At an IAS Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of March, 2007.

P R E S E N T:

HON. BERT A. BUNYAN,
Justice.

- X

JEANNE SCHIMICCI, et ano.,

Plaintiffs,

- against - Index No. 9826/99

DERMPATH, INC., et al.,

Defendants.

- X

DERMPATH, INC., et al.,

Third-Party Plaintiffs,

- against - Third Party Index No. 75260/04

DARLCO PRODUCTS, INC.,

Third-Party Defendant.

- X

The following papers numbered 1 to 6 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	2, 3, 4
Reply Affidavits (Affirmations)	5, 6
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers in this products liability action, plaintiff Jeanne Schimicci[1] moves for an order, pursuant to CPLR 2221, for leave to reargue with respect to the order of this court, dated May 23, 2006, which dismissed the plaintiff's complaint, pursuant to CPLR 3126, on spoliation grounds and, upon such reargument, to grant plaintiff's cross-motion to strike the answer of defendants/third-party plaintiffs Dermpath, Inc. (Dermpath), Pathsource Inc., Edward H. Heilman and Robert J. Friedman (the Dermpath defendants) and deny the cross-motion of the Dermpath defendants to dismiss plaintiff's complaint. The Dermpath defendants oppose the instant motion on the ground that the court did not overlook or misapprehend any relevant facts or misapply any controlling principle of law in dismissing the plaintiff's complaint. Third-party defendant Darlco Products Inc. (Darlco) takes no position as to plaintiff's motion for leave to reargue, but rather requests, in the event that the court grants reargument and reinstates plaintiff's complaint, that Darlco be allowed to renew its motion for spoliation sanctions as against the Dermpath defendants.

Given that the relevant facts have been amply outlined in the court's prior order, the following summary is provided merely for the purpose of highlighting the factual and procedural aspects of the action which are germane to the instant motion for leave to reargue. In the instant action, plaintiff claims to have suffered pulmonary injuries and chemically induced asthma as a result of her exposure, in or around and between April 1996 and July

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[1]Though, apparently, subsequently withdrawn or discontinued, the initial complaint contained a derivative claim by Joseph Schimicci for the loss of society and companionship of his then-wife, Jeanne; "plaintiff," used in the singular herein, will always refer to Jeanne Schimicci

1996, to formalin - the liquid form of the gas, formaldehyde - at her workplace. Plaintiff alleges that such exposure occurred due to the Dermpath defendants' negligence in their design, manufacture, packaging and/or shipping of pre-filled formalin containers.

At the time of her alleged injury, plaintiff was employed as a scrub nurse for non-party Dr. Barry Zide, a plastic and reconstructive surgeon, and assisted Dr. Zide in his in-office pre and post-operative care of patients, including the surgical taking or removal and preservation of skin biopsy specimens for laboratory testing. Upon excise, the biopsy specimens were placed in a pre-filled specimen bottle containing 10 percent buffered formalin. The bottle was then re-sealed by capping, and the specimen forwarded to a dermapathology laboratory for testing.

Dermpath operated a dermapathology laboratory in Scarsdale, New York, where its pathologists and other staff members processed and analyzed skin biopsies received from practitioners/clients, including Dr. Zide, for the purpose of rendering medical diagnoses thereon. Dermpath was acquired by defendant/third-party plaintiff Pathsource in 1998 and, subsequently, by several other successors-in-interest. Defendants/third-party plaintiffs Dr. Edward H. Heilman and Dr. Robert J. Friedman were co-founders and former partners of Dermpath's Scarsdale laboratory facility. As part of its dermapathology operations, Dermpath routinely supplied its practitioners/clients, such as Dr. Zide, with small (20 ml) and larger-sized (120 ml) specimen bottles/containers, pre-filled with 10 percent buffered formalin, for the preservation and transport of excised biopsy specimens.

There is no dispute on the record that, during the relevant time period, Dermpath obtained its supply of pre-filled, pre-labeled 20 ml formalin containers from third-party defendant Darlco. Dermpath contends, but Darlco strongly denies, that Darlco also supplied Dermpath with larger, 120 ml, pre-filled formalin containers.

With respect to her exposure to formalin, plaintiff alleges that several pre-filled specimen bottles of 10 percent buffered formalin supplied by Dermpath to Dr. Zide's office were defectively designed, manufactured or packaged in that the specimen containers were cracked and/or leaking and that, as a result of such defective design, manufacture or packaging, formalin leakage occurred in one or more storage areas in Dr. Zide's office, causing plaintiff to suffer direct and indirect exposure (through physical contact and by inhalation) to formalin and, as a result, to sustain the pulmonary injuries she claims in the instant action.

