**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) SPOLIATION 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/DVR) 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/DVR) is any different than the information found on the Rapid Eye C.D. containing recorded video images of the incident in question and retained as evidence in this case. Furthermore, Michael J. Witkowski, Ed.D., CPP is not qualified to provide testimony the computer server hard-drive (storage `S' drive/IVR/DVR) lost by WESTEC can be considered "spoliation of evidence". He has no understanding of what computer server hard-drive (storage 'S' drive/IVR/DVR) information WESTEC lost and has no basis to testify whether WESTEC'S loss of the

computer server hard drive (storage `S' drive/IVR/DVR) significantly impairs plaintiffs 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/1VR/DVR) 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 on 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/DVR), 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 digital video recorder (the

"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. The images recorded on the Rapid Eye's hard drive were then transferred by WHITE CASTLE to a compact disc (the "Rapid Eye C.D."). The C.D. was not lost and has been produced by WHITE CASTLE and is evidence in this case. The Rapid Eye 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 lines, 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/IVR 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 by capturing the computer key strokes and a narrative history of the intervention specialists' activities through a software program known as ("DICE"). The DICE All Activity Records for the MILLER incident is marked as Witkowski's deposition Exhibit #10 ("DICE All Activity Records"). The DICE All Activity Records for the MILLER incident were not lost and are evidence in this case.

II
THE SECOND AMENDED COMPLAINT AND PLAINTIFF'S MAY 2, 2010 S.C.R. 213(0(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 '13'). 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.

1. On March 15, 2010, this Court ordered Plaintiff to make S.C.R. 213(f)(3) disclosures by April 28, 2010 (See Exhibit 'C').
2. Naming Michael J. Witkowski, Ed.D., CPP as plaintiffs S.C.R. 213(1)(3) opinion witness on May 24, 2010, Plaintiff made the S.C.R. 213(0(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 plaintiffs 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/DVR)
AMOUNTS TO SPOLIATION OF EVIDENCE AND HIS SPOLIATION 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 resume). Michael J. Witkowski, Ed.D., CPP has a
doctorate in educational leadership (Exhibit `E' p. 7) and has no experience in computer 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 or 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 he 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 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 regarding whether the audio/visual images allegedly lost by WESTEC were or were not the same as recorded on the Rapid Eye and saved to the Rapid Eye 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 is included here.

**IV
IT IS PROPER FOR THIS COURT TO STRIKE MICHAEL WITKOWSKI'S SPOLIATION TESTIMONY
AS THE OPINIONS OF MICHAEL J. WITKOWSKI, ED.D., CPP
ARE UNSUPPORTED BY THE EVIDENCE**

Neither plaintiff's May 24, 2010 S.C.R. 213 disclosures nor Witkowski's resume qualify Witkowski as possessing special skills in the area of WESTEC'S alleged loss of computer information. There is no presumption a witness is qualified to give an opinion and the offering party must show the witness possesses the necessary learning, skill and experience to provide the opinion. *Baltos v. Weaver Division of Kidde & Company,* 199 Ill.App.3d 821, 557 N.E.2d 580 (I" Dis. 1990) [holding: plaintiff's testimony barred who had 20 years experience using transmission jacks, but had no knowledge in the design or manufacturing of the jacks]. Overall, Witkowski's opinion in this case is that if #25 had a premises 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 qualifications or factual understanding WESTEC'S loss of computer information precludes plaintiff from proving a negligent security case against WHITE CASTLE (See **Exhibit 'E'** p. 224-226). It is also clear from Witkowski's deposition that even without the alleged missing computer server hard drive (storage 'S' drive/IVR/DVR) from WESTEC, Witkowski has adequate information to provide opinions in support of plaintiff's negligent security case against WHITE CASTLE. Witkowski never said he did not have sufficient information to provide testimony in support of a negligent security case against WHITE

CASTLE. Witkowski's May 24, 2010 S.C.R. 213 disclosures #1-19 support plaintiffs negligent security case against WHITE CASTLE, without restrictions; Witkowski's deposition also provides no competent opinions placing restrictions on his ability to provide testimony in a negligent security case against WHITE CASTLE.

Here, Witkowski's fact knowledge and opinions do not support any theory that WESTEC'S loss of computer server hard drive (storage `S' drive/IVR/DVR) causes the plaintiff to be unable to prove an underlying lawsuit. *Midwest Trust Services, Inc. v. Catholic Health Partners Services,* 392 111.App. 3d 204, 910 N.E.2d 638 (1St Dis. 2009) [holding: where expert establishes sufficient facts to prove underlying case, spoliation opinions are not allowed and summary judgment granted]. Plaintiff says Witkowski was not tendered as an expert in forensic computer science (Exhibit 'E' p. 194); plaintiff also says 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 the communications link and computer equipment of both WHITE CASTLE and WESTEC, Witkowski can not competently testify that what was deleted from WESTEC'S computer server hard drive (storage 'S' drive/IVR/DVR) restricts his ability to provide negligent security testimony against WHITE CASTLE. It is well-settled, 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. *Torres v. Midwest Development Company,* 383 Ill.App.3d 20, 889 N.E.2d 654 **(1St** Dis. 2008). The proponent of expert testimony must demonstrate the witness is properly qualified as an expert based on training and experience and that the witnesses opinion is not based on speculation and conjecture. Additionally, the fact basis of the opinion must be reliable. *Volpe v. IKO Industries, Ltd.,* 327 III.App.3d 567, 763 N.E.2d 870 **(1St** Dis. 2002) [holding: motion for summary judgment and motion to strike expert opinion granted where expert opinion offered was outside experts area of competency]. Here, the only time Witkowski was at #25 was on **July 16, 2010,** five years post-accident and was never at WESTEC'S command center **(Exhibit 'E' p.** 197, 198). Witkowski has no factual basis to ever provide opinions that any lost computer server hard drive (storage 'S' drive/IVR/DVR) information is significant. *Torres v. Midwest Development Company,* 383 Ill.App.3d 20, 889 N.E.2d 654 (1" Dis. 2008) [experts opinions barred, where expert was unfamiliar with loss site on occurrence date, and could not provide factual basis for opinions]. Again, Witkowski does

not have the training or experience to establish that WESTEC'S lost information is important to plaintiff's case, or that without the information plaintiff will lose against WHITE CASTLE. He can provide unrestricted fact testimony to establish a negligent security case against WHITE CASTLE also requiring his spoliation opinions be stricken.

WHEREFORE, movant respectfully requests Witkowski's opinion testimony, including S.C.R. 213(0(3) spoliation of evidence disclosure #20, be stricken and that Witkowski be barred from providing any opinion testimony on spoliation of evidence.

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