SPOLIATION OF EVIDENCE:
A Chronology of Judicial Development in Illinois

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In the last 24 years there have been approximately 40 cases decided by Illinois state and federal courts regarding the issue of spoliation of evidence. From this body of law, three clear-cut principles have emerged. First, Illinois law does not recognize an independent cause of action for spoliation of evidence. Second, a claim based on spoliation of evidence must sound in negligence. A plaintiff alleging such a claim must plead the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, an injury proximately caused by the breach, and resulting damages. Third, judicial remedies for spoliation of evidence are determined and imposed on a case-by-case basis depending upon the circumstances surrounding the destruction or disposal of the evidence at issue.

Remedies can run the gamut from a spoliation jury instruction to discovery sanctions precluding the admissibility of evidence, or even, in some instances, dismissal of the action. With such a range of remedies, litigants may experience difficulty in accurately predicting what, if any, outcomes may result when an Illinois court is faced with the issue of spoliation of evidence. In the interest of bringing a measure of clarity, the following discussion contains a chronological survey of cases that contributed to the body of precedent in Illinois dealing with the issue of spoliation of evidence.

The first reported decision in Illinois dealing with spoliation of evidence was Stegmiller v. H.P.E., Inc., 81 Ill. App. 3d 1144, 401 N.E.2d 1156 (1st Dist. 1980). The Stegmiller case involved an administrator of an estate who brought a products liability action alleging that an improper insulated swimming pool filter manufactured, sold, and installed by the defendants electrocuted the administrator’s son. An investigator hired by the plaintiff’s attorney picked up the pool filter from the Stegmiller home on August 30, 1972. The filter was stored in the attorney’s office pending examination. After moving his office to a new location, the plaintiff’s attorney was unable to find the pool filter.

Following several unsuccessful requests by the defendants for the plaintiff to produce the pool filter for examination, the trial court dismissed the plaintiff’s complaint for failure to comply with Illinois Supreme Court Rule 219(c). It is clear from a review of the Stegmiller opinion that the dismissal was based not so much on the plaintiff’s loss of the pool filter (and, indeed, the defendants never argued that they were unable to defend the claim based on the fact that the pool filter was lost), but rather on the fact that the plaintiff waited more than three years before attempting to explain why the pool filter could not be produced in response to the defendants’ request to produce.
In Fox v. Cohen, 84 Ill. App. 3d 744, 406 N.E.2d 178 (1st Dist. 1980), the plaintiff, an administrator of the estate of a deceased patient, filed a wrongful death action against the decedent’s physician and Alexian Brothers Medical Center. The plaintiff sued the medical center for negligently destroying EKG tracings and reports concerning the decedent. The plaintiff alleged that the actions of the defendants in destroying the EKG tracings deprived the plaintiff of vital evidence necessary to sustain her burden of proof against the decedent’s physician. The trial court dismissed the spoliation of evidence counts and the plaintiff then appealed.

On appeal, the appellate court affirmed the dismissal of the plaintiff’s spoliation claims. In so doing, the court stated the following:

Counts II and III allege that the hospital’s breach of its duty caused the plaintiff to lose her malpractice action against the defendant doctor as alleged in Count I of the complaint. However, plaintiff has not yet sustained any injury. The medical malpractice claim under Count I is still pending . . . That plaintiff will lose her malpractice action because of a missing EKG is, as of now, purely speculative and uncertain. Liability cannot be predicated upon surmise or conjecture as to the cause of the injury . . . Plaintiff’s action under Counts II and III is premature.

Fox, 406 N.E.2d at 183.

The issue of spoliation of evidence was next addressed by the First District Appellate Court in the case of Ralston v. Casanova, 129 Ill. App. 3d 1050, 473 N.E.2d 444 (1st Dist. 1984). In this case, the plaintiff brought a strict products liability action against an automobile manufacturer and a seatbelt manufacturer, alleging that manufacturing and design defects rendered the seatbelt unreasonably dangerous.

After the lawsuit was filed, the defendants moved to preserve the seatbelt assembly and to restrain all parties from destructive testing. The trial court entered two protective orders to that effect. Subsequent to the entry of the protective orders, and concededly in violation thereof, the plaintiffs’ expert, without notice to the defendants, proceeded to disassemble, examine, and test the seatbelt assembly. An independent expert appointed by the court testified that the effect of plaintiffs’ expert’s conduct was to render questionable the results of any subsequent tests performed on the seatbelt assembly.

As a result of the destructive testing, the trial court barred the plaintiffs’ expert from testifying at trial. Since the plaintiffs’ expert was barred from testifying and expert testimony was needed to support the plaintiffs’ strict product liability claim, summary judgment was entered in favor of the defendants. The entry of summary judgment in favor of the defendant was upheld by the appellate court, which reasoned that an order barring the plaintiffs’ expert from testifying at trial was an appropriate sanction due to the expert’s spoliation of evidence.

The case of Applegate v. Seaborn, 132 Ill. App. 3d 473, 477 N.E.2d 74 (4th Dist. 1985), involved a claim seeking recovery for damages arising out of an automobile collision. The plaintiff filed suit against General Motors alleging that the company had negligently designed and manufactured the truck the defendant driver was operating at the time of the accident. In particular, the plaintiff alleged that defects in the front differential housing of the truck caused it to go out of control and collide with the plaintiff’s vehicle.

Following the collision at issue, the defendant driver’s insurer hired a metallurgist to examine the differential housing. That expert prepared a report concluding that a defectively manufactured differential housing casting had been installed in the defendant’s truck. After the inspection, the expert disposed of the differential housing. The plaintiff subsequently learned of the expert’s report and disclosed him as a trial witness. The trial court barred the expert from testifying at trial as a discovery
sanction after the plaintiff could not produce to General Motors the differential housing examined by the expert.

On appeal, the Fourth District Appellate Court reversed the sanction entered by the trial court. According to the appellate court, the expert who disposed of the parts at issue was retained, originally, not by the plaintiff, but by the defendant’s insurer. There was no basis in the record to conclude that the plaintiff ever had control over the vehicle parts or the expert prior to the disposal of the parts. Based on the plaintiff’s inability to control what the expert did with the parts, the court held that the expert should not have been barred from testifying on behalf of the plaintiff at trial. Applegate, 477 N.E.2d at 76.

In Petrick v. Monarch Printing Corp., 150 Ill. App. 3d 248, 501 N.E.2d 1312 (1st Dist. 1986), the plaintiff brought a direct action for spoliation of evidence against the defendant after the trial court granted summary judgment in favor of the defendant on claims for accrued expenses and retaliatory discharge in violation of public policy. The trial court entered judgment on the pleadings in favor of the defendant, and the plaintiff then appealed.

On appeal, the appellate court noted that destruction of evidence known to be relevant to pending litigation “violates the spirit of liberal discovery.” Petrick, 501 N.E.2d at 1319. The appellate court also noted that, “intentional destruction of evidence manifests a shocking disregard for orderly judicial procedures and offends traditional notions of fair play.” Id.

After making these pronouncements, the appellate court noted that it did not need to decide whether Illinois law would recognize an independent tort of spoliation since, in this case, an indispensable element of such a tort was missing. According to the court, although the plaintiffs’ retaliatory discharge suit was totally unsuccessful, the plaintiff failed to adequately plead a nexus between the failure of the retaliatory discharge suit and the defendant’s destruction of ledger books and other records.

The court found it was the plaintiffs’ failure to present any evidence to support his retaliatory discharge claim or to explain his lack of any evidence that led to the entry of judgment in favor of defendant. As a result, the appellate court held that judgment for the defendant was proper where dismissal of the underlying claim resulted from the plaintiff’s abandonment of the very theory of liability that the destroyed evidence would have supported. Petrick, 501 N.E.2d at 1322.

In Graves v. Daley, 172 Ill. App. 3d 35, 526 N.E.2d 679 (3rd Dist. 1988), the plaintiffs filed a products liability action against a furnace manufacturer and seller to recover damages caused by a fire that destroyed their home. Following the fire, the plaintiffs’ insurance company, Western States, retained an expert to inspect the premises and prepare a report regarding the cause and origin of the fire.

The insurance company’s expert reported that, in his opinion, a defective condition in the furnace was the probable cause of the fire. The plaintiffs were paid by Western States and wanted to clear away the debris and rebuild their home. Western States then gave the plaintiffs permission to dispose of the furnace, which they did.

After the plaintiffs filed their cause of action, the defendants requested that the plaintiffs produce the furnace for inspection. The plaintiffs responded by indicating that the furnace was unavailable. The defendants then moved for sanctions, requesting that the trial court either dismiss the lawsuit or, in the alternative, bar the plaintiffs from introducing any evidence concerning the condition of the furnace.

After a hearing on the defendants’ motion, the trial court entered an order barring the plaintiffs from presenting any evidence regarding the condition of the furnace. The plaintiffs’ motion to reconsider was denied and the defendants moved for summary judgment. That motion was granted and an appeal followed.

In discussing the issue of spoliation, the appellate court stated:
The plaintiffs destroyed the furnace after receiving permission to do so from Western States [the real party in interest]. This is not a case where the evidence was innocently or negligently destroyed. In the instant case, the plaintiffs willingly caused the furnace to be destroyed with Western State’s approval. The plaintiffs and Western States had complete control of the furnace from the date of the fire . . . . In the instant case, Western States and the plaintiff knew, or should have known that a defective condition of the furnace, the item they allege caused the fire, was a crucial piece of evidence and should have been preserved.