According to plaintiff, the first such incident occurred in April 1996, in a storage cabinet in Dr. Zide's operating room, when plaintiff discovered that one or more large, 120 ml, pre-filled bottles of formalin had cracked open and leaked onto other bottles and boxes of bottles of formalin stored within that cabinet. Plaintiff allegedly cleaned the area, discarded the purportedly defective, cracked and leaking formalin bottles, and wiped off the other bottles and returned them to storage. Plaintiff, thereafter, allegedly experienced pulmonary symptoms.

Plaintiff testified that other leakages of 10 percent buffered formalin occurred in Dr. Zide's office in May, June and July 1996, with the last such incident occurring on or about July 13, 1996. As to each such incident, plaintiff alleges there were one or more cracked or leaking large, 120 ml, formalin containers. Although plaintiff further testified that, on one or more occasions, she noticed that the cap on the outer/mailer container of a small formalin bottle, or the cap on the 20 ml bottle itself, was loose, she asserted that she was not aware of any incident of cracking or leakage from a small bottle, and did not know whether any looseness of caps resulted from leakage onto a 20 ml bottle from a larger formalin container.

Plaintiff left or resigned her employment shortly following the July 1996 formalin leakage incident and, thereafter, forwarded a correspondence to Dr. Zide wherein she asserted that her alleged injuries were caused by exposure to formalin in his medical offices due to spillage from containers. She subsequently filed claims for workers' compensation and social security disability benefits, alleging pneumonic symptoms and illness caused by exposure to formaldehyde in the workplace.

Prior to leaving her employment, plaintiff obtained from Dr. Zide's office and secured one or more 20 ml pre-filled bottles of 10 percent buffered formalin, but either discarded and/or failed to secure any of the larger, purportedly cracked, leaking and defective, 120 ml bottles. At her deposition, she testified that she obtained the 20 ml bottles "for evidence." She further testified that "[o]nce . . . I realized . . . that it could have been the formaldehyde

that was doing it to me, I . . . thought . . . that it would be good evidence . . . [t]o prove . . . that the containers were leaking." When asked if she had obtained such bottles for the purpose of her lawsuit, she replied "Yes." She further stated "I really . . . wanted a large container." When further questioned as to why she did not obtain one of the larger containers she testified that she "found the larger ones to be dangerous to even hold, sometimes, because they were so filled with formaldehyde. And, they were so flimsy." With respect to the smaller bottles, although she testified that she did not remember if they had been obtained from Dr. Zide's office, she also testified that they were the same containers which were used at said office during the relevant time period. She also testified that she had to have obtained the bottles at the time of her injury in 1996. She stated that she did not believe that she returned to Dr. Zide's office after she ceased working there and did not ask anyone who worked for Dr. Zide to obtain the subject bottles for her.

Plaintiff commenced the instant action in March 1999 and served the summons and complaint upon the Dermpath defendants in or about August 1999.

At the time of service of the summons and complaint in this action, Dermpath had already been acquired by Pathsource or one or more successors-in-interest; the Scarsdale laboratory had been closed; and, according to the Dermpath defendants, much or all of the laboratory's business documentation had either not been maintained for more than one year or been transferred to the new owners, and was not capable of being located.

The Dermpath defendants disclosed, at deposition and otherwise, an exemplar of a pre-filled 20 ml formalin specimen bottle, its outer mailer bottle and packaging, and what they initially believed to be a true exemplar of a 120 ml pre-filled specimen bottle and its packaging. Plaintiff and Dr. Zide, however, failed to identify the 120 ml specimen bottle as the type used in the doctor's office during the critical period, and it was later confirmed by one or more Dermpath witnesses, that the 120 ml exemplar bottle was, in fact, not in Dermpath's supply chain during the critical period.

Darlco was first made aware of plaintiff's allegations upon commencement of the third-party action, in or about March 2004, almost five years after commencement of the main action and almost eight years after the alleged injury. Subsequently, Darlco moved for dismissal of the third-party complaint on spoliation grounds, primarily arguing that the Dermpath defendants had either lost or destroyed exemplars of the 120 ml formalin specimen bottles and any documentation as to whether Darlco did or did not provide such bottles to Dermpath during the relevant time period. Subsequently, the cross- motions by the Dermpath defendants and plaintiff which are the subject of the instant motion for leave to reargue were filed.

