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.

2010 OCT

MOTION OF WESTEC FOR SUMMARY JUDGMENT ON COUNT III OF PLAINTIFF'S SECOND AMENDED COMPLAINT 'SPOLIATION OF EVIDENCE'

Defendant, WESTEC INTELLIGENT SURVEILLANCE, INC. F/K/A WESTEC INTERACTIVE SECURITY, INC., (hereafter, WESTEC), by and through their attorney, LAW OFFICES OF LOWELL D. SNORF, III, moves this Honorable Court pursuant to 735 ILCS 5/2-1005 (b) for summary judgment as to Count III of Plaintiff's Second Amended Complaint at Law (Spoliation of Evidence):

I
PARTIES

1. The plaintiff is SHARON MILLER, individually and as Special administrator of the Estate of DEPARIS MILLER, deceased. She brings this action on behalf of her deceased son DEPARTS MILLER who was allegedly stabbed to death on May 5, 2005 at 2:30 a.m. at the #25 restaurant.

2. A defendant is WHITE CASTLE SYSTEM, INC., which on May 5, 2005 operated a 24 hour fast food restaurant. This restaurant is referred as "#25" located at 5618 W. North Avenue in the City of Chicago.

3. A defendant is WESTEC and on May 5, 2005 WESTEC was an off-premises interactive video surveillance monitoring company that pursuant to its contract with WHITE CASTLE performed off-premises video

monitoring of #25 from WESTEC'S Irving, California command center. WESTEC'S responsibilities included conducting three video/audio tours and responding to alarms for #25.

II
THE PLEADINGS AND **PLAINTIFF'S S.C.R. 213(f)(3) DISCLOSURES**

Plaintiff brings her negligent security action against WHITE CASTLE for the alleged failure of WHITE CASTLE to provide an on-site guard at #25, which Plaintiff alleges would have prevented the stabbing of DEPARTS MILLER. WHITE CASTLE admits on **May 5, 2005** it did not have an on-site guard at #25. Resulting from a **May 5, 2005, 2:30 a.m.** stabbing of DEPARTS MILLER in the east parking lot of WHITE CASTLE Store No.: 25, on **May 4, 2007,** SHARON MILLER filed her negligent security complaint against WHITE CASTLE. Thereafter, on **October 4, 2007,** SHARON MILLER filed an amended complaint again naming WHITE CASTLE as the only defendant. WESTEC is not a named defendant in plaintiffs **October 4, 2007,** amended complaint and WESTEC is immune from a direct action by deceased's estate because the two year limitation period of 735 ILCS 5/13-202 expired. On December **4, 2009,** plaintiff filed a second amended complaint adding Count III-Spoliation of Evidence-against WESTEC, alleging at Count III, ¶34 WESTEC 'lost' its computer server hard drive (storage 'S' drive/IVR/DVR) during its **June, 2006** move from California to Iowa which contained *inter alia,* the internal recording audio system for WESTEC which may prevent SHARON MILLER from proving a negligent security case against WHITE CASTLE (See **Exhibit 'A'** Count III, ¶ 39). On **January 4, 2010,** WESTEC answered plaintiff's Count III spoliation of evidence, asserting affirmative defenses (See **Exhibit 'B').** On **January 15, 2010** plaintiff answered WESTEC'S affirmative defenses (See **Exhibit \`C').** On **April 28, 2010,** plaintiff provided S.C.R. 213(f)(3) disclosures providing only **one** uncertain opinion relevant to spoliation (See **Exhibit 'D').** On **July 9, 2010,** plaintiff provided answers to a request to produce on Michael J. Witkowski, Ed.D., CPP which also provided no support to plaintiffs spoliation count (See **Exhibit \`E').**

III
SUMMARY JUDGMENT STANDARD

735 ILCS 5/2-1005(b) allows a Defendant with or without affidavits to move for summary judgment as to all or any part of the relief sought against the Defendant. Summary judgment is appropriate where there is no genuine issue

of material fact, and the moving party is entitled to **judgment** as a matter of law. The plaintiff is not required to prove her case at the summary judgment stage, however, plaintiff must present evidentiary facts to support each element of a cause of action, *Strut: v. Vicere,* 389111.App.33 676, 906 N.E.2d 1261. Unsupported complaint allegations do not raise a question of fact in a summary judgment proceeding. *Lesniak v. Estate ofLesniak,* 8211I.App.3d 1102, 403 N.E.2d 683, 687 (1' Dis. 1980); *Kimbrough v. Jewel Companies, Inc.* 92 Ill.App.3d 813, 416 N.E.2d 327 (la' Dis. 1981).

