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ILLINOIS

SPOLIATION

1. Elements/definition of spoliation: Is it an "intentional or fraudulent" threshold or can it be negligent destruction of evidence.

Illinois law does not recognize a separate and independent tort for spoliation of evidence. *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 652 N.E. 2d 267 (1995); *Dardeen v. Kuehling*, 213 Ill. 2d 329, 821 N.E. 2d 227 (2004) In *Boyd*, the seminal Illinois Supreme Court decision addressing spoliation of evidence, the court recognized that a claim for negligent spoliation of evidence could be brought under existing negligence principles. *Boyd*, 166 Ill. 2d at 192-93, 652 N.E. 2d at 270. Subsequent Illinois decisions have declined to extend Boyd to allow claims for intentional or fraudulent spoliation of evidence. *Boyd*, *supra*.; *Dardeen, supra*.; *Cangemi v. Advocate South Hosp.*, 364 Ill. App. 3d 446, 845 N.E. 2d 792 (2006); *Orr v. Knapheide Mfg. Co.*, 2010 U.S. Dist. LEXIS 125348 (2010)

A plaintiff claiming spoliation of evidence must prove that: (1) the defendant owed the plaintiff a duty to preserve the evidence; (2) the defendant breached that duty by losing or destroying the evidence; (3) the loss or destruction of the evidence was the proximate cause of the plaintiff's inability to prove an underlying lawsuit; and (4) as a result, the plaintiff suffered actual damages. *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 26, 979 N.E.2d 22, 27; *Dardeen,* 213 Ill.2d at 336, 821 N.E.2d at 227; *Boyd*, 166 Ill.2d at 194, 196, 652 N.E.2d 267; *Anderson v. Mack Truck, Inc.,* 341 Ill. App. 3d 212, 793 N.E. 2d 962 (2003)

In deciding the sufficiency of a claim for negligent spoliation of evidence, Illinois courts look most critically at the duty and causation elements.

- Duty

In Illinois, the general rule is that there is no duty to preserve evidence. *Martin v. Keeley & Sons, Inc.,* 2012 IL 113270, ¶ 27, 979 N.E.2d at 28*; Boyd,* 166 Ill.2d at 195, 652 N.E.2d 267. A duty to preserve evidence, however, may arise through an agreement, a contract, a statute, or another "special circumstance". Additionally, a defendant may voluntarily assume a duty to preserve evidence by affirmative conduct. *Boyd*, 116 Ill. 2d at 195, 652 N.E. 2d at 270; *Darden*, 213 Ill. 3d at 335, 821 N.E. 2d at 231 Under any of the foregoing instances, a defendant owes a duty of due care to preserve evidence "if a reasonable person in defendant's position should have foreseen that the evidence was material to a potential civil action." *Boyd, Id*. In *Dardeen*, the Illinois Supreme Court articulated a two-prong test for determining whether a pleading sufficiently alleges a duty to preserve evidence. The first prong addresses whether the party claiming spoliation alleges sufficient facts establishing a duty to preserve evidence through an agreement, a contract, a statute, "special circumstances", or a voluntary undertaking (the "relationship prong"). If the "relationship prong" is satisfied, the second prong analyzes whether

the duty to preserve extends to the evidence at issue, i.e., if a reasonable person in defendant's position should have foreseen the evidence as material to a potential civil suit (the "foreseeability prong"). If the party claiming spoliation fails to satisfy both prongs, there is no duty to preserve the evidence at issue. *Martin v. Keeley & Sons, Inc.,* 2012 IL 113270, ¶ 27, 979 N.E.2d at 28; *Boyd, Id*.; *Dardeen*, 213 Ill. 2d at 336, 821 N.E. 2d at 221.

A mere request that a party preserve evidence is generally insufficient to impose a duty absent some further special relationship as set forth in *Boyd. Andersen*, 341 Ill. App. 3d at 217-18, 793 N.E. 2d at 969 For a duty based on an agreement or contract, the agreement or contract must be between the parties to the spoliation claim. *Dardeen*, 213 Ill. 2d at 336-37, 821 N.E. 2d at 231 A statute may create a duty to preserve evidence. *Rodgers v. St. Mary's Hosp.,* 149 Ill. 2d 302, 597 N.E. 2d 616 (1992) Further, a duty to retain the evidence beyond the statutory period may arise upon notice from an attorney of potential litigation or by affirmative conduct establishing a voluntary assumption of the duty to preserve. *Jackson v. Michael Reese Hosp. & Med. Ctr.,* 294 Ill. App. 3d 1, 689 N.E. 2d 205 (1997); *Stinnes Corporation v. Kerr-McGee Coal Corporation*, 309 Ill. App. 707, 779 N.E. 2d 1167 (1999) To establish a duty to preserve evidence based upon a voluntary assumption, the party claiming spoliation must allege facts describing the affirmative conduct. *Jackson*, 294 Ill. App. 3d at 11, 689 N.E. 2d at 212. A voluntary undertaking requires a showing of affirmative conduct by the defendant evincing defendant's intent to voluntarily assume a duty to preserve evidence. *Martin,* 2012 IL 113270 at 31, 979 N.E.2d at 28; *Boyd,* 166 Ill.2d at 195, 652 N.E.2d 267 (citing *Nelson v. Union Wire Rope Corp.,* 31 Ill.2d 69, 74, 199 N.E.2d 769 (1964)). In *Martin*, the Supreme Court found defendant did not voluntarily undertake a duty to preserve a steel I-beam for the purpose of potential future litigation. The Court and reasoned that even if the defendant "preserved" the evidence for its own investigative purposes, since defendant never performed any testing of the subject steel beam or moved the beam from the place where it fell, plaintiffs must demonstrate affirmative conduct by defendant showing its intent to voluntarily undertake a duty to the plaintiffs. *Martin, Id.*