*Graves*, 526 N.E.2d at 681-82.

Based on the foregoing, the entry of summary judgment in favor of the defendants was upheld.

In the case of *Rodgers v. St. Mary’s Hospital of Decatur*, 198 Ill. App. 3d 871, 556 N.E.2d 913 (4th Dist. 1990), the plaintiff filed a medical malpractice suit in his capacity as the administrator of the his late wife’s estate against St. Mary’s Hospital and the obstetricians and radiologists responsible for her care during the days immediately prior to her death. Two years after the plaintiff filed suit, a jury returned a verdict in favor of the defendant radiologists and against the plaintiff.

The plaintiff then filed a separate cause of action against St. Mary’s Hospital. In that action, the plaintiff requested damages based on the hospital’s alleged loss of all abdominal x-rays taken of his wife for the five years prior to her death. The plaintiff alleged that the missing x-rays were critical and important evidence, which, either alone or in combination with other evidence, would have established the radiologists’ negligence in treating his wife.

In dealing with the plaintiff’s spoliation of evidence claim, the appellate court declined to decide whether a cause of action for spoliation of evidence existed under Illinois law. Instead, the appellate court held that the plaintiff’s complaint stated a statutory cause of action since Illinois statutes require hospitals to retain x-ray films for, depending on the circumstances, up to 12 years after the films are taken. *Rodgers*, 556 N.E.2d at 916.

The Supreme Court affirmed the decision of the appellate court in *Rodgers v. St. Mary’s Hospital of Decatur*, 149 Ill. 2d 302, 597 N.E.2d 616 (1992), holding that a private cause of action exists under the X-ray Retention Act, that the husband had stated a claim under the Act, and that the husband’s claim was not barred by waiver or *res judicata*.

In *Argueta v. Baltimore and Ohio Chicago Terminal Railroad Co.*, 224 Ill. App. 3d 11, 586 N.E.2d 386 (1st Dist. 1991), the First District Appellate Court upheld the trial court’s decision that the defendants’ expert report concerning the cause of a fractured crane spindle pin was inadmissible due to the inadvertent destruction of the pin prior to trial. According to the appellate court, “a trial court is not required to find that a party *intentionally* destroyed evidence in order for the court to bar testimony regarding that evidence . . . [and] the trial court had discretion to conclude that the other parties in the suit were prejudiced by their inability to conduct tests of their own on this material piece of evidence.” *Argueta*, 586 N.E.2d at 393 (emphasis added).

In *American Family Insurance Co. v. Village of Pontiac GMC, Inc.*, 223 Ill. App. 3d 624, 585 N.E.2d 1115 (2nd Dist. 1992), the plaintiffs, William and Nancy Gill, purchased a 1981 Pontiac Grand Prix from Village Pontiac/GMC in Naperville, Illinois. Approximately a month after the plaintiffs purchased their car, a fire occurred at their home. The fire severely damaged the home and other personal property.

After the fire, the plaintiffs’ homeowner’s insurer, American Family Insurance Company, hired an investigator to determine the cause and origin of the fire. In the investigator’s opinion, which was based in part on the opinions of an electrical engineer hired by the investigator, the origin of the fire was in the area along the trunk light wire beneath the left end of the rear seat, and the cause of the fire
was a short circuit which resulted when a copper trunk light circuit wire with damaged insulation contacted a ground wire.

The cause and origin expert removed the copper wire that he believed caused the short circuit and took numerous photographs of the trunk area of the car. Following the inspection, the plaintiffs transferred title of the car to their automobile insurance company, and a salvage company destroyed the car itself seven months later after the plaintiffs’ insurer transferred title to that company.

After the plaintiffs filed suit to recover damages associated with the destruction of their home and its contents, the defendant car manufacturer, General Motors Corporation, filed a motion to bar the plaintiffs from introducing any evidence regarding the condition of the car because the car had been destroyed. The trial court granted that motion and barred the plaintiffs from presenting “any evidence, direct or circumstantial, concerning the condition of the Pontiac Grand Prix which is at issue in this case, at the trial of this cause.” American Family, 585 N.E.2d at 1117. After entering this order, the trial court granted the defendant’s motion for summary judgment based on the plaintiffs’ inability to use any evidence concerning the condition of the car.

In affirming the entry of summary judgment in favor of the defendants, the appellate court stated as follows:

In this case, plaintiffs intentionally allowed the most crucial piece of evidence in this case to be destroyed. Plaintiffs should have known the potential defendants to a case alleging negligence and product liability would undoubtedly want to inspect, as plaintiffs’ experts had done, and perhaps test the object alleged to have caused the damage . . . . Indeed, Farmers Insurance in anticipation of its subrogation claim allowed the car to be destroyed only after its experts had thoroughly examined the car and had issued their opinions on the cause of the fire . . . . Plaintiffs were the only individuals who had first-hand knowledge of the physical evidence which was far more appropriate under these circumstances in determining whether the vehicle caused the fire than photographs and two wires taken from the trunk area . . . . We do not believe that the trial court’s order barring all evidence, direct or circumstantial, concerning the condition of the car was an abuse of discretion.

American Family, 585 N.Ed.2d at 1118.

In Marrocco v. General Motors Corp., 966 F.2d 220 (7th Cir. 1992), the Seventh Circuit Court of Appeals had an opportunity to analyze the proper sanctions for destruction of key evidence. In this case, the plaintiffs filed a products liability action against General Motors when the plaintiffs lost control of their vehicle, crossed the centerline of a divided highway and crashed into a semi-trailer truck. The plaintiffs alleged that the accident was caused by a pre-collision fracture of the rear axle of their automobile.

During the discovery phase of the case, the plaintiffs’ retained experts disassembled the left rear axle bearing assembly of the automobile, thereby irretrievably losing the sequence of the roller bearing which was contained in the assembly. This destructive testing was performed after the trial court had entered a protective order requiring both parties to preserve the condition of the car and its components.

Based on the foregoing, the Seventh Circuit Court of Appeals upheld the dismissal of the plaintiff’s cause of action against the defendants stating, “given the record before us, it would be hard to imagine plaintiffs more deserving of civil sanctions than the Marroccos.” Marrocco, 966 F.2d at 223.

A similar result was reached in the case of State Farm Fire & Casualty Co. v. Frigidaire, 146 F.R.D. 160 (N.D. Ill. 1992). Here, the district court held that barring all evidence, which was the equivalent of a dismissal of the plaintiffs’ products liability action, was an appropriate sanction for the
plaintiff allowing its subrogors to dispose of a dishwasher, alleged to have caused a home fire, after their expert had an opportunity to complete an inspection of the appliance.

Chronologically, the next Illinois case to discuss spoliation of evidence was *Fitzpatrick v. ACF Properties Group, Inc.*, 231 Ill. App. 3d 690, 595 N.E.2d 1327 (2d Dist. 1992). However, an analysis of this case does not advance an understanding of the issue of spoliation of evidence since the appellate court merely held that the plaintiff failed to plead a cause of action for spoliation of evidence in her underlying complaint and failed to preserve the issue for appeal.

In *Mayfield v. Acme Barrel Co.*, 258 Ill. App. 3d 32, 629 N.E.2d 690 (1st Dist. 1994), the court was once again faced with the issue of whether or not an independent tort of spoliation of evidence would be recognized in this state. According to the First District Appellate Court, the Illinois Supreme Court recognized an implied statutory cause of action for spoliation of evidence under the X-Ray Retention Act with its decision in *Rodgers v. St. Mary’s Hospital*. However, the court also said the issue of whether Illinois would recognize a common law tort for spoliation of evidence had yet to be resolved.

Recognizing the lack of finality regarding this issue, the court noted that, “the cases which have addressed the issue are unanimous in their holding that an indispensable prerequisite to the maintenance of such an action, if it does exist, is a showing of an actual injury proximately caused by the loss or destruction of the evidence in question . . . . The threat of some future harm that has not yet been realized is insufficient to satisfy this element of the claim and, as such, no action for spoliation can be brought until the underlying claim which is dependent upon the missing evidence is lost.” *Mayfield*, 629 N.E.2d at 695.

According to the *Mayfield* court, the plaintiffs’ claims for alleged spoliation of evidence were premature since the plaintiffs had pending viable claims against the putative tortfeasors. *Id.* at 696. As a result, the trial court affirmed the dismissal of the plaintiffs’ spoliation claims without prejudice. The key to this decision was the fact that, “the plaintiffs do not allege that they have lost any cause of action that they might have against the manufacturer or distributors; they only allege that their opportunity to establish liability has been prejudiced.” *Id.* at 695-696.

In *H and H Sand and Gravel Haulers Co. v. Coyne Cylinder Co.*, 260 Ill. App. 3d 235, 632 N.E.2d 697 (2nd Dist. 1994), the Second District Appellate Court held that a sanction precluding a trial on the merits is only appropriate when the defense has incurred prejudice by the alteration or destruction of a crucial piece of evidence.

In this case, the appellate court determined that exclusion of the plaintiffs’ expert witness from testifying at trial was not an appropriate discovery sanction since the acetylene cylinder at issue was available for investigation and inspection by the defense (even though it was dismantled by the plaintiff’s expert and component parts were discarded following his inspection), as were photographs and notes taken during the plaintiffs’ expert’s examination. The court also held that the defendants’ declination of its right to conduct an inspection of the acetylene cylinder at issue diffused its claim of prejudice.

