UIC Law Review

Volume 32 | Issue 2 Article 5

Winter 1999

Funny Thing Happened on the Way to the Courtroom: Spoilation of Evidence in Illinois, 32 J. Marshall L. Rev. 325 (1999)

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COMMENTS

A FUNNY THING HAPPENED ON THE WAY TO THE COURTROOM: SPOLIATION OF EVIDENCE IN ILLINOIS

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INTRODUCTION

In February 1989, Dr. Narendra Gupta performed surgery on Cindy Miller's left foot.[1] Two years later, in March 1991, Ms. Miller consulted a different doctor, Dr. Hess, due to additional problems with the same foot; she was experiencing stumbling and loss of balance.[2] Dr. Hess informed Ms. Miller that her condition might have been due to malpractice on Dr. Gupta's part,[3] but that he needed to examine the x-rays that were taken of her foot both before and after the February 1989 surgery.[4] Thus, in August 1991, Ms. Miller's attorney requested that Dr. Gupta provide the x-rays.[5]

In October 1991, just before leaving his office for the evening, Dr. Gupta removed Ms. Miller's x-rays from her medical file, placed them in an x-ray jacket, and then placed the jacket on the floor about three feet away from a wastebasket.[6] Rather predictably, the cleaning woman, who was in the habit of throwing out x-ray jackets that were located in or near Dr. Gupta's trash, threw out Ms. Miller's x-rays.[7] Ms. Miller's x-rays were later destroyed in the hospital incinerator.[8] Without the necessary x-rays, Ms. Miller could not obtain the certificate of merit required

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* J.D. Candidate, June 1999.

1. Miller v. Gupta, 672 N.E.2d 1229, 1230 (Ill. 1996).
2. *Id.*
3. Specifically, "Hess told Miller that she suffered from a transfer wound and misalignment of her toe . . . ." Theodore Postel, *Medical Malpractice: Missing x-ray*, CHI. DAILY L. BULL., Apr. 11, 1997, at 1.
4. *Miller*, 672 N.E.2d at 1230.
5. *Id.* at 1231.
6. *Id.*
7. *Id.*
8. *Id.*

for the filing of a medical malpractice suit,[9] and her malpractice suit was dismissed.[10] By allowing the necessary x-rays to be destroyed, Dr. Gupta escaped any liability for his possible malpractice and deprived Ms. Miller of any chance to bring a malpractice suit.[11] Dr. Gupta's actions in this case are known as "spoliation of evidence."

Spoliation of evidence refers to "[t]he intentional destruction of evidence . . . or the significant and meaningful alteration of a document or instrument."[12] One court has narrowly defined the term "spoliation" as the "failure to preserve property for another's use as evidence in pending or future litigation."[13] Spoliation of evidence also includes concealing evidence or even tampering with witnesses.[14] One author's survey stated that fifty percent of all litigators believe that spoliation of evidence, in any of its forms, is a pervasive problem, and one which they have experienced at some time in their careers.[15]

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9. 735 ILCS 5/2-622(g) (West 1994).

10. *Miller*, 672 N.E.2d at 1231. Ms. Miller was given leave to amend her complaint in conformity with the Illinois Supreme Court's decision in *Boyd v. Traveler's Ins. Co.*, 652 N.E.2d 267 (Ill. 1995), which held that a "cause of action for negligent spoliation of evidence can be stated under existing negligence law." *Miller*, 672 N.E.2d at 1233. Thus, Ms. Miller must show that Dr. Gupta had a duty to retain her x-rays. *Boyd*, 652 N.E.2d at 270. See *infra* notes 166-76 and accompanying text for a discussion of why the x-ray Retention Act, 210 ILCS 90/1 (West 1994), does not apply to Dr. Gupta as a private physician.

11. *Miller*, 672 N.E.2d at 1232. "[W]ithout the x-rays, Miller [could] not assert a meritorious cause of action." *Id.* Because Miller was unable to comply with section 2-622 by obtaining a certificate of merit before filing her medical malpractice suit, the trial court dismissed Miller's medical malpractice claim. *Id.*

12. BLACK'S LAW DICTIONARY 1401 (6th ed. 1990). Spoliation of evidence may also be defined as "the failure to preserve property for another's use as evidence in pending or future litigation." Terry R. Spencer, *Do Not Fold Spindle or Mutilate: The Trend Towards Recognition of Spoliation as a Separate Tort*, 30 IDAHO L. REV. 37, 39 (1993-94).

13. Solano v. Delancy, 264 Cal. Rptr. 721, 724 n.4 (Cal. Ct. App. 1989). This unpublished case was the first in California to define the term "spoliation" in this context. *Id.* at 729. A similar definition is the "failure to preserve property, either intentionally or negligently, for another's use as evidence in pending or future litigation." Kelly P. Cambre, *Spoliation of Evidence: Proposed Remedies for the Destruction of Evidence in Louisiana Civil Litigation*, 39 LOY. L. REV. 601, 603 (1993).

14. Anthony C. Casamassima, *Spoliation of Evidence and Medical Malpractice*, 14 PACE L. REV. 235, 235 (1994). Spoliation of evidence destroys the discovery process and the truth-seeking processes therein. *Id.* Thus, there are three main purposes for classifying spoliation of evidence as tortious conduct: to promote truth-seeking; to promote fairness in the litigation process; and to preserve judicial integrity. *Id.* at 239.

15. Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991). Of a survey of antitrust attorneys, 69% responded that the most common

This Comment examines the need for an independent tort of spoliation of evidence in Illinois, concentrating specifically on cases of medical malpractice. Part I of this Comment explains the background and examines the elements of this tort. Part II examines remedies for destruction of evidence other than the establishment of a new tort, and examines why these remedies are ineffective to deter spoliation of evidence. Finally, Part III of this Comment discusses a new remedy for the destruction of evidence. Specifically, Part III proposes that Illinois adopt a new tort, that of intentional spoliation of evidence.[16]

I. THE HISTORY AND BACKGROUND OF THE SPOLIATION TORT

In Illinois, the Supreme Court has narrowly rejected the intentional spoliation tort.[17] The Court stated that a plaintiff

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unethical practice they have encountered is spoliation of evidence. *Id.* "'[I]t would be difficult to exaggerate the pervasiveness of evasive practices,' including intentionally withholding evidence." *Id.* (citing Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 829 (1980)). The problem of spoliation of evidence is compounded by the fact that many civil cases settle before trial, thus greatly reducing the chance that a spoliator will be caught and punished. Eric Marshall Wilson, *The Alabama Supreme Court Sidesteps a Definitive Ruling in Christian v. Kenneth Chandler Construction Co.: Should Alabama Adopt the Independent Tort of Spoliation?*, 47 ALA. L. REV. 971, 972 (1996).

16. Courts adopting this tort will need to answer questions regarding who has a duty to preserve evidence, when the cause of action for spoliation of evidence arises, whether the plaintiff must lose the underlying claim before bringing a claim of spoliation of evidence, and how damages are calculated. Charles A. Cohn, *Tort and Other Remedies for Spoliation of Evidence*, 81 ILL. B.J. 128, 129 (1993). Any court recognizing this tort must also "identify . . . a legally-protectable interest and then apply the traditional tort elements to that interest." Pati Jo Pofahl, *Smith v. Superior Court: A New Tort of Intentional Spoliation of Evidence*, 69 MINN. L. REV. 961, 962 (1985). Finally, if there are any criminal statutes dealing with destruction of evidence, the court must decide whether the criminal statutes pre-empt the possible civil action. *Id.* However, the mere existence of a potential criminal penalty does not automatically bar the creation of a civil tort remedy, as the two remedial schemes serve different purposes. Andrea H. Rowse, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 198 (1985). Criminal penalties are designed to protect society as a whole, while tort remedies are designed to compensate injured individuals. *Id.* at 199. Spoliation of evidence is "both a crime against the state and a tortious act against the individual." *Id.*

17. *See* Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 270 (Ill. 1995) (holding that "an action for negligent spoliation of evidence can be stated under existing negligence law without creating a new tort"). Therefore, a plaintiff must plead and prove that the defendant owed a duty to the plaintiff to preserve that evidence. *Id.* Further, the First District held recently that the statute of limitations on a negligent spoliation of evidence cause of action is five years. Cammon v. West Suburban Hosp. Med. Ctr., 704 N.E.2d 731, 740 (Ill. App. Ct. 1998).

already has a cause of action for negligent spoliation of evidence under existing negligence law; thus, in the Court's view, there was no need to adopt a new tort.[18] However, in order to state a cause of action for negligent spoliation in Illinois, a plaintiff must plead and prove the traditional negligence elements of duty, breach of duty, causation, and damages.[19] With this statement, the Court highlighted the main problem with a cause of action in negligence for spoliation of evidence; mainly, that there is no general duty to preserve evidence.[20] Thus, if a plaintiff cannot establish a duty on the defendant's part to preserve evidence, then a plaintiff has no cause of action in Illinois even for negligent spoliation of evidence.

