Attorney No. 43736
STATE OF ILLINOIS)
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COUNTY OF COOK)

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

SHARON MILLER, Special Administratrix of the Estate of DEPARIS MILLER, deceased,	)	
Plaintiff,	)	
vs.	)	Case No. 07 L 004632
WHITE CASTLE SYSTEM, INC., a Delaware corporation; and WESTEC INTELLIGENT SURVEILLANCE, INC., a Delaware corporation,	)	Call "M_1"
Defendants.	)	

MEMORANDUM IN OPPOSITION TO DEFENDANT WESTEC'S MOTION *IN LIMINE* TO STRIKE AND BAR ANY SCR 213(f)(3) SPOLIATION OPINION TESTIMONY OF PLAINTIFF'S EXPERT, MICHAEL J. WITKOWSKI, ED.D, CPP
and
MOTION FOR SUMMARY JUDGMENT ON COUNT III OF THE PLAINTIFF'S SECOND AMENDED COMPLAINT AT LAW

Plaintiff asks the court to deny Defendant Westec Intelligent Surveillance, Inc.'s motion *in limine* to strike and bar any spoliation opinion of Dr. Witkowski and motion for summary judgment on Count III of the pending complaint. In support thereof, the plaintiff states as follows:

1. This is a personal injury action seeking monetary damages by Sharon Miller, Special Administratrix of the Estate of Deparis Miller, deceased. Further, Plaintiff alleges negligent spoliation of evidence against Defendant Westec Intelligent Surveillance, Inc. ("Westec").

2. Plaintiff alleges, *inter alia*, that Deparis Miller sustained life-ending injuries on May 5, 2005 at White Castle restaurant (5618 W. North Avenue, Chicago, IL) where Westec provided "interactive security," (*see* Contract p00001, Exhibit "A") and recorded (audio/video) the same, contemporaneously with the event. This incident resulted in a homicide investigation by the Chicago Police Department ("CPD") that required Westec to preserve and provide CPD with audio/video regarding this event that was in its possession. In light of, *inter alia*, a potential civil action arising out of the event, Westec sought to preserve the existence and integrity of the evidence. Thereafter, Westec lost the evidence. On August 10, 2009, the parties took the discovery deposition of Joe Ochoa. Ochoa is a C3 Manger f/k/a VCC Supervisor. At the deposition, Ochoa testified that following the May 5, 2005 stabbing of Deparis Miller at the White Castle certain hardware was retained due to the importance of certain information contained therein. Since the date of the incident and after hardware retained for safekeeping, Ochoa and/or Westec lost, mislaid, and/or destroyed the aforementioned hardware and the information contained thereon. (*See* Ochoa pp75-76, 85-86, Exhibit "F").

3. On May 24, 2010, the plaintiff filed her SCR 213(f)(3) disclosures that disclosed the opinions of Michael J. Witkowski, Ed.D, CPP ("Witkowski") and, *inter alia*, reserved "the right to elicit opinions from any Defendants' opinions' witnesses, including those expressed in the disclosures of and at the depositions of those witnesses" and "adopts and incorporates herein any favorable testimony or opinions provided by "any witnesses identified pursuant to 213(f)(1), (2) and (3) by any other party in this matter." (*See* Plaintiff's Answers to Interrogatories, p5 of 6, Exhibit "D"). Witkowski's deposition was taken on July 16, 2010. (*See* Witkowski, Exhibit "E").

4. On August 23, 2010, White Castle filed its SCR 213 disclosures that disclosed the opinions of Jon D. Groussman, JD ("Groussman"). (See attached White Castle's Answers to

Interrogatories, Exhibit "I"). Groussman's report states that "Westec failed to maintain their computer server hard-drive that contained the internal recording audio system for Westec." Groussman's deposition was taken on September 15, 2010.

5. On October 4, 2010, Westec filed this subject motion *in limine* to strike and bar spoliation opinion of Witkowski contending, essentially, that because the plaintiff's expert is not a computer expert he cannot opine that he cannot accept Ochoa's admission that the evidence was lost/destroyed and because Witkowski does not know what exactly was lost we cannot opine that had it been made available it may have affected his opinion.