Illinois courts had not precisely defined a "special circumstance" in the context of recognizing a duty in a spoliation of evidence claim. However, in *Miller v. Gupta,* 174 Ill.2d 120, 220 Ill.Dec. 217, 672 N.E.2d 1229 (1996), the Supreme Court hinted at what special circumstances might give rise to a duty to preserve evidence. *Martin*, 2012 IL 113270, ¶¶ 39-42, 979 N.E.2d at 30–31; *Dardeen,* 213 Ill.2d at 338, 821 N.E.2d 227. In *Miller*, the Court made special mention of evidence in the record that might constitute "special circumstances" supporting a duty by the defendant upon repleading of the complaint: (1) the plaintiff's medical malpractice attorney requested the plaintiff's X rays from her doctor; (2) in response to the request, the doctor obtained the X rays and placed them on the floor in his office prior to taking them to the hospital for copying; (3) the doctor admitted that his wastebasket was located three feet from where he placed the X rays; (4) a housekeeper who was assigned to clean the doctor's office testified that she regularly disposed of X ray jackets located in or near the trash; and (5) the housekeeper stated her belief that the plaintiff's X rays were thrown out when she cleaned the office and were later destroyed in the hospital's incinerator. Miller*,* 174 Ill.2d at 123–24, 129, 672 N.E.2d 1229; *compare* to *Dardeen,* 213 Ill.2d 329, 821 N.E.2d 227 (plaintiff never contacted the defendant to ask it to preserve evidence, Plaintiff never requested evidence from State Farm, and he never requested that State Farm preserve the sidewalk or even document its condition, though Plaintiff visited the accident site hours after he was injured, he did not photograph the sidewalk, State Farm never possessed the evidence at issue and, thus, never segregated it for the plaintiff's benefit). *Id.* at 338, 821 N.E.2d 227.

Relying on the "special circumstances" exception discussed in *Miller* and *Dardeen,* the Court in Martin found defendant did not have a duty to preserve the beam under. The Court held that a defendant's possession and control of evidence, in itself, is sufficient to establish the relationship prong of the Boyd test. Martin, 2012 IL 113270 at ¶¶ 44-46, 979 N.E.2d at 31–32. *Dardeen,* 213 Ill.2d at 339, 290 Ill.Dec. 176, 821 N.E.2d 227. The Court indicated that a request by the plaintiff to preserve the evidence and/or the defendant's segregation of the evidence for the plaintiff's benefit could be sufficient to establish the "special circumstances" exception,

but found that no such request or segregation existed in Martin. *Martin, Id*. The Court in Martin also held that defendant's status as plaintiff's employer did not establish a duty owed to Plaintiff to preserve the beam, finding no Illinois case that has held that an employer-employee relationship is sufficient to establish a duty to preserve evidence. *Martin, Id*.

Although a protective order or other judicial order clearly creates a duty to preserve evidence, the Illinois Supreme Court has held that a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence prior to the filing of a lawsuit or entry of a protective order. *Shimanovsky v. General Motors Corp.,* 181 Ill. 2d 112, 121, 692 N.E .2d 286, 289-90 (1998) The Illinois Supreme Court in *Dardeen* distinguished its holding in *Boyd* that " the general rule is that there is no duty to preserve evidence" with its holding in *Shimanovsky* that "a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant, material evidence" on the basis that the issue in *Shimanovsky* concerned whether the complaint could be dismissed as a discovery sanction whereas *Boyd* considered the sufficiency of a claim for negligent spoliation of evidence. *Dardeen*, 213 Ill. 2d at 339-340, 821 N.E. 2d at 233 Illinois courts apparently view a claim for negligent spoliation of evidence and a dismissal or other sanction under Illinois Supreme Court Rule 219(c) as separate and distinct. *Adams v. Bath And Body Works, Inc.,* 358 Ill. App. 3d 387,393, 830 N.E. 2d 645, 654 (2005). This was analyzed and clarified in *Martin*. "Spoliation of evidence, as a cause of action intended to impose liability for a defendant's loss or destruction of evidence, was not at issue in *Shimanovsky." Martin*, 2012 IL 113270 at ¶¶ 50-51, 979 N.E.2d at 32; *See, Shimanovsky v. General Motors Corp.,* 181 Ill.2d 112, 229 Ill.Dec. 513, 692 N.E.2d 286 (1998). Rather, in that case, the defendant moved for discovery sanctions against the plaintiffs for altering a key piece of evidence prior to filing suit. *Id.* at 115, 692 N.E.2d 286. This court held that discovery sanctions against the plaintiff were not an abuse of the trial court's discretion, because "a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence." *Id.* at 121, 229 Ill.Dec. 513, 692 N.E.2d 286. In rejecting Plaintiffs' argument that the reasoning in *Shimanovsky* is applicable to a claim for negligent spoliation of evidence, the Supreme Court noted it had also previously considered, and rejected, the same argument in Dardeen. *Martin v. Keeley & Sons, Inc.,* 2012 IL 113270 at ¶¶ 50-51, 979 N.E.2d at 32. The issues, policies and test applied by the Supreme Court in *Shimanovsky* were entirely different from those *Dardeen* and *Martin* and were not relevant to spoliation. *Martin, Id*. (reiterating that the standards for stating a claim for spoliation of evidence have been set forth in *Boyd). Martin, Id.*

Whether a duty to preserve evidence is found to exist through an agreement, a contract, a statute, a "special circumstance, or by voluntary assumption, the duty is imposed by operation of law. A party does not waive a spoliation claim in failing to respond to a request to examine the evidence. *Brobbey v. Enterprise Leasing Co.*, 404 Ill App. 3d 420, 434, 922 N.E. 2d 1084, 1096 (2010) There appears to be no duty, however, if a party or the party's representatives examine the evidence and fail to request that the evidence be further preserved. *Burlington N. & Santa Fe Ry. Co.,* 389 Ill. App. 3d 961, 906 N.E. 2d 83 (2009)