According to the *H and H Sand* court, at trial the defendant would be allowed to call its own expert to testify regarding his investigation into the explosion at issue. That expert could testify that, in his opinion, the explosion was caused by the ignition of gasoline vapors, and not by a leaking acetylene gas cylinder. The defendant would be able to present the testimony of his own designers, manufacturers, and installers to refute the plaintiffs’ allegation that the acetylene gas cylinder was unreasonably dangerous. Also, the defendant would be able to cross-examine the plaintiffs’ expert regarding his handling and alteration of the acetylene cylinder, valve, generator, and welder.

The court concluded, assuming the evidence adduced at trial created a factual issue regarding the missing evidence, the defendant could request that the trial court give I.P.I. Civil 3rd Number 5.01, the jury instruction that is designed to inform the jury that if a party has failed to offer evidence within its power to produce, the jury may infer that the evidence would have been adverse to that party. In the
court’s view, the availability of all these measures indicated that the trial court abused its discretion in barring the plaintiffs’ expert from testifying as a discovery sanction and a reversal of summary judgment in favor of the defendants was warranted. *H and H Sand*, 632 N.E.2d at 705.

In *Shelbyville Mutual Insurance Co. v. Sunbeam Leisure Products Co.*, 262 Ill. App. 3d 636, 634 N.E. 2d 1319 (5th Dist. 1994), the Fifth District Appellate Court rejected the arguments made by the Second District in the *H and H Sand* case. The appellate court held that it was not an abuse of discretion for the trial court to bar the plaintiff from introducing evidence of any defects that allegedly existed in the plaintiff’s grill, or any testimony regarding the origin or spread of the fire within the grill, after the wooden grill frame was inadvertently discarded from the plaintiff’s office. Specifically, the court noted:

The insurance company argues . . . that Sunbeam did not suffer any prejudice because [their expert] was able to form “an opinion” contrary to the opinion of [the plaintiff’s expert]. However, the insurance company did not file any affidavit or other evidence to refute Sunbeam’s claim that it was prejudiced because it was not able to examine the grill in its precise post-fire condition and that such an examination may have provided evidence to further support [their expert’s] opinion and to refute [the plaintiff’s expert’s] findings . . .

By the inadvertent destruction of a portion of the grill, the insurance company effectively foreclosed a possible affirmative defense of what may have been the actual cause of the fire. Sunbeam thus lost any opportunity to present affirmative defenses of alternative causes of the fire and was limited by the insurance company’s action to merely rebutting [the plaintiff’s] opinion. Mere rebuttal of the theory of the insurance company’s expert may not be nearly as an effective defense as a presentation to the jury by Sunbeam that the fire was actually caused by something other than a defective product. In light of these limitations on Sunbeam’s ability to defend itself and a reasonable probability that the insurance company’s acts foreclosed the truth as to the cause of the fire from ever being ascertained, we cannot say that the trial court erred in barring evidence or testimony about the allegedly defective grill.

*Shelbyville Mutual Insurance Co.*, 634 N.E.2d at 1324.

In *Allstate Insurance Co. v. Sunbeam Corp.*, 865 F. Supp. 1267 (N.D. Ill. 1994), the United States District Court for the Northern District of Illinois once again had an opportunity to review whether or not the dismissal of a complaint was an appropriate sanction for spoliation of evidence.

The *Allstate* case revolved around a fire that was allegedly caused by a release of propane gas in or around the insured’s barbeque grill. Allstate contended that the fire started as a leak somewhere in the “gas train,” the system of pipes, valves, and hoses conveying gas from the cylinder to the burners in the grill. The fire grew until it overheated the propane tank, causing it to vent a large quantity of propane.

Sunbeam, on the other hand, contended that it was more likely that a spare tank of propane had been stored beneath or directly behind the grill, and that this spare tank had been overfilled with liquid propane, leaving insufficient room for expansion of the propane. According to Sunbeam, expansion of the propane brought on by heat from the sun, the hot ambient air, and the nearby operating grill caused the explosion.

In support of this theory, Sunbeam pointed to photographs of the scene taken by investigators two days after the fire, as well as a home videotape taken by the homeowners approximately eight hours after the fire, all of which showed a second propane tank among the remains of the grill in addition to the service tank used for fueling the grill at the time of the explosion.
In the trial court, Sunbeam argued that it had a major difficulty in proving its theory: first, the second tank shown in the photographs and videotape could not be found or examined and, second, the grill frame with accessories which could have shown burn marks and patterns supporting Sunbeam’s theory were also nowhere to be found.

Shortly after the fire, an Allstate investigator, in the performance of a cause and origin investigation, preserved only the service tank that was connected to the grill, the connecting fittings, the remains of the regulator, and the remains of the burners. He directed that everything else be thrown away, which included the third burner, the grill frame, any wood accessory remnants, and the second propane tank shown in the videotape and photographs.

The district court held that the defendant was entitled to a dismissal of the products liability action brought against it due to evidence spoliation. According to the court, the parts of the grill and spare propane tank found near the grill were disposed of at the insurer’s direction, and it was impossible without those items to prove or disprove the manufacturer’s defense that the fire at issue was caused not by the operation of the grill but by the spare tank being over-pressurized and heated.

The court reasoned that, without the evidence, “which a reasonable investigator would have preserved, Sunbeam’s defense has been seriously and materially weakened. Accordingly, in the face of the disruption of this material evidence, we recommend that the complaint be dismissed.” Allstate, 865 F. Supp. at 1279.

The federal district court’s decision was upheld by the Seventh Circuit Court of Appeals in Allstate Insurance Co. v. Sunbeam Corp., 53 F.3d 804 (7th Cir. 1995).

A similar result was reached in Thomas v. Bombardier-Rotax Motorenfabrik, 909 F. Supp. 585 (N.D. Ill. 1996), where the court found that the defendant’s motion to bar evidence and for summary judgment should be granted based on the plaintiff’s intentional destruction of evidence that deprived the defendant of an ability to establish its case.

In Farley Metals, Inc. v. Barber Coleman Co., 269 Ill. App. 3d 104, 645 N.E.2d 964 (1st Dist. 1995), the First District Appellate Court held that the trial court was justified in imposing a sanction of dismissal after it determined that explosion artifacts stored at a warehouse and covered by a protective order were destroyed due to the plaintiff’s counsel’s failure to timely pay storage bills.

The court recognized that several courts in Illinois had declared that dismissal is proper only as a last resort when the offending party’s actions demonstrate a deliberate, contumacious, and unwarranted disregard for the court’s authority and where a trial on the merits would prejudice the opposing party. Yet, the court ruled that the negligent or inadvertent destruction or alteration of evidence may result in a harsh sanction, including dismissal, when the opposing party is disadvantaged by the loss. Farley Metals, 645 N.E.2d at 968.

The court went on to hold that in cases where belated compliance with discovery is impossible due to the permanent loss of evidence, trial courts ought not to dwell on whether the offending party’s noncompliance was contumacious or deliberate, but rather should focus upon whether the imposition of less severe sanctions will promote the overriding concern for the search for truth. Therefore, in determining the reasonableness of the noncompliance, the court may consider, inter alia, the importance of the information sought. Id.

Once the trial court orders sanctions under Supreme Court Rule 219(c), the sanctioned party has the burden of showing that its noncompliance was reasonable or warranted by extenuating circumstances. However, when crucial information or evidence is destroyed, the offending party’s intent becomes significantly less germane in determining a proper sanction. A showing that the plaintiff’s noncompliance was reasonable does not hinge on intent. The critical issue is how important the undisclosed material was to the opposing party. Id.
In this case, the appellate court upheld the dismissal of the case as a sanction despite the fact that the defendants had had numerous opportunities to inspect the artifacts prior to their disposal. *Id.* at 970-971.

The seminal Illinois case regarding spoliation of evidence is *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 652 N.E.2d 267 (1995). On February 4, 1990, Tommy Boyd was working inside a van belonging to his employer, Superior Foods. To keep the van warm, Boyd was using a propane catalytic heater that was designed, manufactured, and distributed by Coleman. An explosion occurred, allegedly caused by propane gas escaping from the heater. Boyd sustained serious personal injuries and other damages. The heater was Boyd’s personal property.

Boyd filed a claim for workers’ compensation benefits against his employer and Travelers Insurance Company, his employer’s workers’ compensation insurer. On February 6, 1990, a Travelers claim adjuster visited the Boyd residence. He took possession of the Coleman heater, telling Boyd’s wife that Travelers needed the heater in order to investigate her husband’s workers’ compensation claim. He also told the plaintiff’s wife that Travelers would inspect and test the heater to determine the cause of the explosion.

Travelers’ adjuster transported the heater to a Travelers office and stored it in a closet. Subsequently, when Boyd asked that the heater be returned to him, Travelers was unable to locate it. On September 27, 1991, Boyd sought a court order compelling Travelers to return the heater. Travelers admitted that its employee took possession of the heater and placed it in a closet from which it later disappeared. Travelers never tested the heater.

The Boyds filed a five-count complaint in the Circuit Court of Cook County. Counts I and II alleged negligent and willful and wanton spoliation of evidence against Travelers. The plaintiffs alleged that they had been injured by Travelers’ loss of the heater because no expert could testify with certainty as to whether the heater was defective or dangerously designed. Therefore, they alleged, Travelers’ loss of the heater had irrevocably prejudiced and adversely affected their products liability action against Coleman.

