BUILDING A SOLID FOUNDATION FOR DEFENSE: GATHERING AND PRESERVATION OF EVIDENCE

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
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Spoliation of evidence is the loss, destruction or alteration of evidence. Examples of spoliation include the failure to preserve the scene of a train derailment, the accidental destruction of evidence on the desk of a lawyer by a janitor, the loss of a heater that exploded, the removal of wires from a car that caught fire, and the intentional erasing of a computer image relevant to a copyright lawsuit. Illinois treats spoliation differently from Wisconsin and Missouri. A discussion of those differences follows.

I. THE LAW OF SPOLATION IN ILLINOIS

Spoliation of evidence claims in Illinois may be pursued in two ways. The first is under a negligence theory arising out of duty to preserve created by agreement, contract, or statute. Boyd v. Travelers Ins. Co., 166 Ill. 2d 188, 652 N.E.2d 267, 270, 209 Ill. Dec. 727 (1995). The second is a discovery sanction under Illinois Supreme Court Rule 219(c) arising out of a duty to take reasonable measures to preserve the integrity of relevant and material evidence. Shimanovsky v. General Motors Corp., 181 Ill. 2d 112, 121, 692 N.E.2d 286, 229 Ill. Dec. 513 (1998).

A. Negligent Spoliation

In Boyd v. Travelers Ins. Co., 166 Ill. 2d 188, 652 N.E.2d 267, 209 Ill. Dec. 727 (1995), the Illinois Supreme Court made a watershed pronouncement regarding spoliation of evidence. Tommy Boyd was using a propane catalytic heater to keep his employer's van warm. The heater exploded leading to severe injuries to Mr. Boyd. He sued the manufacturer of the heater. Two days after the accident two claims adjusters from Travelers Insurance, his employer's workers' compensation carrier, took possession of the heater for investigation and inspection. Prior to any tests being performed, Travelers lost the heater. When Boyd requested the return of the heater, Travelers refused claiming that it had inadvertently misplaced the heater. Boyd brought suit seeking to compel Travelers to return the heater. Travelers responded that it had in fact lost the heater and that it had not had the opportunity to test the heater prior to its loss.

Boyd's lawsuit against Travelers alleged that he suffered injury and irrevocable prejudice arising from the loss of the heater since no expert could testify with any certainty as to whether the heater was defective or dangerously designed. Boyd alleged both negligent, and willful and wanton, spoliation of evidence. Travelers filed a motion to dismiss the spoliation allegations. The trial court granted the motion. The court reasoned that even though Illinois would recognize an independent case of action for spoliation "given the right facts," Boyd's claims were "premature unless and until they lost the underlying suit against [the manufacturer]." Boyd, 166 Ill. 2d at 192. The Illinois Supreme Court disagreed. It ruled that "like a majority of jurisdictions," Illinois had not recognized spoliation of evidence as an independent cause of action. It reasoned that "[c]ourts have long afforded redress for the destruction of evidence and, in our opinion, traditional remedies adequately address the problem presented in this case." Boyd, 166 Ill. 2d at 194. The Court held
that Boyd could state a claim for spoliation under existing negligence law, but reserved judgment on whether intentional spoliation was actionable under Illinois law. To state a claim for negligent spoliation, a party must plead the four traditional elements of negligence: (1) the existence of a duty; (2) a breach of that duty; (3) proximate causation; and (4) damages. 

**Boyd**, 166 Ill. 2d at 194-195. The Court then tailored the duty element to spoliation claims:

The general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute [citation] or another special circumstance. Moreover, a defendant may voluntarily assume a duty by affirmative conduct. [Citation.] In any of the foregoing instances, a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.

**Boyd**, 166 Ill. 2d at 195 (emphasis added). The Court determined that there was no automatic duty to preserve evidence, though it may arise out of agreement, contract, statute or special circumstance or by voluntary assumption of the duty. *Id.* at 195.

