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By: William Seth Howard
O'Hagan Spencer LLC, Chicago

Courtney S. Karamanol
O'Hagan Spencer LLC, Chicago

Spoliation of Evidence in Illinois: Getting Tossed Out of Court Because You Tossed Out Your Junk

Introduction

Spoliation of evidence increasingly has become an area of interest in Illinois as litigation becomes more complex and obligations to preserve evidence have become more burdensome. Spoliation can be defined as the destruction or alteration of material evidence, and "evidence" which may be spoliated can include tangible evidence, paper records, accident scenes,[2] electronic records,[3] hard drives, and mechanical devices. The remedies available to an aggrieved party where spoliation of evidence has occurred are also wide ranging and include: criminal penalties,[4] evidentiary presumptions against the spoliator,[5] money sanctions, barring of evidence,[6] dismissal or default, and a tort claim for spoliation.

A party confronted with the loss or destruction of relevant, material evidence at the hands of an opponent may either: (1) seek sanctions, including dismissal of his opponent's complaint under Rule 219(c), or (2) bring a claim for negligent spoliation of evidence.[7] In determining which of these avenues to pursue against a spoliator, the primary considerations should be: (1) whether the spoliator is a potential litigant or a third-party, and (2) the degree of culpability involved. Rule 219(c) sanctions and tort claims for spoliation are both available against potential litigants but only tort claims for spoliation are available against third-party spoliators.

Below is a discussion of options one should consider when faced with apparent spoliation of evidence. Section II addresses the circumstances in which seeking sanctions under Rule 219(c) are appropriate. The article examines *Shimanovsky v. GMC*, in which the Illinois Supreme Court held that dismissal of the case under Illinois Supreme Court Rule 219(c) was appropriate where a party's actions show a deliberate, contumacious or unwarranted disregard of the court's authority.[8] But, where the spoliation of evidence is merely negligent, there are less severe discovery sanctions available under Rule 219(c), including barring evidence and evidentiary presumptions.

Section III discusses filing a tort claim for spoliation. When the spoliation is negligent a party can pursue a tort for negligent spoliation as outlined in *Boyd v. Travelers Ins. Co.*, and its progeny, which held that a claim for spoliation of evidence may be stated in Illinois under a negligence cause of action.[9]

Finally, in Section IV, the article offers practical advice regarding discovery to conduct upon encountering spoliation of evidence.

Sanctions Under Rule 219(c)

Pursuant to Illinois Supreme Court Rule 219(c), a victim of spoliation may seek a wide variety of discovery sanctions, which include monetary penalties, evidentiary presumptions, barring of evidence[10] and dismissal of the lawsuit or default judgment.[11] *Shimanovsky v. GMC* is one of the first cases to address Rule 219(c) sanctions for lost evidence. In *Shimanovsky v. GMC* the plaintiff filed a products liability action against an automobile manufacturer, alleging that the steering mechanism was defective.[12] Prior to filing the lawsuit, the plaintiff's attorney employed an expert to examine the steering mechanism and the expert performed "destructive testing" on the steering mechanism.[13] Therefore, the steering mechanism was destroyed and not available for inspection or analysis by the defendant's experts or for use at trial. The manufacturer subsequently filed a motion to dismiss the lawsuit, or in the alternative, to bar any evidence of the condition of the power-steering mechanism pursuant to Rule 219(c).

The analysis set forth in *Shimanovsky* is at the very foundation of Illinois' spoliation law because it dictates that there was a pre-suit duty to preserve evidence for "potential litigants."[14] The plaintiff attempted to argue that there was no violation of a court order, and as such, no basis for sanctions under Rule 219(c).[15] However, the court held that "plaintiffs knew, or should have known, the evidentiary value of the allegedly defective product," and therefore, the plaintiffs were "not free to destroy crucial evidence simply because a court order was not issued to preserve it."[16] The establishment of a pre-suit duty for potential litigants has become a vexing issue in Illinois spoliation litigation, as the limits and boundaries of this duty have not yet been clearly delineated. This issue will be discussed in more detail in Section III(B)(1), below.

After establishing a pre-suit duty for potential litigants to preserve evidence, the *Shimanovsky* court addressed which sanctions were most appropriate for a breach of the duty. The court set forth six (6) factors to be considered when determining which Rule 219(c) sanction, if any, would be applicable:

(1) the surprise to the adverse party;
(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 testimony or evidence; and
(6) the good faith of the party offering the testimony or evidence. [17]

Illinois courts have made clear that in choosing a sanction under Rule 219(c), the purpose of the sanction is not merely to punish the dilatory party, but to effectuate goals of discovery.[18] A just order is one that is "commensurate with the seriousness of the violation" and "ensures both the accomplishment of discovery and a trial on the merits."[19]

Dismissal & Default Judgment:
Requirement of Bad Faith Destruction of Evidence

The *Shimanovsky* court noted that under Rule 219(c), an "order of dismissal with prejudice or a sanction which results in a default judgment are drastic sanctions to be invoked only in those cases where the party's actions show a deliberate, contumacious or unwarranted disregard of the court's authority."[20] Intentionality is not enough; the spoliator must have acted in bad faith when destroying the evidence. For instance, in *Shimanovsky* the plaintiffs were able to demonstrate that, although they intentionally destroyed the evidence via destructive testing, they did so in good faith because: (1) the destructive testing was necessary for the plaintiffs to conduct further investigation to determine if they had a viable cause of action, and (2) after the testing was performed, the plaintiffs preserved all of the parts and components of the automobile and power-steering mechanism.[21] Given the lack of bad faith, the court would not dismiss the case.

This bad faith requirement for dismissal/default under Rule 219(c) remains the law in Illinois, and was recently upheld in *Adams v. Bath and Body Works*.[22] In *Adams*, the plaintiff's house burned down, and the initial investigation focused on lamps as the likely source of the fire. It was later discovered that the source may have instead been candles, which were purchased at Bath and Body Works ("BBW").[23] In the interim, much of the evidence in the vicinity of the candles had been removed from the premises and destroyed. Due to the destruction of evidence, BBW moved to dismiss the plaintiff's claim pursuant to Rule 219(c), and the trial court granted BBW's motion.[24] The First District reversed the dismissal, holding there was no bad faith destruction of the evidence.[25] The *Adams* court followed the *Shimanovsky* holding that a Rule 219(c) dismissal requires intentional bad faith destruction of evidence. Thus, the *Adams* court rejected a line of cases finding that negligent or inadvertent destruction or alteration of evidence may result in harsh sanctions, including dismissal, when a party is disadvantaged by the loss.[26]

In finding that there was no bad faith spoliation, the *Adams* court focused on the fact that there were no "'reasonable measures' which the plaintiff could have, but failed, to undertake to protect the evidence, short of treating the second floor of the house owned by [the landlord] like a crime scene."[27] The court also found a lack of bad faith because the plaintiff, as a lessee of the apartment, "played no role in, nor had any notice of, the destruction of the evidence which defendants claim was essential to their defense."[28] There was also circumstantial evidence of a lack of bad faith, because the plaintiff had "no knowledge that [the evidence] might have been relevant and material; his initial theory was that two lamps, recovered by his attorney shortly after the fire, had been the cause."[29]

It is clear from *Shimanovsky* and *Adams* that bad faith is necessary for a claim to be dismissed or default judgment entered pursuant to Rule 219(c). However, it is yet undetermined whether bad faith alone is sufficient for imposition of this harsh sanction, or whether the remaining factors as outlined in *Shimanovsky* (such as prejudice to the spoliation victim) need be examined and balanced. Thus far, the remaining factors of the *Shimanovsky* test have been considered only once the court has determined that there has been no bad faith destruction, and therefore, some other sanction, besides dismissal or default judgment, is the appropriate remedy. Because dismissal or default judgment will only be entered in the most egregious cases involving bad faith destruction or non-preservation of evidence, the party bringing a motion for Rule 219(c) sanctions should also seek imposition of less drastic sanctions, including monetary fines,[30] barring of evidence, or the use of various evidentiary presumptions.