Furthermore, except under limited circumstances, "Illinois law does not require health care providers to retain their patient medical records for any particular length of time."[21] Thus, health care providers have no general duty to preserve patient records.[22] It is clear in this situation that recognizing the separate intentional tort of spoliation of evidence would address this situation. Section A discusses the historical background of spoliation.[23] Section B briefly addresses the first jurisdictions to adopt spoliation as a tort in modern times.[24] Finally, Section C discusses the elements of the tort as first set forth in the

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18. *Boyd*, 652 N.E.2d at 270.

19. *Id.* The First District recently further examined the pleading requirements for a negligent spoliation cause of action. In *Jackson v. Michael Reese Hosp. and Med. Ctr.*, the court stated that in order to state a duty to preserve evidence, a plaintiff must plead fact-specific conduct to demostrate defendant's assumption of that duty. 689 N.E.2d 205, 212 (Ill. App. Ct. 1997). Further, in order to show proximate cause, a plaintiff must show that but for the spoliation there was a reasonable probability of succeeding in the underlying lawsuit. *Id.* at 214. Finally, the plaintiff must plead specific allegations as to the nature of damages he suffered. *Id.* at 216.

20. *Boyd*, 652 N.E.2d at 270. This holding was contrary to several previous appellate court decisions. *See* Matthew S. Hefflefinger, *Remedies for Spoliation of Evidence in Illinois: The Arrival of the Cause of Action*, 42 ILL. ST. B. ASS'N TRIAL BRIEFS, Jan. 1997, at 1-4. *See, e.g.*, Shelbyville Mut. Ins. Co. v. Sunbeam Leisure Prods. Co., 634 N.E.2d 1319, 1323 (Ill. App. Ct. 1994) (holding that preserving the allegedly defective product in a product liability suit is vital to both the proof and the defense of such suits); American Family Ins. Co. v. Village Pontiac GMC, Inc., 585 N.E.2d 1115, 1118 (Ill. App. Ct. 1992) (holding that sanctions for the failure to preserve evidence may be imposed even in the absence of a court order barring destruction); and Graves v. Daley, 526 N.E.2d 679, 681-82 (Ill. App. Ct. 1988) (holding that even where there is no court order to preserve evidence, parties must preserve that evidence which they know or should know will be used in litigation).

21. Douglas Rallo, *No Cure Yet For Spoliation of Patient Records*, CHI. B. ASS'N REC., Oct. 1992, at 30.

22. *Id.*

23. See *infra* notes 26-34 and accompanying text for a discussion on the background of spoliation of evidence.

24. See *infra* notes 35-62 and accompanying text for a discussion of other jurisdictions that have adopted the spoliation tort.

California case *Solano v. Delancy*.[25]

A. Historical Background

Court decisions detailing spoliation of evidence date back at least as far as the eighteenth century case *Armory v. Delamirie*,[26] in which the plaintiff, a chimney sweeper, brought a jewel to a goldsmith to have it appraised.[27] The jeweler's apprentice removed the stone and gave the plaintiff only what the setting was worth.[28] The plaintiff refused this small sum and asked for the jewel back.[29] However, the jeweler refused to return the jewel, returning only the empty socket.[30] The plaintiff sued to recover the value of the jewel; however, the jewel had disappeared by the time of trial.[31] The court instructed the jury that in determining damages, they should assume the jewel's value to be that of the most expensive jewel that could possibly fit in that setting.[32] Thus, the spoliation inference was born.[33] However, although the idea that courts should sanction spoliators has been around for at least two centuries, the idea that spoliators should be punished through a separate tort cause of action is fairly new.[34]

B. Jurisdictions Adopting the Spoliation Tort

The first jurisdiction to adopt the independent tort of spoliation of evidence was California, with the 1984 case of *Smith v. Superior Court*.[35] The plaintiff, Phyllis Smith, was injured while driving when a wheel and tire from an oncoming van came loose and flew into her windshield.[36] The impact from the wheel broke the plaintiff's windshield, causing small pieces of glass to fly into her eyes and face.[37] As a result of the accident, the plaintiff was permanently blinded in both eyes and her sense of smell was irreparably damaged.[38] One of the defendants, Abbott Ford, who

25. 264 Cal. Rptr. 721, 729 (Cal. Ct. App. 1989). See *infra* notes 69-78 and accompanying text for a discussion of the elements of the spoliation tort.

26. 93 Eng. Rep. 664 (1722).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. 93 Eng. Rep. 664 (1722).

32. *Id.* The jury did exactly that. *Id.*

33. This is an illustration of the maxim *contra spoliatorem omnia praesumuntur*, or "everything most to his disadvantage is to be presumed against the destroyer." BLACK'S LAW DICTIONARY 1401 (6th ed. 1990).

34. Nancy Melgaard, *Spoliation of Evidence—An Independent Tort?*, 67 N.D. L. REV. 501, 502 (1991). Courts have traditionally been very intolerant of evidence spoliation. *Id.* at 501.

35. 198 Cal. Rptr. 829, 829 (Cal. Ct. App. 1984).

36. *Id.* at 831.

37. *Id.*

38. *Id.*

had customized the van's wheels, promised the plaintiff to preserve certain parts of the van so that an expert for the plaintiff could examine them.[39] However, Abbott Ford, after making this promise and knowing that the parts were to be used in a suit, later lost or destroyed the parts.[40] Thus, plaintiff was unable to examine the van to determine the cause of the accident.[41]

The plaintiff then filed a second amended complaint, which included a count entitled "Tortious Interference with Prospective Civil Action By Spoliation of Evidence."[42] Abbott Ford demurred to that count, contending that the named cause of action did not exist.[43] The trial court sustained the demurrer.[44] The appellate court, however, overruled the trial court by recognizing that this cause of action did in fact exist.[45] The court stated that in light of California's recognition that "for every wrong there is a remedy,"[46] and in light of precedent holding that a criminal destruction of evidence statute did not provide a private right of action,[47] it was appropriate for the court to recognize a private cause of action for spoliation of evidence.[48] Thus, by recognizing the tort of spoliation of evidence, California acknowledged that the right to bring a

39. *Id.* The court ordered Abbott Ford to "maintain securely in [its] care, possession, custody and control for later examination and testing by Plaintiffs' technical experts the left rear tire and wheel, lug bolts, lug nuts and brake drum." *Id.* at 832.

40. 198 Cal. Rptr. at 831. The complaint alleged that Abbott Ford had "willfully, wrongfully, and intentionally, and with conscious disregard of the probable serious harm to Plaintiffs . . . lost, destroyed or otherwise disposed of the physical evidence which they had promised to maintain for Plaintiffs." *Id.* at 832.

41. *Smith*, 198 Cal. Rptr. at 831.

42. *Id.*

43. *Id.* at 832.

44. *Id.* The trial court dismissed without leave to amend as to the spoliation of evidence count, ruling "that such an intentional tort did not exist." *Id.*

45. *Id.* The appellate court quoted Dean Prosser, stating that "[w]hen it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy." *Id.* (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 3-4 (4th ed. 1971)).

46. *Id.* (citing CAL. CIV. CODE § 3523 (West 1997).

47. *Smith*, 198 Cal. Rptr. at 833 (discussing Agnew v. Parks, 343 P.2d 118 (Cal. Ct. App. 1959)). The destruction of evidence is an "'obstruction of justice' for which only the state can prosecute . . . ." *Id.* Moreover, the criminal penalty is only a misdemeanor, and is thus only a minimal deterrent to a party who can possibly gain a great deal financially by destroying of incriminating evidence. *Id.* at 835.