- Breach Of Duty

The breach of a duty to preserve evidence occurs upon the loss, destruction, alteration or non-preservation of the subject evidence. Alleging a failure to take reasonable steps to guard against or otherwise protect the lost or destroyed evidence evidence is sufficient to plead the breach of the duty. *Jackson*, 294 Ill. App. 3d at 13, 689 N.E. 2d at 210 Illinois further recognizes that preserving some evidence without preserving all relevant evidence which could possibly explain other potential causes of the occurrence constitutes a breach of duty by the party with the opportunity to preserve the evidence. *American Family Insurance Co. v. Village Pontiac GMC, Inc.,* 223 Ill. App 3d 624, 585 N.E. 2d 1115 (1992); *Shelbyville Mutual ins. Co. v. Sunbeam Leisure Products Co.,* 262 Ill. App. 3d 636, 634 N.E. 2d 1319 (1994)

- Causation

In negligence spoliation of evidence claims, a party must allege sufficient facts to support a claim that the loss or destruction of the evidence *caused the party to be unable to prove* the underlying lawsuit. A 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 lawsuit. A defendant may be held liable in a negligent spoliation action only if its loss or destruction of the evidence caused plaintiff to be unable to prove the underlying lawsuit. *Boyd*, 116 Ill. 2d at 198, 652 N. E. 2d at 272 If the plaintiff could not prevail in the underlying lawsuit even with the lost or destroyed evidence, then defendant's conduct is not the cause of the loss of the lawsuit. *Boyd*, 166 Ill. 2d at 196, 652 N.E. 2d at 271; *Andersen*, 341 Ill. App. 3d at 218, 793 N.E. 2d at 969 A party must allege a nexus between the lost or destroyed evidence and the loss of its claim or defense. *Andersen*, 341 Ill. App. 3d at 218-19, 793 N.E. 2d at 969; *Jackson*, 294 Ill. App. 3d at 15, 689 N.E. 2d at 214; *Thornton v. Shah*, 333 Ill. App. 3d 1011, 1020-21, 777 N.E. 2d 396 (2002); *Midwest Trust Services, Inc. v. Catholic Health Partners Services*, 392 Ill. App. 3d 204210, 910, N.E. 2d 638, 643 (2009) Further, a claim for negligent spoliation of evidence may be tried concurrently with the underlying lawsuit before a single jury. *Boyd,* 166 Ill. 2d at 196, 652 N.E. 2d at 271

- Damages

A negligent spoliation of evidence claim requires that actual damages be plead. The threat of future harm, not yet realized, is not actionable. *Boyd*, 116 Ill. 2d at 197, 652 N.E. 2d at 272 Allegations of how the party was damaged by the loss or destruction of the evidence is required. *Jackson*, 294 Ill. App. 3d at 17, 689 N.E. 2d at 216 In *Boyd*, the plaintiff sufficiently alleged actual damages by alleging serious personal injuries from a heater explosion, the proper elements of a product liability action, the loss of the heater by the defendant's insurer, and a nexus between the plaintiff's inability to prove the underlying action and the loss of the heater. *Boyd, supra*; *Jones v. O'Brien Tire & Battery Service Ctr.*, 322 Ill. App. 3d 418, 424, 752 N.E. 2d 8, 14 (2001).

2. Distinction between first party and third-party spoliation.

Illinois does not recognize a distinction between first party and third party spoliation. Where another party has destroyed or altered evidence, that party may be joined as a direct defendant or a third-party defendant in a claim for negligent spoliation of evidence. *Boyd,supra*.; *Jones v. O'Brien Tire & Battery Service Ctr.*, 374 Ill. App. 3d 918, 871 N.E. 2d 98 (2007) Illinois courts have declined to address whether actual possession is required to impose a duty to preserve the evidence. *Dardeen*, 213 Ill. 2d at 339, 821 N.E. 2d at 233. When the third party is not in possession, the duty element is satisfied by alleging facts of affirmative conduct establishing a voluntary assumption of the duty to preserve. *Jones*, 374 Ill. App. 3d at 927, 871 N.E. 2d at 107-08 The causation requirement for third-party complaints alleging negligent spoliation of evidence is generally satisfied by alleging that the destroyed or altered evidence impaired the direct defendant's ability to defend itself. *Jones*, 322 Ill. App. 3d at 423-24, 752 N.E. 2d at 12.

3. Whether there is a separate cause of action for a spoliation claim.

Illinois law does not recognize a separate, independent tort for spoliation of evidence. *Boyd*, 166 Ill. 2d at 192-93, 652 N.E. 2d at 269-270; *Andersen*, 341 Ill. App. 3d at 215, 793 N.E. 2d at 965; *Dardeen*, 213 Ill. 2d at 335-36, 821 N.E. 2d at 231. Spoliation of evidence does not provide an independent basis for a tort claim, but relief is available if a claim can be stated under ordinary negligence law. *Martin*, 2012 IL 113270 at ¶ 25, 979 N.E.2d at 27; *Andersen, Id.*

4. Remedies when spoliation occurs:

Illinois law provides two remedies for a party claiming spoliation. A party may (1) bring a claim for negligent spoliation of evidence (see above), or (2) seek sanctions, including dismissal of the complaint or a defense, under Illinois Supreme Court Rule 219(c). *Boyd, Id*.; *Shimanovsky, Id*.; *Adams*, 358 Ill. App. 3d at 393-94, 830

N.E. 2d at 652 A party is not automatically entitled to a specific sanction because evidence is destroyed or altered. Illinois Supreme Court Rule 219(c) grants the court discretion to impose a sanction for discovery violations (failure to produce requested evidence) or violations of court orders. The court must consider the unique situation of each case and apply the appropriate criteria to the facts to determine what particular sanction, if any, should be imposed. *Shimanovsky*, 181 Ill. 2d at 127, 692 N.E. 2d at 292-93.