Boyd had pleaded that Travelers’ representatives visited his home and said they needed to take the heater to investigate his workers’ compensation claim knowing it was evidence relevant to future litigation, and subsequently lost it. Boyd had alleged a duty on the part of Travelers by its voluntary undertaking and a breach of that duty. As to causation, Boyd had alleged that the spoliation caused him to be unable to prove the underlying lawsuit. “A plaintiff need not show that, but for the loss or destruction of the evidence, the plaintiff would have prevailed in the underlying action.” *Id.* at 196 n.2. It is enough to have been deprived of a key piece of evidence which precluded expert testimony about the potentially defective/dangerous design of the heater. *Id.* at 197.

The *Boyd* Court articulated a two-prong test for determining when there is a duty to preserve evidence. As a threshold matter, first determine whether such a duty arises by agreement, contract, statute, special circumstance, or voluntary undertaking. *See, Id.* at 195. If so, then determine whether that duty extends to the evidence at issue – i.e., whether a reasonable person should have foreseen that the evidence was material to a potential civil action. *See, Id.* at 195. If the plaintiff does not satisfy both prongs, there is no duty to preserve the evidence at issue.

The Illinois Supreme Court revisited spoliation in *Dardeen v. Kuehling*, 213 Ill. 2d 329, 821 N.E.2d 227, 290 Ill. Dec. 176 (2004). In *Dardeen*, plaintiff fell in a hole in the sidewalk at defendant Kuehling's residence while delivering newspapers. [The bricks in the sidewalk had “cocked up” creating a hole.] Kuehling called his insurance agent at State Farm to ask if she could/should remove the bricks. The agent said yes. Shortly after the accident, plaintiff returned to the Kuehling residence to see the hole and speak with Kuehling. Neither plaintiff nor Kuehling took any photographs of the hole. A few days after the visit, Kuehling removed 25-50 bricks from the area, so that “nobody else would get hurt.”
Plaintiff filed a premises liability complaint against Kuehling. After plaintiff learned that the bricks had been removed, he amended the complaint to add a negligent spoliation claim against Kuehling and State Farm. Kuehling and State Farm moved for and were granted summary judgment. The Appellate Court reversed, finding that State Farm’s contract with Kuehling imposed a duty, State Farm knew the hole was material to potential civil litigation, and as a result of the brick removal a crucial piece of evidence was missing.

The Supreme Court disagreed. Calling Boyd its “watershed pronouncement on spoliation of evidence,” it clarified its duty analysis stating:

> When we said, in Boyd, that a duty to preserve evidence could arise by an agreement or contract, we meant an agreement or contract between the parties to the spoliation claim. Kuehling and State Farm had an insurance contract, to which Dardeen was not a privy. The record does not contain the contract, but Dardeen does not argue that it contained a provision under which State Farm owed Kuehling a duty to preserve evidence from being destroyed by Kuehling herself, much less a provision under which Dardeen would be a third-party beneficiary of such a duty.

*Id.* at 337-338. The Court further reasoned that Dardeen never contacted the defendant to ask it to preserve evidence. Dardeen never requested evidence from State Farm, and he never requested that State Farm preserve the sidewalk or even document its condition. And though he visited the accident site hours after he was injured, he did not photograph the sidewalk. Additionally, State Farm never possessed the evidence at issue and, thus, never segregated it for the plaintiff’s benefit. *Id.* at 338. State Farm argued, and the Court agreed, 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.” *Id.* at 339.

In order to avoid summary judgment, Dardeen needed to show something more than State Farm’s agent answering affirmatively to Kuehling’s question whether she could remove the raised bricks. Without evidence of possession or control by State Farm of the sidewalk, the Court found State Farm owed no duty to Dardeen to preserve it. *Id.* at 339.