Less Drastic Sanctions May Be Imposed in the Absence of Bad Faith

Presence or absence of bad faith is the primary inquiry in a motion seeking dismissal of a claim or entry of default judgment. However, the other factors delineated in *Shimanovsky* have been considered by Illinois

courts when evaluating the appropriateness of the less drastic Rule 219(c) discovery sanctions. Less drastic remedies under Rule 219(c) include:

(i) * * *;
(ii) * * *;
(iii) barring the offending party from maintaining a particular claim, counterclaim, third-party complaint, or defense relating to that issue;[31]
(iv) barring witnesses from testifying concerning that issue;[32]
(v) * * *;
(vi) striking any pleading relating to that issue;
(vii) fees or expenses, order interest to be paid for the period of pre-trial delay caused by the behavior.[33]

In determining which Rule 219(c) sanction is appropriate, Illinois courts will consider the remaining factors set forth in *Shimanovsky*, including surprise, due diligence and prejudice.[34] For instance, the defendant in *Shimanovsky* could not claim that it was "surprised" by the plaintiffs' destructive testing because of its own lack of diligence in seeking discovery of the automotive parts.[35] That is, the defendant filed a Rule 214 request seeking production by the plaintiffs of any documents pertaining to expert examination of the automobile, but did not seek production of the automobile or any of its components.[36] Furthermore, by the time the defendant did bring a motion to compel production of the parts, 5 1/2 years had elapsed since the commencement of the suit.[37]

Another factor a court will consider in tailoring a Rule 219(c) sanction is the prejudice to the non-spoliating party.[38] In *Shimanovsky*, the defendant argued that when a defendant is precluded from testing an allegedly defective product in its post-accident condition, the prejudice suffered by the defendant is manifest.[39] Nonetheless, the court remanded the case for a hearing to specifically determine the degree of prejudice defendant suffered and also highlighted that: (1) the plaintiffs did not destroy or dispose of the entire product, (2) the power-steering components still existed in such a condition that defendant's experts were able to form their opinions as to a lack of defect, (3) the defendant had access to all the same information, reports, and photographs upon which plaintiffs' experts relied, and (4) the defendant possessed all the information regarding the original design and production of the power-steering mechanism.[40]

Loophole to the Bad Faith Requirement:
Barring Evidence May Lead to Entry of Summary Judgment

Where there is not sufficient evidence of bad faith for a court to dismiss a claim pursuant to Rule 219(c), a litigant may ultimately achieve the same end by seeking to have key evidence barred, and then moving for summary judgment. A court may be less hesitant to enter sanctions barring evidence, as it seems to be less drastic. However, the effect of barring one or more key pieces of evidence may significantly undermine the plaintiff's case. In many circumstances, the barring of evidence leaves the door wide open for a successful motion for summary judgment.

In *Ralston v. Casanova*, the plaintiff claimed damages resulting from defects in a seat belt designed and manufactured by the defendant.[41] Despite a court order forbidding destructive testing, the plaintiff's expert disassembled and tested the belt in a manner that was not compliant with the applicable Federal Motor Vehicle Safety Standards for seat belt testing and could cause erroneous test results on any subsequent appropriate testing performed on the seat belt.[42] On defendant's motion, the trial court barred the plaintiff from presenting any expert evidence at trial regarding the condition of the allegedly defective seat belt. The appellate court affirmed the decision.[43] The defendant then moved for dismissal under 735 ILCS 5/2-619 and 2-1005. Because

the plaintiff's expert was barred from testifying, the plaintiff could only proffer his own deposition testimony as to a defect in the belt.[44] The plaintiff argued his testimony showed that "in the absence of abnormal use or reasonable secondary causes, the seat belt failed to perform in the manner reasonably expected."[45]

But, the appellate court held that the defective nature of a product when it left a manufacturer's control cannot be presumed from evidence of the mere occurrence of an accident involving a product. Further, the First District found the plaintiff failed to produce any evidence to prove that the product's allegedly defective condition existed when the product left the defendants' control.[46] Thus, although the circumstances in *Ralston* did not reach the level of bad faith required for dismissal under Rule 219(c), the barring of the plaintiff's expert's testimony under that rule sounded the death knell of the case.

Likewise, the *Graves v. Daley* case came to a similar end due to spoliation of a furnace alleged to have caused a fire that destroyed the plaintiffs' home.[47] The plaintiffs obtained permission from their insurance company to dispose of the furnace after several inspections had occurred.[48] Subsequently, the plaintiffs filed a lawsuit against the manufacturer and retailer of the furnace, who moved for sanctions under Rule 219(c) because the furnace had been destroyed.[49] The trial court entered an order barring the plaintiffs from presenting any evidence regarding the condition of the furnace.[50] Subsequently, the trial court entered summary judgment in favor of the defendants. The appellate court affirmed.[51]

Finally, in *Kambylis v. Ford Motor Co.*, the court barred the plaintiff from presenting evidence concerning the Ford Escort, which he alleged was the cause of his personal injuries. The plaintiff failed to retrieve the car from an impound lot before it was destroyed. Thus, the court barred his use of any photographs or his expert's report. Without any evidence regarding the alleged defect in the car, the plaintiff was unable to present a factual basis to the court that would entitle him to judgment, and therefore the court granted the defendant's summary judgment.[52]

In each of these cases, the non-spoliator asserted a motion for sanctions to bar evidence. None of the motions required a showing of intentional or bad faith destruction of evidence. Yet, each of the defendants successfully moved for summary judgment, arguing that the plaintiff could not meet the burden of proof without the barred evidence.

The *Adams* court, however, rejected the defendant's reliance on *Graves* and *Kambylis*. The *Adams* court found the plaintiff had not acted in bad faith when destroying the candles, and it would not dismiss the plaintiff's claim as a 219(c) sanction.[53] Ultimately, the court stated, "we reject defendants' reliance upon those cases [citing *Graves* and *Kambylis*] which have found that negligent or inadvertent destruction or alteration of evidence may result in a harsh sanction, including dismissal, when a party is disadvantaged by the loss."[54] However, as was stated above, *Graves* and *Kambylis* did not grant dismissal as a 219(c) sanction; rather, those courts barred certain evidence that allowed the defendant to then move for summary judgment. It is not clear whether the *Adams* court simply misread the *Graves* and *Kambylis* decisions, or whether the *Adams* court was rejecting the two-step tactic to achieve dismissal after evidence has been spoliated. Regardless, *Adams* was a First District case and to date, the Illinois Supreme Court has not commented on the propriety of dismissal via summary judgment that stems from barring evidence under Rule 219 due to spoliation.