IV
FACTS

On May 5, 2005 around 2:30 a.m., DEPARIS MILLER entered WHITE CASTLE Store #25 (hereafter #25). During **May, 2005,** WESTEC was under contract with WHITE CASTLE to perform remote video and audio surveillance for #25. The contract required WESTEC to perform three video tours per day and respond to #25's alarms when #25 signaled WESTEC (See **Exhibit 'A'; D.Facts ¶7** and ¶9; see **Exhibit 'B'** ¶7 and ¶9).

On May **5, 2005,** #25 had video monitoring/surveillance equipment at its restaurant. The *#25* monitoring equipment included 16 video/audio cameras (see **Exhibit 'F',** p. 81, deposition ofJoe Ochoa, with Exhibits), a WESTEC two-way intercom, and **a** Rapid Eye digital video recorder (the "Rapid Eye"). Images recorded to the Rapid Eye were subsequently transmitted to WESTEC (See **Exhibit 'C'** ¶8, affidavit of Joe Ochoa). Upon opening the audio/visual recordings sent from the Rapid Eye, the WESTEC operator had access to 16 video images from 16 cameras (See **Exhibit `F'** p. 82).

To get WESTEC to respond to an alarm, a WHITE CASTLE employee would use a red phone, activate a panic button, or push a pendant (See **Exhibit 'F',** p. 102). When a #25 employee would push the store's front counter alarm, the signal would travel almost instantaneously to the control panel and from there to WESTEC (See **Exhibit 'F'** p. 103, 104). Once the signals were received by WESTEC, a WESTEC intervention specialist would connect to WHITE CASTLE'S Rapid Eye (See **Exhibit 'F', p. 81, 104,** 105).

On **May 5, 2005, at 2:33:38 a.m., a** #25 employee pushed the front counter alarm in the #25 front dinning room (See **Exhibit 'F'** p. 107, 112, 117). WESTEC'S intervention specialist, Chris Malek, saw the #25 alarm had been

triggered via a pending event cue in WESTEC'S software called DICE (See Exhibit 'F' p. 51, 84). The #25 alarm was automatically generated and saved in DICE (See Exhibit 'F' p. 129, 130). From the DICE All Activity Record **(Exhibit `F', Sub-Exhibit** '7'), WESTEC could determine when the alarm signal was activated (See **Exhibit 'F'** p. 106). The DICE All Activity Record shows that the alarm from #25 came into WESTEC at **2:37:28 a.m.** (See **Exhibit 'F'** p. 136, 137). The DICE All Activity Record shows two activations at the #25 front counter hub for the **May 5, 2005** incident (See **Exhibit 'F'** p. 137). Also, the DICE All Activity Record shows when Chris Malek voiced down during the incident (See **Exhibit 'F'** p. 137, 138).

In addition to DICE, everything WESTEC did while handling the event was captured on the Rapid Eye C.D. (marked as Exhibit '5' in Ochoa's deposition) (See **Exhibit `G',** ¶ 10, ¶11). WESTEC'S view of #25 is the same as what was recorded on the Rapid Eye (See **Exhibit 'F'** p. 147, **Exhibit 'C').** The Rapid Eye C.D. included Chris Malek's voice downs to #25 and the times of the voice downs (See **Exhibit 'F' p.** 112, **113,** 115, 116, 139). After reviewing Malek's voice downs via the Rapid Eye C.D., Ochoa, a WESTEC C-3 Manager, said the voice downs were successful (See **Exhibit 'F'** p. 141, 163). After review of the Rapid Eye C.D., Ochoa could not confirm any telephone calls made by WESTEC to #25 and he does not recall any calls made to #25 (See **Exhibit 'F'** p. 120, 127; see **Exhibit `G').**