**B. Intentional Spoliation**

Whether Illinois recognizes an independent cause of action for intentional spoliation is an open question. Courts have used the Illinois Supreme Court’s failure in Boyd to create a cause of action for intentional spoliation as a bar to such claims. In Borsellino v. Goldman Sachs Group, Inc., 477 F.3d 502 (7th Cir. 2007) the Court, applying Illinois law, construed a claim for intentional spoliation as a claim for negligent spoliation reasoning that Illinois does not recognize the claims for intentional spoliation. *Id.* at 510. In Cangemi v. Advocate South Suburban Hospital, 364 Ill. App. 3d 446, 845 N.E.2d 792, 300 Ill. Dec. 903 (1st Dist. 2006), the Appellate Court, First District dismissed an intentional spoliation claim holding that “[p]laintiffs cite to no case that specifically recognizes intentional spoliation of evidence as a tort in Illinois.” *Id.* at 815.
On the other hand, in *Williams v. General Motors Corp.*, No. 93 C 6661, 1996 WL 420273 (N.D. Ill. July 25, 1996), a federal district court determined that “As the *Boyd* decision implies, in cases like this where intentional conduct has been alleged, it is likely that the Illinois Supreme Court would recognize a cause of action for intentional spoliation of evidence. It would make no sense, after all, for the court to hold a defendant liable for its merely negligent conduct but not for intentional conduct that resulted in the same harm.” *Id.* at *3.

If Illinois were to recognize a claim for intentional spoliation, the elements of the claim were set forth in a pre-*Boyd* case, *Mohawk Mfg. & Supply Co. v. Lakes Tool Die & Engineering, Inc.*, No. 92 C 1315, 1994 WL 85979 (N.D. Ill. March 14, 1994). In *Mohawk*, the plaintiff alleged that the defendant intentionally erased material from defendant's copyrighted computer. The Court set forth the elements of an intentional spoliation claim as: (1) the existence of a potential civil action; (2) defendant’s knowledge of the action; (3) destruction of relevant evidence; (4) intent; (5) a causal connection between the destruction and the plaintiff’s inability to prove the claim; and (6) damages. *Id.* at *1.

**C. Discovery Sanctions Under Illinois Supreme Court Rule 219(c)**

In *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 692 N.E.2d 286, 229 Ill. Dec. 513 (1998), a products liability action was commenced against General Motors claiming that its power-steering mechanism was defective causing plaintiff to lose control of her car and crash on July 7, 1985. Soon after the accident, plaintiffs’ counsel retained John Stilson, a mechanical engineer, to investigate whether the automobile possessed a defect which may have caused the crash. Stilson’s initial inspection of the automobile did not reveal any defect which would result in a loss of power-steering control. Thus, Stilson determined that an internal inspection of the automobile’s power-steering mechanism was necessary. On September 20, 1985, Stilson removed the power-steering mechanism from the automobile and disassembled it. The internal inspection revealed that various components of the power-steering mechanism were damaged by the crash. In addition, grooves were discovered in one of the power-steering components. Stilson recommended to plaintiffs’ counsel that a metallurgist be retained to determine whether the grooves were a result of the crash or whether they indicated a possible defect. Consequently, plaintiffs’ counsel hired a metallurgist, Lyle Jacobs. In October 1985, Jacobs examined the power-steering mechanism and concluded that it was necessary to section some of the components in order to determine the cause of the grooves. Accordingly, Jacobs sectioned the components and performed various tests on the sectioned pieces. As a result of these tests, Jacobs concluded that the grooves were not damaged from the crash, but rather were the result of long-term wear. Plaintiffs filed suit on June 16, 1986.

General Motors’ experts first viewed the automobile and its parts on September 28, 1989 while the evidence was still in plaintiffs' possession. However, GM did not seek production of the actual power-steering components until December 23, 1991, when it moved to compel Stilson to produce the automobile parts at his deposition. The court granted defendant’s motion to compel and, accordingly, Stilson produced the power-steering components at his deposition on January 8, 1992. GM’s experts examined the power-steering components sometime in January 1992. The experts opined that the plaintiffs’ automobile contained no defect or unreasonably dangerous
condition which caused or contributed to the crash. In addition, the experts concluded that the sectioning of the power-steering components by plaintiffs' expert deprived GM of the opportunity to show the jury further evidence of the proper manufacture and operation of the mechanism.