Travelers filed a motion to dismiss counts I and II of the plaintiffs’ complaint, contending that negligent and intentional spoliation of evidence are not recognized torts under Illinois law. In the alternative, Travelers claimed that, even if Illinois was to recognize either cause of action, the plaintiffs’ claims were premature because the underlying products liability action against Coleman was still pending. Travelers argued that, until the plaintiffs lost the underlying action, they had suffered no actual injury, a necessary element to any cause of action.

The trial court granted Travelers’ motion to dismiss counts I and II without prejudice. The trial court agreed with Travelers that the plaintiffs’ claims were premature unless and until they lost the underlying suit against Coleman, thereby sustaining an actual injury. The trial court then certified the issue for appeal to the Illinois Supreme Court.

On appeal, the Supreme Court was asked to determine whether Illinois courts recognize “spoliation of evidence” as an independent cause of action. The court recognized that many jurisdictions have long afforded redress for the destruction of evidence and, according to the court, traditional remedies adequately address the problem presented in the *Boyd* case. Thus, an action for negligent spoliation of evidence could be stated under existing negligence law in Illinois without creating a new tort.

In discussing the spoliation of evidence cause of action, the Supreme Court noted that the general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute or another special circumstance. In addition, the court recognized that a defendant may voluntarily assume a duty to preserve evidence through its affirmative conduct. According to the court, in any of the foregoing instances, a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant’s position should have foreseen that the evidence was material to a potential civil action.
The justices of the Supreme Court disagreed with Travelers’ assertion that for the plaintiffs to allege actual injury from the loss of the heater, they first had to pursue and lose the underlying claim. According to the court, in a negligence action involving the loss or destruction of evidence, a plaintiff must merely allege sufficient facts to support a claim that the loss or destruction of the evidence caused the plaintiff to be unable to prove an underlying lawsuit.

Accordingly, a plaintiff need not show that, but for the loss or destruction of the evidence, the plaintiff would have prevailed in the underlying action. The court believed that this was too difficult a burden for the plaintiff to bear, as it may be impossible to know what the missing evidence would have shown.

In outlining precisely what a plaintiff must prove, the court stated, “A plaintiff must demonstrate, however, that but for the defendant’s loss or destruction of the evidence, the plaintiff had a reasonable probability of succeeding in the underlying suit. In other words, if the plaintiff could not prevail in the underlying action even with the lost or destroyed evidence, then the defendant’s conduct is not the cause of the loss of the lawsuit. This requirement prevents a plaintiff from recovering where it can be shown that the underlying action was meritless.” Boyd, 652 N.E.2d at 271.

According to the court, actual damages must be alleged as well. A threat of future harm, not yet realized, is not actionable. The wrongful conduct must impinge upon a person. Consequently, a plaintiff is required to allege that a defendant’s loss or destruction of the evidence caused the plaintiff to be unable to prove an otherwise valid, underlying cause of action. Boyd, 652 N.E.2d at 272.

In light of the fact that the court held that a claim for spoliation of evidence could be stated under existing negligence law, the court declined to recognize intentional spoliation of evidence as a new tort in this state. Id. at 273.

In Murphy v. General Motors Corp., 285 Ill. App. 3d 278, 672 N.E.2d 371 (1st Dist. 1996), a police officer who was injured when the seat in his squad car suddenly collapsed brought an action for negligent repair. He alleged that two months prior to the accident one of the defendants, Palos Auto Glass & Trim, Inc. (“Palos”), negligently repaired his car seat frame. According to the plaintiff, Palos repaired the seat by performing a “mig” weld on its frame, but General Motors’ product specifications provided that “spot resistance” welding should be used to repair the type of seat in his squad car.

Following the accident in question, the squad car was taken to an auto repair business owned by Raymond Holzinger. Mr. Holzinger testified at a deposition that when the vehicle arrived, he examined the front seat and concluded that, due to its condition, it could not be repaired. Therefore, the front seat was removed from the vehicle and a replacement front seat was installed.

After removing the seat, Holzinger disposed of it. Before he discarded it, however, he examined it and discovered that repair work had previously been performed on the seat frame. Specifically, he noted an apparent break in the frame that had been repaired by a weld. Although the weld had not broken in the accident, there was a “bend” in the frame one to two inches from the point of the weld.

When Palos learned that the seat had been discarded, it moved for summary judgment asserting that because the car seat had been destroyed the plaintiff could not prove that its conduct in repairing the seat frame proximately caused the plaintiff’s injuries.

In opposing the motion for summary judgment, the plaintiff presented the affidavit of Dr. Crispin Hales, an engineering and metallurgical expert. Dr. Hales reviewed the plaintiff’s complaint, the relevant depositions, and the engineering specifications for the seat frame issued by General Motors. The specifications included information about the seat frame’s metal composition and physical properties. The specifications also indicated that only spot-welding should be used to repair such seats.

Based upon the above information, Dr. Hales was of the opinion that, assuming the seat frame had been manufactured in accordance with GM’s specifications, the mig weld performed by Palos would have reduced the strength of the seat frame and caused it to fail.
The court struck Dr. Hales’ affidavit in its entirety because it considered his opinions speculative. Because the seat was unavailable, the plaintiff could not presume that the seat had, in fact, been manufactured according to GM’s specifications. The judge ruled that, since the plaintiff was precluded from relying upon Dr. Hales’ opinion as to the propriety of mig welding, the plaintiff could not establish negligence on the part of Palos. Therefore, the court entered summary judgment in favor of the defendant.

On appeal, summary judgment for the defendant was reversed. According to the court, the plaintiff’s expert should have been allowed to testify even though the car seat at issue was disposed of because that expert assumed that the seat was manufactured to General Motors’ specifications and, therefore, a mig weld was an improper fix. In the expert’s opinion, that improper fix led to the plaintiff’s injuries. Essentially, the appellate court held that the plaintiff could rely on “circumstantial” evidence to support his claim despite the fact that any direct evidence of the defendant’s negligence had been destroyed. Murphy, 672 N.E.2d at 374.

The case of Miller v. Gupta, 174 Ill. 2d 120, 672 N.E.2d 1229 (1996), is another case involving the destruction of x-rays. The plaintiff, Cindy Miller, filed an action in the Circuit Court of Marion County against Dr. Nerenda K. Gupta, alleging medical malpractice and spoliation of evidence. The circuit court dismissed the plaintiff’s complaint in its entirety.

The appellate court reversed, finding that the trial court abused its discretion in dismissing the plaintiff’s medical malpractice count on the basis that the plaintiff had not attached the required medical provider affidavit. The appellate court also remanded the case so that the plaintiff could amend her pleadings regarding spoliation of evidence.

On further appeal, the Illinois Supreme Court held that a patient is not excused from the requirement that she file an affidavit from a health professional declaring that the plaintiff has a meritorious cause of action even in those instances where the evidence necessary to support such an affidavit has been destroyed. The court recognized that in those cases where a plaintiff is unable to obtain the affidavit of a health care practitioner because of the destruction of evidence, the proper cause of action for the plaintiff is not a medical malpractice action, but rather a cause of action against the individual who has destroyed the evidence.

According to the court, a plaintiff claiming negligent spoliation of evidence must plead the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, an injury proximately caused by the breach, and damages flowing therefrom. Miller, 672 N.E.2d at 1233.

In light of the foregoing, the Supreme Court remanded the plaintiff’s case and provided her with an opportunity to amend her spoliation of evidence claim to conform to the mandates of Boyd v. Travelers Insurance Co.

In Braverman v. Kucharik Bicycle Clothing Co., 287 Ill. App. 3d 150, 678 N.E.2d 80 (1st Dist. 1997), a bicyclist who suffered head injuries in an accident brought a products liability action against the manufacturer of his leather bicycle helmet alleging defective design. The Circuit Court of Cook County granted summary judgment in favor of the defendant manufacturer on the basis that the helmet had been lost by the plaintiff.

On appeal, the court held that the absence of a product is not necessarily fatal to a plaintiff’s cause of action. According to the court, it is possible to introduce sufficient evidence to establish a prima facie case of strict liability even in the absence of the allegedly defective product if there is circumstantial evidence that will support a claim of a product defect.

The appellate court noted that the trial court made no finding of bad faith on the plaintiff’s part, the court did not strike the deposition testimony and affidavits of the plaintiff’s expert (who had examined an exemplar helmet and provided the opinion that it was defectively designed, unreasonably dangerous, and not fit for its intended use), and the court did not exclude the literature that the defendant distributed or the exemplar helmet itself.
All of the circumstantial evidence remained in the record and, based on that circumstantial evidence and the testimony of his expert, the plaintiff had established sufficient evidence of a prima facie case of strict liability. As a result, the appellate court reversed the entry of summary judgment in favor of the defendant manufacturer. *Braverman*, 678 N.E.2d at 85.

In *Chidichimo v. University of Chicago Press*, 289 Ill. App. 3d 6, 681 N.E.2d 107 (1st Dist. 1997), the First District Appellate Court held that there is no duty to preserve records in a workers’ compensation proceeding. The appellate court also held that the plaintiff in *Chidichimo* was collaterally estopped in his civil action from relitigating the question of whether the destruction of his records amounted to a spoliation of evidence.

In *Jackson v. Michael Reese Hospital and Medical Center*, 294 Ill. App. 3d 1, 689 N.E.2d 205 (1st Dist. 1997), the Illinois Appellate Court had an opportunity to address several interesting issues regarding spoliation of evidence. The plaintiffs in *Jackson* filed a medical malpractice action against several defendants on August 14, 1985. This action alleged negligence based on injuries suffered by the minor plaintiff in the course of treatment for serious medical problems, including the absence of an anus.