When Ochoa would review an incident, he would review it on the internal WESTEC IVR, then save it on his hard drive. (See **Exhibit 'F'** p. 76). However, although Ochoa thought he reviewed the MILLER event, he is not certain he in fact did (See **Exhibit 'F'** p. 76). Therefore, Ochoa is not certain whether information related to the MILLER event was saved to his hard drive, which was later lost (See **Exhibit 'F'** p. 76, 77). Ochoa is not certain whether any evidence was lost (See **Exhibit 'F'** p. 58, 165, 166). More specifically, Ochoa was not certain what information relating to the MILLER event may or may not have been lost (See **Exhibit 'F'** p. 58, 165, 166).

In **June, 2006,** WESTEC moved from California to Iowa (See **Exhibit 'F' p.** 57, 123). During the move, many of WESTEC'S records were lost (See **Exhibit 'F'** p. 57). Ochoa said everybody's files were lost (See **Exhibit 'F'** p. 124). Ochoa says his documents were on a storage device and destroyed (See Exhibit 'F' **p.** 58, 123, 124). Personnel file boxes were lost (See **Exhibit 'D'** p. 58, 123). A server was put on a storage device (See **Exhibit 'F'** p. 58). Ochoa

had no explanation what was lost (See Exhibit 'F' p. 58). After the move, the information was no longer available on the server (See Exhibit 'F' p. 124). Ochoa does not know what happened to the information (See Exhibit 'F' p.124). Ochoa could not tell what WHITE CASTLE information was lost (See Exhibit 'F' p. 58, 164, 165, 166). WESTEC did not tell WHITE CASTLE information was lost because WESTEC was never certain any information was lost (See Exhibit 'F' p. 165).

Ochoa first became aware the MILLER lawsuit in July, 2009 (See Exhibit 'F' p. 165). There is no evidence WHITE CASTLE or Plaintiff Sharon Miller requested WESTEC to retain specific information related to the May 5, 2005 MILLER event. There is no evidence Plaintiff notified WESTEC of the incident. There is no evidence plaintiff directed WESTEC to keep specific direct evidence for her negligent security case against WHITE CASTLE.

V
ARGUMENT
MILLER MAKES NO FACTUAL SHOWING WESTEC HAD A DUTY TO PRESERVE COMPUTER INFORMATION

A. Plaintiff has no material proof WESTEC voluntarily agreed to preserve direct evidence, and summary judgment should be granted.

Plaintiff alleges WESTEC "voluntarily undertook" to preserve a computer server, that WESTEC should have foreseen the `evidence' was material, that defendants lost the server, then breached their duty to plaintiff and now Plaintiff is unable to prove negligence against WHITE CASTLE (See Exhibit 'A', ¶ 34-39). There continues to be no duty under Illinois law to preserve evidence. *Boyd v. Travelers Insurance Co.,* 166 III.2d 188, 191, 652 N.E.2d 267, 270 (1995). Spoliation of evidence is a form of negligence. Proof of spoliation requires a showing that the defendant owed the plaintiff a duty to preserve evidence, breached that duty, and proximately caused the plaintiff to be unable to prove the underlying cause of action. *Boyd v. Travelers Insurance Co.,* 166 Il1.2d 188, 191, 652 N.E.2d 267, 270 (1995). In a spoliation claim, the injury that must be proven is that "Defendant's loss or destruction of the evidence caused the plaintiff to be able to prove an otherwise valid, underlying cause of action." *Id* at 272. A spoliation of evidence claim is connected to the merits of the underlying suit. *Boyd v. Travelers Insurance Co.,* 166 III.2d 188, 191, 652 N.E.2d 267, 270 (1995); see also *Kelly v. Sears Roebuck & Co.,* 308 Il1.3d 633, 720 N.E.2d 683, 694-95 (1999) [holding:

affirming dismissal of spoliation count where plaintiff was unable to point to a specific piece of evidence that which precludes plaintiff from recovering in underlying case].