On the eve of trial, plaintiffs filed a motion in limine, seeking to bar GM from cross-examining plaintiffs' experts regarding their methods of testing the power-steering components. GM responded with its motion to dismiss the case or, in the alternative, bar any evidence of the condition of the power-steering mechanism. GM argued that it was entitled to such relief pursuant to Supreme Court Rule 219(c), as a sanction for the destruction of the power-steering components without notice by plaintiffs' expert witness. The circuit court denied plaintiffs' motion in limine and granted GM's motion to dismiss plaintiffs' complaint with prejudice. On appeal, the Appellate Court determined that the circuit court did not err in imposing a sanction on plaintiffs for the destructive testing of the power-steering components. However, the Appellate Court did determine that the circuit court abused its discretion by dismissing plaintiffs' case without first considering the degree of prejudice suffered by defendant. Accordingly, the Appellate Court reversed the trial court's dismissal order and remanded the cause for a hearing to determine whether the degree of prejudice suffered by defendant warranted dismissal of plaintiffs' cause of action.

GM appealed. It argued that a defendant in a products liability action is entitled to dismissal whenever a plaintiff has spoliated the allegedly defective product and such spoliation gives the plaintiff an unfair advantage in the litigation. GM further argued that the Appellate Court erred in remanding the cause for a hearing to determine the level of prejudice it suffered from the destructive testing. GM 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. Id. at 118-119. In response, plaintiffs contended that the circuit court lacked authority to impose any sanction upon them because Rule 219(c) provides sanctions only for violations of discovery rules and pretrial orders. Plaintiffs argued that, because their expert's testing of the power-steering components did not violate any discovery rule or court order, the circuit court was without authority to sanction them for the destructive testing. Plaintiffs argued in the alternative that, if the circuit court was empowered to impose any sanction under these circumstances, they were entitled to a full evidentiary hearing to determine in what manner and to what extent the destructive testing prejudiced defendant. Id. at 119.

The Illinois Supreme Court reviewed Rule 219(c), which authorizes a trial court to impose a sanction, including dismissal of the cause of action, upon any party who unreasonably refuses to comply with any provisions of the court's discovery rules or any order entered pursuant to these rules. The decision to impose a particular sanction under Rule 219(c) is within the discretion of the trial court and, thus, only a clear abuse of discretion justifies reversal. Id. at 120. The Court initially observed that the testing of the power-steering components was performed by plaintiffs' experts approximately eight months prior to the date plaintiffs filed their complaint. Therefore, the trial court had not entered any order prohibiting such testing. The Court noted that some Illinois courts had 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
any protective order can be entered by the court. *Id.* at 121. The Court noted that while it had previously recognized the value of destructive testing as a discovery tool, it had also held that such testing must be authorized in the sound discretion of the trial court and be permitted only when “the rights of the opposing litigant are not unduly prejudiced.” *Id.* at 122. The Court concluded that either party may seek production of evidence for testing whenever the condition of such item is relevant. *Id.* Thus, GM had a right to perform tests on the power-steering components in order to formulate its defense to the products liability action. However, plaintiffs’ destructive testing interfered with GM’s right to such discovery. Under the specific circumstances of this case, the Court could not say that the trial court abused its discretion in determining that plaintiffs’ actions were an unreasonable noncompliance with discovery rules. *Id.* at 123

The Court then had to determine if dismissal of the suit was the proper sanction. The factors a trial court is to use in determining what sanction, if any, to apply 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. *Id.* at 124. Applying these factors to the instant case, the Court found the majority of factors weighed in favor of plaintiffs. On remand the circuit court was ordered to enter a sanction other than dismissal.

Sanctions were also discussed in *Adams v. Bath and Body Works, Inc.*, 358 Ill. App. 3d 387, 830 N.E.2d 645, 294 Ill. Dec. 233 (1st Dist. 2005). In *Adams*, a tenant whose wife died in house fire brought a products liability action against the manufacturer and distributor of a candle, the alleged cause of fire, and a Smoke Detector Act claim against the landlord, Ms. Kubasak. The manufacturer and distributor of the candle filed a third-party action against State Farm, Kubasak’s insurer, for negligent spoliation of evidence.