6. Simultaneously, Westec filed this subject motion for summary judgment contending that (1) Westec owed no duty to preserve the computer serve containing evidence related to the incident involving Deparis Miller; (2) that the plaintiff must prove at motion stage that she cannot prove her case against White Castle in order to present the spoliation claim to a jury.

7. Both of Westec's motions must be denied for the reasons set forth below.

8. This matter is set for trial on November 30, 2010.

RESPONSE TO MOTION IN LIMINE TO STRIKE AND BAR

9. Westec seeks to bar, *in limine*, Witkowski from discussing or offering any opinion about evidence that Westec lost. Westec's argument that, essentially, Witkowski plaintiff's expert is not a computer expert he cannot opine that he cannot accept Ochoa's admission that the evidence was lost/destroyed and because Witkowski does not know what exactly was lost he cannot opine that had it been made available it may have affected his opinion.

10. An *in limine* motion permits a party to obtain an order before trial excluding inadmissible evidence and prohibiting interrogation concerning such evidence without the

necessity of having the questions asked and objections thereto made in front of the jury. *Reidelberger v. Highland Body Shop, Inc.*, 83 Ill. 2d 545, 549, 416 N.E.2d 268 (1981). Before granting a motion *in limine*, courts must be certain that such action will not unduly restrict the opposing party's presentation of its case. *Reidelberger*, 83 Ill. 2d at 550. Trial judges should be cautious in entering broad *in limine* orders, attempt to anticipate proper evidence that might be excluded by the order. *Cunningham v. Millers General Ins. Co.*, 227 Ill. App. 3d 201, 591 N.E.2d 80, 83 (4th Dist. 1992).

11. As stated above, Westec's employee, Ochoa, admitted that the company preserved and, then, lost evidence regarding the stabbing at the White Castle. Moreover, counsel for Westec, in the subject motion, admits "[d]uring WESTEC'S move from California to Iowa, WESTEC lost computer server hard drive (storage 'S' drive/IVR/DVR) which may have included information regarding the #25 stabbing of DeParis Miller." (*See* motion at p2).

12. First, although, as to the element of causation in an action for negligent spoliation of evidence, the plaintiff is required to allege that a defendant's loss or destruction of evidence caused the plaintiff to be unable to prove an otherwise valid, underlying cause of action, *Boyd v. Travelers Ins. Co.*, 166 Ill. 2d 188, 197, 652 N.E.2d 267 (1995) (which Westec does not dispute), the plaintiff is not yet required to prove his cause of action in order to avoid an evidentiary motion *in limine* such as this. Witkowski's disclosures stated that "[t]he 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." A jury, as finder-of-fact, could equally and independently conclude that the missing evidence prevented the plaintiff from proving its case by a preponderance of the evidence (after hearing the evidence at trial) and,

thereafter, find in favor of the plaintiff and against Defendant Westec Intelligent Surveillance, Inc.

13. Second, just because Witkowski is not a "forensic computer science" expert does not preclude both him and a jury, as finder-of-fact, to accept the admission by Westec that it lost evidence regarding this event.

WHEREFORE, for the foregoing reasons, this court must deny the Westec's motion to strike and bar.

RESPONSE TO MOTION FOR SUMMARY JUDGEMENT

14. To avoid summary judgment, the non-movant must come forward and demonstrate the existence of a genuine issue of material fact. *Blue v. Envtl. Eng'g, Inc.*, 215 Ill. 2d 78, 99-100, 828 N.E.2d 1128 (2005). The purpose of summary judgment is not to try questions of fact, but to determine if one exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335, 775 N.E.2d 987, 994 (2002). In ruling on a motion for summary judgment, the trial court should not resolve disputed factual matters, nor make credibility determinations. *Prairie v. Univ. of Chicago Hosp.*, 298 Ill. App. 3d 316, 327, 698 N.E.2d 611 (1st Dist. 1998). The trial court may not weigh the evidence. *Watkins v. Schmitt*, 172 Ill. 2d 193, 211, 665 N.E.2d 1379 (1996). Moreover, where a factual dispute may exist, summary judgment must not be used to shortcut the trial process or preempt the right to trial by jury. *Bell v. Board of Educ. of the City of Chicago*, 67 Ill. App. 3d 402, 405, 385 N.E.2d 84 (1st Dist. 1978). To determine whether a factual issue exists, pleadings, depositions, and affidavits must be construed most strictly against the moving party and most liberally in favor of the opponent. *Armagast v. Medici Gallery & Coffee House, Inc.*, 47 Ill. App. 3d 892, 896, 365 N.E.2d 446 (1st Dist. 1977).