In *Boyd,* Defendant, Travelers Insurance, lost a propane catalytic heater that badly burned Boyd. *Id.* Travelers sent two employees to Boyd's house to secure the heater, telling Boyd, Traveler's needed the heater to investigate Boyd's workers' compensation claim. *Id.* **The heater belonged to Boyd.** *Id* The Traveler's employees knew the heater was critical evidence. Without the heater, plaintiff had no direct evidence to prove a products liability case. In *Boyd,* the key to factually establish spoliation was plaintiff's ability to identify a specific piece of lost evidence, e.g. the lost heater, and factually show why that lost evidence allowed plaintiff to prove her underlying products liability case. *Id.* Here, plaintiff, MILLER, cannot allege specific facts to show WESTEC ever agreed to preserve any direct evidence relevant to MILLER'S underlying negligent security case against WHITE CASTLE. There is no factual showing how WESTEC'S loss ofunspecified evidence is even remotely connected with Plaintiff's allegations WHITE CASTLE failed to have an on-site security guard to protect DEPARIS MILLER, causing DEPARTS MILLER to be stabbed (See **Exhibit `A',** Count I, III).

In any analysis of whether an alleged claim for spoliation of evidence is factually sufficient, the first inquiry is whether a defendant had any duty to preserve evidence. *Id.* *Dardeen v. Kuehling,* 213 I11.2d 329, 821 N.E.2d 227 (2004), explained but did not modify *Boyd* and said:

> *Boyd* articulates a two-prong test for the existence of a duty to preserve evidence: (1) an agreement, contract, statutory requirement, or other special circumstance such as the assumption of the duty by affirmative conduct (the relationship prong), and (2) that a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action (the foreseeability prong). *Boyd,* 166 I11.2d at 195, 209 Ill.Dec. 727, 652 N.E.2d 267. **Unless both prongs are satisfied, there is no duty to preserve evidence.** *Boyd,* 166 I11.2d at 195, 209 111.Dec. 727, 652 N.E.2d 267. *Andersen,* 793 N.E.2d 962.

At issue in *Dardeen,* 213 I11.2d 329, 821 N.E.2d 227 (2004), was the first "relationship prong" of *Boyd,* 652 N.E.2d at 271 (1995). In *Dardeen v. Kuehling,* 213 I11.2d 329, 821 N.E.2d 227 (2004), the plaintiff fell on defendant's sidewalk. **Before** plaintiff sued defendant, defendant homeowner asked State Farm if it was acceptable to fix the

sidewalk. *Id* State Farm told the homeowner to fix the sidewalk. After the sidewalk was fixed, plaintiff sued State Farm alleging spoliation of evidence because State Farm allowed repairs to the sidewalk, and Plaintiff had no ability to prove negligence against the homeowner after the sidewalk was fixed. *Id.* Plaintiff argued State Farm 'controlled' the direct evidence, i.e., the sidewalk on which plaintiff fell and therefore State Farm had a duty to preserve the sidewalk for plaintiff. The Supreme Court said plaintiff could did not meet the *Boyd* "Relationship Prong" because State Farm's "opportunity to control" the side walk did not impose a duty on State Farm to plaintiff Here, plaintiff cannot meet her burden of proof under the *Boyd* first "Relationship Prong." Plaintiff establishes no facts of what direct information WESTEC agreed to 'control.' Plaintiff also fails to establish that but for the loss of WESTEC'S information, the Plaintiff had a reasonable probability of proving the lack of an on-site guard at #25 resulted in the stabbing of DEPARIS MILLER. There are no material facts alleging how any lost information is important evidence. Any evidence that was lost, was lost in June, 2006 before MILLER filed her May 4, 2007 complaint against WHITE CASTLE.