The factors considered in determining the appropriate sanction are: (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. *Shimanovsky*, 181 Ill. 2d at 124, 692 N.E. 2d at 291 The mode of relief most appropriate depends on the party's culpability in altering or destroying the evidence and the prejudicial effect on the party claiming spoliation. *Farley Metals, Inc. v. Barber Colman Co.,* 269 Ill. App. 3d 104, 645 N.E. 2d 964 (1995); *Shimanovsky*, 181 Ill. 2d at 123, 692 N.E. 2d at 291; Adams, 358 Ill. App. 3d at 394, 830 N.E. 2d at 652.

- Negative inference instruction

Illinois has approved the use of Illinois Pattern Jury Instruction 5.01 (I.P.I., Civil, 5.01) against a party failing to produce evidence through loss, alteration or destruction. I.P.I. 5.01 allows a jury to draw an adverse inference from a party's failure to produce evidence if the moving party produces foundational evidence of each of the following: (1) the evidence was under the control of the opposing party and could have been produced through the exercise of reasonable diligence; (2) the evidence was not equally available to each party; (3) a reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed the evidence to be in his favor; and (4) no reasonable excuse for the failure to produce has been shown. *Roeseke v.Pryor*, 152 Ill. App. 3d 771,780-81, 504 N.E. 2d 927, 933 (1987); *Uhr v. Lutheran General Hospital*, 226 Ill. App. 3d 236, 261-62, 589 N.E. 2d 723, 742 (1992); *Graves v. Rosewood Care Center, Inc.,* 968 N.E. 2d 103, 113, 2012 Ill. App. LEXIS 255, 24 (2012) The issuance of a 5.01 instruction rests within the court's discretion and is subject to reversal only on a clear abuse of discretion. *Roeske*, 152 Ill. App. 3d at 780, 504 N.E. 2d at 933; *Graves*,968 N.E. 103 at 113, 2012 Ill. App. LEXIS 255 at 24. The instruction is not warranted if the lost or destroyed evidence is merely cumulative of the facts and circumstances established. *Hawkes v. Casino Queen, Inc.*, 336 Ill. App. 3d 994,1009, 785 N.E. 2d 507, 519 (2003).

- Dismissal

Dismissal of a claim, defense or affirmative defense as a sanction under Illinois Supreme Court Rule 219(c) is not dependent on the entry of a protective order. *Shimanovsky*,181 Ill. 2d at 120-21, 692 N.E. 2d at 289-90; *American Family*, supra. A potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant, material evidence even prior to the filing of a lawsuit or entry of a protective order. *Adams,* 358 Ill. App. 3d at 395, 830 N.E. 2d at 652-53 Dismissal as a sanction requires conduct which shows a deliberate, contumacious or unwarranted disregard of the court's authority. *Shimanovsky*, 181 Ill. 2d at 123, 692 N.E. 2d at 291; Adams, 358 Ill. App. 3d at 394, 830 N.E. 2d at 652; *Morrocco v. General Motors Corp.,* 966 F. 2d 220 (7th Cir. 1992) (dismissing complaint for contumacious destruction of a wheel assembly in violation of a protective order) For negligent or inadvertent destruction or alteration of evidence, a party can seek redress by asserting a claim for negligent spoliation of evidence (see above). *Adams*, 358 Ill. App. 3d at 394, 830 N.E. 2d at 653 *But see*, *Farley*, 269 Ill. App. 3d 104 at 110, 645 N.E. 2d at 968 (dismissing complaint and holding 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"); *Jones v. Goodyear Tire & Rubber Co.,* 966 F. 2d 220 (7th Cir. 1992) (granting a directed verdict in favor of plaintiff for inadvertent loss of tire parts in holding that sanctions are not limited to willful non-compliance).

- Criminal sanctions

Illinois does not provide for criminal sanctions as it does not recognize intentional or fraudulent spoliation of evidence.

- Other sanctions

Absent dismissal, Illinois Supreme Court Rule 219(c) allows courts to fashion a myriad of sanctions. Available sanctions include: barring the filing of a particular claim, counterclaim, third-party complaint, defense or affirmative defense; barring a witness from testifying; barring expert opinion testimony or reports; precluding additional testing; and, barring other testimony or evidence based on or relating to the spoiled evidence. A court may additionally order payment of reasonable expenses, including attorney's fees, incurred as a result of the misconducted associated with the spoliation as well as a monetary fine if the conduct is willful. Illinois Supreme Court Rule 219(c); *American Family, supra*.; *Argueta v. Baltimore * O.C.T.R.R.*, 224 Ill. App. 3d 11, 586 N.E. 2d 386 (1992).

5. Spoliation of electronic evidence and duty to preserve electronic information.

The analysis is the same for physical evidence and electronic evidence.

6. Retention of surveillance video.

There exists no statutory duty to retain or preserve surveillance video under Illinois law. Although no independent duty to preserve surveillance video is recognized, a possessor of video footage may create a duty under the *Martin* and *Boyd* scenarios to preserve the video. Absent a statutory duty, Illinois courts will analyze whether a duty exists through an agreement, a contract, a "special circumstance" or by voluntary assumption of a duty to preserve. *Boyd*, 116 Ill. 2d at 195, 652 N.E. 2d at 270 Under any of the foregoing circumstances, a possessor of the surveillance video would owe a duty of reasonable care to preserve the video if a reasonable person in the possessor's position should have foreseen that the surveillance video was material to a potential civil action. *Boyd, Id.* Of the *Boyd* scenarios, a possessor creating a duty by voluntary assumption seems most likely. However, in an unpublished opinion, an Illinois court held that a party's internal policy to save its surveillance video after an incident insufficient to constitute a voluntary assumption that would create such a duty. *Ballerini v. Wal-Mart Stores, Inc.*, 2012 Ill. App. Unpub. LEXIS 1056, 11, 1012 Ill. App. (3d) 110423U, 16 (2012)("the law, not defendant's internal policies, defines whether a duty exists.") But see, *Shimanovsky* and its progeny holding that a potential litigant is held to owe a duty to take reasonable measures to preserve and produce relevant evidence even prior to the filing of a lawsuit or entry of a protective order. *Shimanovsky*, 181 Ill. 2d at 120-21, 692 N.E. 2d at 289-90; *Adams*, 358 Ill. App. 3d at 395, 830 N.E. 2d at 653.