In their cross-motion to dismiss plaintiff's complaint on spoliation grounds, the Dermpath defendants contended that the only destruction of key or essential evidence in this case involved plaintiff's intentional destruction and disposal of the allegedly cracked and leaking 120 ml formalin specimen bottles. The Dermpath defendants argued that their

defense of this action had been severely prejudiced by such destruction and, therefore, dismissal of plaintiff's complaint on this ground was warranted.

Plaintiff, in turn, cross-moved for an order striking the Dermpath defendants' answer to the complaint and precluding their presentment of any evidence at trial on the ground that Dermpath's loss or disposal of its supply and/or documentation of its supplier of 120 ml exemplar bottles has prejudiced plaintiff in the prosecution of her action.

In its order, dated May 23, 2006, the court granted the Dermpath defendants' cross-motion to dismiss the plaintiff's complaint on spoliation grounds. In its decision, the court noted the following standard for dismissal of a cause of action premised upon spoliation of evidence:

> Spoliation sanctions are available as a remedy where a party destroys key physical evidence and thereby prejudices the opposing party's ability to prove his or her case (*Kirkland v New York City Housing Authority*, 236 AD2d 170, 173-175 [1997]). The spoliation sanction of striking the offending party's pleading is applicable "even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation" (*DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41, 53 [1998]). Because the negligent loss or destruction of evidence can be just as fatal to the non-spoliator's case as that which is done willfully (*Squitieri v City of New York*, 248 AD2d 201, 202-203 [1998]), spoliation sanctions are not limited to instances where evidence is destroyed intentionally or in bad faith, and can also be imposed when the destruction or loss of evidence is merely negligent (*id.*; *see also DiDomenico*, 252 AD2d at 53; *Kirkland*, 236 AD2d at 173-174; *Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Conditioning*, 221 AD2d 243 [1995]).

In reviewing the plaintiff's deposition testimony concerning her awareness of the evidentiary value of the subject bottles, and applying the relevant spoliation standards above, the court found that:

> According to plaintiff's own deposition testimony, she realized, in or between April and July 1996, that her physical illnesses could have been caused by exposure to formalin. Believing that the actual formalin bottles would be "good evidence" and proof that the containers were leaking and defective, she obtained one or more of the smaller, 20 ml, pre-filled formalin specimen bottles from her place of employment, "for evidence" and to "preserve evidence" for the purposes of a lawsuit or other legal action by herself against the immediate supplier, whom she knew to be Dermpath.
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> The record is equally clear that plaintiff, during this period within which she contemplated legal action and only days prior to leaving her employment, knowingly discarded, or caused to be discarded one or more allegedly cracked and defective 120 ml formalin containers, after they had been emptied and rinsed of their contents, and failed to secure any of the non-cracked bottles. According to plaintiff, she "really wanted" one of the larger, 120 ml, containers, but found the larger bottles, not cracked or necessarily defective, but dangerous to hold because they were "flimsy."
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> Plaintiff's counsel's present argument that plaintiff was without power or authority to secure the 120 ml bottles for purposes of her contemplated legal action, since they were her employer's property, is unconvincing, (1) given that these items were in plaintiff's constructive possession, could have been secured by her upon notice to her employer and were, in fact, discarded by her, and (2) since she nevertheless secured one or more 20 ml bottles, which were no less her employer's property than the 120 ml bottles discarded by her.
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> Equally unavailing is plaintiff's counsel's argument that plaintiff's act in discarding, rather than securing, this evidence was due to her proper concerns over the threat these items might pose to her physical health. The key evidence at issue is not the formalin itself, but the allegedly defective bottles it was contained in. Plaintiff testified that, prior to discarding the cracked and defective 120 ml bottles, she thoroughly emptied the bottles, washed them in a sink, rinsed them off, and placed them in disposable bags. However, as to the smaller, 20 ml bottles that had merely been soaked or moistened with

> formalin, but were not themselves defective, she merely wiped those bottles with a paper towel and returned them to storage. That plaintiff, thereafter, had no concerns over assuming physical possession, to use as exemplars in an expected lawsuit, of one or more bottles of the 20 ml containers, that had merely been wiped down and were still filled with formalin, but feared taking possession of a 120 ml bottle, emptied of its contents, washed, dried and appropriately bagged, is incongruous.
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> In sum, plaintiff possessed evidence and had notice of its relevance; she thus had a duty to preserve it (*Danna v New York Telephone Co.*, 752 F Supp 594, n 9 [1990]).

