

# Injured While Skiing: Do I Have A Case? Maybe, But Make Sure You Preserve Critical, Physical Evidence

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*Diane Carrion & John Carrion v. Mountain Creek Resort, Inc.*, is a personal injury matter that was recently decided by the Appellate Division in New Jersey. The case sheds light on how personal injury attorneys should handle and preserve physical evidence critical to a plaintiff's case against a defendant.

## An Expert Skier Falls and Hits a Pipe at Defendant's Ski Facility

A 55-year-old self-described expert skier who had been skiing since she was a child brought a lawsuit to recover for damages resulting from a ski accident. On the morning of the accident, the steepest and most difficult trail at Defendant's ski facility was closed due to ice. Once the trail opened, the Plaintiff and her friend were the first skiers to utilize the slope. The Plaintiff testified that she attempted to stop before reaching a steep drop, but that she could not stop due to ice on the slope. The Plaintiff further testified that she fell, slid more than 100 feet and that she ultimately hit a pipe.

This pipe was previously damaged when a trail grooming machine struck it a month before the date of the accident. At that time, the Defendant had removed the snowmaking gun from the pipe, but did not remove the damaged pipe. Defendant's risk manager testified that the pipe could not be removed during the winter because the machinery required to remove the pipe could not be transported to the area due to the steep snow-covered slope.

## Inspection of the Pipe

Shortly after the accident, the Plaintiff retained an attorney who sent a letter to the Defendant requesting that the pipe be preserved and made available for inspection. Shortly after filing her

lawsuit, the Plaintiff requested that a ski area operation and risk management expert inspect the damaged pipe. The expert was accompanied by a professional photographer, who photographed and videoed the scene.

Shortly after the inspection, the Defendant removed the pipe and disposed of it.

Prior to trial, the Plaintiff filed a motion in *limine* for what is known as “a spoliation charge” with respect to the removed pipe. A spoliation charge is essentially a direction to the jury that allows the jurors to assume that evidence destroyed or unable to be found would be unfavorable to the party who is missing the evidence. In other words, the Plaintiff’s request was for the judge to direct the jury that the Defendant’s disposal of the pipe created the assumption that the pipe, if shown as evidence during the trial, would be unfavorable to the defendant. However, the judge denied Plaintiff’s motion and the matter proceeded to trial.

## Jury Verdict Favors the Defendant Ski Facility

After a lengthy trial, the jury returned a verdict in favor of the Defendant.

In response, the Plaintiff filed a motion for a new trial and argued, in part, that the trial court improperly denied her request for a spoliation charge. Plaintiff argued that another expert, a biomechanical expert, needed to evaluate the pipe in order to make a proper and sound conclusion and be able to withstand cross examination. The trial court denied the Plaintiff’s motion, reasoning that Plaintiff’s ski operations expert had conducted a site inspection before the pipe was replaced and had photographed the specific damage. The Court further reasoned that similar pipes were present on the Defendant's property which the Plaintiff failed to inspect and analyze. The Plaintiff appealed the trial court’s decision.

## The Appellate Division Also Ruled in Favor of the Defendant Ski Facility

Plaintiff appealed the denial of her motion requesting a spoliation charge. In affirming the decision of the trial court, the Appellate Division adopted the reasoning of the lower court. The Court noted that Plaintiff's biomechanical expert conceded that he could not conduct testing on the mountain where the pipe had been located even if it was not removed. In addition, the Court reasoned that the Plaintiff failed to inspect and produce a similar pipe on Defendant's property, either for testing or to display to the jury, each of which could have been done. Further, there was no evidence that the Defendant acted in bad faith in removing the pipe.

In so holding, the Appellate Division provided guidance to attorneys on how to preserve critical evidence in the possession of the opposing party and what to do if that critical evidence becomes unavailable. Most significantly, the attorney should have sent correspondence to the Defendant indicating that the pipe needed to be preserved indefinitely, despite the fact that an expert already analyzed it. After realizing that the pipe had been removed, the attorney for the Plaintiff could have requested that her expert analyze and conduct testing on a similar pipe which could then be utilized and presented to a jury during trial.

### What This Case Means: Physical Evidence

If you are the subject of a personal injury and there is critical and physical evidence to support your claim for damages, and that physical evidence is disposed of or becomes unavailable, your attorney should request a similar item be presented to the jury during trial. As the decisions in *Diane Carrion & John Carrion v. Mountain Creek Resort, Inc.* show, if a defendant disposed of physical evidence and did not act in bad faith in its removal, a plaintiff must produce a similar piece of evidence for expert analysis and jury inspection. A motion requesting a spoliation charge, at least under the facts of this personal injury matter, will be declined by the court.