

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION**

SHARON MILLER, Special Administrator of )  
the Estate of DEPARIS MILLER, deceased, )  
 )  
Plaintiff, )

v. )

WHITE CASTLE SYSTEM, INC. and )  
WESTEC INTELLIGENT SURVEILLANCE, INC. f/k/a )  
WESTEC INTERACTIVE SECURITY, INC., )  
\_\_\_\_\_ )

No. 07 L 004632

WHITE CASTLE SYSTEM, INC., )  
 )  
Third-Party Plaintiff, )

v. )

WESTEC INTELLIGENT SURVEILLANCE, INC. f/k/a )  
WESTEC INTERACTIVE SECURITY, INC., )  
 )  
Third-Party Defendant. )

**MOTION OF WESTEC TO STRIKE AND BAR ANY S.C.R. 213(f)(3) SPOILIATION OPINION TESTIMONY  
OF PLAINTIFF’S EXPERT, MICHAEL J. WITKOWSKI, ED.D., CPP**

Defendant/Third-Party Defendant, WESTEC INTELLIGENT SURVEILLANCE, INC. F/K/A WESTEC INTERACTIVE SECURITY, INC., (hereafter, ‘WESTEC’), respectfully requests an order barring any opinion spoliation testimony from plaintiff’s expert, Michael J. Witkowski, Ed.D., CPP, that WESTEC’S **June, 2006** loss of Westec’s computer server hard-drive (storage ‘S’ drive/IVR), amounts to spoliation of evidence. Michael J. Witkowski, Ed.D., CPP has no knowledge the information contained on WESTEC’S lost computer server hard-drive (storage ‘S’ drive/IVR) is any different than the information found on the Rapid Eye C.D. retained as evidence in this case. Furthermore, Michael J. Witkowski, Ed.D., CPP is not qualified to provide testimony that any of computer server hard-drive (storage ‘S’ drive/IVR) lost by WESTEC can be considered “spoliation of evidence”. He has no understanding of what computer server hard-drive (storage ‘S’ drive/IVR) information WESTEC lost and has no basis to testify WESTEC’S loss of the computer server hard-drive (storage ‘S’ drive/IVR), significantly impairs plaintiff’s ability to prove her negligent security case against WHITE CASTLE.

I

**BACKGROUND OF THE DEPARIS MILLER STABBING AT WHITE CASTLE RESTAURANT #25**

On **May 5, 2005**, WHITE CASTLE restaurant #25 (hereafter #25) was a fast-food franchise at 5618 W. North Avenue in the City of Chicago. On Thursday, **May 5, 2005 at 2:33:47 a.m.**, the decedent, DeParis Miller, entered #25 (the Miller incident). 57 seconds later at **2:34:14 a.m.** DeParis Miller exited #25 through the east door and was allegedly stabbed to death. On **May 5, 2005**, WESTEC was a remote video surveillance monitoring company viewing and listening to #25 from its command center in Irvine, California. WESTEC's obligations at #25 were contractual. The CONTRACT FOR PURCHASE AND/OR LEASE OF SECURITY SERVICES AND PRODUCTS between WHITE CASTLE and WESTEC, (including *Addendum 'B' Visual Command Center Guidelines and Procedures*) is marked (See, Exhibit 'A') and is also attached to plaintiff's second amended complaint. Under the terms of this contract, WESTEC had a limited contractual duty to monitor the video surveillance system at #25 (a) when alarm signals are received from the video surveillance system located at the subject location, and (b) during scheduled video surveillance tours of the subject location. The CONTRACT did not require WESTEC to save any audio or visual images beyond 60 days and WESTEC was not required to have security guards within #25 (**Exhibit 'A' Addendum B, Reports at Page 6/6**). During **June, 2006**, WESTEC moved its business from California to Iowa. During WESTEC'S move from California to Iowa, WESTEC lost computer server hard-drive (storage 'S' drive/IVR) which may have included information regarding the #25 stabbing of DeParis Miller. Plaintiff claims this lost information amounts to spoliation of evidence. Consequently, Miller brought this action against WHITE CASTLE for wrongful death based for the failure of #25 to have guards at #25 and against WESTEC for spoliation of evidence, for WESTEC'S loss of computer server hard-drive (storage 'S' drive/IVR), which plaintiff claims decreases her chances in proving a negligent security case against WHITE CASTLE.