In addition, the court found that the Dermpath defendants were inalterably prejudiced in their defense of the action by plaintiff's spoliation of key evidence and, therefore, determined that dismissal of plaintiff's complaint was warranted. In so finding, the court explained its reasoning as follows:

> Having reviewed the deposition and affidavit evidence and other portions of the record, the court finds that plaintiff's action in discarding each and every one of the allegedly defective containers of formalin, though emptied and cleaned by her of their contents, while, admittedly in contemplation of litigation, securing other, concededly non-defective, pre-filled bottles, constituted willful and/or negligent spoliation of evidence (*compare Pai v Springs Industries, Inc.*, NYLJ, Jan. 16, 2003, at 24, col. 5 [Supreme Court, Queens County] [spoliation sanctions denied, where plaintiff admittedly destroyed four bed sheets that were allegedly defective due to the presence of excessive levels of formaldehyde therein, but retained remaining five bedsheets, and made same available to defendants for testing]).
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> However, the destruction of evidence alone is not enough to invoke the imposition of spoliation sanctions. The party seeking the sanction must also demonstrate that the destroyed evidence was key evidence that was crucial to proving that party's case (*DiDomenico*, 252 AD2d at 53; *Squitieri*, 248 AD2d at 202-203).
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> The Appellate Division, Second Department, has held that the actual destroyed physical evidence cannot be deemed crucial where adequate

documentation of the evidence, in the form of photographs, reports or testimony of individuals who have had an opportunity to inspect the evidence prior to its destruction, exists and allows the adversely affected party to prove his or her case (*see Marro v St. Vincent's Hospital*, 294 AD2d 341, 342 [2002] [destruction of motorcycle by plaintiff did not require dismissal of case as a spoliation sanction where eyewitness affidavits, photographs of the post-accident condition of the motorcycle and hospital records were sufficient to allow defendant to establish its defense]; *Chung v Caravan Coach Company*, 285 AD2d 621, 622 [2001] [striking of defendant's answer not warranted where photographs, maintenance records and deposition testimony of individuals with knowledge existed concerning destroyed evidence]).

Here, plaintiff failed to photograph or, other than through a self-serving letter to her former employer, document any examples of the allegedly cracked containers. She failed to have any person other than herself, observe or conduct an inspection of the allegedly defective containers, and she allowed approximately three years to pass before commencing her action (*i.e.*, before notifying the parties in the stream of commerce of an alleged defect in their product), by which time no evidence of the allegedly defective product remained for photographing, inspecting or documenting

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Nevertheless, "[w]here the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction [than the striking of a pleading], or no sanction, may be appropriate" (*Klein v Ford Motor Co.*, 303 AD2d 376, 377 [2003]). The Appellate Division, Second Department has also recently noted, in *De Los Santos v Polanco* (21 AD3d 397 [2005]), that "where the plaintiffs and defendants are equally affected by the loss of the items in their investigation of the accident and neither have reaped an unfair advantage in the litigation, it is improper to dismiss a pleading on the basis of spoliation of evidence" (*id.* at 398; *see also Lawson v Apsen Ford, Inc.*, 15 AD3d 628, 629-630 [2005]; *Ifraimov v Phoenix Industrial Gas, LLC*, 4 AD3d 332, 333-334 [2004]; *O'Reilly v Yavorskiy*, 300 AD2d 456, 457 [2002]).

De Los Santos was not a products liability action. It was a personal injury action wherein the issue in dispute, and sought to be proved and disproved by evidence of the spoliated police vehicle, was whether "the police were speeding at the time of the accident and thus were acting in 'reckless disregard' of the plaintiffs' safety" (*De Los Santos*, 21 AD3d at 398).

Separate rules or considerations exist for tort actions involving products liability, such as plaintiff's herein action.

As previously touched upon, "[i]n strict products liability, a manufacturer, wholesaler, distributor, or retailer who sells a product in defective condition is liable for injury which results from use of the product regardless of privity, foreseeability, or the exercise of due care. ... Depending upon the factual circumstances, an injured party may bring a cause of action under the theories of strict products liability, negligence or breach of warranty. The crux of a strict liability manufacturing claim is the product's failure to perform as expected due to an error in the manufacturing process that resulted in a defect. Whether pleaded in strict products liability, negligence or breach of warranty, the plaintiff must prove that the product was defective as a result of either a manufacturing flaw, improper design, or a failure to provide adequate warnings regarding use of the product ..., and that the defect was a substantial factor in bringing about the injury" (*Langer v Well Done, Ltd.*, 11 Misc 3d 1056[A], *2, *3 [2006]).