COLLATERAL SOURCE

7. Can plaintiff submit to a jury the total amount of his/her medical expenses, even if a portion of the expenses were reimbursed or paid for by his/her insurance carrier?

Yes. The collateral source rule provides that the jury should not consider the payment of health insurance when deciding a plaintiff's damages, because a plaintiff may recover the entire amount of damages sustained regardless of who paid the medical bills. *Hojek v. Harkness*, 314 Ill. App. 3d 831, 838, 733 N.E.2d 356, 362 (1st Dist. 2000). The leading and most difficult case for defense attorneys in Illinois is the *Wills* case which holds that Plaintiffs can collect the full amount of a bill even if completely or only partially paid. *Wills v. Foster*, 229 Ill. 2d 393, 892 N.E.2d 1018 (2008). The Court found that the collateral source rule prohibits Defendants from informing the jury that the medical care providers settled for less than the full amount of the bills. Their reasoning includes a comment that Defendants should not get the benefit of the reduced charges because of the collateral source rule. Thus, a Plaintiff may recover sums of money which he or she is not obligated to pay. However, for

a medical bill to be admissible into evidence, it must be established that the charges were reasonable. *Wills*, 229 Ill. at 403, 892 N.E.2d at 1025. In Illinois, only those bills which have been paid are presumptively admissible. *Klesowitch v. Smith*, 2016 IL App (1st) 150414, 52 N.E.3d 365. If the bills have not been paid, they are still admissible if a proper foundation is laid by introducing the testimony of a person having knowledge of the services rendered and the usual and customary charges for such services. Once the witness is shown to possess the requisite knowledge, the reasonableness requirement necessary for admission is satisfied if the witness testifies that the bills are fair and reasonable. *Arthur v. Catour*, 216 Ill. 2d 72, 82, 833 N.E.2d 847, 853–54 (2005).

8. **Is the fact that all or a portion of the plaintiff's medical expenses were reimbursed or paid for by his/her insurance carrier admissible at trial or does the judge reduce the verdict in a post-trial hearing?**

This fact is not admissible at trial in Illinois. As a rule of evidence, the collateral source rule operates to prevent the jury from learning *anything* about collateral income. *Wills*, 229 Ill. at 418, 892 N.E.2d at 1033. However, in *Perkey v. Portes*, the Court held that Section 2-1205 of the Code of Civil Procedure modifies the collateral source rule such that a Defendant is entitled to a setoff for medical bills which have been paid by an insurer or fund, at an amount greater than $25,000, at a reduced level, to the extent of that reduction. *Perkey v. Portes-Jarol*, 2013 IL App (2d) 120470, ¶¶ 110-117, 1 N.E.3d 5, 27. In other words, if the total bill is $100,000.00 and the health insurer pays $40,000.00 to satisfy the charges, the remaining $60,000.00 should be reduced from the judgment. However, a more recent decision from the 4th District Appellate Court rejected the *Perkey* analysis and held that no setoff is allowed even where the bills have been written off and Plaintiff does not have to pay the written off amounts. *Miller v. Sarah Bush Lincoln Health Ctr*., 2016 IL App (4th) 150728, ¶ 21, 56 N.E.3d 599, 605. Whether our liberal Supreme Court will allow the *Perkey* interpretation to prevail, especially since it contradicts *Wills* and *Miller*, remains to be seen.

It should also be noted that there are two different statutes, although they are quite similar, applicable to medical malpractice cases and other tort cases. *Perkey* involved a medical malpractice case. In other tort cases, the applicable statute is 735 ILCS 2-1205.1. Both provide for a setoff. Unless and until *Perkey* is overturned, Defendants should continue to file post-trial motions for a setoff for bills covered by insurance to the extent those bills exceed $25,000.00 and are written off by the medical care providers pursuant to their agreement with an insurer.

9. **Can defendants reduce the amount plaintiff claims as medical expenses by the amount that was actually paid by an insurer? (i.e. where plaintiff's medical expenses were $50,000 but the insurer only paid $25,000 and the medical provider accepted the reduced payment as payment in full).**

No. Pursuant to the collateral source rule, a plaintiff is entitled to recover the full amount of a medical bill even if it was settled by a third party for a lesser amount. *Wills v. Foster*, 229 Ill. 2d 393, 892 N.E.2d 1018 (2008). However, if Plaintiff fails to lay the proper foundation for the full amount billed then only the amounts paid by the insurer will be admitted at trial as presumptively admissible. *Klesowitch v. Smith*, 2016 IL App (1st) 150414, 52 N.E.3d 365. In *Wills,* the plaintiff did not produce a witness to testify that the total billed amount was reasonable, but the court found that was not necessary because the defendant in that case stipulated to the admission of the billed amounts and did not object to the question of their reasonableness. *Id.* at 419. Whereas in *Klesowitch*, defendant did not stipulate to the admission of the written-off amounts and did object to the question of their reasonableness. *Klesowitch*, 2016 IL App (1st) at ¶ 46. Accordingly, the First District found the trial court improperly admitted the full amount billed, including the written-off amounts, at trial and remanded the case for entry of remitter of the portion of the judgement for the written off or settled portions of the medical bills. *Id*. at ¶ 51.

ACCIDENT AND INCIDENT REPORTS

10. Can accident/incident reports be protected as privileged attorney work product prepared in anticipation of litigation or are they deemed to be business records prepared in the ordinary course of business and discoverable?