48. *Id.* at 837. The court also stated that because "spoliation of evidence is a form of obstruction of justice, an act of [it] has a devastating effect on a potential plaintiff and could prevent . . . a prospective plaintiff from filing any suit at all." *Id.* at 835.

lawsuit is a legally protected interest.[49]

Spoliation of evidence injures this right by substantially impairing a plaintiff's existing lawsuit or a plaintiff's ability to bring a lawsuit.[50] In Abbott Ford's case, the court held that Abbott's actions unreasonably interfered with Smith's ability to file and win her lawsuit.[51] The court referred to this protected interest as a valuable "probable expectancy."[52] Other courts adopting this tort have also recognized the need to protect this "probable expectancy."[53]

Several other jurisdictions have followed California's lead in adopting this tort.[54] These include Alaska,[55] Florida,[56] Ohio,[57] New Mexico,[58] an appellate court in Texas,[59] and a federal court in

49. Wilson, *supra* note 15, at 974.

50. *Id.*

51. *Smith*, 198 Cal. Rptr. at 837. "[T]he spoliation tort is a tort of interference." Wilson, *supra* note 15, at 974. Spoliation of evidence thus interferes with a plaintiff's expectancies of future recovery or with expectancies of successfully defending a lawsuit. *Id.* at 975.

52. *Smith*, 198 Cal. Rptr. at 837. The court equated the tort of intentional spoliation of evidence with the tort of "intentional interference with prospective business advantage." *Id.* at 836. This tort protects the probable expectancy of a prospective business advantage; in pleading this cause of action, a plaintiff need only allege that but for the defendant's acts, the plaintiff would have obtained a contract or profit. *Id.* See *infra* notes 204-07 and accompanying text for further discussion of the similarities between the spoliation tort and the tort of interference with prospective business advantage.

53. *See, e.g.*, Hazen v. Anchorage, 718 P.2d 456, 464 (Alaska 1986) (stating that the plaintiff's prospective civil actions were valuable probable expectancies, the tampering with which could be remedied in tort). A probable expectancy is a logical belief that a person will profit from the occurrence of some event which he reasonably expects to occur. Maurcie L. Kervin, *Spoliation of Evidence: Why Mississippi Should Adopt the Tort*, 63 MISS. L.J. 227, 228 (1993).

54. See *infra* notes 55-62 and accompanying text for a list of the jurisdictions that have adopted the spoliation tort. *But see* LaRaia v. Superior Court, 722 P.2d 286, 289 (Ariz. 1986) (rejecting the spoliation tort due to the adequacy of existing remedies for evidence spoliation); Murphy v. Target Prods., 580 N.E.2d 687, 690 (Ind. Ct. App. 1991) (refusing to recognize a spoliation tort absent a duty on defendant's part to preserve evidence); Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1179 (Kan. 1987) (refusing to recognize a spoliation tort "absent a duty on the defendant's part to preserve possible evidence"); Panich v. Iron Wood Prods. Corp., 445 N.W.2d 795, 799 (Mich. Ct. App. 1989) (refusing to recognize a spoliation tort under the facts of the case at bar); and Weigl v. Quincy Specialties Co., 601 N.Y.S.2d 774, 776-77 (N.Y. Sup. Ct. 1993) (refusing to adopt the spoliation tort on the facts presented, but stating that a valid claim for spoliation could be stated if plaintiff could show intentional conduct on defendant's part designed to disrupt plaintiff's case).

55. Hazen v. Anchorage, 718 P.2d 456 (Alaska 1986).

56. Bondu v. Gurvich, 473 So. 2d 1307 (Fla. Dist. Ct. App. 1984).

57. Smith v. Howard Johnson Co., 615 N.E.2d 1037 (Ohio 1993).

58. Coleman v. Eddy Potash, Inc., 905 P.2d 185 (N.M. 1995).

Kansas.[60] In addition, New Jersey indicated in *Viviano v. CBS, Inc.*[61] that it would accept the tort of spoliation of evidence if given the chance and the proper facts.[62]

Illinois has also indicated in several cases (most recently in *Boyd v. Traveler's Insurance Company*)[63] that it would accept the spoliation tort if presented with the proper circumstances.[64] In fact, Illinois has refused to accept the tort on narrow factual grounds in several cases.[65] However, in several cases, Illinois

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59. Ortega v. Trevino, 938 S.W.2d 219 (Tex. App. 1997). *But see* Malone v. Foster, 956 S.W.2d 573, 582 (Tex. App. 1997) (refusing to follow *Ortega*'s lead in adopting the spoliation tort).

60. Foster v. Lawrence Mem'l Hosp., 809 F. Supp. 831 (D. Kan. 1992).

61. 597 A.2d 543 (N.J. Super. Ct. App. Div. 1991).

62. The court stated that "[i]mmunizing the willful destruction or concealment of evidence would not further the policy of encouraging testimonial candor." *Viviano*, 597 A.2d at 549. Although the particular form of obstruction of justice at issue in this case was the concealment, not the spoliation, of evidence, the court discussed the spoliation tort with favor, implying that it would accept the spoliation tort if presented with the right facts. *Id.* at 549. New Jersey subsequently recognized an analogous tort, that of fraudulent concealment of evidence, in *Hirsch v. General Motors Corp.*, 628 A.2d 1108, 1119 (N.J. Super. Ct. Law Div. 1993). The New Jersey court reasoned that in cases of spoliation where the plaintiffs spoliated certain evidence, the spoliation tort is inapplicable. *Id.* The court stated that because the spoliation tort protects a litigant's interest in bringing a prospective cause of action, the spoliation tort is thus inapplicable where the only interference is with a defendant's ability to defend against a lawsuit. *Id.* Rather, the defendant's solution is a cause of action for the intentional interference with civil discovery. *Id.* Illinois presumably would not follow this approach. Although Illinois does not yet recognize a spoliation tort, Illinois courts will impose sanctions on either party if it spoliates evidence, regardless of whether that party is a plaintiff or defendant. *See, e.g.*, Jones v. Goodyear Tire and Rubber Co., 966 F.2d 220, 225 (7th Cir. 1992) (holding that defendant's non-compliance with protective orders justified the trial court's imposition of a directed verdict in favor of plaintiffs); Graves v. Daley, 526 N.E.2d 679, 681 (Ill. App. Ct. 1988) (holding that where plaintiffs destroyed a defective product in a products liability action, the trial court was correct in barring the plaintiffs from presenting any evidence concerning the product). Thus, it seems that Illinois courts would extend this equal treatment to a spoliation tort, and would allow defendants as well as plaintiffs to claim its protection.

63. 652 N.E.2d 267 (Ill. 1995). See *infra* note 65 and accompanying text for a discussion of the cases that rejected the tort on narrow factual grounds.

64. The court stated that the current cause of action could be "stated under existing negligence law," rather than through the creation of a new tort. *Boyd*, 652 N.E.2d at 270. The court then stated that although the plaintiffs' complaint described the defendants' conduct as "willful and wanton," the plaintiffs did not allege sufficient facts from which the jury or the court could infer intentional conduct. *Id.* at 273. Thus, the plaintiffs failed to state a cause of action for intentional spoliation of evidence. *Id.* See *infra* notes 91-100 and accompanying text for further examination of the court's decision in *Boyd*.

65. *See, e.g.*, Rodgers v. St. Mary's Hosp., 597 N.E.2d 616, 619 (Ill. 1992) (holding that plaintiff has a sufficient cause of action in a statute, rather than a new tort); Petrik v. Monarch Printing Corp., 501 N.E.2d 1312, 1321 (Ill. App.

courts have found a duty on the part of the defendant to preserve evidence,[66] thus indicating a trend toward acceptance of the spoliation tort.[67] The *Boyd* court stated that one reason it could not adopt the spoliation tort at that time was that the plaintiffs had not sufficiently proved intentional conduct on the part of the defendants; thus, the plaintiffs had not satisfied the intent element of the tort.[68] A plaintiff must satisfy each of five elements in order to establish a cause of action under this tort.

C. *Elements of the Tort*

The five elements of the intentional spoliation tort were first set out in *Solano v. Delancy*.[69] There, the court listed the elements as:

> pending or probable litigation involving the plaintiff; knowledge by the defendant of the existence or likelihood of the litigation; intentional 'acts of spoliation' [or destruction of the evidence] on the part of the defendant [that are] designed to disrupt the plaintiff's case; [actual] disruption of the plaintiff's case; and damages proximately caused by the acts of the defendant.[70]

The first of these elements is satisfied if future litigation is at all reasonably foreseeable.[71] The second element can be inferred from the circumstances surrounding the underlying events of the case.[72] The third element may be satisfied in two ways: one, the defendant must reasonably foresee that the spoliated evidence will

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Ct. 1986) (holding that the plaintiff did not allege sufficient injury to state a cause of action in spoliation of evidence); Fox v. Cohen, 406 N.E.2d 178, 183 (Ill. App. Ct. 1980) (stating that the plaintiff had not yet lost her underlying malpractice claim, and therefore stated no actual injury).