As a result, "when a party to a products liability action alters, loses or destroys key evidence before it can be examined by the other party's expert, the Court should dismiss the pleadings of the party responsible for spoliation, or at the very least, preclude that party from offering evidence as to the destroyed product" (*Andersen v Schwartz*, 179 Misc 2d 1001, 1003-1004 [1999], *citing Squitieri*, 248 AD2d at 201; *see also Liz v William Zinsser & Co.*, 253 AD2d 413, 414 [1998]).

"In cases alleging design defects, such as the instant action, the loss of the specific instrumentality that allegedly caused the plaintiff's injuries is not automatically prejudicial to the manufacturer [or supplier] thereof because defects will be exhibited by other products of the same design" (*Rios v Johnson V.B.C.*, 17 AD3d 654, 656 [2005], *citing Klein*, 303 AD2d at 378 *and Dayal v Coinmach Industries Co.*, 284 AD2d 206 [2001]). In short, the defects are usually capable of being proven circumstantially, through products of the same design (*see Treston v Allegretta*, 181 AD2d 470 [1992]; *Strelov v The Hertz Corp.*, 171 AD2d 420 [1991]).

Here, plaintiff willfully discarded the only source of the alleged design defect and her delay in informing the Dermpath defendants of her claim resulted in there being no other products of the same design at the time the defective product claim was finally made. There is no alternative evidence, as there was no photographing or inspection of the evidence prior to its loss; and, as in

Langer, "the loss of the bottle ... renders defendants bereft of appropriate means to confront plaintiff's claim with incisive evidence" (11 Misc 3d at 1056, *3).

Plaintiff and defendants are not equally hampered in the prosecution or defense of their case by the inability to produce and examine the discarded bottles of formalin. There is no indication that the defects may be proven circumstantially, through products of the same design; the actual defective bottles are essential for the Dermpath defendants to sustain their burden of demonstrating that no defect existed; and plaintiff, by purposefully disposing of such evidence, has reaped an unfair and insurmountable advantage over defendants (*see generally Kirkland*, 236 AD2d at 175; *Treston*, 181 AD2d at 471).

The court also rejected plaintiff's arguments that the Dermpath defendants were guilty of spoliation with respect to the subject bottles and, found in relevant part, that:

The Dermpath defendants did not have notice of the alleged defects in this product, either from plaintiff or from any other party or source, for almost three years after the time the defects allegedly presented themselves, and learned of such claims only after Dermpath's supplier ceased supplying it with this particular product and Dermpath's ownership had changed one or more times. The Dermpath defendants could not have anticipated litigation at a time when they could have prevented any further loss of key or critical evidence, and acted promptly, upon learning of the litigation and underlying claim, to acquire related physical and documentary evidence.

It is further noted that there is no record of Dermpath having possessed, and supplied to any party other than plaintiff's employer, any defective containers of formalin and, even if Dermpath had been able to obtain a true exemplar of 120 ml pre-filled bottles of formalin supplied to and by it during the critical time period, the record does not suggest that such non-defective exemplar evidence could have been considered key or essential such that the Dermpath defendants would be subject to severe spoliation sanctions for its discard or destruction (*see generally Galante v Cashmore Furniture Corp.*, NYLJ, March 30, 2004, at 19, col 1). The same is true as to Dermpath's alleged failure to preserve or secure its records of its supplier of this specific product.

Under these circumstances, dismissal of the complaint is warranted as "a matter of elementary fairness" (*see Liz*, 253 AD2d at 414; *Squitieri*, 248 AD2d at

204; *Kirkland*, 236 AD2d at 175-176; *Langer*, 11 Misc 3d at 1056, *3; *Andersen*, 179 Misc 2d at 1005-1006). For the foregoing reasons, the Dermpath defendants' cross-motion for spoliation sanctions is granted, and plaintiffs' complaint is dismissed in its entirety.