Evidentiary Presumptions

Under Rule 219(c), a court may also instruct the jury to presume that the destroyed evidence, if it were available, would be beneficial to the non-spoliating party's case. Illinois Pattern Jury Instruction No. 5.01 states as follows:

> If a party to this case has failed [to offer evidence] within his power to produce, you may infer that the [evidence] would be adverse to that party if you believe each one of the following elements:

1. The [evidence] was under the control of the party and could have been produced by the exercise of reasonable diligence.
2. The [evidence] was not equally available to an adverse party.
3. A reasonably prudent person under the same or similar circumstances would have [offered the evidence] if he believed [it to be] favorable to him.
4. No reasonable excuse for the failure has been shown.[55]

Illinois courts require the party offering the instruction to show that either: (1) there was a willful withholding of the evidence, or (2) there is no reasonable excuse for non-production,[56] and an unsuccessful good faith search for the evidence does not constitute a "reasonable excuse for non-production.[57] This instructs the fact finder to presume the prejudicial nature of the destroyed evidence against the party that failed to produce it, but also allows the fact-finder to weigh the value of the destroyed evidence. The presumption, however, is rebuttable by the spoliating party.[58] In *R.J. Mgmt. Co. v. SRLB Dev. Corp.*, the plaintiff had a contract with the defendant that required the defendant pay an extra contingent amount to the plaintiff if the defendant's profits from a development exceeded a particular amount.[59] The defendant had prematurely destroyed its financial records before the lawsuit and the trial court had applied the presumption that destroyed evidence would have favored the plaintiff.[60] Yet, the court also found the defendant had offered enough circumstantial evidence to rebut the presumption.[61]

In *Haynes v. Coca-Cola Bottling Co.*, the defendant argued that the plaintiff's failure to produce an allegedly defective soda can created a legal presumption that it was damaged after it left the defendant's control.[62] The soda can was apparently discarded by an office cleanup crew at the plaintiff's counsel's office without his authority.[63] The court would not grant the presumption because there was no evidence in the record that the attorney deliberately destroyed the can. The court further reasoned that the plaintiff introduced adequate direct and circumstantial evidence to support the claim and it was unnecessary for her to produce the can to satisfy the burden of proof.[64]

Furthermore, in *Coupon Redemption, Inc. v. Ramadan*, the plaintiff did not produce certain documents because "time did not allow the production of all the documents reflecting the rejection of 13,000 of defendant's coupons."[65] The *Coupon* court held that such a reason did not "yield an inference that it was unreasonable or that the [documents] were willfully withheld."[66]

Despite the fact that the use of an evidentiary presumption is less severe than the imposition of more drastic sanctions (such as dismissal or barring evidence), it will not be employed in every case in which allegations of spoliation are made. Instead, a showing needs to be made that the evidence either was willfully withheld, or that no reasonable excuse for non-production has been shown.

Rule 219(c) Sanctions are Unavailable Where the Spoliator is Not a Party

It is worth noting that Rule 219(c) sanctions are unavailable where the spoliator is not a party to the subject litigation. Rule 219(c) permits sanctions only where a party unreasonably fails to comply with a discovery order (although this language has been held to encompass a pre-suit duty even without the entry of a discovery order[67]). A party that had nothing to do with the destruction of evidence because it was destroyed by a third party cannot be said to have unreasonably failed to comply with a discovery order. Before non-compliance can be unreasonable, a party must have been in a position to comply.[68] In *Stringer v. Packaging Corp. of America*, an allegedly defective box was destroyed by the plaintiff's employer through no fault of the plaintiff.[69] The defendant manufacturer moved under Rule 219(c) for either dismissal, or in the alternative, to bar evidence as to the condition of the allegedly defective box.[70] However, the Illinois Appellate Court, Fourth

District, upheld the trial court's denial of the manufacturer's Rule 219(c) motions as the plaintiff did not destroy the evidence, his employer, a non-party to the litigation did.[71]

A Tort Claim for Spoliation

Not only can one pursue sanctions under Rule 219(c) for spoliation of evidence, but also one may pursue a common law negligence claim against a spoliator, whether it is the underlying plaintiff, defendant or a third-party. In *Adams v. Bath and Body Works*, the court underscored that a claim for negligent spoliation of evidence and sanctions under Rule 219(c) are separate and distinct remedies for victims of spoliation.[72] In *Adams*, the victim of the spoliation chose to seek redress under Rule 219(c), and thus, the court found that any reliance upon *Boyd* or its progeny was inappropriate.

Illinois precedent indicates that if the spoliator is the plaintiff or the defendant in the underlying suit, one should pursue redress for spoliation under Rule 219(c). Nonetheless, there is no prohibition on also bringing a claim for negligent spoliation against a plaintiff or defendant under the *Boyd* line of cases. If a court denies the less severe Rule 219(c) sanctions, pleading a claim for negligent spoliation under *Boyd* would provide another possible remedy. But, when a third-party to a lawsuit is the spoliator of the evidence, and the plaintiff did not have any control over the evidence, Illinois courts have made clear that a Rule 219(c) sanction will be inapplicable.[73] A lawsuit against the spoliator would be the only means of redress for the alleged spoliation.

Many states have created independent spoliation torts for intentional spoliation, negligent spoliation, or both. Illinois is not among that group of states. In *Boyd v. Travelers Insurance Co.*, the Illinois Supreme Court rejected[74] an independent tort claim for spoliation of evidence, either willful or negligent,[75] but it held that a claim can be stated under ordinary common law negligence.[76] Thus, the plaintiff in a spoliation of evidence case must plead: (i) the existence of a duty, (ii) a breach of the duty, (iii) an injury proximately caused by the breach, and (iv) damages.[77]

In Illinois, no general duty to preserve evidence exists for third-parties;[78] however, *Boyd* delineates a two-prong test for the existence of a duty to preserve evidence: (1) an agreement, statutory requirement, other special circumstance or the assumption of the duty by affirmative conduct (the relationship prong),[79] 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).[80]

Duty: The Relationship Prong

A duty to preserve evidence may arise by agreement, from a statute, or under special circumstances. Each of the means by which the relationship prong is established is discussed below.

Agreement or Statute

In *Dardeen v. Kuehling*, the plaintiff was injured when he stepped into a hole in the defendant's sidewalk.[81] The defendant called her insurer and asked, "Would it be all right if I removed those bricks before this happened {sic} again?" to which the insurer said yes.[82] The defendant then fixed the hole and subsequently the plaintiff sued the insurer for negligent spoliation of evidence.[83] In determining whether the insurer as a third-party spoliator had a duty to *Dardeen*, the appellate court held that the insurer had a contractual relationship with its insured, the defendant, which gave rise to a duty to preserve evidence.[84] The Illinois Supreme Court overturned the appellate court's ruling.[85] The supreme court interpreted *Boyd* to mean

that "a duty to preserve evidence could arise by an agreement or contract, [the *Boyd* court] meant an agreement or contract between the parties to the spoliation claim."[86]

Though less common, a duty to preserve evidence may arise also from a statute that prevents destruction of certain types of evidence. In *Rodgers v. St. Mary's Hosp.,* the court held that it was "clear that the X-Ray Retention Act was designed to prevent the loss of evidence that may be essential to the pursuit or defense of a medical malpractice claim."[87]

Other "Special Circumstance"

A third way a court can find a duty exists is via a "special circumstance."[88] Although "special circumstances" and assumption of a duty by affirmative conduct were clearly separate ways to allege the existence of a duty in the *Boyd* court's opinion, they seem to have become conflated over time. For instance, in *Andersen v. Mack Trucks, Inc.,* the court cited *Boyd* as holding, "[n]o general duty to preserve evidence exists, but a duty can arise out of an agreement or contract, a statutory requirement, or another special circumstance, such as the assumption of the duty by affirmative conduct."[89] Furthermore, Illinois courts have suggested what does not, and what possibly could, constitute a special circumstance, however, no definite guidance has yet been given to practitioners on this point.