66. *See Petrik*, 501 N.E.2d at 1319 (finding a duty to preserve evidence in the supreme court rules governing discovery); *Fox*, 406 N.E.2d at 181 (deriving a duty to preserve evidence from various hospital regulations and the accreditation standards of the American Hospital Association); *Rodgers*, 597 N.E.2d at 619 (finding a statutory duty to preserve evidence in the x-ray Retention Act (210 ILCS 90/1 (West 1994)).

67. Cohn, *supra* note 16, at 130.

68. *Boyd*, 652 N.E.2d at 273.

69. 264 Cal. Rptr. 721, 729 (Cal. Ct. App. 1989).

70. *Id.* at 729. Because the court in *Smith* equated the spoliation tort with the tort of intentional interference with prospective business advantage, the *Solano* court inferred the spoliation elements from those of the business tort. *Id.* (citing *Smith v. Superior Court*, 198 Cal Rptr. 829, 836 (Cal. Ct. App. 1984)). *See also* Thomas G. Fischer, Annotation, *Intentional Spoliation of Evidence, Interfering With Prospective Civil Action, As Actionable*, 70 A.L.R. 4TH 984 (1990) (listing the elements of the intentional spoilation tort).

71. Melgaard, *supra* note 34, at 505-06. If the possibility of future litigation is reasonably foreseeable to the defendant, a duty to preserve evidence will be imposed on the defendant. *Id.* at 506. "The most important factor in establishing a duty to preserve evidence is the foreseeability of harm to the plaintiff if the evidence is lost." Cohn, *supra* note 16, at 130.

72. Melgaard, *supra* note 34, at 506.

be used against him; and two, the defendant must intend to affect the plaintiff, as indicated by the totality of the circumstances.[73] The fourth element may be satisfied by evidence of actual disruption in the plaintiff's case due to the spoliated evidence.[74]

The fifth element, that of damages, presents "the most troubling aspect" of the spoliation tort.[75] The damages in a spoliation of evidence case consist of "the inability to prove or defend [the underlying] lawsuit" for which the evidence is needed.[76] The *Smith* court recognized the difficulty in proving damages in general, and especially in cases such as the one at bar, where the plaintiff had not yet lost the underlying product liability case on which the spoliation claim was based.[77] Thus, the *Smith* court stated that the plaintiff in a spoliation case need only prove his or her "damages as a matter of just and reasonable inference."[78]

Although Illinois courts have not yet accepted the spoliation tort, several court decisions have found a duty to preserve evidence, and thus have imposed liability for spoliation of evidence.[79] For example, in *American Family Insurance Co. v. Village Pontiac GMC, Inc.*,[80] where the plaintiffs destroyed the evidence on which their products liability suit was based, the court imposed a duty on the plaintiffs to preserve evidence.[81] This duty was based on the fact that the plaintiffs knew the evidence would be needed in their own products liability suit.[82] Thus, the court found a duty to preserve evidence based on the foreseeability of litigation.[83] Similarly, in *Shelbyville Mutual Insurance Co. v.*

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73. *Id.* However, one author has suggested that "courts should require plaintiffs . . . prove that the defendant intended to produce the harm or knew with substantial certainty that the harm . . . would follow." Pofahl, *supra* note 16, at 973.

74. Melgaard, *supra* note 34, at 507.

75. *Smith*, 198 Cal. Rptr. at 835. The most difficult aspect of any court's recognition of a cause of action for intentional spoliation of evidence is computing "the requisite tort element of damages proximately resulting from [the] defendant's alleged act [of spoliation]." *Id.*

76. Margaret O'Mara Frossard & Neal S. Gainsberg, *Spoliation of Evidence in Illinois: The Law After Boyd v. Traveler's Insurance Co.*, 28 LOY. U. CHI. L.J. 685, 712 (1997).

77. *Smith*, 198 Cal. Rptr. at 835.

78. *Id.* One author characterizes the Smith court's damages discussion as adopting the rationale of legal malpractice cases, which is that damages should "be measured by the amount that could have been recovered in the underlying action." Pofahl, *supra* note 16, at 976.

79. See *infra* notes 80-90 and accompanying text for an explanation of where courts have found a duty to preserve evidence.

80. 585 N.E.2d 1115 (Ill. App. Ct. 1992).

81. *Id.* at 1118.

82. *Id.* In imposing the duty to preserve evidence, the court also considered the importance of the evidence to the party seeking to have it produced. *Id.*

83. *Id.* The "plaintiffs should have known that potential defendants . . . would want to inspect the alleged defect, as [the] plaintiff's experts had done."

Sunbeam Leisure Products Co.,[84] the court imposed a duty to preserve evidence based on the plaintiff insurance company's destruction of the evidence.[85] Because the plaintiff's insurance company knew that the plaintiffs would likely file a products liability lawsuit, the insurance company was under a duty to preserve the allegedly defective product for inspection.[86] Further, in *Allstate Insurance Co. v. Sunbeam Corp.*,[87] the court imposed a duty to preserve evidence on the plaintiffs' insurance company.[88] Because Allstate, as the plaintiffs' insurer, knew that the plaintiffs might bring a products liability suit against the manufacturer of the defective product, the court held that Allstate should have known or foreseen that the defendant would need to examine the remains of the product.[89] Thus, the court held that the insurance company had a duty to preserve the evidence.[90]

The most definitive Illinois case discussing the duty to preserve evidence is *Boyd v. Traveler's Insurance Co.*[91] In that case, the court stated that "a duty to preserve evidence may arise through an agreement, a contract, a statute, or another special circumstance."[92] Furthermore, the court stated that a duty to preserve evidence may also arise through the defendant's own "affirmative conduct."[93] Thus, in those situations where a duty to preserve evidence arises, the possibility of litigation must also be reasonably foreseeable to the defendant.[94] Also, the duty to

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Id.

84. 634 N.E.2d 1319 (Ill. App. Ct. 1994).

85. *Id.* at 1322. The insurance company had shipped to several experts a defective grill, alleged to have started a fire that destroyed part of the plaintiffs' house. *Id.* at 1321-22. By the time the grill reached the defendant manufacturer's expert, the grill was missing the "operating propane tank, the regulator, a second burner, [and] the wooden grill frame." *Id.* Due to the insurance company's actions resulting in the loss of a portion of the grill, the defendant may have lost an affirmative defense regarding what actually caused the fire. *Id.* at 1324.

86. *Id.*

87. 53 F.3d 804 (7th Cir. 1995).

88. *Id.* at 807.

89. *Id.*

90. *Id.* Because the insurance company had not yet determined the actual cause of the fire, Allstate had a duty under Illinois law to preserve all evidence of the fire and any alternate causes other than the defective product. *Id.*

91. 652 N.E.2d 267 (Ill. 1995).

92. *Id.* at 270-71.

93. *Id.* at 271. "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." *Id.* The New Jersey court has extended this duty to preserve evidence even further, stating that the duty arises regardless of whether there is an agreement or court order to preserve such evidence. *Hirsch*, 628 A.2d at 1116. Thus, all that is needed to establish a duty is the foreseeability of harm. *Id.*

94. Melgaard, *supra* note 34, at 505-06.

preserve evidence arises "if a reasonable person in the defendant's position should have foreseen that the evidence was material to potential civil litigation."[95] Therefore, Illinois courts have established the first element of the spoliation tort.

The *Boyd* court also discussed the issue of causation and damages.[96] The court stated that "a plaintiff must demonstrate . . . that but for the defendant's loss or destruction of the evidence, the plaintiff had a reasonable probability of succeeding in the underlying suit."[97] The defendant's spoliation of evidence must have caused the plaintiff to be unable to prove the underlying lawsuit.[98] Furthermore, a plaintiff must prove this before the plaintiff has even lost the underlying case.[99] However, this also means that the plaintiff is permitted to bring a spoliation claim "concurrently with the underlying lawsuit."[100] This process, however, is extremely confusing and cumbersome. The spoliation tort is, overall, a much more effective remedy for the spoliation or destruction of evidence.