With respect to Darlco's motion to dismiss on spoliation grounds, the court noted that the third-party action "ha[d] been rendered moot [by reason of the dismissal of plaintiff's complaint], and the court need not determine Darlco's motion for spoliation sanctions and dismissal of that action"

Subsequent to the court's decision and order, plaintiff brought the instant motion for leave to reargue the subject cross-motions. In support of her motion, plaintiff primarily argues that the court misapprehended and overlooked the facts in reaching its decision because plaintiff was not aware of the connection between her injuries and the spills/leaks of formalin at the time of their actual occurrence and, therefore, was not aware of the evidentiary value of the subject cracked and/or leaking bottles and had no duty to preserve such containers. In addition, she contends that the time frame during which she realized a connection between the spills and/or leaks and her alleged injuries and, therefore, took steps to preserve the smaller 20 ml bottles did not occur contemporaneous to the actual occurrence of such leaks and/or spills. With respect to her cross-motion for spoliation sanctions, plaintiff maintains that the court misapprehended and overlooked material facts when it found that the Dermpath defendants were unable to secure an exemplar of the subject 120 ml bottle since evidence proffered by the plaintiff allegedly demonstrated that Dermpath continued to utilize said bottle

"well into calendar year 2001, more than two years after the commencement of the instant action."

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 27 [1992], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992]; *see also Delgrosso v 1325 Ltd. Partnership*, 306 AD2d 241, 241 [2003]; *Calo v Wal-Mart Stores, Inc.*, 305 AD2d 351, 351 [2003]; *Foley v Roche*, 68 AD2d 558, 567 [1979], *lv denied* 56 NY2d 507 [1982]). However, such motion should not be used as a vehicle to permit an unsuccessful party to argue once again the very questions previously decided (*Foley*, 68 AD2d at 567). Moreover, "'[a] motion for reargument is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those already presented'" (*Woody's Lumber Co., Inc. v Jayram Realty Corp.*, 30 AD3d 590, 593[2006], quoting *Gellert & Rodner v Gem Community Management*, Inc., 20 AD3d 288, 288 [2005]).

At the outset, the court notes that plaintiff's motion for leave to reargue largely rehashes arguments and cites to facts and law already presented to, and reviewed and ruled upon, by the court. Accordingly, the court finds that it did not misapprehend or misapply the facts or law in granting the Dermpath defendants' cross-motion to dismiss plaintiffs'

complaint on spoliation grounds and, concomitantly, denying plaintiff's cross-motion to strike the Dermpath defendants' answer for spoliation.

It is well settled that spoliation sanctions are appropriate where the allegedly spoliating party disposed of or otherwise failed to secure evidence once he or she was aware of the item's potential evidentiary value (*see Miller v Weyerhaeuser Co.*, 3 AD3d 627, 628 [2004], *lv dismissed* 3 NY3d 701 [2004] and *appeal dismissed* 5 NY3d 822 [2005]); *Horace Mann Insurance Co. v E.T. Appliances, Inc.*, 290 AD2d 418, 419 [2002]; *Di Domenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41, 53 [1998]; *Squitieri v City of New York*, 248 AD2d 201, 202 [1998]; *Kirkland v New York City Housing Auth.*, 236 AD2d 170, 173-174 [[1997]). This is true even where the item in question was not the property of the party who possessed knowledge of its usefulness to future claims (*see The Standard Fire Insurance Co. v Federal Pacific Electric Co.*, 14 AD3d 213, 219 [2004]; *Amaris v Sharp Electronics Corp.*, 304 AD2d 457, 457-458 [2003], *lv denied* 1 NY3d 501 [2004]). Here, the plaintiff testified that, at least as of the June 1996 formalin spill which occurred while she was still employed by Dr. Zide, she "was beginning to realize that [the formaldehyde] was starting to have an effect on me, because I was feeling the symptoms a lot faster then I felt them before." Relatedly, she testified that she secured the smaller 20 ml bottles "[o]nce . . . I realized that it could have been the formaldehyde that was doing it to me, I . . . thought that it would be good evidence . . . [t]o prove . . . that the containers were leaking." She further testified that she had obtained such bottles for the purpose of her lawsuit. She also stated that "I really . . . wanted

a large container." When questioned as to why she did not obtain one of the larger containers she testified that she "found the larger one to be dangerous to even hold, sometimes because they were so filled with formaldehyde. And, they were so flimsy." Accordingly, the reasonable inference to be derived from plaintiff's testimony that she "really wanted" to secure the larger bottles as evidence but found them to be too "dangerous" and flimsy" to hold was that her decision making process concerning whether or not to secure a large bottle occurred while she was still employed by Dr. Zide and actively handling such containers. She does not state, for instance, that she did not realize while still employed by Dr. Zide that such bottles had evidentiary value or that she later realized their potential value, but no longer had access to them once she left Dr. Zide's employ. Rather, she stated that she "really wanted" such bottles for evidentiary purposes but was discouraged from securing them due to their alleged flimsiness. Accordingly, she either discarded the large cracked and/or leaking bottles - by washing them and placing them in disposable bags, as she testified - or otherwise failed to secure such bottles, thereby allowing the spoliation of key evidence in the case.