The issue of control over evidence has been analyzed as a possible "special circumstance" that may give rise to a duty to preserve evidence. As mentioned above, in *Dardeen v. Kuehling* the plaintiff was injured when he stepped in a hole in the defendant's walkway, which the defendant fixed after obtaining permission from the insurance company to do so.[90] The plaintiff argued that the insurance company's "authority to guide or manage the actions of its insured" regarding how to handle evidence in possession of the insured gave the insurance company a degree of control over that evidence that was itself sufficient to impose on the insurance company a duty to preserve evidence under the "special circumstance" language in *Boyd*.[91] Nonetheless, after pointing out that "no Illinois court has held that a mere opportunity to exercise control over the evidence at issue is sufficient to meet the relationship prong,"[92] the *Dardeen* court held that the statement by the insurance agent, by itself, did not demonstrate control of the evidence.[93] Because the *Dardeen* court found that the insurance company had not actually exercised any control over the evidence, it did not need to consider what level of control over the evidence would qualify as a "special circumstance" giving rise to a duty to preserve evidence.[94]

In *Andersen,* the court analyzed whether a mere request that a party preserve evidence would be a special circumstance giving rise to a duty to preserve evidence and held that the request alone would not be sufficient to impose a duty absent some further special relationship.[95] "We will not speculate as to what other facts [the spoliation plaintiff] could plead to establish the existence of a duty."[96]

Assumed Duty by Affirmative Conduct

In most third-party spoliation cases, there will be no contract or statute from which to derive a duty, and thus the plaintiff will have to prove a duty either via a special circumstance or an assumed duty by affirmative conduct.

In *Boyd*, the plaintiff, an employee, was using his own propane lamp inside of his employer's van.[97] The lamp exploded causing his injuries.[98] The workers' compensation carrier admitted that its employees took possession of the heater and placed it in a closet, from which it later disappeared.[99] Thus, the *Boyd* court held that the complaint properly plead a duty via affirmative conduct, and defined that affirmative conduct as:

> "[the workers compensation carriers'] employees visited the Boyd home, telling [the plaintiff's wife] that they needed the heater to investigate Boyd's workers' compensation claim.[100]

Although the *Boyd* court did not explicitly state that "segregation" of the evidence is a requirement to voluntarily assume a duty to preserve evidence, in discussing the facts of the case the court noted that the carriers' employees indicated that "they would inspect and test the heater…[and that] the heater, initially placed in a closet, later could not be found."[101]

In *Jones v. O'Brien Tire & Battery Serv. Ctr.*, the court analyzed whether a party that does not possess the evidence, but merely exercises some form of control over the evidence, can assume a duty by affirmative conduct.[102] The insurer told the insured to retain certain wheels of a truck that were potential evidence in a case.[103] The insurer also told the insured to preserve the wheels by keeping them "out of the weather."[104] The insured stored both wheels, along with the truck, in an open barn.[105] The insured testified that the insurer told him that he could repair the truck and the repair shop discarded the wheels.[106] Instead of analyzing this case under the "special circumstances" prong of the *Boyd* test as the *Dardeen* court did,[107] the *Jones* court analyzed whether the insurer voluntary undertook a duty by affirmative conduct and held that it did.[108]

According to the reasoning in *Jones*, to voluntarily assume a duty to preserve evidence by affirmative conduct one must have some degree of control over the evidence. The *Jones* court defined "control" as:

> [p]ower or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. The ability to exercise a restraining or directing influence over something.[109]

After establishing that the insurer did have sufficient control of the evidence, the *Jones* court found that "through its actions, [the insurer] voluntarily assumed a duty to exercise reasonable care and due diligence to preserve the evidence. [The insurer] voluntarily undertook to preserve the wheels when it instructed its insured…to keep them."[110]

Finally, in *Stinnes Corp. v. Kerr-McGee Coal Corp.*, the plaintiff was injured in a coal-mining vehicle accident occurring at a mine owned by the third-party defendant.[111] Damaged parts from the vehicle were missing, and the plaintiff alleged, *inter alia*, that defendant gathered, tagged, and segregated the defective vehicle parts.[112] The court held that such allegations properly state a claim that the defendant had assumed a duty by affirmative conduct.[113]

None of the *Boyd*, *Jones* or *Stinnes* courts held that segregating evidence was a necessary requirement to find a party voluntarily assumed a duty by affirmative conduct. When prosecuting a spoliation claim, counsel should be conservative and properly allege that the spoliator did segregate the evidence in some manner.

Duty: The Foreseeability Prong

After one establishes the existence of an agreement, statutory requirement, other special circumstance, or the assumption of the duty by affirmative conduct (the relationship prong), the plaintiff in a spoliation action must also establish 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).[114] Once the court has ruled that the spoliator has a duty to preserve evidence, the foreseeability prong is usually self-evident and thus little case law exists addressing this prong.

In *Stoner v. Wal-Mart Stores, Inc.*, the spoliator lost a surveillance videotape, which recorded the plaintiff's fall. The plaintiff alleged Wal-Mart's employees knew of the videotape, took steps to preserve it,

and knew it contained footage relevant to the plaintiff's fall.[115] The court held that it could not "say that no reasonable person would have foreseen that the videotape would be material to a potential lawsuit."[116]

In analyzing the foreseeability prong, the *Jones* court held that the claims adjustor's job "was to anticipate litigation and evaluate evidence, as he did when he sent his expert…to examine the wheels. [The court] believe[s] that a reasonable claims adjustor in Krone's position would have anticipated the possibility of future litigation in this matter."[117]

The *Stinnes Corp.* court appeared to analyze only the foreseeability prong, [118] which the *Andersen* court noted effectively creates a general duty to preserve evidence but *Boyd* rejected a general duty to preserve evidence under Illinois law.[119]

Under both a Rule 219(c) analysis and a Boyd analysis there can be a pre-suit duty to preserve evidence. The *Boyd* court stated 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."[120] The *Adams* court, indirectly addressing the duration of a pre-suit duty under Rule 219(c), focused on the fact that there were "no 'reasonable measures' that the plaintiff could have, but failed, to undertake to protect this evidence, short of treating the second floor of the house owned by [the landlord] like a crime scene."[121] Finally, in *Andersen,* the spoliator sent a letter to the plaintiff informing him that they intended to place the equipment back in service after the accident, and thereafter the equipment was sold. Regarding the duration of the duty to preserve evidence, the *Andersen* court held:

> 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.[122]

However, the very idea of a pre-suit duty to preserve evidence or an accident scene runs contrary to the public policy rationale, which favors remediation of potential hazardous property. For instance, Illinois and federal court both have rules of evidence that prohibit admission of "subsequent remedial measures" to prove liability because society wants to encourage their remediation.[123] A pre-suit duty to preserve evidence is contrary to the public policy promoted by evidentiary rules against the admission of remediation evidence.

Not only does our legal system favor remediation, which incentivizes spoliation, but one must also consider the property rights of the party that owns or controls the potential evidence. Many clients may have a piece of equipment or real property that if taken off-line while waiting for potential litigation will result in lost revenue for the company. At what point does the company's property rights and potential consequential damages outweigh the duty to preserve evidence, especially if they are a third-party and there is no suit pending? This issue has yet to be answered or addressed in Illinois spoliation cases.