II. OTHER REMEDIES FOR SPOLIATION OF EVIDENCE AND WHY THESE REMEDIES ARE INADEQUATE

Illinois courts have developed several remedies other than a spoliation tort to deal with evidence spoliation.[101] These remedies include: discovery sanctions such as preclusion of evidence or even

95. *Boyd*, 652 N.E.2d at 271. The main issue seems to be whether the defendant had notice - both of impending litigation and of the relevance of evidence in his possession. Hefflefinger, *supra* note 20, at 8.

96. *Boyd*, 652 N.E.2d at 271. *See also Smith*, 198 Cal. Rptr. at 836 (relaxing the proof of causation so that a plaintiff need only allege that a "reasonable probability" existed that s/he would have obtained compensatory damages but for the defendant's spoliation of evidence).

97. *Boyd*, 652 N.E.2d at 271 n.2.

98. *Id.* at 271. Thus, the defendant must have spoliated a key piece of evidence that is highly relevant to the determination of the underlying lawsuit. *Id.* This is the actual damage that plaintiff must allege. *Id.* at 272.

99. *Id.*

100. *Id.* This also means that the same trier of fact will hear both claims. *Id.* The court reasoned that "a single trier of fact would be in the best position to resolve all claims fairly and consistently." *Id. But see* Mayfield v. Acme Barrel Co., 629 N.E.2d 690, 695 (Ill. App. Ct. 1994); Fox v. Cohen, 406 N.E.2d 178, 183 (Ill. App. Ct. 1980) (holding that a plaintiff must first lose the underlying claim before s/he is able to allege harm in terms of a spoliation claim).

101. See *infra* notes 102-85 and accompanying text for a discussion of other remedies for spoliation of evidence. One main problem with any of these remedies, however, is that none are effective in a situation where a non-party third person destroys or spoliates evidence. Frossard & Gainsberg, *supra* note 76, at 686. There are three main purposes behind spoliation remedies: to restore the accuracy of the discovery process; to compensate the spoliation victim; and to punish the spoliator. Casamassima, *supra* note 14, at 239-40.

dismissal of the complaint;[102] adverse jury inferences;[103] statutes such as the x-ray Retention Act;[104] and criminal penalties.[105] Furthermore, the Illinois Supreme Court has stated that a claim "for negligent spoliation can be stated under existing negligence law."[106]

However, these remedies are ineffective in deterring the widespread problem of spoliation of evidence.[107] One general drawback to the traditional remedies for spoliation of evidence is that they do not have any effect in a situation where a third person, not a party to the action, has destroyed or spoliated the evidence.[108] Moreover, these remedies are only effective if enough evidence remains to enable the innocent party to continue with his suit or defense.[109] Finally, some judges are reluctant to punish parties severely for the spoliation of evidence.[110]

This Part briefly explains each of these remedies and why they are inadequate to deter spoliation of evidence. Section A discusses the discovery sanctions that are available to the court and the reasons for their ineffectiveness.[111] Section B examines the adverse jury inference instruction and the problems inherent in this instruction.[112] Section C discusses the statutory remedy of

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102. ILL. SUP. CT. R. 219 (1996): Consequences of Refusal to Comply with Rules or Order Relating to Discovery or Pretrial Conferences. See *infra* notes 115-139 and accompanying text for a discussion of the discovery rules. When imposing sanctions, Illinois courts adhere to the "public policy of preserving evidence [to avoid] prejudice in either prosecuting or defending an action." Hefflefinger, *supra* note 20, at 1.

103. ILL. PATTERN JURY INSTRUCTIONS (Civil 3d) 5.00-5.01: Failure to Testify or Produce Evidence and Failure to Produce Evidence or a Witness.

104. 210 ILCS 90/1 (West 1994).

105. 720 ILCS 5/31-4 (West 1994).

106. *Boyd*, 652 N.E.2d at 270. The Court held that "an action for negligent spoliation [of evidence could] be stated under existing negligence law" without creating a new tort. *Id.*

107. Nesson, *supra* note 15, at 793. Moreover, in imposing any remedy, courts will generally choose the least severe sanction possible to remedy prejudice. David A. Bell et al., *An Update on Spoliation of Evidence in Illinois*, 85 ILL. B.J. 530, 531 (1997). Furthermore, in order to impose a remedy for spoliation of evidence, the "act [of spoliation] must . . . be defined as illegal [based either on a statute or on a pre-existing common law] duty to preserve evidence." Spencer, *supra* note 12, at 44.

108. Frossard & Gainsberg, *supra* note 76, at 686.

109. *Id.* at 688.

110. Nesson, *supra* note 15, at 795. According to Nesson, "[c]ourts have gone to great lengths to avoid imposing severe punishments on spoliators. For example, courts have conflated the compensatory and punitive rationales for sanctioning spoliation, adopting whichever rationale justified imposing minimal sanctions or no sanctions at all under the particular circumstances at hand." *Id.* at 799.

111. See *infra* notes 128-39 and accompanying text for a discussion of the ineffectiveness of discovery sanctions.

112. See *infra* notes 141-64 and accompanying text for a discussion of

the x-ray Retention Act, and asserts that this statute is ineffective at deterring spoliation.[113] Finally, section D examines criminal penalties for the destruction or spoliation of evidence.[114] Section D also explains why these criminal penalties are inapplicable to a civil case.

A. Discovery Sanctions

In making the decision to impose sanctions on a spoliating party, Illinois courts consider two factors: whether the alleged spoliator knew that the evidence would be relevant to a potential case and the degree of prejudice to the nonspoliator.[115] In imposing sanctions, Illinois courts primarily attempt to reduce the degree of prejudice suffered by the non-spoliator.[116] If a party proves that he suffered prejudice in either prosecuting or defending his case, then Illinois courts will generally impose sanctions regardless of whether the spoliation occurred before or after the suit was filed.[117]

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problems inherent in the spoliation inference instruction.

113. See *infra* notes 165-76 for an examination of the limited spoliation remedy provided by the X-Ray Retention Act.

114. See *infra* notes 177-83 and accompanying text for a discussion of why criminal penalties are ineffective to deter spoliation in civil litigation.

115. Hefflefinger, *supra* note 20, at 1. Illinois courts feel that it is insignificant whether the destruction of the evidence was intentional or inadvertent. *Id.* at 1-2. *See* Iain D. Johnston, *Federal Courts' Authority to Impose Sanctions for Prelitigation or Preorder Spoliation of Evidence*, 156 F.R.D. 313 (1994) (discussing sanctions available to the federal courts).

116. Hefflefinger, *supra* note 20, at 1. Most Illinois court decisions demonstrate that the courts are willing to impose sanctions even when the spoliated evidence was not intentionally destroyed. *Id.* at 1-2.

117. *See, e.g.*, Stegmiller v. H.P.E., Inc., 401 N.E.2d 1156, 1159 (Ill. App. Ct. 1980) (holding that where the plaintiff's lawyer in a product liability suit lost the allegedly defective product before suit was filed, then waited three years before informing defendant, plaintiff's conduct reflected an "unreasonable noncompliance with the discovery process, thus warranting dismissal of the complaint"); Ralston v. Casanova, 473 N.E.2d 444, 452 (Ill. App. Ct. 1984) (granting summary judgment in favor of defendants and barring expert's testimony because expert violated a court order by disassembling an allegedly defective seat belt assembly); Arguetta v. Baltimore & Ohio Chicago Terminal R.R., 586 N.E.2d 386, 393 (Ill. App. Ct. 1991) (holding that even though defendant's destruction of evidence was unintentional, the testimony of defendant's expert would still be barred; the court stated that a "trial court is not required to find that a party intentionally destroyed evidence in order for the court to bar testimony regarding that evidence"); Graves v. Daley, 526 N.E.2d 679, 681 (Ill. App. Ct. 1988) (holding that where the plaintiffs' insurance company told them to destroy an allegedly defective furnace, the plaintiffs were barred from presenting any evidence of the furnace's condition; the court stated that "preservation of an allegedly defective product is of the utmost importance in both proving and defending against a strict liability action"); American Family Ins. v. Village Pontiac GMC, Inc. 585 N.E.2d 1115, 1118 (Ill. App. Ct. 1992) (holding that where plaintiff's insurance company destroyed evidence, the court could bar testimony as to the car's condition; the court stated that even without a court order to preserve evidence, "court[s]

Courts will impose punitive discovery sanctions if the destroyed evidence is highly relevant to the case and the non-spoliator has been prejudiced.[118] Courts will also impose discovery sanctions where the destruction of evidence is in violation of a court preservation order.[119]

The power of Illinois courts to sanction spoliators derives from the Discovery Rules of the Illinois Supreme Court.[120] Furthermore, the trial court has broad discretion in determining whether to issue sanctions; that decision will not be overturned "absent [a finding of] abuse of discretion."[121]

Rule 219 of the discovery rules empowers the court to take several actions upon a showing that a party has refused to comply with a court order or rule. The court may order: a stay of further proceedings pending compliance; a default, barring further pleadings relating to that issue; the dismissal of a claim or counterclaim relating to that issue; the exclusion of certain testimony concerning that issue; a default judgment or dismissal against the offending party; or that any relevant portion of the offending party's pleadings be stricken and judgment be entered as to that issue.[122] These sanctions are to be imposed only when the original court order was just, but the spoliator's noncompliance is unreasonable.[123] Finally, "the purpose behind imposing discovery sanctions is to ensure that full discovery occurs."[124] Therefore, the purpose of Rule 219 is to help the discovery process rather than to punish the offending party.[125] At the same time, however, the court must not hesitate to impose sanctions for serious discovery

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may focus on the importance of the information a party is seeking to have produced" in deciding whether to issue sanctions).