Illinois Supreme Court Rule 201(b)(2) defines work product as follows: "Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." Ill. Sup. Ct. R. 201(b)(2) (eff. July 1, 2002). "The work-product doctrine provides a broader protection than the attorney-client privilege, and is designed to protect the right of an attorney to thoroughly prepare his case and to preclude a less diligent adversary attorney from taking undue advantage of the former's efforts." *Waste Management, Inc. v. International Surplus Lines Insurance Co.,* 144 Ill.2d 178, 196, 579 N.E.2d 322, 329 (1991). Any relevant material generated in preparation for trial which does not disclose "conceptual data" is freely discoverable under Rule 201(b)(2). *Id.* at 196, 579 N.E.2d at 329–30.

- Attorney work product doctrine

Illinois has elected to take an approach to work product that reflects a greater emphasis on the value of full disclosure and deemphasizes, for this purpose, the adversarial approach. *King v. American Food Equipment Co.*, 160 Ill. App. 3d 898, 112 Ill. Dec. 349, 513 N.E.2d 958 (1st Dist. 1987). The position, which was first taken in *Monier v. Chamberlain*, 35 Ill. 2d 351, 358, 221 N.E.2d 410, 416 (1966), and later incorporated into Rule 201(b)(2), is that all material prepared by or for a party in preparation for litigation is discoverable unless it discloses the "theories, mental impressions, or litigation plans of the party's attorney." In the situations where this limited exclusion from discovery is applicable, it is, with one exception, absolute and not subject to avoidance by any showing of hardship or necessity.

The concept of "theories, mental impressions, or litigation plans of the party's attorney" has been construed relatively strictly. *Holland v. Schwan's Home Serv., Inc.,* 2013 IL App (5th) 110560, ¶ 205, 992 N.E.2d 43, 86. Accordingly, the principle of full disclosure requires that a statement taken from a prospective witness, either by a party's attorney or some other agent, is fully discoverable.

- The Ordinary Course of Business Exception

Under Illinois Supreme Court Rule 236(a), any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. Ill. Sup. Ct. R. 236(a).

Unless an accident or incident report was created "in anticipation of litigation," the report is admissible under the business-record exception to hearsay. This rule is based on the conclusion that the motivation of a person preparing a report that he intends to use in future litigation could affect its trustworthiness. *Poltrock v. Chicago & North Western Transportation Co.,* 151 Ill.App.3d 250, 502 N.E.2d 1200, 1203 (1986). *Holland v. Schwan's Home Serv., Inc.,* 2013 IL App (5th) 110560, ¶¶ 200-201, 992 N.E.2d 43, 85–86. For example, in *Holland v. Schwan's Home Serv., Inc.,* the court found the defendant's claim file on the plaintiff to be a business record rather than attorney work product, because it was prepared to assist the defendant's insurance company in processing the plaintiff's worker's compensation claim, not in preparation for the plaintiff's claim of retaliatory discharge against the defendant. *Id.*

The determination of whether business records are admissible is within the sound discretion of the circuit court,

and its determination will not be reversed absent an abuse of discretion. *Bank of America, N.A. v. Land,* 2013 IL App (5th) 120283, ¶ 13, 992 N.E.2d 1266.

SOCIAL MEDIA

11. What means are available in your state to obtain social media evidence, including but not limited to, discovery requests and subpoenas? Can you give some examples of your typical discovery requests for social media?

- Illinois Means to Obtain Social Media Evidence

In Illinois, social media evidence qualifies as electronically stored information (hereinafter "ESI"), which includes "any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations in any medium from which electronically stored information can be obtained either directly or, if necessary, after translation by the responding party into a reasonable usable form." Ill. S. Ct. R. 201(b)(4). ESI may be obtained through the traditional discovery methods of "depositions upon oral examination or written questions, written interrogatories to parties, discovery of documents, objects or tangible things, inspection of real estate, requests to admit and physical and mental examination of persons." Ill. S. Ct. R. 201(a).

For example, an Ill. S. Ct. R. 216(a) Request for Admission of a Fact could be used to ascertain whether a party has a social media profile. That request could be followed by an Ill. S. Ct. R. 216(b) Request for Admission of Genuineness of a Document, attaching a printout from the social media profile that contains the post in question. Nicholas O. McCann, *Tips for Authenticating Social Media Evidence*, 100 Ill. B.J. 482, 485 (2012). While written discovery requests are appropriate to obtain social media evidence, subpoenas directly to the social networking sites are not permitted. The Federal Stored Communications Act prohibits non-governmental groups from issuing civil subpoenas to social media providers for actual social media content, but such attorneys might be able to obtain other useful data such as dates and times of posts. 18 U.S.C. § 2701 et seq. Instead, a more effective method of discovery would be requesting production from the actual user. Ed Finkel, *Building Your Case with Social Media Evidence*, 102 Ill. B.J. 276, 277-79 (2014).

- Examples of Discovery Requests

Typical discovery requests for social media include the following examples:

Please list all e-mail addresses including, but not limited to, work and personal email, or other such address you were using on the date of the incident(s) in Plaintiff's Complaint, as well as all of your social media profile URLs including, but not limited to, MySpace, Facebook, Twitter, Tumblr, Instagram and LinkedIn profiles that were active on the date of the incident(s) in Plaintiffs' Complaint.

Please produce Plaintiff's complete profile on Facebook, MySpace, Linkedin, Twitter, or any other social media network (including all updates, changes, or modifications to plaintiff's profile), and all status updates, messages, wall comments, causes joined, groups joined, activity streams, blog entries, details, blurbs, comments, and applications. Note: You may download and print your Facebook data by logging onto your Facebook account, selecting "Account Settings" clicking on the "Download a copy" link in the "General Account Settings" section and following the directions on the "Download Your Information" page.