Breach of Duty

When alleging a spoliation of evidence claim, the plaintiff must also plead breach of the duty to preserve evidence.[124] Where the party claiming spoliation 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.[125]

Causation and Proximate Cause

Proving causation, proximate cause, and damages in a spoliation of evidence claim is difficult. One must prove what the evidence would have shown, how the jury would have weighed the lost evidence, and how to calculate the effect of the lost evidence on the outcome of the case, which all involve inordinate speculation.

In *Boyd,* the defendant argued that the plaintiffs cannot properly allege causation because they must first lose their underlying cause of action against the manufacturer of the heating lamp to sustain an actual injury.[126] The *Boyd* court stated that to plead proximate cause, a party claiming spoliation "must allege sufficient facts to support a claim that the loss or destruction of the evidence caused [the spoliation plaintiff] to be unable to prove [or defend] an underlying lawsuit."[127] The spoliation plaintiff need not demonstrate that they would have won the underlying suit, but must demonstrate that, but for the loss or destruction of the evidence, they had a "reasonable probability of succeeding in the underlying suit."[128] As for proper pleading requirements, a spoliation plaintiff cannot simply allege that an important piece of evidence is missing and with it he would have a reasonable probability of winning. However, the spoliation plaintiff does not need to allege the impossible either, *i.e.*, what exactly the piece of evidence would have shown.[129] The *Boyd* court held that the plaintiff sufficiently plead causation because he "alleged that [the insurer] not only lost the heater, but also failed to test it to determine the cause of the explosion and as a result, no expert could testify without doubt as to whether the heater was defective or dangerously designed."[130]

In *Caburnay v. Norwegian Am. Hospital,* a doctor allegedly tripped and fell on a fold or buckle in a mat at a hospital. [131] The hospital was unable to produce the mat because it had been destroyed or lost and was not available for inspection. In *dicta*, the court highlighted that the plaintiff was simply unable to demonstrate "that the loss or destruction of the [mat] caused [him] to be unable to prove an underlying lawsuit" because "[i]f the mat were produced, it would still not be probative of whether or not the condition of the mat…existed at the time of this fall." [132] That is, even if the mat were produced, there would be no way to tell from the mat alone whether a buckle existed at the time of the plaintiff's accident, and thus, the plaintiff could not prove causation in his spoliation claim.

Sometimes a third-party destroys evidence that prevents a defendant from proving an affirmative defense. In *Andersen* the destroyed evidence prevented the defendant from being able to prove an affirmative defense based upon third-party modification or other intervening cause.[133] The *Andersen* court held that when the spoliation plaintiff is the defendant in the underlying lawsuit, he must allege specific facts that, if proven, would show that due to the loss of evidence he will lose the underlying case, and not merely that one specific defense will become unavailable.[134]

Damages

In addition to proving the other three elements of a negligence action (duty, breach, and proximate cause), a spoliation plaintiff must also prove damages.[135] The appropriate measure of damages is difficult to determine in spoliation cases because, without the missing evidence, the likelihood of the plaintiff's prevailing on the merits cannot be precisely determined. The inherent problem with proving damages in spoliation claims is comparable to a legal malpractice suit in which the plaintiff must prove by a preponderance of evidence that but for the attorney's alleged negligence, the client would have obtained a more favorable result in her underlying suit.

A California court pointed out that "[i]t would seem to be sheer guesswork, even presuming that the destroyed evidence went against the spoliator, to calculate what it would have contributed to the plaintiff's

success on the merits of the underlying lawsuit."[136] These damages cannot be proven with the requisite "reasonable certainty" required in negligence cases for two reasons: (1) because the underlying suit has not yet been tried no damage has occurred, and (2) even if the probable result of the underlying case is determined, the monetary amount by which the spoliated evidence would have benefitted the plaintiff is speculative.[137]

However, courts have wrestled with the idea of speculative damages many times before, not just in legal malpractice cases, but also in determining pain and suffering, future wage losses, or consequential damages. Courts have been willing to lower the requisite "standard of certainty" in these cases:

> [w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of damages as a matter of "just and reasonable inference," although the result be only approximate.[138]

Some states solve this problem by defining these speculative damages as an "expectancy", *i.e.*, the value of the opportunity to win a suit.[139] However, the *Boyd* court refused to base damages on a vague concept such as the loss of an expectancy, holding that "[a] threat of future harm, not yet realized, is not actionable."[140] Thus, to prove damages one must: (i) allege that the loss of evidence caused the party to be unable to prove the cause of action and (ii) the underlying cause of action is otherwise valid.[141]

After properly pleading damages, one method for actually calculating damages would be to calculate the amount of damages that would have been obtained in the underlying lawsuit, multiplied by the probability that the plaintiff would have won the suit if he had the benefit of the spoliated evidence.[142] However, this method was both proffered and critiqued in a pre-*Boyd* suit because it is nearly impossible to predict the probability of winning a lawsuit based on evidence that does not exist:

> [I]t is impossible to know what the destroyed evidence would have shown. There are many different ways to prove a claim, and under the best of circumstances it is difficult to predict the likelihood of winning a lawsuit. It would seem to be sheer guesswork, even presuming that the destroyed evidence went against the spoliator, to calculate what it would have contributed to the plaintiff's success on the merits of the underlying lawsuit. Given that plaintiff has lost the lawsuit without the spoliated evidence, it does not follow that he would have won it with the evidence. The lost evidence may have concerned a relevant but relatively trivial matter. If evidence would not have helped to establish plaintiff's case, an award of damages for its destruction would work a windfall for the plaintiff.[143]

No matter what method is used, the end result is the same, *i.e.*, the calculation of damages in a spoliation claim will always be highly speculative. Nonetheless, courts have decided that public policy dictates that the speculative nature of damages in spoliation claims should not be a shield for a spoliator to bar recovery.[144]

Joinder and Res Judicata

The *Boyd* court made clear that cases *may* be tried concurrently, first the underlying case, which would establish if damages have been sustained, and then the spoliation case.[145] This is because the jury would best be able to determine whether the spoliation actually caused the loss of the underlying suit and thus caused the damages.[146] If a plaintiff loses the underlying suit, only the trier of fact who heard the case would know the

real reason why.[147] The *Boyd* court indicated that the claims may be tried together, but did not require litigants to do so, stating, "[w]e therefore encourage plaintiffs and the trial court to employ joinder in this case."[148]

No Evidentiary Presumptions

The *Boyd* court stated that an evidentiary presumption is improper in third-party tort claims for spoliation for two reasons. First, if the plaintiff can prove their underlying lawsuit without the missing evidence, then they have not been injured by the spoliation, and second, if the spoliator can prove that the plaintiffs would have lost their underlying claim even with the missing evidence, then the spoliator has not caused the plaintiffs' injury.[149]

Did the Evidence Ever Exist?

Another issue that may arise in spoliation tort claims is whether the evidence ever existed. In *Ballerini v. Wal-Mart Stores, Inc.*, the plaintiff sued to recover for damages sustained when she tripped and fell over a bag of mulch that was on the floor of the defendant's store. Wal-Mart maintained that it did not input anything into their computers for the occurrence and did not request surveillance footage because the occurrence never rose to the level of being an "accident."[150] Furthermore, the evidence was undisputed that there were no surveillance cameras in the area of the garden center where the fall took place.[151] The *Ballerini* court dismissed the claim holding that it was not reasonably foreseeable that material evidence would be on the video.[152] However, the court probably did not need to reach that level of analysis. If the non-spoliator has absolutely no proof that the evidence ever existed then a claim simply cannot be made. Surely a spoliation plaintiff must come forward with some evidence, direct or circumstantial, that the evidence did in fact exist and was subsequently spoliated before he meets his burden of proof.