On **May 5, 2005**, #25 had video monitoring/surveillance equipment at its restaurant. In part, the #25 monitoring equipment included 16 video/audio cameras, a WESTEC two way intercom, and a Rapid Eye. For the Miller incident at #25, the visual and audio activities were recorded to WHITE CASTLE'S Rapid Eye. For the Miller incident, the Rapid Eye recorded all visual and audio activities within #25, recording the same to a C.D. **The C.D. was not lost and**

**has been produced by WHITE CASTLE and is evidence in this case. The C.D. contains all the visual and audio recordings/images of the Miller incident.**

At the time of the Miller incident, WESTEC was connected to the #25 Rapid Eye via an internet and telephone connection which allowed WESTEC to view, listen and communicate with #25 through WHITE CASTLE'S cameras, microphones, and speakers. The Rapid Eye audio and visual images were captured on the #25 Rapid Eye and were contemporaneously transmitted by telephone and internet to WESTEC in Irvine, California. There are no other video or audio images of the Miller incident other than what is captured on the Rapid Eye C.D.

Other than an emergency telephone (red phone) and other telephone line, WESTEC'S only way to view and listen to the Miller incident at #25 was through the #25 Rapid Eye. #25 images from the Rapid Eye were sent electronically from the Rapid Eye to Irvine, California and could be stored in WESTEC'S command center on WESTEC'S DVR or 'S' drive.

At WESTEC'S command center in Irvine, California, WESTEC saved the #25 Rapid Eye audio and visual images on WESTEC'S DVR. WESTEC also recorded the command center response activities of its intervention specialists. This was done by recording the intervention specialists' activities to DICE. DICE is a software program that records intervention specialists' activities, including key strokes. The DICE All Activity Records is marked as Witkowski's deposition Exhibit #10. **The DICE All Activity Records were not lost and the DICE All Activity Records are evidence in this case.**

## **II**

### **THE SECOND AMENDED COMPLAINT AND PLAINTIFF'S MAY 2, 2010 S.C.R. 213(f)(3) DISCLOSURES**

1. On **December 4, 2009**, 4.5 years after the **May 5, 2005** loss and after the 735 ILCS 5/2-1302 personal injury statute expired against WESTEC, SHARON MILLER (mother of DEPARIS MILLER) filed her second amended complaint, and named WESTEC as a spoliation defendant for the first time (See **Exhibit 'B'**). Paragraphs 34, 36, and 39 of Count III-Spoliation of Evidence read:

34. Ochoa testified that he, on behalf of WESTEC, voluntarily undertook, through affirmative conduct, to preserve certain materials following the incident including, but not limited to, a computer server hard-drive (storage S drive), which contained, *inter alia*, the internal recording audio system for WESTEC.

36. Further, Ochoa testified that the aforementioned storage S drive was lost/mislaid/destroyed following/during the move of WESTEC'S "Command Center" operations from Irvine, California to Des Moines, Iowa in or around June, 2006.

39. As a direct and proximate result of the defendant's breach, the plaintiff is unable to demonstrate negligence, and consequently, she will be prevented from establishing his alleged breaches.

2. On **March 15, 2010**, this Court ordered Plaintiff to make S.C.R. 213(f)(3) disclosures by **April 28, 2010** (See **Exhibit 'C'**).

3. Naming Michael J. Witkowski, Ed.D., CPP as plaintiff's S.C.R. 213(f)(3) opinion witness on **May 24, 2010**, Plaintiff's made the S.C.R. 213(f)(3) spoliation of evidence disclosure (See **Exhibit 'D'**). Plaintiff's disclosure #20 reads:

20. Westec sought to preserve and, then, lost a computer server hard-drive (storage S drive) that contained, *inter alia*, the internal recording audio system for Westec. (Ochoa pp75-76, 85-86) and this missing evidence has not been produced by Westec. The plaintiff is severely prejudiced by the lost server hard-drive and without the missing evidence the plaintiff's reasonable probability of succeeding has been diminished.

### III

#### MICHAEL J. WITKOWSKI, ED.D., CPP HAS NO EXPERTISE OR FACTUAL BASIS TO TESTIFY WESTEC'S LOSS OF COMPUTER SERVER HARD-DRIVE (STORAGE 'S' DRIVE/IVR) AMOUNTS TO SPOILIATION OF EVIDENCE AND HIS SPOILIATION OPINIONS SHOULD NOT BE ALLOWED