The plaintiffs voluntarily dismissed their medical malpractice claim against all of the defendants and filed a new complaint alleging negligent spoliation of evidence against Michael-Reese Hospital and Medical Center. Their claim alleged that the defendant’s loss or destruction of certain x-rays taken of the child caused the plaintiffs to be unable to prove their original medical malpractice claim.

The plaintiffs’ first complaint was dismissed, and the trial court granted the plaintiffs leave to file an amended complaint. The plaintiffs’ first amended complaint asserted a claim under the X-ray Retention Act that the trial court subsequently dismissed. In their second amended complaint, the plaintiffs alleged a cause of action for spoliation of evidence under *Boyd v. Travelers Insurance Co.* The plaintiffs also filed an emergency motion to reconsider the dismissal of their first amended complaint.

The trial court denied the plaintiffs’ motion to reconsider the dismissal of the first amended complaint, which asserted a claim under the X-ray Retention Act. The court granted the defendant’s Section 2-619 motion to dismiss for failure to attach a certificate of merit under Section 2-622 of the Illinois Code of Civil Procedure and granted the defendant’s Section 2-615 motion to dismiss for failure to state a cause of action for negligent spoliation of evidence. The plaintiffs then appealed.

On appeal, the appellate court noted that the X-ray Retention Act requires hospitals to retain x-rays as part of their regularly maintained records for a period of five years. The Act further provides that if a hospital has been notified in writing by an attorney at law before the expiration of the five-year period that there is litigation pending in court involving a particular x-ray, then the hospital must retain the x-ray for a period of 12 years from the date that the x-ray film was produced.

According to the court, a duty to retain x-rays for a longer period of time is only triggered by the receipt of written notice from an attorney before the expiration of the five-year retention period that litigation involving the x-ray in question is pending. The court held that the plaintiffs’ request for x-rays, prior to the filing of their lawsuit, did not give rise to a duty on the part of the defendant to preserve the x-rays in question.

In addition to the foregoing, the appellate court held that Section 2-622’s requirement for submission of a certificate of merit does not apply to a claim of negligent spoliation of evidence arising from a medical malpractice action.

Although the court held that the plaintiffs could not proceed with a cause of action under the X-ray Retention Act, the court analyzed whether they could proceed with a cause of action for negligent spoliation of evidence. To state such a cause of action, a plaintiff must plead the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, an injury proximately caused by the breach, and damages.
The appellate court determined that the complaint in *Jackson* failed to sufficiently allege what affirmative conduct was voluntarily undertaken by the hospital regarding the retention, preservation, and maintenance of the minor plaintiff’s x-rays. With respect to proximate cause, the court held that the complaint was also deficient. The court noted as follows:

In arriving at a standard for pleading causation in cases alleging spoliation of evidence the Supreme Court, in *Boyd*, recognized the difference between factually alleging that the spoliation caused plaintiff to be unable to prove the underlying lawsuit and the more difficult burden of factually alleging that but for the spoliation the plaintiff would have prevailed in the underlying lawsuit . . . . Under the *Boyd* standard, a plaintiff must show that but for the spoliation there was a reasonable probability of succeeding in the underlying suit.

* * *

Applying the *Boyd* causation standard, the complaint must allege sufficient facts to support a claim that the spoliation of evidence caused the plaintiff to be unable to prove the underlying medical malpractice lawsuit and that, but for the defendant’s spoliation, the plaintiff had a reasonable probability of succeeding in the underlying medical malpractice suit.

*Jackson*, 689 N.E.2d at 214.

In regard to the damages aspect of a spoliation claim, the court again reinforced the fact that actual damages must be alleged in an action for negligent spoliation of evidence. A threat of future harm, not yet realized, is not actionable. The court stated:

In medical malpractice cases, the plaintiff has the burden of proving (1) the proper standard of care against which the physician’s conduct is to be measured, (2) the unskilled or negligent failure to comply with that standard, and (3) the resulting injury proximately caused by the lack of skill or care . . . According to allegations in the record, plaintiffs were damaged as to the loss of x-rays significantly prejudiced plaintiffs’ ability to prove their medical malpractice case at trial. However, the pleadings do not allege how the loss or destruction of the x-rays caused the plaintiffs to be unable to prove each element of their cause of action, resulting in actual damages. Rather, the pleadings simply contain vague allegations that the missing x-rays caused plaintiffs to be unable to establish a deviation from the standard of care and thus they were forced to non-suit the claim. Missing is the nexus between the x-rays and plaintiffs’ ability to prove the underlying suit for medical malpractice as required when pleading damages in a spoliation of evidence claim under *Boyd* . . . .

*Jackson*, 689 N.E.2d at 216.

Based on the foregoing, the appellate court affirmed the trial court’s finding that the plaintiffs failed to state a cause of action for negligent spoliation of evidence.

In *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 692 N.E.2d 286 (1998), the Illinois Supreme Court ruled that the plaintiff’s destructive testing of an allegedly defective power steering component prior to the commencement of the lawsuit warranted the imposition of a discovery sanction, but dismissal of the lawsuit was an unreasonable sanction.

The court agreed with the appellate court that a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence. This duty is based on the court’s concern that, were it unable to sanction a party for the pre-suit destruction of evidence, the potential
litigant could circumvent discovery rules or escape liability simply by destroying the proof prior to the filing of a complaint. Shimanovsky, 692 N.E.2d at 290.

Having determined that the trial court had the authority to impose a sanction on the plaintiffs for the destructive testing of evidence, the Supreme Court next addressed whether dismissal was the appropriate sanction. The court ruled that an order of dismissal with prejudice or a sanction which results in a default judgment is a drastic sanction to be invoked only in those cases where the party’s actions show a deliberate, contumacious, or unwarranted disregard of the court’s authority. Being such a drastic sanction, dismissal should only be employed as a last resort after all of the court’s other enforcement powers have failed to advance the litigation. Id. at 291.

The court addressed the various factors that a trial court is to use when determining what sanction, if any, is to apply. These factors include:

(1) The surprise to the adverse parties;

(2) The prejudicial effect of the proffered testimony or evidence;

(3) The nature of the testimony or evidence;

(4) The diligence of the adverse party in seeking discovery;

(5) The timeliness of the adverse party’s objection to the testimonial evidence; and

(6) The good faith of the party offering the testimony or evidence.

Applying these factors, the Supreme Court found that the majority of the factors weighed in favor of the plaintiffs. Therefore, a dismissal of the plaintiffs’ products liability action was an unreasonable discovery sanction for the plaintiffs’ destructive testing of the automobile’s allegedly defective power steering components. Id.

Of particular importance to the court was the fact that the plaintiffs did not destroy or dispose of the entire allegedly defective product. All the components of the power steering mechanism and the remainder of the automobile were still available for the defendant’s investigation. Although certain additional tests of the power-steering mechanism, which the defendant claimed were impossible to perform following the spoliation of the power-steering mechanism, may have provided the defendant with further evidence to support its defense, the power-steering components still existed in such a condition that the defendant’s experts were able to form their opinions that the mechanism contained no defect.

The court also determined that the defendant’s claims of prejudice were weakened by its lack of diligence in seeking production of the product at issue. Id. at 293.

According to the court, a party is not automatically entitled to a specific sanction just because evidence is destroyed or altered. Rather, a court must consider the unique factual situation that each case presents and then apply the appropriate criteria to those facts to determine what particular sanction, if any, should be imposed.

The court further held that dismissing the plaintiff’s cause of action solely because evidence was altered, without any regard to the unique factual situation or the relevant factors that should be considered in determining an appropriate sanction, serves only to punish the party and does nothing to further the objects of discovery. Hence, a careful analysis of the actions of the party that destroyed the evidence, as well as the effect of the lack of that evidence on the opposing party, must be made prior to fashioning a sanction.
In *Cammon v. West Suburban Hospital and Medical Center*, 301 Ill. App. 3d 939, 704 N.E.2d 731 (1st Dist. 1998), the appellate court held, for the first time, that spoliation of evidence claims are subject to the five-year statute of limitations found in 735 ILCS 5/13-205.

In *Kelly v. Sears Roebuck and Co.*, 308 Ill. App. 3d 633, 720 N.E.2d 683 (1st Dist. 1999), the plaintiff filed a four-count complaint seeking to recover damages based on Sears’ sale of used batteries as new. In counts I and II of his complaint, the plaintiff alleged that Sears violated the Illinois Consumer Fraud and Deceptive Business Practices Act, and committed common law fraudulent concealment, by selling batteries to customers as if they were new without disclosing its practice of intermingling new and used batteries. In counts III and IV of his complaint, the plaintiff sought damages for intentional and negligent spoliation of evidence.

The plaintiff argued that, if purchasers of the batteries were required to prove that the batteries they bought were indeed used, Sears should be liable for failing to preserve the evidence identifying which of the batteries it sold were new and which were used. The Circuit Court of Cook County dismissed the plaintiff’s claims with prejudice and an appeal followed.

On appeal, the First District Appellate Court, in addressing the spoliation issue, reiterated that, in order to prevail in a negligence action involving the loss or destruction of evidence, a plaintiff must allege sufficient facts to support a claim that the loss or destruction of evidence caused the plaintiff to be unable to prove an underlying suit. Put another way, the plaintiff must demonstrate that but for the defendant’s loss or destruction of the evidence, the plaintiff had a reasonable probability of succeeding in the underlying suit.

