstances of this low-value, non-intentional spoliation by the attorney of the plaintiff would not be circumstances similar to the case at bar where the spoliation is intentional, by the plaintiff herself, criminal and to the absolute detriment of the defense in establishing that Defendants had probable cause for the charge of stalking.

The other case cited in footnote 3 was Fox v. Mercedes-Benz Credit Corporation, 281 N.J. Super. 476, 658 A. 2d 732 (App. Div. 1995). In Fox, the plaintiff sued defendant lender following lender's deficiency action for an amount owed on a series of commercial vehicle loans after the resale of the vehicles. Fox alleged concealment of evidence, and the trial court dismissed his complaint on summary judgment. Summary judgment on liability was entered against the defendant, Fox, and a judgment in the amount of \$140,185.71 was entered against Fox following a proof hearing. Plaintiff appealed on several grounds, to include the concealment claim. *Id.* at 477-480.

Prior to the appeal, the deficiency action was remanded and retried. In discovery for the remanded trial, the lender voluntarily surrendered documents "That full use in part led to a substantial reduction of the amount of the deficiency. Judge Stark found a deficiency that resulted in a judgment of \$69,863.33, down from the \$140,185.71 of the first judgment." *Id.* at 481. With those facts at hand, and Rosenblit not yet decided, the Appellate Division was reluctant to break with Viviano, *infra*, and held that "even if Fox's

allegations are deemed true, allegations we doubt a reasonable jury could reach, he fails to state a cause of action for which relief can be granted. . . . Defense of a claim is not cognizable under the tort of evidence concealment." Id. at 483. Accordingly, the facts of Fox are distinguishable from those before this Honorable Court and are of no precedential value.

The Supreme Court of New Jersey would, in this case, most likely find that the defendants could satisfy the elements of the modified fraudulent concealment tort and allow the counterclaim. Moreover, equity requires that this Honorable Court address plaintiff's spoliation. Certainly, defendants should be granted leave to assert the counterclaim, but at a minimum the appropriate adverse charge should be made to the jury.

III. F.R.C.P. 13(E) PROVIDES FOR THE AMENDMENT OF A PLEADING WITH A CLAIM THAT MATURES AFTER A PRIOR PLEADING, AND ACCORDINGLY, DEFENDANTS SHOULD BE ALLOWED TO AMEND THEIR ANSWER WITH A COUNTERCLAIM FOR FRAUDULENT CONCEALMENT AND "SPOILIATION INFERENCE" WHERE THEIR FIRST KNOWLEDGE OF THE DESTRUCTION OF PHOTOGRAPHS WAS MORE THAN A YEAR AFTER THE PLAINTIFF'S COMPLAINT.

The plaintiff admits that she destroyed photographs of her "civic activities" in her deposition on November 22, 2004. On August 31, 2004 when Plaintiff's counsel responded for his client as to the photographs, he simply responds, "Plaintiff is not in possession of any photographs or videotapes." See Exhibit D, page 2, paragraph 5. Obviously, Plaintiff certainly knew on August 31, 2004 that any photographic evidence had been destroyed.

F.R.C.P. 13(a) provides that

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction....

At the time of the filing of Defendants' Answer, they did not have at that time a claim against the plaintiff for intentional spoliation of evidence and bad faith because they did not then know of Plaintiff's intentional conduct. Therefore, defendants are entitled to rely upon F.R.C.P. 13(e).

F.R.C.P. 13(e) provides "A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading." Clearly, the claim for intentional spoliation "matured" after the Defendants' filing of its original Answer.

CONCLUSION

For the foregoing reasons, defendants should be allowed to amend their Answer to assert a counterclaim for fraudulent concealment by the plaintiff.

s/ W. Dana Venneman

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Dated: April 4, 2005