118. Frossard & Gainsberg, *supra* note 76, at 697.

119. *Id.* at 698. The amount of prejudice that the non-spoliator must prove he suffered due to the spoliation varies depending on whether the spoliation was in violation of a court preservation order. *Id.* at 699.

120. ILL. SUP. CT. R., Article II: Rules on Civil Proceedings in the Trial Court.

121. Ruperd v. Ryan, 683 N.E.2d 166, 170 (Ill. App. Ct. 1997).

122. ILL. SUP. CT. R. 219(c).

123. Stegmiller v. H.P.E., Inc., 401 N.E.2d 1156, 1158 (Ill. App. Ct. 1980). "'Unreasonable noncompliance' has been construed as conduct which indicates a deliberate and pronounced disregard for the rule or order not complied with. [citation omitted] A 'just order' has been defined as one which insures both discovery and a trial on the merits." *Id.* A showing of the unreasonableness of a party's noncompliance with a discovery order depends upon "how important the undisclosed evidence was to the other party." Farley Metals, Inc. v. Barber Colman Co., 645 N.E.2d 964, 968 (Ill. App. Ct. 1994).

124. *Ruperd*, 683 N.E.2d at 171. However, if this "were really the case, it would seem that discovery sanctions would not be imposed if the evidence had been fully destroyed, because it would be impossible for full discovery to occur." *Id.*

125. *Farley Metals*, 645 N.E.2d at 967.

violations.[126] Thus, in deciding on the proper sanction to be issued, Illinois trial courts must try to obtain full discovery leading to a trial on the merits.[127]

However, there are several limits to the court's ability to issue sanctions which reduce their effectiveness. If an innocent party in a spoliation case does not establish that she suffered prejudice due to the spoliation, then Illinois courts will not impose discovery sanctions.[128] Also, Illinois courts will generally not impose sanctions where the court finds that the spoliator neither knew nor should have known that the spoliated evidence would be relevant to litigation.[129] Furthermore, some cases have focused on the type of conduct of the spoliator in deciding whether to impose sanctions; for example, the United States Supreme Court has stated that sanctions are only appropriate where the spoliator acted with willfulness, bad faith, or fault.[130] Thus, the mere loss of evidence, by itself, does not warrant the imposition of sanctions.[131]

Moreover, if there is no pre-existing court order to protect evidence, then a court may not assert any sanctions.[132] Only in a few cases have Illinois courts been willing to impose sanctions for spoliation of evidence where there was no pre-existing court order.[133] However, these few cases all turn on the fact that the party who destroyed the evidence prior to a court order had notice that the spoliated evidence was material to pending litigation.[134]

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126. *Id.* Illinois courts hope that the imposition of discovery sanctions will act as a deterrent to other parties contemplating the violation of discovery rules. *Id.* at 967-68.

127. *Id.* at 968.

128. Hefflefinger, *supra* note 20, at 4. *See* H & H Sand and Gravel v. Coyne Cylinder, 632 N.E.2d 697, 705 (Ill. App. Ct. 1994) (stating that "when the alteration or destruction of evidence does not prevent a party from establishing its case, there has been no prejudice.").

129. Hefflefinger, *supra* note 20, at 4. For example, in *Heins v. Bolton*, the court refused to issue a sanction barring plaintiff's expert witness from testifying where a third party removed and presumbably destroyed evidence of the cause of a fire. 1998 WL 832422, *4 (Ill. App. Ct. 1998). The third party had no knowledge of impending litigation. *Id.*

130. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 640 (1976).

131. Hefflefinger, *supra* note 20, at 5.

132. Scott S. Katz & Anne Marie Muscaro, *Spoliage of Evidence - Crimes, Sanctions, Inferences, and Torts*, 29 TORTS & INS. L.J. 51, 55 (1993). This is because a party who spoliates evidence before the discovery request is physically unable to comply with such a request or court order. John K. Stipancich, *The Negligent Spoliation of Evidence: An Independent Tort Action May Be the Only Acceptable Alternative*, 53 OHIO ST. L.J. 1135, 1139 (1992).

133. *See* Graves v. Daley, 526 N.E.2d 679, 681 (Ill. App. Ct. 1988) (stating that parties are not allowed to destroy evidence simply because no court order was issued to protect it).

134. *Id.*; *see also* Ralston v. Casanova, 473 N.E.2d 444, 449 (Ill. App. Ct. 1984); Stegmiller v. H.P.E., Inc., 401 N.E.2d 1156, 1158-59 (Ill. App. Ct. 1980). Thus, the possibility of litigation was reasonably foreseeable to these

Finally, although one purpose behind discovery sanctions is to deter parties from violating discovery rules, deterrence is often ineffective.[135] Sanctions are ineffective in deterring spoliation mainly because courts impose them with the goal of aiding "discovery rather than punishing the spoliator."[136] Furthermore, courts only impose sanctions when they find that the spoliator's "noncompliance with discovery rules or orders is unreasonable."[137] Moreover, because most cases settle before trial begins, the spoliator's risk of being caught is minimal; even if his act of spoliation is discovered before settlement, in general the court will merely order the spoliator to disclose the evidence if at all possible.[138] Courts will only impose the drastic sanction of dismissal or default judgment in those cases where the spoliator's "actions show a deliberate, contumacious, or unwarranted disregard of the court's authority."[139] Sanctions which do not seriously punish a party for spoliation of evidence have little or no deterrent effect. Similarly, another possible remedy for spoliation, that of the adverse jury inference instruction, has little, if any, effect on deterrence of the spoliation of evidence.[140]

B. Adverse Jury Inference

In general, the intentional spoliation of evidence that is material to a case raises an inference that this evidence would have been unfavorable to the spoliator's defense or cause of action.[141] Thus, in certain cases of spoliation, Illinois courts can

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defendants; this foreseeability imposed the duty to preserve evidence. *Id.*

135. Nesson, *supra* note 15, at 795. "Civil discovery presents powerful incentives to spoliate evidence." *Id.*

136. Wakefield v. Sears, Roebuck and Co., 592 N.E.2d 539, 542 (Ill. App. Ct. 1992). Also, sanctions do not compensate the injured party in a spoliation case, primarily because sanctions for evidence spoliation do not compare "to the potential loss of an entire cause of action." Stipancich, *supra* note 132, at 1139. In other words, monetary sanctions will almost never match what the plaintiff's actual damages may have been. Melissa A. Bruzzano, *Spoliation of Evidence in California*, 24 SW. U. L. REV. 123, 125 (1994).

137. Applegate v. Seaborn, 477 N.E.2d 74, 76 (Ill. App. Ct. 1985).

138. Nesson, *supra* note 15, at 796. "Suppression [or spoliation of evidence] will deprive the opponent of valuable evidence and will promote a favorable settlement; settlement will produce closure that effectively seals the case." *Id.*

139. *Wakefield*, 592 N.E.2d at 542. However, this sanction lets the defendant off lightly, as damages are difficult to assess and the spoliated evidence may have induced a jury to assign higher damages. Nesson, *supra* note 15, at 801-02. Moreover, no matter how severe the sanction that is imposed, it can never replace evidence that has been lost or destroyed. Jones v. Goodyear Tire and Rubber Co., 966 F.2d 220, 225 (7th Cir. 1992). Finally, the default judgment can only be issued after the spoliator fails to obey both a discovery request and a court order to compel discovery. Stipancich, *supra* note 132, at 1139.