Discovery

Every spoliation claim is fact-intensive and defense counsel will need to tailor a discovery strategy accordingly. A brief sample of useful spoliation interrogatories are as follows:

1. Identify each and every document or other piece of tangible evidence relevant to Plaintiff's claims which has been lost, destroyed or cannot be found.
2. Identify the date the document or other piece of tangible evidence was lost or destroyed.
3. Identify whether a copy of such documents were made.
4. Produce any policy or procedure for evidence retention.
5. Was the evidence destroyed consistent with the standard policy of evidence retention?
6. Has the spoliator been found guilty of spoliation or other discovery abuses in other proceedings.[153]

Conclusion

Claims for spoliation of evidence are on the rise, and Illinois courts have now delineated two separate routes possible for a victim of spoliation: (1) a tort claim for spoliation of evidence and (2) sanctions under Rule 219(c).[154] Whether your client is pursuing a claim for spoliation or has potentially spoliated evidence, a thorough understanding of Illinois spoliation law should assist in you in preparing your claim or defense.

(Endnotes)

[1] *Graves v. Daley*, 172 Ill. App. 3d 35, 40, 526 N.E.2d 679 (3rd Dist. 1988)(Justice Heiple dissenting).

[2] *Fire Ins. Exchange v. Zenith Radio Corp.*, 747 P.2d 911 (Nev. 1987).

[3] *Strasser v. Yalamanchi*, 783 So. 2d. 1087 (Fla. Dist. Ct. App. 2001).

[4] Jamie S. Gorelick, et. al., Destruction of Evidence 5.14 at 200-03 (1989)(listing statutes which criminalize the destruction of evidence); *see also* 720 Ill. Comp. Stat. 5/31-4(a)(1993)(criminalizing the destruction of evidence in a pending criminal case).

[5] *Beery v. Breed*, 311 Ill. App. 469, 472-73, 36 N.E.2d 591, 593 (2d Dist. 1941).

[6] *Ralston v. Casanova*, 129 Ill. App. 3d 1050, 473 N.E.2d 444 (1st Dist. 1984).

[7] *Adams v. Bath & Body Works, Inc.*, 358 Ill. App. 3d 387, 394, 830 N.E.2d 645, 653 (1st Dist. 2005)(The *Adams* court made clear that a tort for negligent spoliation of evidence in *Boyd* and dismissal as a sanction under Rule 219 (c) in *Shimanovsky*, are separate and distinct).

[8] *Shimanovsky v. GMC*, 181 Ill. 2d 112, 692 N.E.2d 286 (1998).

[9] *Boyd v. Travelers Ins. Co*., 166 Ill. 2d 188, 652 N.E.2d 267 (1995).

[10] *See* n. 5, supra.

[11] *In re Estate of Soderholm*, 127 Ill. App. 3d 871, 469 N.E.2d 410 (1st Dist. 1984)(holding that default judgment was proper where plaintiff failed to produce evidence which was in its control).

[12] *Shimanovsky*, 181 Ill. 2d at 120, 692 N.E.2d at 289.

[13] *Id*. at 692 N.E.2d at 290.

[14] *Id*.

[15] Testing of the power steering mechanism by the plaintiff's expert took place approximately eight months prior to the filing of the plaintiff's complaint. Therefore, at the time of the destructive testing, there had not been any court orders prohibiting such testing. Nevertheless, some Illinois courts have held that it is unreasonable noncompliance, and thus sanctionable, for a party to fail to produce relevant evidence because it was destroyed prior to the filing of a lawsuit (and thus before a protective order can be entered by the court). *See Shelbyville Mut. Ins. Co. v. Sunbeam Leisure Products Co*., 262 Ill. App. 3d 636, 640-42, 634 N.E.2d 1319, 1322-24 (5th Dist. 1994); *Am. Fam. Ins. Co. v. Vill. Pontiac-GMC*, 223 Ill. App. 3d 624, 626-28, 585 N.E.2d 1115, 1117-19 (2d Dist. 1992); *Graves v. Daley*, 172 Ill. App. 3d 35, 37-39, 526 N.E.2d 679, 680-82 (3d Dist. 1988).

[16] The Court added that if it were unable to sanction a party for the pre-suit destruction of evidence, a potential litigant could circumvent discovery rules or escape liability simply by destroying the proof prior to the filing of a complaint. *See Graves*, 172 Ill. App. 3d at 38-39, 526 N.E.2d at 680-82.

[17] *Shimanovsky*, 181 Ill. 2d at 124, 692 N.E.2d. at 291.

[18] *Id.* at 123, 692 N.E.2d. at 291.

[19] *Buffington v. Yungen*, 322 Ill. App. 3d 152, 154, 748 N.E.2d 844, 846-47 (2d Dist. 2001).

[20] *Shimanovsky*, 181 Ill. 2d at 123, 692 N.E.2d at 291.

[21] *Id*. at 125-26, 692 N.E.2d. at 292.

[22] *Adams*, 358 Ill. App. 3d at 387, 830 N.E.2d 645 (1st Dist. 2005),

[23] *Id.* at 390, 830 N.E.2d at 649.

[24] *Id*. at 390-92, 830 N.E.2d at 650-51.

[25] *Id*. at 395-96, 830 N.E.2d at 654.

[26] *See Farley Metals, Inc. v. Barber Coleman Co.*, 269 Ill. App. 3d 104, 110, 645 N.E.2d 964, 968 (1st Dist. 1994)(affirming trial court's dismissal of plaintiff corporation's complaint, where plaintiff corporation did not intentionally destroy the evidence, but had been on notice that destruction was likely without payment of storage fees); *Stegmiller v. H.P.E., Inc.*, 81 Ill. App. 3d 1144, 401 N.E.2d 1156 (1st Dist. 1980)(affirming trial court's dismissal of complaint against pool company where the subject pool filter was inadvertently lost, holding that there was unreasonable noncompliance with the discovery procedures which warranted dismissal of the complaint).

[27] *Adams*, 358 Ill. App. 3d at 390-92, 830 N.E.2d at 650-51.

[28] *Id*. at 396, 830 N.E.2d at 654.

[29] *Id.*

[30] Though Rule 219(c) includes monetary penalties as one of the discovery sanctions available to an aggrieved litigant, some courts do not view monetary sanctions as an effective deterrent against spoliation of evidence, because the benefit of spoliation material evidence may outweigh the burden of any potential discovery fines. Gorelick, *supra*, n. 4.

[31] *Whittaker v. Stables*, 339 Ill. App. 3d 943, 791 N.E.2d 588 (2d Dist. 2001).

[32] *Kambylis v. Ford Motor Co*., 338 Ill. App. 3d 788, 788 N.E.2d 1 (1st Dist. 2003).

[33] Ill. Sup. Ct. R. 219(c).

[34] *Shimanovsky*, 181 Ill. 2d at 124, 692 N.E.2d at 291.

[35] *Id*. (The defendant filed a Rule 214 request seeking production of any documents pertaining to expert examination of the automobile, but did not seek production of the automobile or any of its components. Furthermore, by the time the defendant filed a motion to compel production of the parts, five and a half years had elapsed since commencement of the lawsuit).