In affirming the dismissal of the plaintiff’s spoliation of evidence claims, the court stated as follows:

Unlike the plaintiffs in *Boyd*, the present plaintiff cannot point to a particular piece of evidence that has been destroyed. Plaintiff is also unable to show that Sears ever had the duty to preserve any evidence or assumed such a duty by their actions. Sears was under no general duty to preserve evidence. It is not enough for plaintiff to allege that, simply because Sears was dealing fraudulently on some occasions, it knew that every battery and proof of purchase was a piece of evidence relevant to future litigation, without factual evidence of such knowledge on Sears’ part. Plaintiff has also failed to demonstrate that he had a reasonable probability of prevailing in the underlying suit but for defendant’s failure to warn him of the destruction of the potential evidence. Indeed, the exhibits attached to plaintiff’s complaint demonstrated that the great majority of batteries sold by Sears were new. Therefore, had Sears retained receipts indicating whether the batteries purchased by plaintiff were new, it is much more probable than not that those receipts would show that the batteries were new when purchased.

*Kelly*, 720 N.E.2d at 694-695.

In *Stinnes Corp. v. Kerr-McGee Coal Corp.*, 309 Ill. App. 3d 707, 722 N.E.2d 1167 (5th Dist. 1999), a man trip manufacturer claimed the employer of two coal miners was guilty of negligent spoliation of evidence for failing to preserve the component parts of a man trip after it overturned and injured the miners. The plaintiff essentially alleged that as a result of the defendant’s failure to use due care in preserving the parts of the man trip at issue, it was unable to establish which component parts of the axle failed, whether such parts were replacement parts, or whether Kerr-McGee had inadequately maintained the vehicle and its parts.

The plaintiff asserted that but for the loss of the evidence, it had a reasonable probability of succeeding in its defense of the personal injury suits brought by the injured miners. Moreover, the
plaintiff suffered money damages because it was forced to settle the personal injury suits brought by the miners since it was unable to refute, with a reasonable probability of success, the miner’s claims.

The plaintiff also claimed that the defendant had a policy of tagging and preserving parts of its machinery that were involved in accidents resulting in injuries to its workers, the defendant did so in this case, and at the time it undertook to preserve relevant parts of the man trip at issue it knew or reasonably should have known that those parts were material to a potential action for product liability.

The plaintiff further alleged that, despite segregating the parts and knowing such parts were evidence in a potential future lawsuit, the defendant failed to preserve the evidence in that it disposed of the parts prior to the miners filing their lawsuits.

Based on these allegations, the appellate court held that the plaintiff adequately stated the elements of a cause of action for negligent spoliation of evidence, including properly alleging a duty on the part of the employer to preserve the destroyed evidence. The court, echoing *Shimanovsky*, stated that “a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence. This duty is based on the court’s concern that, were it unable to sanction a party for the pre-suit destruction of evidence, a potential litigant could circumvent discovery rules or escape liability by simply destroying the proof prior to the filing of a complaint.” *Stinnes*, 722 N.E.2d at 1173.

The *Stinnes* court also held that the Mormon Doctrine does not trump a spoliation claim, the employer’s settlement with the miners did not preclude the spoliation claim, and the Federal Mine Safety and Health Act did not preempt the plaintiff’s spoliation action.

In *Natale v. Gottlieb Memorial Hospital*, 314 Ill. App. 3d 885, 733 N.E.2d 380 (1st Dist. 2000), the plaintiff filed a medical malpractice action against his surgeon and Gottlieb Memorial Hospital, seeking damages for emotional distress he allegedly suffered after being invaded by a non-sterile, contaminated endoscope. The plaintiff also filed a count alleging spoliation of evidence since the endoscope that was used during his procedure was discarded.

The court entered summary judgment in favor of the defendants on the plaintiff’s emotional distress claim since the plaintiff was never told by anyone that the endoscope used during his procedure carried any infectious organism, the plaintiff had no evidence that he was actually exposed to HIV, hepatitis, or any other infectious disease, and all the tests that were performed on the plaintiff for any communicable diseases were negative. Since the plaintiff had no evidence of actual exposure, the court entered summary judgment in favor of the defendants.

Once summary judgment was entered on the emotional distress claim, the trial court dismissed the plaintiff’s spoliation of evidence claim. An appeal then followed.

On appeal, the court affirmed the entry of summary judgment in favor of the defendants on the emotional distress claim noting that with no evidence of actual exposure, summary judgment was properly granted.

The appellate court further held that the entry of judgment in favor of the defendants on the plaintiff’s fear of illness claim precluded the plaintiff’s negligent spoliation of evidence claim. Since the plaintiff could not prove that he suffered compensable damages as a result of the negligence in the underlying tort, the plaintiff was unable to prevail on his spoliation of evidence count. *Natale*, 733 N.E.2d at 385.

In *Cosgrove v. Commonwealth Edison Co.*, 315 Ill. App. 3d 651, 734 N.E.2d 155 (2nd Dist. 2000), a plaintiff who was injured in a fire that occurred when a downed electric power line ignited gas leaking from an underground pipeline sued the gas and electric companies. The trial court granted summary judgment to the utility companies on the plaintiff’s negligence, *res ipsa loquitur*, and spoliation of evidence claims.
On appeal, the appellate court reinstated the plaintiff’s *res ipsa loquitur* claim against the gas company and, as a result, the court held that the plaintiff’s negligent spoliation of evidence claim had become moot. According to the court:

... with a valid *res ipsa loquitur* claim in place, the burden is on [the gas utility company] NiGas to demonstrate that the gas leak and fire did not result from its negligence. The missing section of [gas] pipe will not prevent Cosgrove from proving her case; it may prevent NiGas from bearing its burden. Since the loss of the pipe will not prevent Cosgrove from proving her case, there is no issue of material fact present, and summary judgment was proper [regarding the plaintiff’s negligent spoliation of evidence claim].

_Cosgrove_, 734 N.E.2d at 161.

In _Fremont Casualty Insurance Co. v. Ace-Chicago Great Dane Corp._, 317 Ill. App. 3d 67, 739 N.E.2d 85 (1st Dist. 2000), the appellate court was asked to decide for the first time whether a spoliation of evidence claim is a claim for “bodily injury” for insurance coverage purposes. The appellate court answered in the negative. It held that a spoliation of evidence claim was not a claim for “bodily injury” within the scope of an employer’s liability policy and, therefore, the insurer had no duty to defend or indemnify against the spoliation claim.

The case of _Jones v. O’Brien Tire & Battery Service Center, Inc._, 322 Ill. App. 3d 418, 752 N.E.2d 8 (5th Dist. 2001), revolved around a spoliation of evidence claim that arose after a truck rear wheel assembly was discarded.

The defendant, O’Brien Tire & Battery Service Center, filed a third-party action against the owner of the truck and his insurance company for spoliation of evidence. In its third-party complaint, the defendant alleged that the owner of the truck was in possession of the wheel assembly and that he knew or should have known that the wheel assembly was material to a potential civil action arising from the incident.

In response, the truck owner argued that there is no duty to preserve evidence where there is no “special relationship” between the plaintiff and the defendant and, furthermore, there is no duty to preserve evidence where there is no pending litigation between the parties or any order of protection in place with respect to the evidence at issue.

The appellate court rejected both of the owner’s arguments, specifically finding that, “a plaintiff in a negligence case based upon spoliation of evidence need only allege that a reasonable person in the defendant’s position should have foreseen that the evidence in question was material to a potential civil action. There is no requirement that the plaintiff allege the existence of any “special relationship” which would give rise to that knowledge.” _Jones_, 725 N.E.2d at 12.

In rejecting the argument that there is no duty to preserve evidence where there is no litigation pending between the parties or any order of protection in place with respect to the evidence at issue, the court stated that, “to hold that a duty to preserve evidence does not arise until an action was filed would encourage the destruction of evidence.” _Id._ at 13.

In _Thornton v. Shah_, 333 Ill. App. 3d 1011, 777 N.E.2d 396 (1st Dist. 2002), the appellate court was asked to decide whether parents who brought an action against their physician and HMO after their child died in utero had alleged sufficient facts to state a claim for negligent spoliation of evidence.

The plaintiffs alleged that they, and members of the HMO, had several after-hours conversations with the defendant. The plaintiffs further alleged that their HMO had a duty to retain all records related to the mother’s medical care, including all records of telephone conversations between the plaintiffs and the after-hours HMO nurse, the nurse and the defendant, and the plaintiff and the
defendant, particularly in view of the severe and emergency nature of the mother’s medical condition prior to the baby’s birth.

Furthermore, the plaintiffs alleged that their HMO negligently or willfully lost or destroyed records of telephone conversations from several days prior to the birth of their child. The plaintiffs pled that as a direct and proximate result of their HMO’s loss or destruction of the records of telephone calls, which were a part of the plaintiff’s medical records, that plaintiffs were missing key evidence relevant to proving a case of medical negligence against the defendant doctor and the plaintiffs’ HMO, thereby sustaining injury.

The appellate court held that, although the plaintiffs’ complaint properly pled a duty and a breach of that duty, the complaint did not contain sufficient allegations regarding the element of causation. According to the court, the paragraph of the plaintiffs’ complaint dealing with causation in regard to the spoliation of evidence claim:

. . . does not assert specific facts explaining how the missing telephone records caused the plaintiffs to be unable to prove an underlying lawsuit. Accordingly, the circuit court’s dismissal of Count VI [the spoliation count] under Section 2-615 was appropriate because plaintiffs’ complaint fails to allege facts sufficient to state a cause of action for negligent spoliation.

Thornton, 777 N.E.2d at 404-405.