1. On **July 19, 2010** the deposition of Michael J. Witkowski, Ed.D., CPP was taken (See **Exhibit 'E'**, the deposition of Witkowski with deposition exhibits, including resumé). Michael J. Witkowski, Ed.D., CPP has a doctorate in educational leadership (**Exhibit 'E'** p. 7) and has no experience in engineering, software applications, or Rapid Eye technology (**Exhibit 'E'** p. 195, 196). Michael J. Witkowski, Ed.D., CPP had no knowledge what computer information was lost by WESTEC nor how this lost information affects plaintiff's case (**Exhibit 'E'** p. 259). Witkowski has never testified as an expert in computer forensics, or forensic data recovery (**Exhibit 'E'** p. 194), and was never qualified as an expert in remote monitoring of video surveillance systems (**Exhibit 'E'** p. 195). He had no education or experience in computer science, or

degrees in computer engineering or software applications (**Exhibit 'E'** p. 195). Witkowski did not know how to run WESTEC'S DICE Computer Software, and never testified on WESTEC'S DICE operation. He was not familiar with the video Rapid Eye installed inside WHITE CASTLE #25 (**Exhibit 'E'** p. 196). He had never worked for a video monitoring surveillance company (**Exhibit 'E'** p. 197). While he acknowledged WESTEC monitored #25 from Irvine, California, he had never been to WESTEC'S command center (**Exhibit 'E'** p. 198). For the Miller incident, he was not aware there was a Rapid digital recorder in #25 (**Exhibit 'E'** p. 201). "All he knew there was equipment set-up in #25, and thought it recorded remotely" (**Exhibit 'E'** p. 201). He did not know where the Rapid Eye System was at #25 (**Exhibit 'E'** p. 202). He acknowledged WHITE CASTLE'S Rapid Eye recorded the WHITE CASTLE visual and audio surveillance, and recorded this information to a Rapid Eye C.D. (**Exhibit 'E'** p. 202). He did not know how WHITE CASTLE'S Rapid Eye C.D. was recorded at #25, and thought the C.D. was recorded offsite. He was not aware how the audio or visual images were stored at #25 (**Exhibit 'E'** p. 203), but then agreed the #25 Rapid Eye C.D. was prepared by WHITE CASTLE (**Exhibit 'E'** p. 204). The WHITE CASTLE surveillance C.D. made by #25 recorded the employees working the registers and parking lot (**Exhibit 'E'** p. 204). The Rapid Eye C.D. recorded the internal surveillance inside #25 (**Exhibit 'E'** p. 205), which is what occurred inside the restaurant and was recorded to a C.D. (**Exhibit 'E'** p. 205). There were sixteen cameras in the restaurant (**Exhibit 'E'** p. 206). He had no personal knowledge the Rapid Eye C.D. did not correctly record the events visually from surveillance cameras inside #25 (**Exhibit 'E'** p. 209).

To respond to the #25 Miller incident alarm activation, Witkowski said WESTEC received a front counter alarm, and WESTEC then responded to the alarm (**Exhibit 'E'** p. 220). The only way WESTEC could respond to the WESTEC alarm is through the on-premise #25 Rapid Eye (**Exhibit 'E'** p. 221). Once WESTEC received the # 25 alarm, WESTEC would remotely access WHITE CASTLE'S Rapid Eye through #25 cameras and audio (**Exhibit 'E'** p. 221). Other than telephones, WESTEC'S only connection to #25 was through WESTEC'S Rapid Eye and this was WESTEC'S only portal to #25 (**Exhibit 'E'** p. 220). Whatever WHITE CASTLE'S Rapid Eye was recording was at the same time being observed by WESTEC in California (**Exhibit 'E'** p. 221). WESTEC could not see or hear anything other than what WESTEC was seeing through the

#25 Rapid Eye, and Witkowski agreed the audio and visual images of the Miller incident were transmitted to WESTEC over an internet and telephone line (Exhibit 'E' p. 221).

For the Miller incident, he said WESTEC viewed and listened to the same video transmitted from the #25 Rapid Eye to WESTEC in California (Exhibit 'E' p. 221). WESTEC had no means of monitoring or recording what occurred in #25 other than what was transmitted through the Rapid Eye to WESTEC in California (Exhibit 'E' p. 223).

For the Miller incident, Witkowski said, WESTEC saved the Rapid Eye audio and visual images on WESTEC'S DVR (224). **He did not think WESTEC had any audio or video recordings of the Miller incident stored at WESTEC'S command center DVR that were not also recorded on the #25 DVR (Exhibit 'E' p. 224). What WESTEC recorded and lost on its California DVR is no different than captured on the Rapid Eye C.D. (Exhibit 'E' p. 226).**

Witkowski did not know what computer equipment WESTEC had in California (Exhibit 'E' p. 228). He assumed WESTEC had a DVR (Exhibit 'E' p. 228) and that WESTEC'S IVR was a more advanced form of a DVR (Exhibit 'E' p. 229). He had no expertise in WESTEC'S equipment (Exhibit 'E' p. 229). He had no knowledge the video lost by WESTEC in its move from California was any different than the video kept by WHITE CASTLE, and saved to the C.D. (Exhibit 'E' p. 229). Michael J. Witkowski, Ed.D., CPP did not know what equipment WESTEC had in California to record the information coming in from #25 (Exhibit 'E' p. 228). He didn't know if WESTEC lost any audio when its DVR was lost (Exhibit 'E' p. 229, 230). He had no knowledge of what WESTEC recorded to its internal DVR (Exhibit 'E' p. 230). He had no idea what was recorded in WESTEC'S command center that was not also recorded on the WHITE CASTLE C.D. (Exhibit 'E' p. 231).