The first "Relationship Prong" *of Boyd* allows plaintiff to allege WESTEC "voluntarily undertook" to preserve evidence. However, any voluntary undertaking duty by WESTEC is limited to preserving direct material evidence supporting plaintiffs underlying claim. A plaintiff must specifically identify what direct evidence the spoliator lost and why the lost evidence impairs plaintiffs case; and no Illinois case imposes a duty on any alleged spoliator to preserve collateral evidence. *Thornton v. Shah,* 333 Ill.App.3d 1011, 777 N.E.2d 396 (1" Dis. 2007) [Spoliation claim dismissed where no facts alleged explaining how missing telephone records caused plaintiffs to be unable to prove underlying malpractice claim. *See also: Jackson v. Michael Reese Hospital,* 294 III.App.3d 1, 689 N.E.2d 205 (1" Dis. 1998) [holding: to properly allege spoliation, plaintiff must factually establish why missing x-rays were needed to prove an underlying medical negligence case].

Here, plaintiff alleges WESTEC voluntarily agreed to keep information. Plaintiff must make a factual showing the missing information is critical to plaintiffs ability to prove her negligence case against WHITE CASTLE and without the missing information, she cannot prove a claim. *Boyd v. Travelers Insurance Co.,* 652 N.E.2d 267, 271 (1995). Simply alleging WESTEC voluntary agreed to preserve `S' drive information without alleging why the lost information

is material invites a spoliation claim over insignificant evidence. *Boyd v. Travelers Insurance Co.,* 652 N.E.2d 267, 274 n. 2 (1995). Here, plaintiff cannot make any factual showing WESTEC voluntary undertook a duty to preserve any evidence from its computers. The plaintiff has no information WESTEC agreed or had any duty to retain, preserve or maintain any computer information for plaintiff. Plaintiff raises no facts WESTEC had notice of any litigation, or that MILLER needed or requested any information from WESTEC. WESTEC had no ongoing relation with MILLER. There was never a discovery demand by plaintiff on WESTEC requesting information relative to WESTEC'S database for the MILLER incident. Plaintiff cannot satisfy the "first prong" ofBovdas she cannot show any voluntary undertaking to preserve direct evidence critical to the underlying action. *Dardeen v. Kuehling,* 213 I11.2d 329, 821 N.E.2d 227 (2004).

Plaintiff also cannot satisfy *Boyd's* second prong. *Id* Here, there must be a showing the duty extends to the specific evidence at issue by demonstrating WESTEC should have known the lost direct evidence would be material to SHARON MILLER'S negligence action against WHITE CASTLE. Plaintiff cannot describe the direct lost information. Plaintiff has the Rapid Eye C.D. and DICE, but she alleges no material facts why WESTEC'S lost 'S' drive causes her to be unable to prove a case against WHITE CASTLE.

A specific focus on the meaning of lost specific evidence is found in *Boyd* and *Dardeen.* In *Boyd,* the evidence lost was the catalytic heater. Without question this lost evidence caused plaintiff to be unable to prove a products liability case against the manufacturer. In *Dardeen,* the court focused on the issue of 'control of evidence', i.e., the sidewalk upon which plaintiff fell. In both *Boyd* and *Dardeen* there was careful definition of what the 'specific evidence' is which causes a plaintiff to be unable to prove her case. Here, plaintiff cannot establish material fact WESTEC'S loss of unspecified information on an ' S' drive causes plaintiff to be unable to prove her case against WHITE CASTLE. There is also uncertainty what, if any, information WESTEC lost (See Exhibit 'F' p. 58, 164, 165, 166). Here, plaintiff makes no material showing any evidence lost was material in her underlying case against WHITE CASTLE. Again, plaintiff must establish both *Boyd's* prongs or plaintiff's spoliation claim will fail. A review of plaintiff's second amended complaint and the record before this court shows plaintiff cannot meet *Boyd's* requirements.