Similarly, with respect to the smaller bottles, plaintiff also testified that she secured such bottles because she believed that they would be good evidence. Although she argues that she testified at her deposition that she did not remember if such bottles had been obtained from Dr. Zide's office, she also testified that they were the same containers utilized by Dr. Zide and that she must have obtained the bottles near the time of her injury. She further stated that she did not return to Dr. Zide's office after she left his employ in July 1996 and that she

did not have anyone else from the office obtain the bottles for her. Accordingly, the court properly reasoned that such bottles were obtained at or near the time of the alleged spills and/or leakages and, in any event, were not secured by her later than her departure from Dr. Zide's office. Given her admitted recognition of the potential evidentiary value of both the smaller and larger bottles, as well as the fact that she did secure the smaller bottles, the court found that she possessed the requisite knowledge and ability to secure the "key evidence" - namely the larger cracked and/or leaking bottles - yet "failed to take sufficient steps to insure [their] preservation" (*Amaris*, 304 AD2d at 457), thereby prejudicing the Dermpath defendants by preventing them from inspecting or testing the specific allegedly defective instrumentality which plaintiff claims caused her harm (*see Langer v Well Done, Ltd.*, 11 Misc 3d 1056, [A] at *3 [2006][finding that plaintiff's failure to secure allegedly defective bottle of oven cleaner which was taken from her at hospital "render[ed] defendants bereft of appropriate means to confront plaintiff's claim with incisive evidence"]).

Although plaintiff also argues that the lack of documentation in her medical records, prior to September 2006, of any connection between the alleged formalin spills and her pulmonary symptoms demonstrates her own lack of knowledge of such connection at a time when she potentially could have secured the subject bottles, the court notes that such argument was not specifically raised by plaintiff in her original cross-motion, but, instead has been explicitly made for the first time in her motion to reargue (*see Woody's Lumber Co.*, 30 AD3d at 593[declining to address issue raised for the first time on motion for leave to reargue]).

Accordingly, the court shall not entertain such argument. In any event, even if the court were to consider this contention, plaintiff's own deposition testimony, which the court has construed as evidencing her knowledge of the subject bottles' potential evidentiary value prior to cessation of her employment with Dr. Zide, and her related failure to secure such bottles despite said knowledge, is sufficient to support the court's imposition of a spoliation sanction.

The court also properly determined that the dismissal of plaintiff's complaint was an appropriate sanction given that the evidence lost was correctly denominated as "key" to the defense of the action by the Dermpath defendants and, therefore, such loss also irrefutably caused them insurmountable prejudice in pursuing such defense. As noted in the court's previous decision, "when a party to a products liability action alters, loses or destroys key evidence before it can be examined by the other party's expert, the Court should dismiss the pleadings of the party responsible for spoliation, or at the very least, preclude that party from offering evidence as to the destroyed product" (*Andersen v Schwartz*, 179 Misc 2d 1001, 1003-1004 [1999], *citing Squitieri*, 248 AD2d at 201; *see also Liz v William Zinsser & Co.*, 253 AD2d 413, 414 [1998]). Although in some cases "alleging design defects . . . the loss of the specific instrumentality that allegedly caused the plaintiff's injuries is not automatically prejudicial to the manufacturer [or supplier] thereof because defects will be exhibited by other products of the same design" (*Rios v Johnson V.B.C.*, 17 AD3d 654, 656 [2005], *citing Klein v Ford Motor Co.*, 303 AD2d 376, 378 [2003] *and Dayal v Coinmach Industries Co.*, 284 AD2d 206 [2001]) and, therefore, may be capable of proof circumstantially through

products of the same design (*see Treston v Allegretta*, 181 AD2d 470 [1992]; *Strelov v The Hertz Corp.*, 171 AD2d 420 [1991]), there is no indication that the defects at issue here may be proven circumstantially, as the Dermpath defendants, who were not apprised of the need to preserve such evidence until 1999, approximately three years after the actual defective bottles allegedly caused harm to plaintiff, were unable to produce an exemplar of the 120 ml bottles which Dermpath supplied to Dr. Zide in 1996. Moreover, such exemplar, even if it could have been secured, would not have been "key evidence" sufficient to substitute for the actual cracked and leaking bottles to which plaintiff had access at or near the time of her injuries and, therefore, prejudice still would have inured to defendants due to plaintiff's failure to secure same. Accordingly, since such bottles were essential to the Dermpath defendants' defense that no defect existed, plaintiff's actions in disposing of and/or failing to secure such evidence has allowed her to gain has an unfair advantage over the Dermpath defendants. Accordingly, the spoliation sanction of dismissal imposed by the court was appropriate and the court did not overlook or misapprehend any material facts or relevant law in so deciding.