140. Nesson, *supra* note 15, at 794-95.

141. Thomas G. Fischer, Annotation, *Medical Malpractice: Presumption or*

apply an "adverse jury inference" instruction.[142] Under particular enumerated circumstances, "a presumption arises that the evidence a party fails to produce would be unfavorable to him."[143] These circumstances are: whether the evidence was under the control of the spoliating party and could have been produced by him with reasonable diligence; whether the spoliated evidence "was not equally available to the adverse party;" whether a "reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed it to be favorable to him;" and whether any "reasonable excuse for the failure has been shown."[144] An innocent party must satisfy all four of these criteria in order for the judge to issue this instruction.[145] The presumption will not apply if the evidence is "equally available" to either party.[146] Whether to give this instruction is within the discretion of the trial court,[147] subject to reversal only upon its abuse.[148]

Courts have employed the adverse jury inference in medical malpractice cases.[149] This is because "obtaining [medical] records in their original condition" is imperative to the resolution of liability and damages issues.[150] However, the tampering of medical records is a frequent problem.[151] One solution to this problem is the adverse jury inference, in which the intentional spoliation of medical records is seen as evidence of the defendant's

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Inference From Failure of Hospital or Doctor to Produce Relevant Medical Records, 69 A.L.R. 4TH 906 (1990). The inference arises out of a theory that a party's intentional loss, destruction, or spoliation of evidence can be used against that party to demonstrate his awareness of the weakness of his case. 22 CHARLES ALAN WRIGHT AND KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5178 (1978).

142. ILL. PATTERN JURY INSTRUCTIONS (Civil 3d) 5.01: Failure to Produce Evidence or a Witness. Illinois Pattern Jury Instructions should only be used as originally worded where they "correctly and accurately charge the jury." Ruperd v. Ryan, 683 N.E.2d 166, 175 (Ill. App. Ct. 1997).

143. ILL. PATTERN JURY INSTRUCTIONS (Civil 3d) 5.00: Failure to Testify or Produce Evidence.

144. ILL. PATTERN JURY INSTRUCTIONS (Civil 3d) 5.01: Failure to Produce Evidence or a Witness.

145. Pietrzak v. Rush-Presbyterian-St. Luke's Med. Ctr., 670 N.E.2d 1254, 1260 (Ill. App. Ct. 1996); *see* Chiricosta v. Winthrop-Breon, 635 N.E.2d 1019, 1037 (Ill. App. Ct. 1994).

146. Flynn v. Cusentino, 375 N.E.2d 433, 436 (Ill. App. Ct. 1978).

147. Cleveringa v. J. I. Case Co., 595 N.E.2d 1193, 1211 (Ill. App. Ct. 1992).

148. *Pietrzak*, 670 N.E.2d at 1260.

149. Fischer, *supra* note 141, at 906 (discussing medical malpractice cases). Because the problem of tampering with medical records is widespread in medical malpractice actions, many courts have applied this rule of evidence. *Id.*

150. Sanford M. Gage, *Alteration, Falsification, and Fabrication of Records in Medical Malpractice Actions*, 1981 MED. TRIAL TECH. Q. 476, 477 (1981).

151. *Id.* at 477.

consciousness of guilt.[152] One limitation on the use of adverse jury inference instructions, however, is that they "are warranted only where the evidence actually exists but is not produced by the only party to whom it is available."[153] Thus, if a spoliator completely destroys incriminating evidence, these instructions appear to be inapplicable.[154] Similarly, these instructions are not warranted where the unproduced evidence would be merely cumulative.[155] Furthermore, Illinois courts will "generally give this [jury] instruction only if the spoliator intentionally destroyed the evidence to gain an advantage" in the litigation.[156] However, if the evidence is spoliated negligently, then Illinois courts generally will not give the adverse jury inference instruction, reasoning that it may provide a windfall to the injured party.[157]

Another problem with the adverse inference is that it only works well if the lost or spoliated evidence was not the key piece of evidence needed to prove the case.[158] The inference tells the jury that the "evidence would have helped the party who wished to present it."[159] However, if the spoliated evidence is the key piece of evidence needed to prove the case, then the inference is no help.[160] Finally, if the spoliated evidence is, for example, a medical record,

152. Thor v. Boska, 38 Cal. App. 3d 558, 565 (Cal. Ct. App. 1974). A party's spoliation of evidence "is receivable against him as an indication of his consciousness That [sic] his case is a weak or unfounded one . . . ." *Id.* at 567. This case also suggests that the burden of proof in such a situation should shift to the defendant to prove that his negligence is not the cause of plaintiff's injuries. *Id.* at 568.

153. Cleveringa v. J. I. Case Co., 595 N.E.2d 1193, 1211 (Ill. App. Ct. 1992). The Court may not issue these jury instructions absent a showing that the evidence still exists in some form. *Id.*

154. *Id.*

155. Chiricosta v. Winthrop-Breon, 635 N.E.2d 1019, 1037 (Ill. App. Ct. 1994).

156. Frossard & Gainsberg, *supra* note 76, at 692. *But see Wakefield*, 592 N.E.2d at 543 (recognizing IPI 5.01 as a possible solution to unintentional spoliation of evidence).

157. Frossard & Gainsberg, *supra* note 76, at 694-95. Without a showing of the defendant's intent to undermine the pending litigation by his acts of spoliation, there appears to be no reason to issue a punishment so severe as the adverse jury inference instruction against the defendant. *Id.* at 694.

158. *Id.*

159. *Id.*

160. The inference does not by any means replace the need for the substantive proof necessary to a plaintiff's case. Cambre, *supra* note 13, at 607. Furthermore, because whether to give the instruction is left to the judge's discretion, to be exercised at the end of the presentation of both parties' cases, "the innocent party must still present the case without that crucial piece of evidence." Bruzzano, *supra* note 136, at 124. In fact, the adverse inference is a rather ineffective remedy because a "plaintiff can not build a case on a permissive inference alone." Wilson, *supra* note 15, at 994 (quoting James F. Thompson, Note, *Spoilation of Evidence: A Troubling New Tort*, 37 U. KAN. L. REV. 563, 572 (1989)).

without which a plaintiff in Illinois cannot obtain a certificate of merit to file suit, then the adverse jury inference is no help at all; if the plaintiff can not even get to the jury, what good is a jury inference?[161]

The final problem with the adverse jury instruction is that if necessary evidence is spoliated by a third person who is not a party to the suit, then the instruction cannot be given.[162] In such a situation, the issuance of this instruction would give the non-spoliating injured party a tremendous advantage over her equally innocent adversary.[163] Thus, in such a situation, the adverse inference instruction is useless.[164]

However, another remedy for evidence spoliation is statutory; this is embodied by the x-ray Retention Act.[165] Similar to the adverse jury inference instruction, however, the x-ray Retention Act is fairly useless outside of a few specific situations.

C. Statutory Remedies: The X-Ray Retention Act

Illinois employs a statutory remedy specifically for the spoliation of medical records, in the form of the x-ray Retention Act.[166] The Act states that hospitals which produce x-rays or roentgen process[167] photographs at "the request of licensed physicians for use by them in the diagnosis or treatment of a patient's illness or condition must retain such films as part of their regularly maintained records for a period of 5 years."[168]

This statute was enacted in order to prevent the loss of x-ray

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161. *See* Miller v. Gupta, 672 N.E.2d 1229, 1232 (Ill. 1996) (stating that without the spoliated x-rays, Miller will never be able to assert a meritorious cause of action).

162. Frossard & Gainsberg, *supra* note 76, at 695.

163. *Id.*

164. *Id.*

165. X-Ray Retention Act, 210 ILCS 90/1 (West 1994).

166. *Id.* This is the only statute that specifically directs hospitals to retain a certain record. *Id.* Outside of this Act, Illinois hospitals are "guided by the policies of the Illinois Hospital Association (IHA) and the American Hospital Association" regarding record retention. Rallo, *supra* note 21, at 30.

167. A roentgen process photograph is a film of the "internal structures of the body, made by passage of x-rays through the body to act on specially sensitized film." RICHARD SLOANE, THE SLOANE - DORLAND ANNOTATED MEDICAL - LEGAL DICTIONARY 622 (1987).