Six days after the fire, plaintiff retained counsel. Though both state and city fire inspectors were unable to pin down the cause of the fire, they were able to determine that the fire began near a couch located in the living room. Based upon comments he overheard from one of these inspectors, plaintiff’s counsel removed two lamps that he believed were the potential cause of the fire. After it was determined that these lamps were not the cause, plaintiff’s focus shifted to a “Garden Lavender Botanical Candle” that he said was located on an end table near the couch in the living room.

Following the fire, Kubasak hired a fire restoration company to clean up debris. Unbeknownst to plaintiff, the fire restoration company removed and destroyed an end table, the couch, and some carpeting among other items that belonged to plaintiff.

Also shortly after the fire, State Farm retained Crawford & Company (Crawford) to examine the house and determine the extent of the damage. Crawford, in turn, hired Joe Mazzone to investigate the cause of the fire. In his deposition, Mazzone stated that, after ruling out the home’s wiring, appliances, and fixtures, he believed one possible cause of the fire was a candle placed on the end table. Mazzone based this belief on the fact that the area in which these items were located
contained the heaviest “char or burn marks,” as well as plaintiff’s statement to fire inspectors that he blew out a candle on the end table before going to bed on the night of the fire. Mazzone stated that both he and Donald Hitchcock, a fire investigator with the Illinois State Fire Marshall’s office, “agreed that the place where the fire started was the table.” Because the end table, couch, and carpet had been destroyed, however, there was no physical evidence that would either support or refute plaintiff’s statement as to the candle’s location. Plaintiff was not privy to Mazzone’s report until December 1997, well after the end table, couch and carpet were destroyed.

The circuit court granted a motion filed by the candle manufacturer and distributor dismissing plaintiff’s claims as a discovery sanction pursuant to Supreme Court Rule 219(c) for failing to preserve evidence. On appeal, plaintiff contended that the circuit court abused its discretion in dismissing his complaint as a discovery sanction.

The Appellate Court discussed the potential conflict between the Supreme Court’s decisions in Boyd and Shimanovsky and the recent treatment of those decisions in Dardeen. It noted that in an amicus brief, the Illinois Trial Lawyers Association asked the court to “harmonize Boyd, where [it] held that, generally, there is no duty to preserve evidence,” with its holding in Shimanovsky “that a potential litigant owes a duty to potential adversaries to take reasonable measures to preserve the integrity of relevant, material evidence.” Dardeen, 213 Ill. 2d at 337. Instead of harmonizing the two, the Court had previously simply found Shimanovsky “inapposite.” See, Dardeen, 213 Ill. 2d at 339. The Court had noted in the Dardeen case that in Shimanovsky, it had “never mentioned Boyd, or spoliation,” because “the central issue in Shimanovsky was whether the trial court could dismiss the plaintiff’s complaint as a discovery sanction for the plaintiff’s presuit destruction of evidence.” Id. at 340. The Appellate Court, First District held:

The lesson to be taken from this, we believe, is that the two remedies discussed in those cases, i.e., a claim for negligent spoliation of evidence in Boyd and dismissal as a sanction under Rule 219(c) in Shimanovsky, are separate and distinct. See Dardeen, 213 Ill.2d at 339-40. In other words, Shimanovsky and Boyd present a party confronted with the loss or destruction of relevant, material evidence at the hands of an opponent with “two roads diverged in a wood.” He may either (1) seek dismissal of his opponent’s complaint under Rule 219(c) or (2) bring a claim for negligent spoliation of evidence. The mode of relief most appropriate will depend upon the opponent’s culpability in the destruction of the evidence. The former requires conduct that is “deliberate [or] contumacious or [evidences an] unwarranted disregard of the court’s authority” and should be employed only “as a last resort and after all the court’s other enforcement powers have failed to advance the litigation.” Shimanovsky, 181 Ill.2d at 123, 229 Ill.Dec. 513, 692 N.E.2d 286. The latter requires mere negligence, the failure to foresee “that the [destroyed] evidence was material to a potential civil action.” Dardeen, 213 Ill.2d at 336 quoting Boyd, 166 Ill.2d at 195. Because [the candle manufacturer and distributor] chose to take the Rule 219(c) road, any reliance upon Boyd or its progeny to support the circuit court’s sanction is inappropriate.
Adams, 358 Ill. App. 3d at 393-94. The Appellate Court reversed the sanction holding. It determined that first, plaintiff did not engage in any “knowing and willful defiance of the discovery rules or the trial court’s authority.” Shimanovsky, 181 Ill. 2d at 129. The destruction of the end table, couch and carpet occurred long before plaintiff filed his lawsuit. Second, the carpet belonged to Kubasak, and it is questionable whether he could have compelled her to preserve it. Third, even if he could have preserved this evidence, plaintiff had no knowledge that it 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. Finally, and perhaps most importantly, plaintiff played no role in, nor had any notice of, the destruction of the evidence which defendants claim was essential to their defense. Though a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence defendants have offered no “reasonable measures” that plaintiff could have, but failed, to undertake to protect this evidence, short of treating the second floor of the house owned by Kubasak like a crime scene. Adams, 358 Ill. App. 3d at 398.

II. THE LAW OF SPOILATION IN WISCONSIN

A. Tort of Spoliation

Wisconsin has not recognized independent tort actions for the intentional and negligent spoliation of evidence. Estate of Neumann v. Neumann, 242 Wis. 2d 205, 244-249, 626 N.W.2d 821 (Wis. App. 2001).

B. Adverse Inference

The trier of fact can draw an adverse inference from intentional spoliation of evidence. Jagmin v. Simonds Abrasive Co., 61 Wis. 2d 60, 80-81, 211 N.W.2d 810 (1973). The Supreme Court affirmed the trial court’s refusal to give an adverse inference instruction in the absence of clear, satisfactory and convincing evidence that the defendant had intentionally destroyed or fabricated evidence. Jagmin, 61 Wis. 2d at 80-81.

C. Sanctions

Wisconsin trial courts have discretion in imposing sanctions for spoliation of evidence. See, State v. McGrew, 255 Wis. 2d 835, 646 N.W.2d 856 (Wis. App. 2002). However, sanctions cannot “be considered unless there is clear and convincing proof that evidence was deliberately destroyed or withheld.” Hoskins v. Dodge County, 251 Wis. 2d 276, 642 N.W.2d 213, 228 (Wis. App. 2002). When deciding whether and how to sanction a party who has destroyed evidence, Wisconsin courts consider the circumstances, including whether the destruction was intentional or negligent, whether comparable evidence is available, and whether at the time of destruction the responsible party knew or should have known that a lawsuit was a possibility. Farr v. Evenflo Co., Inc., No. 2004AP1149, 2005 WL 1830908, at *2 (Wis. App. Aug. 4, 2005). In Garfoot v. Fireman’s Fund Ins. Co., 228 Wis. 2d 707, 724, 599 N.W.2d 411 (Wis. App. 1999), the Court held that dismissal as sanction for destruction of evidence requires a finding of egregious conduct, “which, in this context, consists
of a conscious attempt to affect the outcome of litigation or a flagrant knowing disregard of the judicial process.”


### III. THE LAW OF SPOILATION IN MISSOURI

A party who intentionally destroys or significantly alters evidence is subject to an adverse evidentiary inference under the spoliation of evidence doctrine. *Baldridge v. Director of Revenue, State of Mo.*, 2 S.W.3d 212, 222 (Mo. App. W.D. 2002), “[T]he destruction of written evidence without a satisfactory explanation gives rise to an inference unfavorable to the spoliator.” *Garrett v. Terminal R. Ass’n of St. Louis*, 259 S.W.2d 807, 812 (Mo. 1953). “Similarly, where one party has obtained possession of physical evidence which [the party] fails to produce or account for at the trial, an inference is warranted against that party.” *St. Louis County Transit Co. v. Walsh*, 327 S.W.2d 713, 717 (Mo. App. 1959). “[W]here one conceals or suppresses evidence such action warrants an unfavorable inference.” *Id.* at 717-718.