VI
ARGUMENT

PLAINTIFF CANNOT FACTUALLY ESTABLISH WESTEC'S ALLEGED LOST INFORMATION CAUSES PLAINTIFF TO BE UNABLE TO PROVE HER NEGLIGENT SECURITY CASE AGAINST WHITE CASTLE

A. Plaintiff is unable to prove causation and summary judgment should be granted.

To satisfy the element of proximate causation in an action for spoliation of evidence, a plaintiff must allege "sufficient facts to support a claim the loss or destruction of evidence caused plaintiff to be unable to prove the underlying lawsuit" *Boyd* 652 N.E.2d 267; *Miller v. Gupta* 174 I11.2d 120, 675, N.E.2d 1229 (1996) [spoliation claim causation element required plaintiff to demonstrate how the missing x-rays are critical to plaintiff's ability to prove the suit]. There is no dispute plaintiff has the Rapid Eye C.D. and the DICE report. Plaintiff has no evidence WESTEC lost critical evidence of the events occurring at #25, nor does the lost evidence have any bearing on WHITE CASTLE'S decision not to have a guard at #25, leading to the stabbing of DEPARTS MILLER. Again, Plaintiff's case against WHITE CASTLE is based on Plaintiff's allegation that #25 should have had an on-site guard at #25 (Exhibit 'A', Count II, ¶34). The lack of an on-site guard at #25 subjected DEPARTS MILLER to increased risk of harm, resulting in his stabbing. Again, on May 5, 2005 WHITE CASTLE does not dispute it did not have an on-site guard at #25.

Based on the central issues of Counts I and II of Plaintiff's second amended complaint, Plaintiff's spoliation allegations against WESTEC do not establish that any speculative information lost deprives MILLER of the opportunity to possess indisputable proof of her case against WHITE CASTLE.

In the underlying case, the threshold issue is whether WHITE CASTLE had a foreseeable duty to protect MILLER from his alleged criminal attack at #25. *Sameer v. Butt,* 343 Ill.App.3d 78, 796 N.E.2d 1063 (1" Dis. 2003). Here, Plaintiff retained Michael J. Witkowski, Ed.D., CPP to show MILLER would not have been stabbed if #25 had a guard on staff that an on-site guard would have deterred restaurant violence (see Witkowski deposition found as Exhibit "E" to WESTEC'S Motion to Bar, page 255, incorporated herein by reference as Exhibit **'H'].** Here, Witkowski's opinions are based on an examination of over 35 different forms of documentary evidence provided by plaintiff's attorney.

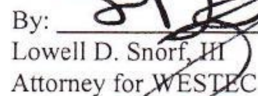
Plaintiff's May 24, 2010 S.C.R. 213(f)(3) interrogatory answers also show Michael Witkowski was provided in excess of 35 comprehensive documents to render his opinions (Exhibit 'V). Additionally, on July 9, 2010, Plaintiff answered WESTEC'S request to produce Michael J. Witkowski. Request #19 asks:

> "All documents relied on Michael J. Witkowski, Ed.D, CPP showing plaintiff is severely prejudiced by Westec's loss of the computer server hard-drive stated in opinion #20."

Here, plaintiff's response # 19 was "See response to request No. 1", which does not factually establish plaintiff's spoliation count. On July 16, 2010, Michael Witkowski was deposed where he provided an unrestricted opinion that on May 5, 2005, #25 needed an on-site guard present [Witkowski's deposition, page 110]. Here, Witkowski based his opinions against WHITE CASTLE on a comprehensive discovery record produced in the underlying case, e.g. the Rapid Eye C.D., DICE reports, written discovery responses, deposition transcripts, police reports, photographs and witness statements. The record clearly shows that even without WESTEC'S unspecified missing evidence, Plaintiff and/or Witkowski has sufficient information to render S.C.R. 213(0(3) opinions in the underlying case against WHITE CASTLE. *See:* _Midwest Trust Services, Inc. v. Catholic Health Partners_ 392 Ill.App.3d 204, 910 N.E.2d 638 (1St Dis. 2009) [holding spoliation proximate cause not established where trial record showed even without missing altered cardiac monitoring strips, plaintiff's expert had sufficient information to render his standard of care opinion in medical negligence case against doctor].

Accordingly, there is no issue of material fact raised, WESTEC'S loss of unspecified computer information causes plaintiff to be unable to prove her case against WHITE CASTLE under Counts I and II of Plaintiff's second amended complaint. WESTEC respectfully requests a summary judgment be entered in its favor, and against Plaintiff on Count III of Plaintiff's second amended complaint at law.

Respectfully Submitted,



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