In Schusse v. Pace Suburban Bus, 334 Ill. App. 3d 960, 779 N.E.2d 259 (1st Dist. 2002), the appellate court held that an employer’s spoliation of evidence concerning an employee’s products liability claim did not arise out of or in the course of the employee’s employment and, as a result, was not compensable under the workers’ compensation statute. Thus, the employee’s action against the employer for spoliation of evidence was not precluded by the exclusivity provision of the Illinois Workers’ Compensation Statute.

The Schusse court also reiterated that the limitations period for the commencement of a negligence action for spoliation of evidence is the five-year limitation period set forth in 735 ILCS 5/13-205.

The case of Bagnola v. SmithKline Beecham Clinical Laboratories, 333 Ill. App. 3d 711, 776 N.E.2d 730 (1st Dist. 2002), involved the destruction of laboratory specimens. The plaintiff, James Bagnola, was ordered by the Chicago Police Department to submit to random drug testing. The plaintiff submitted two urine specimens, which were sent to SmithKline Beecham Clinical Laboratories (“SBCL”) for testing. Both specimens tested positive for cocaine. The Superintendent of the Chicago Police Department brought charges against the plaintiff seeking to discharge him from his position as a Chicago police officer for knowingly possessing and using cocaine.

Almost two years after the department began proceedings to discharge the plaintiff from his position as a police officer, the plaintiff requested the production of both bottles of his urine. SBCL notified the plaintiff that both urine specimens had been destroyed. Destruction of the urine specimens was contrary to the terms of the contract between SBCL and the City of Chicago, which required SBCL to keep all positive specimens for at least three years.

During the course of his administrative hearing, the plaintiff filed a lengthy motion seeking to dismiss the charges against him. In that motion, the plaintiff argued that the City and/or SBCL willfully and intentionally destroyed his urine specimens and, as a result, he was prevented from having those specimens independently tested by another laboratory. The plaintiff argued that his inability to have the specimens independently tested destroyed his ability to successfully defend himself in the administrative hearing.

At the conclusion of the hearing, the review board found the plaintiff guilty of the charges related to the positive drug tests and ordered him discharged from his job. The board also found that SBCL
“inadvertently” destroyed the urine samples and that this inadvertent destruction of the urine samples did not warrant dismissal of the charges against the plaintiff.

Prior to his dismissal from the police force, the plaintiff filed a civil action for spoliation of evidence against the City and SBCL. The trial court granted summary judgment in favor of the defendants in the plaintiff’s action based on the doctrines of res judicata and collateral estoppel.

On appeal, the appellate court held that, since the plaintiff raised his claims of spoliation of evidence in his administrative hearing, those claims were barred from being litigated in the plaintiff’s civil action under the doctrines of res judicata and collateral estoppel.

In Veazey v. LaSalle Telecommunications, Inc., 334 Ill. App. 3d 926, 779 N.E.2d 364 (1st Dist. 2002), the plaintiff, Darryl Veazey, was employed by LaSalle from 1989 until October 25, 1996. In September of 1996, the plaintiff’s immediate supervisor, Ralph Newcomb, received a threatening message on his voicemail. Several individuals for whom the message was played believed that the voice on the message was that of the plaintiff.

On October 22, 1996, the plaintiff was summoned to LaSalle’s regional office and questioned regarding the threatening messages by Mike Mason and Jack Burke. The plaintiff denied leaving any threatening messages on Newcomb’s voicemail but was, nevertheless, ordered to read a transcript of the threatening message so that a recording of his voice could be made for comparison purposes. The plaintiff refused and was suspended from his job without pay.

The plaintiff next met with Mason and Burke on October 25, 1996, and was again ordered to provide a recording of his voice reading a transcript of the threatening message. When the plaintiff refused, his employment with LaSalle was terminated.

The plaintiff filed a three-count complaint against LaSalle. Count I alleged that the plaintiff was fired in retaliation for invoking his rights against self-incrimination as protected by the Illinois and United States Constitutions. Count II alleged a claim for civil conspiracy charging that Mason and Burke conspired to terminate the plaintiff because he was black and because he refused to leave incriminating voicemail messages.

Count III purported to set forth a claim for negligent spoliation of evidence, alleging that LaSalle had lost, misplaced, or destroyed certain evidentiary materials, including the plaintiff’s personnel file and microcassette recordings of the threatening voicemail messages left on Newcomb’s voicemail, making it “more difficult for him [the plaintiff] to succeed in his litigation to recover the damages to which he is entitled.” Veazey, 779 N.E.2d at 367.

The trial court entered an order dismissing the plaintiff’s complaint in its entirety, with prejudice, and the plaintiff appealed. In affirming the dismissal of the plaintiff’s complaint, the appellate court stated the following in regard to the plaintiff’s spoliation of evidence claim:

In order to satisfy the causation element of an action for negligent spoliation of evidence, a plaintiff must allege “specific facts to support a claim that the loss or destruction of the evidence caused the plaintiff to be unable to prove an underlying lawsuit.” Boyd, 166 Ill. 2d at 196, 209 Ill. Dec. 727, 652 N.E.2d 267.

* * *

In count III of his complaint, the plaintiff incorporated all of the allegations contained in counts I and II, his retaliatory discharge and conspiracy claims, respectively. He asserts that LaSalle’s loss or destruction of certain evidence “will make it more difficult for him to succeed in his litigation.” However, the plaintiff fails to identify any alleged causes of action he has or might have had against LaSalle other than those alleged in counts I and II of his complaint. Having found, for reasons other than the absence of evidence, that the plaintiff could not prevail on a
claim of retaliatory discharge or civil conspiracy, we conclude that he has not met his burden to plead facts which satisfy the causation element of an action for negligent spoliation of evidence. As a consequence, we also affirm the trial court’s dismissal of count III of the plaintiff’s complaint.

*Veazey*, 779 N.E.2d at 371-72.

In *Kambylis v. Ford Motor Co.* (*Kambylis*), 338 Ill. App. 3d 788, 788 N.E.2d 1 (1st Dist. 2003), the plaintiff filed a products liability action against Ford Motor Company (“Ford”) for injuries sustained when the airbag in his car failed to deploy during a traffic accident. After the accident, the City of Chicago towed the plaintiff’s vehicle to the auto pound and notified the plaintiff that he had 15 days to either retrieve his vehicle or request a hearing; otherwise, the vehicle would be destroyed.

One day prior to the expiration of the 15-day period, the plaintiff arranged to have the vehicle photographed at the pound in anticipation of filing a lawsuit, but never responded to the City’s notice. Instead, the plaintiff wrote a letter to Ford, warning the company to take immediate action by contacting the pound to arrange for preservation of the auto. Ford claimed that it never received such a letter. The car was subsequently destroyed.

Upon learning that the vehicle was destroyed, Ford filed a motion to bar evidence of the automobile’s alleged defect and moved for summary judgment. Both motions were granted and the plaintiff filed an appeal claiming that he took no affirmative action to destroy the vehicle and even photographed the car before it was destroyed.

In affirming the trial court’s rulings, the appellate court held that, even though the plaintiff did not have actual custody of the evidence, he did have control of the automobile since it was “in the hands of a bailee subject to instruction from the bailor.” *Kambylis*, 788 N.E.2d at 6.

According to the court, the lack of a court order to preserve evidence does not give a plaintiff the right to stand idly by while evidence crucial to the resolution of a case is destroyed. This is particularly true in cases where plaintiff knows where the evidence is and has the authority to prevent its destruction, especially when destruction of the evidence prohibits effective defense against the plaintiff’s claims. The court stated, “[w]e find no case law . . . which would excuse passive spoliation, i.e., spoliation through inaction.” *Id.* at 7.

The appellate court affirmed the trial court’s order barring the plaintiff from introducing photographs of the condition of the vehicle and the plaintiff’s expert’s report as a sanction for allowing the vehicle to be destroyed. Also, the court affirmed the entry of summary judgment in favor of the defendant because, after the plaintiff was barred from introducing photographs and his expert’s report, there was no evidence left to support the plaintiff’s claim of an alleged defect.

In *Andersen v. Mack Trucks, Inc.*, 341 Ill. App. 3d 212, 793 N.E.2d 962 (2nd Dist. 2003), the plaintiff filed a wrongful death, product liability, negligence, and survival action in connection with the death of his father, Daniel Andersen, who was killed in a work-related accident. The plaintiff’s complaint alleged that Daniel was killed on February 14, 2000, when a hydraulic hose in the hoist mechanism of the truck he was operating for BFI Waste Systems of North America (“BFI”) ruptured causing the mechanism to fail and the load to lower onto him. Mack Trucks, Inc. manufactured the truck involved and Galbreath, Inc. manufactured the hoist mechanism at issue.

Galbreath filed a third-party complaint against BFI that alleged that the Waukegan police, OSHA and an engineering consulting firm had each investigated the accident that killed Daniel Andersen. Three days after the accident, BFI’s Waukegan District Manager wrote to Galbreath informing it of the fatality and requesting that a service representative inspect the equipment. The letter also informed Galbreath that BFI intended to place the equipment back in service on March 1, 2000.
On February 21, 2000, Galbreath’s engineering manager made a “brief visual inspection” of the equipment at BFI’s Waukegan facility. Sometime shortly after the inspection, Galbreath sent the Waukegan District Manager a letter requesting that he turn over evidence relating to Daniel Andersen’s death, including the ruptured hose. Galbreath asked that the hose be preserved if it could not be turned over.