[36] *Id.*

[37] *Id*. at 125, 692 N.E.2d at 292.

[38] *Id*. at 126, 692 N.E.2d at 292.

[39] *Id.* at 119, 692 N.E.2d at 289.

[40] *Id*. In remanding the case, the court highlighted the following facts: (1) the plaintiffs did not destroy or dispose of the entire product; (2) the power-steering component still existed in such a condition that the defendant's experts were able to form their opinions as to lack of defect; (3) the defendant had access to all the same information, reports, and photographs upon which the plaintiffs' expert relied; and (4) the defendant possessed all the information regarding the original design and production of the power-steering mechanism.

[41] *Ralston v. Casanova*, 129 Ill. App. 3d 1050, 1053, 473 N.E.2d 444, 447 (1st Dist. 1984).

[42] *Ralston*, 129 Ill. App. 3d at 1053-54(the testing "thoroughly and permanently compromised" the validity, credibility and possibility of accuracy of any future test on the seat belt.)

[43] *Id.* at 1055, 473 N.E. 2d at 448.

[44] *Id.*

[45] *Id.*

[46] *Id*. at 1060, 473 N.E. 2d at 451.

[47] *Graves*, 172 Ill. App. 3d at 36, 526 N.E.2d 679, 680 (3d Dist. 1988).

[48] *Id.*

[49] *Id.*

[50] *Id.* at 37.

[51] *Id*. at 39. The appellate court emphasized that the insurance company was a real party in interest in this case and instructed the plaintiffs to dispose of the furnace. Therefore, the plaintiffs willingly caused the furnace to be destroyed.

[52] *Kambylis*, 338 Ill. App. 3d at 799, 788 N.E.2d 1.

[53] *Adams*, 358 Ill. App. 3d at 393, 830 N.E.2d at 652.

[54] *Id.* at 394, 830 N.E.2d at 653.

[55] Illinois Pattern Jury Instruction No. 5.01.

[56] *Coupon Redemption, Inc. v. Ramadan*, 164 Ill. App. 3d 749, 755, 518 N.E.2d 285, 290 (1st Dist. 1987); *Haynes v. Coca-Cola Bottling Co*., 39 Ill. App. 3d 39, 46, 350 N.E.2d 20, 26 (1st Dist. 1976); *Berlinger's, Inc. v. Beef's Finest, Inc*., 57 Ill. App. 3d 319, 325, 372 N.E.2d 1043, 1048 (1st Dist. 1978)(adverse presumption arising from non-production of available evidence depends on lack of reasonable excuse for such non-production.)

[57] *Ivey v. Loyola Hosp*., 1-95-1657, Rule 23 Order (Ill. App. Ct. 1997).

[58] *R.J. Mgmt. Co. v. SRLB Dev. Corp.*, 346 Ill. App. 3d 957, 965, 806 N.E.2d 1074 (2d Dist. 2004).

[59] *R.J. Mgmt. Co.*, 346 Ill. App. 3d at 959, 806 N.E.2d at 1077.

[60] *Id.* at 966, 806 N.E.2d at 1082.

[61] *Id.* at 969, 806 N.E.2d at 1084.

[62] *Haynes*, 39 Ill. App. 3d at 46, 350 N.E.2d at 26.

[63] *Id.*

[64] *Id*.

[65] *Coupon Redemption*, 164 Ill. App. 3d at 756, 518 N.E.2d at 290-91

[66] *Id*. The plaintiff's chargeback sheets were to be viewed with distrust, as weaker and less satisfactory evidence than the original rejection notices, which the plaintiff did not produce, allegedly due to the short trial date. However, they were not to be completely disregarded by the trial court.

[67] *Shimanovsky*, 181 Ill. 2d at 121, 692 N.E.2d at 290.

[68] *Stringer v. Packaging Corp. of America*, 351 Ill. App. 3d 1135, 1139-40, 815 N.E.2d 476, 480 (4th Dist. 2004).

[69] *Stringer*, 351 Ill. App. 3d at 1137, 815 N.E.2d at 478.

[70] *Id.*

[71] *Id*. at 1139-40, 815 N.E.2d at 480.

[72] *Adams*, 358 Ill. App. 3d at 387, 830 N.E.2d at 645 (2005).

[73] *Stringer*, 351 Ill. App. 3d at 1139-40, 815 N.E.2d at 480.

[74] The language of the *Boyd* court is vague as to whether the creation of a separate spoliation tort was definitely rejected but other courts have seemed to follow that holding. *Boyd*, 166 Ill. 2d at 193-94.

[75] Some states allow for negligent spoliation claims, intentional spoliation claims, or both. *See generally Continental Insurance Co. v. Herman*, 576 So. 2d 313, 315 (Fla. App. 1990); *Miller v. Allstate Insurance Co.*, 573 So. 2d 24 (Fla. App. 1990)*; Velasco v. Commercial Building Maintenance Co.*, 169 Cal. App. 3d 874, 215 Cal. Rptr. 504 (1985); *Hazen v. Municipality of Anchorage*,

718 P.2d 456 (Alaska 1986)*; Smith v. Howard Johnson Co.*, 67 Ohio St. 3d 28, 615 N.E.2d 1037 (1993); *Smith v. Superior Court*, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984); *La Raia v. Superior Court*, 150 Ariz. 118,722 P.2d 286 (1986); *Murphy v. Target Products*, 580 N.E.2d 687 (Ind. App. 1991); *Koplin v. Rosel Well Perforators, Inc.* 241 Kan. 206, 734 P.2d 1177 (1987); *Panich v. Iron Wood Products Corp.*, 179 Mich. App. 136, 445 N.W.2d 795 (1989); *Federated Mutual Insurance Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434 (Minn. 1990).

[76] *Boyd*, 166 Ill. 2d at 193, 652 N.E. 2d 267, 270 (1995).

[77] *Id.* at 194-95, 652 N.E.2d at 270.

[78] Potential litigants do however have a duty to preserve evidence under Rule 219(c).

[79] The *Boyd* court specifically separated a "special circumstance" from an "assumed duty by affirmative conduct" stating, "a duty to preserve evidence may arise through an agreement, a contract, a statute [citation] or another special circumstance. Moreover, a defendant may volun-tarily assume a duty by affirmative conduct. *Boyd*, 166 Ill. 2d at 195, 652 N.E. 2d at 270.

[80] *Id.*

[81] *Dardeen v. Kuehling*, 213 Ill. 2d 329, 332, 821 N.E.2d 227, 228-29 (2004).

[82] *Dardeen*, 213 Ill. 2d at 331, 821 N.E.2d at 228.

[83] *Id.* at 331, 821 N.E.2d at 228.

[84] *Id.* at 336-37, 821 N.E.2d at 231.

[85] *Id.*

[86] *Id.* at 337, 821 N.E.2d at 231.

[87] *Rodgers v. St. Mary's Hosp.*, 149 Ill. 2d 302, 308, 597 N.E.2d 616, 619 (1992).

[88] *Boyd*, 166 Ill. 2d at 195, 652 N.E. 2d at 271.

[89] *Andersen v. Mack Trucks, Inc.*, 341 Ill. App. 3d 212, 215, 793 N.E.2d 962, 966 (2d Dist. 2003).

[90] *Dardeen*, 213 Ill. 2d at 331, 821 N.E.2d at 228.