In addition, to the extent that plaintiff argues that any claims pertaining to, *inter alia*, negligent packing or shipping of the subject bottles were improperly determined by the court in summary fashion, such argument must fail. As noted by the court, there was no evidence in the record that any of the spills and/or leaks which caused plaintiff's alleged exposure to formalin occurred as the result of any specific alleged negligent packing or shipping methods.

Moreover, the dismissal of such claims by this court as a spoliation sanction was appropriate given that any defense of such claims, as in the case of the previously discussed products liability claims, would also potentially necessitate the inspection and testing of the subject bottles to determine the cause of the complained-of cracking or leaking of the bottles. Although Dr. Zide testified, as noted by plaintiff, that one or two formalin bottles leaked due to loose caps and because the box containing the bottles was placed on its "side" in a cabinet as opposed to being placed on its "bottom" with the formalin bottles inside standing "straight up," as it should have been positioned, such testimony does not provide evidence of negligent packing or shipping which is sufficient to demonstrate any packing or shipping deficiencies attributable to Dermpath nor could it substitute for the physical evidence with respect to cracking and leaking that would have been provided by the spoliated evidence at issue here. Such determination, therefore, does not amount to an improper grant of summary judgment to the Dermpath defendants, as argued by plaintiff, but instead merely demonstrates the court's finding that no evidence supporting such claims existed in the record, particularly in light of the fact that the alleged spills at issue were only alleged to have emanated from the unavailable cracked and leaking bottles. Accordingly, the court did not misapprehend or overlook any facts or law in dismissing plaintiff's entire complaint, including any claims related to alleged negligent packing or shipping.

Finally, with respect to plaintiff's spoliation allegations against Dermpath, the court properly denied the cross-motion based upon such contentions. There is no evidence that

Dermpath possessed exemplars of the subject 120 ml bottles in 1999. To the extent plaintiff argues that Dermpath continued to utilize identical 120 ml bottles until 2001, the court found no evidence to support such argument. Although plaintiff claims that Mr. William Hichak, Dermpath's former lab manager during the requisite time period, testified that Dermpath continued to use the same 120 ml bottles in 2001, he subsequently submitted an affidavit wherein he states that he could not be sure that the bottles supplied from 1999 - 2001, the period of time that Dermpath was aware of plaintiff's lawsuit and still supplied 120 ml bottles, were the same type of bottle that was supplied in 1996. Contrary to plaintiff's contentions that Mr. Hichak's deposition testimony and subsequent affidavit are contradictory, the court finds that such affidavit merely clarifies that although 120 ml bottles continued to be supplied by Dermpath after 1996 and at least until 2001, Mr. Hichak could not state with certainty whether such bottles were identical, in other respects, to those which were supplied in 1996. Moreover, to the extent that Dermpath failed to secure an exemplar of the 120 ml bottle, such exemplar, in any event, could not be construed as "key evidence" and would not provide a sufficient substitute for the actual cracked and/or leaking bottles that plaintiff claims caused her alleged injuries and to which she had both access and the ability to secure prior to leaving Dr. Zide's employ (*see generally Galante v Cashmore Furniture Corp.*, NYLJ, March 30, 2004, at page 19, col 1).

Accordingly, as the court did not overlook or misapprehend any material facts or applicable law in rendering its prior decision, dated May 23, 2006, whereby it granted the

Dermpath defendants' motion dismissing the plaintiff's complaint on spoliation grounds and denied plaintiff's cross-motion seeking spoliation sanctions as against the Dermpath defendants, plaintiff's instant motion for leave to reargue the subject cross motions is hereby denied in its entirety.[2]

The foregoing constitutes the order and decision of the court.

ENTER,

J. S. C.

HON. BERT A. BUNYAN
JUSTICE N.Y.S. SUPREME COURT

[2] Given the court's denial of plaintiff's motion for leave to reargue, Darlco's request that it be allowed to renew its motion for spoliation sanctions against the Dermpath defendants, in the event that the court reinstated plaintiff's complaint, has been rendered moot.