Please provide an affidavit attesting that the response to the production request is complete. Pursuant to Illinois Supreme Court Rules, you are requested to seasonably supplement your response whenever new or additional documents or tangible items become known. If any document has been withheld pursuant to a claim of attorney/client privilege, identify any such document in accordance with Supreme Court Rule 201(n).

Please state whether any individual or corporate entity ever filed a legal proceeding against you in an effort to obtain a Restraining Order or Injunction that would prohibit or limit your use of any social media accounts, including but not limited to Twitter, Facebook, Linked-In, My Space etc., and if so: a) the date and court

(including cause number) that any said proceeding was filed; b) the allegations that were made against you; c) the reason the proceeding was filed; d) the result of the proceeding.

Please provide all statements and photographs contained in Plaintiffs' social networking or social media accounts that reference the incident alleged in the Plaintiffs' Complaint or any injuries plaintiff has suffered in the last ten years.

Please state whether you sent, made or created any Social Media Postings relating to the Incident, the injuries you attribute to the Incident, or any matters referenced in your Complaint. If so, please provide a copy of each such Social Media Posting.

Please identify and produce any and all Social Media Postings you sent, made or created relating to any Defendant.

12. Which, if any, limitations do your state's laws impose on a party on obtaining social media evidence from an opposing party? Possible limitations include a privacy defense, relevance, etc.

Illinois does not impose any specific limitations on a party on obtaining social media evidence from an opposing party. A protective order may accommodate the producing party's legitimate privacy concerns but will likely not bar all social media evidence from discovery. Ill. S. Ct. R. 201(c)(1). It should also be noted that overbroad discovery requests may be denied on relevancy grounds. Nicholas O. McCann, *Tips for Authenticating Social Media Evidence*, 100 Ill. B.J. 482, 482 (2012). Specifically, the definition of discoverable information "is not intended as an invitation to invent attenuated chains of possible relevancy." *Carlson v. Jerousek*, 2016 IL App (2d) 151248, 68 N.E.3d 520, at ¶36 (internal citations omitted).

It is likely that over broad discovery requests seeking social media information will raise concerns over an invasion of an individual's personal privacy rights. The privacy clause of the Illinois Constitution was designed to safeguard "against the collection and exploitation of personal information." *Id.* at ¶34. (citing *People v. Mitchell*, 165 Ill. 2d 211, 220, 650 N.E.2d 1014 (1995)). The Fourth Amendment to the U.S. Constitution and Article 1, § 6 of the Illinois Constitution only prevent those invasions of privacy that are unreasonable. *Id.* at ¶35. "The civil discovery rules adopt two safeguards to ensure that the discovery of private information will be "reasonable" (and hence constitutional): relevance and proportionality." *Id.*

First, the information sought must be relevant. "[C]ompelled disclosure of highly personal information 'having no bearing on the issues in the lawsuit' is an unconstitutional invasion of privacy." *Id.* (internal quotations omitted). The concept of relevance provides a foundation in balancing constitutional privacy concerns with the need for reasonable discovery, 'facilitat[ing] trial preparation while safeguarding against improper and abusive discovery.' *Id.* (internal quotations omitted).

"Proportionality imposes a second limitation on what is discoverable: even if it is relevant, information need not be produced if the benefits of producing it do not outweigh the burdens." *Id.* at ¶39. The proportionality test requires a court to consider both: (1) monetary factors such as the expense of proposed discovery, the amount in controversy, and the resources of the parties; and (2) nonmonetary factors such as the importance of issues in the litigation, the importance of the requested discovery in resolving the issues. *Id.* at ¶40.

In order to avoid privacy implications in discovery requests seeking social media information, parties should seek to tailor their discovery requests, obtain the party's consent to obtain content directly from the website or social media platform at issue, or request that the Court perform an in-camera inspection of the responsive social media information to determine if it is ultimately discoverable. Professor Richard S. Kling, Khalid Hasan & Martin D. Gould, *Getting Access to Social Media Evidence*, 105 Ill. B.J. 24, 26 (2017).

13. What, if any, spoliation standards has your state's Bar or courts set forth on social media for party litigants?

In Illinois, proof of spoliation of negligence requires proof that the defendant owed the plaintiff a duty to preserve that evidence, breached that duty, and proximately caused the plaintiff to be unable to prove the underlying cause of action. *Boyd v. Travelers Ins. Co.*, 166 Ill. 2d 188, 194-95, 652 N.E.2d 267, 270 (1995). The Illinois State Bar Association has stated that preservation of evidence letters should be sent to opposing counsel as soon as possible when an attorney suspects the contents of the opposing party's social media accounts might be needed for discovery. Ed Finkel, *Building Your Case with Social Media Evidence*, 102 Ill. B.J. 276, 277-79 (2014). Such preservation letters are crucial for asserting a subsequent spoliation claims. *Id.* Attorneys should also be mindful of Rules 3.4, 4.1, and 8.4 of the Illinois Rules of Professional Conduct which, in conjunction, require a lawyer to produce complete social media content if the attorney is aware of this content's existence. An attorney who purposely directs a client to destroy social media content violates these rules.

14. What standards have your state's courts set for getting various types of social media into evidence? Please address relevance, authenticity, and whether any exclusionary rule might apply (e.g., Rules 404(a) or 802).

While there is minimal case law in Illinois addressing the application of the Rules of Evidence to social media, Illinois does apply the same rules of evidence regarding admissibility to ESI as it does to any documentary evidence. Nicholas O. McCann, *Tips for Authenticating Social Media Evidence*, 100 Ill. B.J. 482, 482 (2012).