[91] *Jones v. O'Brien Tire & Battery Serv. Ctr.*, 374 Ill. App. 3d 918, 927, 871 N.E.2d 98, 107 (5th Dist. 2007)(citing *Dardeen*, 213 Ill. 2d at 337, 821 N.E.2d at 231).

[92] *Dardeen*, 213 Ill. 2d at 339, 821 N.E.2d at 233.

[93] *Id.* at 339. The *Dardeen* court also underscored that they would not decide whether possession is required in every negligent spoliation case.

[94] *Jones*, 374 Ill. App. 3d at 927, 871 N.E.2d at 107.

[95] *Andersen*, 341 Ill. App. 3d at 217-18, 793 N.E.2d at 969.

[96] *Id.*

[97] *Boyd*, 166 Ill. 2d at 191, 652 N.E.2d at 269.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 195, 652 N.E.2d at 270-71.

[101] *Id.* at 194, 652 N.E.2d at 270.

[102] *Jones*, 374 Ill. App. 3d at 927, 871 N.E.2d at 107.

[103] *Id.* at 922, 871 N.E.2d at 103.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 923, 871 N.E.2d at 103.

[107] *Id*. at 927, 871 N.E.2d at 107.

[108] *Id.* at 926, 871 N.E.2d at 106.

[109] *Id.* at 927, 871 N.E.2d at 107, quoting Black's Law Dictionary 329 (6th ed. 1990).

[110] *Id.*

[111] *Stinnes Corp. v. Kerr-McGee Coal Corp.,* 309 Ill. App. 3d 707, 710, 722 N.E.2d 1167 (1999).

[112] *Stinnes Corp.,*309 Ill. App. 3d at 714, 722 N.E.2d at 1174.

[113] *Id.*

[114] *Boyd,* 166 Ill. 2d at 195, 652 N.E.2d at 270-71.

[115] *Stoner v. Wal-Mart Stores, Inc.*, No. 06-4053, 2008 U.S. Dist. LEXIS 73617, at *7 (C.D. Ill. August 18, 2008).

[116] *Stoner,* 2008 U.S. Dist. LEXIS 73617, at *7.

[117] *Jones,* 374 Ill. App. 3d at 928, 871 N.E.2d at 108.

[118] *Stinnes Corp.,* 309 Ill. App. 3d at 715. *Boyd* specifically states, "A defendant owes a duty of 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." [citation omitted].

[119] *Andersen,* 341 Ill. App. 3d at 216, 793 N.E.2d at 967.

[120] *Boyd,* 166 Ill. 2d at 193, 652 N.E.2d at 270.

[121] *Adams,* 358 Ill. App. 3d at 389, 830 N.E.2d at 647.

[122] *Andersen,* 341 Ill. App. 3d at 218, 793 N.E.2d at 969.

[123] Fed. Rule of Evid. 407; *See also Dardeen,* 213 Ill. 2d at 339, 821 N.E.2d at 233 (the spoliator's actions are consistent with long-standing Illinois public policy).

[124] *Boyd,* 166 Ill. 2d at 194-95, 652 N.E.2d at 270.

[125] *See Jackson,* 294 Ill. App. 3d at 13, 689 N.E.2d at 213.

[126] *Boyd,* 166 Ill. 2d at 195-96, 652 N.E.2d at 272, citing *Federated Mutual Insurance Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434 (Minn.1990); *Petrik v. Monarch Printing Corp.*,150 Ill. App. 3d 248, 501 N.E.2d 1312 (1986); *Fox v. Cohen*, 84 Ill. App. 3d 744, 406 N.E.2d 178 (1980).

[127] *Boyd,* 166 Ill. 2d at 196, 652 N.E.2d at 271.

[128] *Id.* at 196, 652 N.E.2d at 271.

[129] *Id.*

[130] *Id.* at 197, 652 N.E.2d at 272. *See also Jackson,* 294 Ill. App. 3d at 15, 689 N.E.2d at 215 (the court required the plaintiffs to plead how the loss of x-rays specifically prevented them from obtaining a certificate of merit for their malpractice claim); *Thornton v. Shah,* 333 Ill. App. 3d 1011, 1020-21, 777 N.E.2d 396 (2002)(the court required a specific explanation of how missing phone records prevented the plaintiff from proving the defendant's medical negligence.)

[131] *Caburnay v. Norwegian Am. Hosptial,* 963 N.E.2d 1021, 1034, 2011 Ill. App. LEXIS 1297 (1st Dist 2011).

[132] *Caburnay,* 963 N.E.2d at 1035, 2011 Ill. App. LEXIS 1297.

[133] *Andersen*, 341 Ill. App. 3d at 218, 793 N.E.2d at 969.

[134] *Id.*

[135] *Boyd* , 166 Ill. 2d at 194-95, 652 N.E.2d at 270.

[136] *Smith v. Superior Court*, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984).

[137] *Smith*, 151 Cal. App. 3d at 491.

[138] *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 262, 66 S. Ct. 574 (1946)(The United States Supreme Court stated that when a defendant's tortious conduct precludes precise calculation of the amount of damages, "the jury may make a just and reasonable estimate of damage based on relevant data...Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean the more grievous the wrong done, the less likelihood there would be of a recovery…The most elementary conceptions of justice and public policy require the wrongdoer shall bear the risk of the uncertainty which his own wrong has created).

[139] *Smith*, 151 Cal. App. 3d 491.

[140] *Boyd*, 166 Ill. 2d at 197, 652 N.E.2d at 272.

[141] *Id.*

[142] *Petrik v. Monarch Printing Corp.*, 150 Ill. App. 3d 248, 260-61,501 N.E.2d 1312, 1320 (1st Dist. 1986); *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 853 (D.C. 1998).

[143] *Petrik*, 150 Ill. App. 3d at 260-61, 501 N.E.2d at 1320.

[144] *Smith*, 151 Cal. App. 3d at 503.

[145] *Boyd*, 166 Ill. 2d at 198-99, 652 N.E.2d at 272.

[146] *Id.* at 198, 652 N.E.2d at 272.

[147] *Id.*

[148] *Boyd*, 166 Ill. 2d at 198-99, 652 N.E.2d at 272.

[149] *Id*. at 200, 652 N.E.2d at 273.

[150] *Ballerini v. Wal-Mart Stores, Inc.* No. 09-L-107, 2012 Ill. App. Unpub. LEXIS 1056, at *7, 2012 (3rd Dist., May 8, 2012).

[151] *Ballerini.* 2012 Ill. App. Unpub. LEXIS 1056, at *8.

[152] *Id.* at *7.

[153] Michael F. Pezzulli, Charles Fortunato, *Presenting and Defending a Spoliation of Evidence Case,* http://www.courtroom.com/spoliation.pdf (last visited Sept. 10, 2012)

[154] *Adams*, 358 Ill. App. 3d at 393.

About the Authors

William Seth Howard is an associate at *O'Hagan Spencer LLC* where his practice focuses on product liability, professional liability, employment and commercial litigation. He received a J.D. from Loyola University Chicago School of Law in 2007 and received an M.A. in Philosophy and a B.S. in Cell Biology from the University of Illinois in Champaign-Urbana.

Courtney S. Karamanol is an associate at *O'Hagan Spencer LLC* where she focuses her practice on premises and products liability litigation. She received her J.D. from Loyola University Chicago School of Law in 2010 and received a B.A. in Political Science and Economics from Fordham University in 2007.

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Illinois Association of Defense Trial Counsel, PO Box 3144, Springfield, IL 62708-3144, 217-585-0991, idc@iadtc.org