On April 1, 2000, BFI sold the equipment in question to Onyx Waste Services, Inc. BFI did not inform Galbreath of the sale of the equipment at the time the third-party complaint was filed and did not comply with discovery demands for the production of the equipment. Galbreath ultimately succeeded in locating the truck at the Onyx facilities, but the hoist and the hose at issue were never recovered.

As part of its third-party complaint for spoliation of evidence, Galbreath alleged that had the equipment at issue been preserved, it would have established the lack of defect attributable to Galbreath and/or the merit of one or more affirmative defenses based upon third-party modification or other intervening causes. Galbreath also alleged that absent that evidence, it may not be able to prove its affirmative defenses and its ability to defend itself in the underlying litigation had been impaired.

BFI moved to dismiss the third-party complaint alleging spoliation of evidence. That motion was granted, with prejudice. An appeal followed.

On appeal, the appellate court noted that Boyd articulates a two-prong test for the existence of a duty to preserve evidence: (1) an agreement, contract, statutory requirement, or other special circumstance such as the assumption of the duty by affirmative conduct (the relationship prong), and (2) that a reasonable person in the defendant’s position should have foreseen that the evidence was material to a potential civil action (the foreseeability prong). According to the court, unless both prongs are satisfied, there is no duty to preserve evidence. Andersen, 793 N.E.2d at 967.

In holding that the third-party plaintiff had not stated a cause of action for spoliation of evidence, the Andersen court stated as follows:

In this case, Galbreath does not allege any contract or agreement between BFI and itself, nor does it allege that BFI had any statutory or regulatory duty to preserve the evidence . . . Galbreath suggests that its undated letter sent “shortly after” its inspection of the truck, requesting that BFI turn over or preserve the hose and related evidence, constitutes a special circumstance imposing a duty to preserve evidence. We decline to hold that a mere request that a party preserve evidence is sufficient to impose a duty absent some further special relationship . . .

The plaintiff in a spoliation of evidence case must also plead breach of the duty to preserve evidence. In the usual case, where the plaintiff has had no opportunity to inspect the evidence in contemplation of litigation, establishing the inadequate protection of the evidence would be sufficient to plead the breach of the duty . . . Here, Galbreath had the opportunity to, and did in fact, inspect the equipment before it was lost. Arguably, the duty could have terminated with the inspection. The scope of the duty to preserve evidence has not been at issue in other Illinois spoliation cases, but, by natural extension of the reasoning in Boyd, we conclude that the duty remains as long as the defendant should reasonably foresee that further evidence material to a potential civil action could be derived from the physical evidence in the defendant’s possession, e.g., testing, microscopic examination, chemical analysis, etc.

* * *

Further, Galbreath’s complaint does not sufficiently allege an injury proximately caused by the alleged breach of duty . . . Galbreath here alleges that the loss of the evidence caused it to be
unable to prove an affirmative defense based on third-party modification of the equipment or another intervening cause.

BFI has argued that Galbreath has other defenses not dependent on the lost evidence . . . . To remain consistent with Boyd, clearly the plaintiff must allege that the destruction of evidence has caused the plaintiff to be unable to defend the underlying lawsuit. Thus, Galbreath must allege specific facts that if proven would show that, due to the loss of evidence, it will lose the underlying case, and not that one specific defense will become unavailable to it.

* * *

. . . Galbreath fails to plead specifically what it could have done with the equipment that it cannot do now, or what it could have done in addition to its original inspection, and why this is critical to its defense. Further, Galbreath has not alleged facts that would show why it can reasonably rely only on the defense it alleges it has lost. (Emphasis added.)

Andersen, 793 N.E.2d at 968-970.

Although the court held that the plaintiff had not stated the requisite elements to proceed with a claim for spoliation of evidence, the court reversed the dismissal of the third-party complaint, insofar as it was dismissed with prejudice, and remanded the case to the trial court to allow Galbreath to re-plead a cause of action for spoliation of evidence. Id.

The latest Illinois case to discuss the issue of spoliation of evidence is Dardeen v. Kuehling, 344 Ill. App. 3d 832, 801 N.E.2d 960 (5th Dist. 2004). In Dardeen, the plaintiff, a newspaper carrier, was delivering newspapers with his daughter early in the morning on September 1, 1999, when he tripped over a hole on a brick sidewalk located on the property of the defendant, Alice Kuehling, and sustained injuries.

The plaintiff’s daughter called Kuehling later that day and notified her of the plaintiff’s accident. Moreover, in the evening on the day of the accident, the plaintiff, accompanied by his neighbor, returned to Kuehling’s property to inspect the hole and tell Kuehling about his accident. Kuehling’s daughter and son-in-law were present at the evening meeting and observed the condition of the area where the plaintiff fell.

The day of the accident, Kuehling reported the plaintiff’s fall to her State Farm insurance agent, Ronald Couch. Kuehling asked Couch whether she could remove the uneven bricks from the sidewalk to prevent anyone else from falling. Couch told her she could remove the bricks. Within one week of the accident, Kuehling removed between 25 and 50 bricks without first photographing or videotaping the sidewalk where the accident occurred.

On August 1, 2000, the plaintiff filed a complaint against Kuehling and the City of Mt. Carmel alleging failure to repair the hole in the sidewalk and/or failure to warn others that the hole existed. Subsequently, the plaintiff voluntarily dismissed the count against Mt. Carmel and filed an amended complaint adding counts against both Kuehling and State Farm for negligent spoliation of evidence.

The plaintiff alleged that State Farm had a duty to preserve the sidewalk when it became aware of the plaintiff’s claim via its agent, Ronald Couch, and breached its duty by authorizing Kuehling to remove the bricks without first photographing or videotaping the sidewalk. The plaintiff further alleged that by removing the bricks, Kuehling changed the appearance of the accident site and, as a result, destroyed material evidence the plaintiff needed to prove his personal injury case.

State Farm filed a motion for summary judgment on the negligent spoliation of evidence count of the plaintiff’s complaint. On April 30, 2002, the trial court granted State Farm’s motion and the plaintiff appealed.
On appeal, the appellate court reversed the trial court’s grant of summary judgment for State Farm. In support of its decision, the court relied upon the holdings of Boyd v. Travelers Insurance Co. (a duty to preserve evidence may arise through an agreement, a contract, or other special circumstances such as the assumption of a duty by affirmative conduct) and Shimanovsky v. General Motors Corp. (a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence).

The court emphasized that State Farm had a contractual relationship with Alice Kuehling, Kuehling notified State Farm’s agent, Ronald Couch, of the accident, and Kuehling relied on Couch’s advice before removing the bricks. As a State Farm agent, Couch was well aware that the sidewalk was material to any potential civil litigation. Nevertheless, Couch authorized the removal of the bricks without recommending that Kuehling photograph or videotape the site.

Furthermore, Couch could have sent an investigator to preserve the site prior to the removal of the bricks, but chose not to. As a result of State Farm’s actions, the ongoing cases of both the insured, Kuehling, and the plaintiff have been impaired since neither has photographic evidence showing the condition of the sidewalk at the time of the incident.

In its defense, State Farm argued that it had no duty to preserve evidence because it never possessed or retained control over the sidewalk nor prevented the plaintiff or anyone else from inspecting the sidewalk. Moreover, the plaintiff improperly attempted to broaden the scope of a spoliation of evidence claim by imposing liability on a party who never had possession or control over the evidence in question.

In support of its argument, State Farm cited the case of Jones v. O’Brien Tire & Battery Service Center, Inc., discussed supra, and noted that the court in Jones emphasized that possession of evidence was paramount in finding that a party has a duty to preserve evidence.

While showing deference to the holding in Jones, the court stated that Jones does not absolutely require that a party “have possession of the evidence before a duty to preserve evidence is imposed.” Dardeen, 801 N.E.2d at 965.

Seemingly, the Dardeen court broadened the concept of “possession or control of evidence” in concluding that, “State Farm did not have possession of the sidewalk but, instead, exercised control or had the opportunity to exercise control. It was reasonably foreseeable that the condition of the sidewalk at the time of the accident was a crucial issue. Without a doubt, this evidence should have been preserved.” Id. (Emphasis added).

Additionally, State Farm asserted that, if it encouraged Kuehling to destroy the brick sidewalk, it was simply complying with Illinois public policy favoring improvements that enhance public safety. In response, the court noted that in Boyd, “the Illinois Supreme Court also declared that it is against public policy to destroy evidence. It is clear that both these policies could have been advanced had State Farm simply directed Kuehling to photograph or videotape the sidewalk prior to removing between 25 and 50 bricks.” Id. at 966.

Finally, in reversing the trial court’s grant of summary judgment in favor of State Farm, the appellate court took issue with the trial court’s finding that there was ample evidence on the condition of the sidewalk at the time of the incident given that at least eight people viewed the sidewalk prior to its destruction. The court stated, “[w]hat the trial court failed to consider, however, was that the key piece of evidence has been destroyed. Even though several witnesses may be able to testify about the condition of the sidewalk, their descriptions on the scene differ. A photograph or videotape of the condition of the sidewalk at the time of the accident would be conclusive.” Id.

In conclusion, these cases constitute the current state of judicial law in Illinois concerning the issue of spoliation of evidence. Given the frequency in which Illinois courts have grappled with this issue over the past 24 years, spoliation of evidence issues requiring judicial determination will likely continue to surface. As a result, the Illinois judiciary will be called upon to provide guidelines to
litigants and attorneys alike as to the proper handling of evidence whether litigation is on the horizon or has already been initiated.

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