He was shown WESTEC'S command center DICE All Activity Record (Exhibit 10 to Exhibit 'E'), and said the All Activity Record report contains transactions in the WESTEC system (Exhibit 'E' p. 231). Witkowski agreed DICE recorded the key strokes of WESTEC command center personnel (Exhibit 'E' p. 234).

Witkowski had no information any of WESTEC'S DICE records were lost (Exhibit 'E' p. 234). **He didn't know if WESTEC had an 'S' drive in California (Exhibit 'E' p. 238).** He was asked what information WESTEC lost the during its move, and he said WESTEC lost a drive that had information pertaining to the case (Exhibit 'E' p. 240), but he didn't know what information was lost (Exhibit 'E' p. 241). Again, he had no knowledge the audio/visual images allegedly lost by

WESTEC are not the same as recorded on the Rapid Eye C.D., and saved to C.D. (**Exhibit ‘E’** p. 241). Again, when Mr. Witkowski was asked what information WESTEC lost, Witkowski said “How would I know, if I don’t know” (**Exhibit ‘E’** p. 240). He did not know what information was lost, and had no knowledge how the lost information affected Plaintiff’s case. (**Exhibit ‘E’** p. 259). The Rapid Eye C.D. is Exhibit 7 to Michael J. Witkowski, Ed.D. CCP’s **July 16, 2010** deposition, and included here.

**IV**  
**IT IS PROPER FOR THIS COURT TO STRIKE SPOILIATION TESTIMONY**  
**AND OPINION OF MICHAEL J. WITKOWSKI, ED.D., CPP AS UNSUPPORTED BY THE EVIDENCE**

Overall, Witkowski’s opinion in this case is that if #25 had an on premisses security guard, the Miller incident would not have occurred (See **Exhibit ‘E’**). While he may be qualified to provide testimony #25 was inadequately guarded, he has no qualification or understanding WESTEC’S loss of computer information amounts to spoliation of evidence. A witness will be allowed to testify as an expert if his experience and qualifications provide him with knowledge that is not common to a lay person and where such testimony will aid the trier of fact. For example, in *Colella v. JMS Trucking of Illinois, Inc.*, 2010 WL 2977602, 2010 Ill.App.LEXIS 740(2010) [the trial court allowed a specialized CDL truck driver, with 38 years of professional experience driving large trucks in construction sites, with 13 years experience driving dump trucks similar to the one in before the court this case, to give expert testimony about a truck driver’s responsibilities driving trucks at the construction site]. Witkowski’s background and qualifications are not even remotely close to the level of the truck drivers expertise analyzed in *Colella*. Here, Witkowski has no professional, educational, practical, or research experience in the field of computer forensics or computer science. Witkowski’s resume and deposition show no computer knowledge relevant to WESTEC’S loss of computer server hard-drive (storage ‘S’ drive/IVR). *Id.* Since Witkowski lacks the experience and qualifications needed to provide reliable ‘opinion’ testimony, it is proper to strike his spoliation testimony.

For Witkowski to provide competent testimony WESTEC’S loss of computer information is relevant to establish spoliation of evidence, Witkowski must understand how the #25 Rapid Eye worked in connection with WESTEC’S Irvine, California command center. Witkowski has no computer training or practical understanding of the computer/communications link between #25 and WESTEC in California. Plaintiff says Witkowski was not tendered as an expert in forensic computer

science (**Exhibit 'E'** p. 194); plaintiff also say Witkowski was not tendered as a computer software expert (**Exhibit 'E'** p. 243). Here, if Michael J. Witkowski, Ed.D. CCP is not reasonably well versed in computer forensics, Witkowski can not competently testify on what was deleted from WESTEC'S computer server hard-drive (storage 'S' drive/IVR). Much of Witkowski's testimony was speculation and he did not know what computer equipment WESTEC had in California, had no experience with WESTEC'S equipment and could not opine why or how WESTEC'S lost computer evidence was relevant in explaining the Miller's incident. He had no idea whether the lost information was not the same as that recorded on the C.D. and kept as evidence in this case.

WHEREFORE, movant respectfully requests Witkowski's opinion testimony, including S.C.R. 213(f)(3) spoliation of evidence disclosure #20, spoliation of evidence be stricken and that Witkowski be barred from providing any opinion testimony on spoliation of evidence.

Respectfully Submitted,

  
By: \_\_\_\_\_  
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