A question of material fact exists regarding the defendants' duty to plaintiff.

15. Although the general rule is that a party has no duty to preserve evidence. That duty may arise, however, if there is an agreement or contract between the parties imposing the duty, if the duty is imposed by statute, or if some other special circumstance warrants it. *Boyd*, 166 Ill. 2d at 195.

16. The Illinois Supreme Court in *Boyd v. Travelers Ins. Co.* addressed the issues of voluntary duty in the context of spoliation of evidence claim. In this case, Westec's Joe Ochoa testified that Westec voluntary assumed a duty to preserve the now-lost computer server hard-drive (storage S drive), which it assumed following the incident and in light of various investigations (internal, criminal, etc.). *See Boyd*, 166 Ill. 2d at 195. Further, as is the case here, when a party voluntarily assumes a duty, then that party owes the duty to preserve evidence if a reasonable person in that party's position should have foreseen that the evidence would be material to a potential lawsuit. *Boyd*, 166 Ill. 2d at 195. This is certainly a reasonably foreseeable consequence of a stabbing on a property where Westec contracted to provide security. Further, Westec had a duty to continue to exercise due care to preserve the evidence for the benefit of any other potential litigants. *Boyd*, 166 Ill. 2d at 195. None of these are in dispute by Westec.

17. The Illinois Supreme Court clarified the law regarding the duty to preserve evidence in *Dardeen v. Kuehling*, 213 Ill. 2d 329, 821 N.E.2d 227 (2004). There, the court explained that *Boyd* set out a two-prong test. Under the first prong, a spoliation plaintiff must demonstrate that at least one of the circumstances outlined in *Boyd* exists. *Dardeen*, 213 Ill. 2d at 336. Under the second prong, the plaintiff must show that the duty extends to the specific evidence at issue by demonstrating that a reasonable person in the defendant's position should have known the evidence would be material to potential civil litigation. If the spoliation plaintiff

does not satisfy both prongs of the test, there is no duty to preserve the evidence at issue. *Dardeen,* 213 Ill.2d at 336.

18. In order to prevail on a claim of negligent spoliation of evidence, a party must show that (1) the party alleged to have been negligent had a duty to preserve the evidence, (2) the party breached that duty, (3) the breach proximately caused an injury, and (4) the party seeking compensation for negligent spoliation suffered actual damages as a result. *Boyd v. Travelers Insurance Co.,* 166 Ill. 2d 188, 194-95, 652 N.E.2d 267 (1995). A potential litigant owes a duty to an opposing party "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 (1998). A duty extends to particular evidence if a reasonable person should have foreseen that the evidence was material to a potential civil action. *Burlington N. & Santa Fe R.R. Co. v. ABC-NACO*, 389 Ill. App. 3d 691, 906 N.E.2d 83, 101 (1st Dist. 2009) (citing *Dardeen v. Kuehling*, 213 Ill. 2d 329, 336, 821 N.E.2d 227, 231 (2004)), *pet. denied*, 233 Ill. 2d 553, 919 N.E.2d 350.

19. Here, as set forth above, the plaintiff has demonstrated, at least a question of fact exists that the movant-defendant had a duty to preserve the evidence and breached that duty by destroying/losing that evidence. Further, based upon the testimony of both Plaintiff's and White Castle's experts, the information contained on the lost computer drives may have an effect on their opinion and, as such, the plaintiff suffered actual damages as a result of the loss or destruction of the evidence.

WHEREFORE, for the foregoing reasons, this court must deny the Westec's motion for summary judgment.

Respectfully submitted,