- Relevance

A proponent of social media evidence should argue for conditional relevancy under IRE 104(b). Nicholas O. McCann, *Tips for Authenticating Social Media Evidence*, 100 Ill. B.J. 482, 482 (2012). Once a piece of evidence passes the threshold analysis for relevancy under the Illinois Rules of Evidence, it is admissible if it is authenticated and not barred by any exclusionary rules. *See Complete Conference Coordinators Inc. v. Kumon North America, Inc.*, 394 Ill. App. 3d 105, 108-09, 915 N.E.2d 88, 92 (2d Dist. 2009) (noting that emails can be authenticated under traditional rules of authentication); *see also In re Marriage of Perry*, 2012 IL App (1st) 113054, ¶¶46, 47 (finding that the foundation for the admissibility of electronic duplicates of photographs from a web site saved on a flash drive could be established under the traditional rules of evidence).

- Authenticity

Traditional authentication methods apply to social media evidence, such as online communication and photographs. Accordingly, direct or circumstantial evidence establishing unique characteristics of the social media profile, under IRE 901(b)(4), or foundational evidence such as testimony from a witness with knowledge of the communication or photograph at issue, under IRE 901(b)(1), should be used. See Nicholas O. McCann, *Tips for Authenticating Social Media Evidence*, 100 Ill. B.J. 482, 485 (2012).

- Exclusionary Rules

Illinois has not set any specific exclusionary rules regarding ESI, and traditional exclusionary rules regarding character evidence and hearsay therefore apply. See IRE 404; IRE 802.

15. How have your State's courts addressed an employer's right to monitor employees' social media use?

Illinois has passed a law that restricts employers from seeking employees' or prospective employees' passwords to social media accounts. The law prohibits employers from demanding access in any way to an employee's social networking account.

However, the law does not limit an employer's right to monitor the usage of its own electronic equipment as long as it can do so without requiring the employee to provide a password. An example of how employers could monitor the use of their own equipment without requesting passwords would be to see which websites employees are visiting while using the employer's computer. Employers are also permitted to implement

policies regarding social networking site use.

Illinois amended the Right to Privacy in the Workplace Act which became effective on January 1, 2013. The relevant provisions are as follows:

§10. Prohibited inquiries.

(b)(1) It shall be unlawful for any employer to request or require any employee or prospective employee to provide any password or other related account information in order to gain access to the employee's or prospective employee's account or profile on a social networking website or to demand access in any manner to an employee's or prospective employee's account or profile on a social networking site.

(2) Nothing in this subsection shall limit an employer's right to:

(A) promulgate and maintain lawful workplace policies governing the use of the employer's electronic equipment, including policies regarding Internet use, social networking site use, and electronic mail use; and

(B) monitor usage of the employer's electronic equipment and the employer's electronic mail without requesting or requiring any employee or prospective employee to provide any password or other related account information in order to gain access to the employee's or prospective employee's account or profile on a social networking website.

(3) Nothing in this subsection shall prohibit an employer from obtaining about a prospective employee or an employee information that is in the public domain or otherwise in compliance with this amendatory Act of the 97th General Assembly.

(3.5) Provided that the password, account information, or access sought by the employer relates to a professional account, and not a personal account, nothing in this subsection shall prohibit or restrict an employer from complying with a duty to screen employees or applicants prior to hiring or to monitor or retain employee communications as required under Illinois insurance laws or federal laws or by a self-regulatory organization as defined in Section 3(A)(26) of the Securities Exchange Act of 1934, 15 U.S.C. 78(A)(26).

(4) For the purposes of this subsection, "social networking website" means an Internet-based service that allows individuals to:

(A) Construct a public or semi-public profile within a bounded system, created by the service;

(B) Create a list of other uses with whom they share a connection within the system; and

(C) View and navigate their list of connections and those made by others within the system.

For the purposes of paragraph (3.5) of this subsection, "professional account" means an account, service, or profile created, maintained, used, or accessed by a current or prospective employee for business purposes of the employer.

For the purposes of paragraph (3.5) of this subsection, "personal account" means an account, service, or profile on a social networking website that is used by a current or prospective employee exclusively for personal communications unrelated to any business purposes of the employer.

820 ILCS 55/10.

There has not been case law in Illinois specifically addressing the Act's social networking sections.

16. How have your State's state or federal courts addressed limitations on employment terminations relating to social media?

Illinois does not have a law specifically addressing employee terminations relating to social media. However, the following section of Illinois' Right to Privacy in the Workplace Act could be interpreted as limiting employers from terminating employees for their use of social media when they are not at their place of employment:

§5. Discrimination for use of lawful products prohibited.

> (a) Except as otherwise provided…it shall be unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation terms, conditions or privileges or employment because the individual uses lawful products off the premises of the employer during nonworking hours.

Therefore, while an Illinois case has not specifically addressed this section being applied to social media use, it could be argued that an individual could not be discharged or refused to be hired for the lawful use of a social networking site off the employer's premises.

In *Smizer v. Community Mennonite Early Learning Center*, a plaintiff was fired for a posting on his Facebook page which brought family squabble into the workplace. *Smizer v. Community Mennonite Early Learning Ctr.*, 538 F. Appx. 711, 713 (7th Cir. 2013.) In *Smizer*, the plaintiff brought a gender discrimination claim against his former employer, Community Mennonite Early Learning Center, alleging that he was fired because he was a male. *Id.* However, he had worked at the center for seven years and was not terminated until an incident involving his Facebook page occurred. *Id.* at 712. In *Smizer*, the plaintiff worked at Defendant's daycare along with his grandmother. *Id.* Plaintiff had been involved in a custody battle involving his sister and nephew. *Id.* After his sister was awarded custody of his nephew, plaintiff posted comments on his Facebook page using profanity and lashing out at family members. *Id.* Plaintiff's grandmother then said she did not feel safe in plaintiff's presence and felt that plaintiff was creating a hostile work environment. *Id.* Defendant then fired the plaintiff saying that his Facebook posting was the basis for his dismissal. *Id.* at 713. Summary judgment was granted in favor of the Defendant. This case supports the proposition that it was acceptable to terminate plaintiff based off of his Facebook posting. *Id.* at 715.

Therefore, this case suggests that Illinois law may require a showing of impact on the work environment to support an employee being terminated for social media use outside of work.