When one argues an adverse inference should be made, it is necessary that there be evidence showing intentional destruction of the item, and also such destruction must occur under circumstances which give rise to an inference of fraud and a desire to suppress the truth. In such cases, it may be shown by the proponent that the alleged spoliator had a duty, or should have recognized a duty, to preserve the evidence. *Morris v. J.C. Penney Life Ins. Co.*, 895 S.W.2d 73, 77-78 (Mo. App. W.D. 1995).

“Since the doctrine of spoliation is a ‘harsh rule of evidence, prior to applying it in any given case it should be the burden of the party seeking its benefit to make a *prima facie* showing that the opponent destroyed the missing [evidence] under circumstances manifesting fraud, deceit or bad faith.’” *Baldridge v. Director of Revenue, State of Mo.*, 82 S.W.3d 212, 224 (Mo. App. W.D. 2002). Simple negligence, however, is not sufficient to apply the adverse inference rule. *Brissette v. Milner Chevrolet Co.*, 479 S.W.2d 176, 182 (Mo. App. 1972).
Doug joined the Edwardsville office of Heyl Royster in 2004 and became a partner in 2008. With more than 25 years of litigation experience, Doug has defended a broad range of clients from individuals involved in auto accidents to major corporations in product liability claims.

At Heyl Royster, Doug has an active practice defending healthcare professionals who provide medical services to the prison population in Illinois. These professionals are often sued by prisoners for alleged civil rights violations in state and federal courts. His representation of professionals also includes veterinarians who have been sued for malpractice.

In addition to defending professionals, he also defends municipalities in civil rights claims and employers defending their employment decisions in federal court. His employment practice includes charges brought before the Illinois Human Rights Commission and the Equal Employment Opportunity Commission. This variety of experience assists Doug in understanding our clients’ needs and helping them to understand the litigation process.

**Significant Cases**

- *Longstreet v. Cottrell*, 374 Ill. App. 3d 549 (5th Dist. 2007) - The estate of a deceased party cannot introduce the discovery deposition of the deceased party at trial as an exception to the hearsay rule.
- *Steelman v. City of Collinsville*, 319 Ill. App. 3d 1131 (5th Dist. 2001) - The IRS’s seizure of funds being held by a municipal police department did not constitute a conversion of those funds by the department.
- *T.H.E. Insurance v. City of Alton*, 277 F.3d 802 (7th Cir. 2000) - Whether a certificate of insurance can modify the language contained in the policy of insurance.
- *City of East St. Louis v. Circuit Court for the 20th Judicial Circuit, St. Clair County, IL*, 986 F.2d 1142 (7th Cir. 1998) - The federal district court properly entered Rule 11 sanctions against plaintiff’s counsel for bringing suit against a judicial circuit.

**Public Speaking**

- “Casualty and Property Seminar - Premises Liability Update”
  Heyl Royster (2008)
- “Current Issues in Illinois Law”
  United States Arbitration and Mediation, Midwest, Inc. (2007)
- “Claims Against Governmental Agencies / Tort Immunity”
  Illinois State Bar Association (2006)

**Professional Associations**

- Illinois State Bar Association
- St. Clair County Bar Association
- Bar Association for the Central and Southern Federal Districts of Illinois
- East St. Louis Bar Association

**Court Admissions**

- State Courts of Illinois
- United States District Court, Southern and Central Districts of Illinois (Trial Bar)
- United States Court of Appeals, Seventh Circuit
- United States Supreme Court

**Education**

- Juris Doctor, John Marshall Law School, 1983
- Bachelor of Science-Political Science, Eastern Illinois University, 1980