168. 210 ILCS 90/1 (West 1994). The text of the Act is, in part, as follows:

> Hospitals which produce photographs of the human anatomy by the X-Ray or roentgen process on the request of licensed physicians for use by them in the diagnosis or treatment of a patient's illness or condition shall retain such photographs or films as part of their regularly maintained records for a period of 5 years provided that retention of said photographs or film may be by microfilm or other recognized means of minification that does not adversely affect their use for diagnostic purposes.

Id.

evidence, which is commonly the evidence most crucial to the success of a medical malpractice claim.[169] Furthermore, the Illinois Supreme Court has held that a private cause of action is available to plaintiffs under the Act.[170] In order to plead a cause of action based on the violation of the x-ray Retention Act, "the plaintiff must plead and prove an injury and damages proximately caused by the defendant's loss of [the] x-ray."[171] Furthermore, a plaintiff has a cause of action against a hospital for violation of this statute even if the hospital has lost only one x-ray out of many.[172]

However, there are two main problems with the x-ray Retention Act.[173] One problem is that the Act, by its language, applies only to x-ray or roentgen process photographs.[174] Thus, there is no statute dealing with the retention of other kinds of medical test results. The other problem is that the Act, on its face, applies only to hospitals, not to private physicians or even laboratories.[175] Therefore, an injured patient whose x-rays are disposed of or otherwise spoliated by the physician has no cause of action under the Act.[176]

Another possible remedy to deal with the spoliation of evidence is some kind of criminal penalty, such as an obstruction of justice statute. However, a party injured by spoliation of evidence has no real cause of action in the criminal arena either.

D. Criminal Penalties

The Illinois legislature has enacted criminal penalties for the destruction of evidence.[177] The obstruction of justice statute states that "[a] person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he . . . (a) destroys, alters, conceals or disguises physical evidence . . . ."[178] Obstruction of justice is designated a Class 4

169. Rodgers v. St. Mary's Hosp., 597 N.E.2d 597, 619 (Ill. 1992).

170. *Id.* at 619-20. The court stated that "a private cause of action was necessary to provide an adequate remedy for violations of the [X-Ray Retention] Act." *Id.* The court further stated that a private cause of action would be "consistent with the underlying purpose of the Act," which was the prevention of loss of evidence and the protection of plaintiffs in medical malpractice cases whose x-rays were destroyed while in the defendant hospital's possession. *Id.* at 619-20.

171. *Id.* at 620.

172. *Id.* The statute requires that all x-rays be preserved; thus the loss of only one X-Ray is still a violation. *Id.*

173. 210 ILCS 90/1 (West 1994).

174. *Id.*

175. *Id.*; *see also* Miller v. Gupta, 672 N.E.2d 1229, 1233 (Ill. 1996) (stating that because the defendant was a private physician and not a hospital, the Act did not apply to him).

176. *Miller*, 672 N.E.2d at 1233.

177. Obstructing Justice, 720 ILCS 5/31-4 (West 1996).

178. *Id.*

felony.[179] Thus, any offender can be imprisoned for three to six years.[180]

However, criminal sanctions for the spoliation of evidence in a civil case are flatly inadequate, due to the fact that there are no cases where a party was criminally convicted for the spoliation of evidence in civil litigation.[181] Thus, even though the destruction of evidence is a felony carrying a penalty of three to six years of imprisonment,[182] a criminal penalty is not a solution to spoliation if the penalty is never issued. Furthermore, a criminal penalty of jail time fails to compensate the injured party in a civil suit.[183] Thus, criminal sanctions are an ineffective remedy for the spoliation of evidence in a civil suit.

It is therefore clear that traditional remedies for evidence spoliation are ineffective in solving this problem. These remedies have little or no deterrent effect on a potential spoliator,[184] and the spoliator in a civil case, if his destruction goes unnoticed, has little worry of a severe punishment.[185] To resolve the persistent and devastating problem of evidence spoliation, another course of action is necessary.

III. ILLINOIS SHOULD ADOPT THE SPOLIATION TORT

Dean Prosser once stated that "[n]ew and nameless torts are being recognized constantly . . . ."[186] Once a new, protected interest is recognized, courts will then grant a new cause of action for the

179. *Id.*

180. Extended Term, 730 ILCS 5/5-8-2 (West 1996).

181. Katz & Muscaro, *supra* note 132, at 54. Also, criminal penalties are inadequate simply because they serve a different goal than does a tort action. Smith v. Superior Court, 198 Cal. Rptr. 829, 834 (Cal. Ct. App. 1984). "The purpose behind criminal penalties is to protect and vindicate the interests of the public as a whole," while the purpose behind the tort action is to compensate the injured plaintiff herself. *Id.* Not only does the criminal penalty not compensate the injured plaintiff, it also does not protect society's interests as a whole if it is never issued in cases of spoliation. Katz & Muscaro, *supra* note 132, at 54.

182. 730 ILCS 5/5-8-2 (West 1996).

183. Katz & Muscaro, *supra* note 132, at 54. Moreover, any possible exposure to a criminal penalty that a spoliator may have may instead be outweighed by the possible advantage that he will receive by his act of spoliation. *Id.* Also, because in many states the penalty for spoliation of evidence is a misdemeanor, not a felony, these penalties are minor compared to a money judgment in a civil suit. *Id.*

184. Nesson, *supra* note 15, at 794-95. The process of civil discovery itself provides too many incentives to spoliate evidence, which sanctions can not possibly deter. *Id.* at 795.

185. Katz & Muscaro, *supra* note 132, at 54. Due to the widespread disinterest in criminally prosecuting evidence spoliation in civil cases, the threat of criminal prosecution is, at best, "theoretical." *Id.*

186. WILLIAM L. PROSSER, HANDBOOK OF LAW AND TORTS § 1, at 3 (4th ed. 1971).

violation of that protected interest.[187] Illinois should follow the lead of several other states and recognize that the right to file a civil action without interference by spoliation of evidence is a protected interest.[188]

This Part proposes that Illinois adopt the intentional spoliation tort. Section A discusses reasons why Illinois should adopt the tort.[189] Section B examines the similarities between the spoliation tort and another tort long recognized in Illinois, that of intentional interference with prospective business relations.[190] Finally, Section C discusses how the spoliation tort would solve the deficiencies of older, less efficient, remedies for evidence spoliation.[191]

A. *There is a Strong Need for the Spoliation Tort, Particularly in Medical Malpractice Actions*

The Illinois Supreme Court recently indicated in *Boyd v. Traveler's Insurance Co.*[192] that it would adopt the spoliation tort if given the right facts.[193] Illinois must adopt the spoliation tort in

187. Smith v. Superior Court, 198 Cal. Rptr. 829, 832 (Cal. Ct. App. 1984) (citing WILLIAM L. PROSSER, HANDBOOK OF LAW AND TORTS § 1, at 3-4 (4th ed. 1971)). "When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to a remedy." *Id.* In order for the court to step in, the defendant's wrongful act must affect some legal interest of the plaintiff. 74 AM. JUR. 2D *Torts* § 30 (1974). The purpose behind adopting the spoliation tort is to allow a victim of spoliation to "recover damages for the loss of a prospective lawsuit." Bell et al., *supra* note 107, at 531-32.

188. *See, e.g., Smith*, 198 Cal. Rptr. at 832. Illinois has a long history of following California's lead in major tort decisions. *See, e.g.*, Moorman Mfg. Co. v. National Tank Co., 435 N.E.2d 443, 447 (Ill. 1982) (rejecting strict liability in tort for purely economic loss). The decision was based squarely on Seely v. White Motor Co., 45 Cal. Rptr. 17 (Cal. 1965). *Id.* Alvis v. Ribar, 421 N.E.2d 886, 896-97 (Ill. 1981) (adopting pure comparative negligence to replace the doctrine of contributory negligence). The decision was based in part on Li v. Yellow Cab Co., 119 Cal. Rptr. 858, 875 (Cal. 1975). *Id.* Suvada v. White Motor Co., 210 N.E.2d 182, 187 (Ill. 1965) (adopting strict liability in tort as a basis for a cause of action based on a defective product). This decision was based on Greenman v. Yuba Power Prods., Inc., 27 Cal. Rptr. 697 (Cal. 1963). *Id.*

189. See *infra* notes 192-203 and accompanying text for an examination of the need for the spoliation tort particularly in medical malpractice cases.

190. See *infra* notes 204-07 and accompanying text for an analysis of the similarities between the spoliation tort and the interference with prospective business relations tort.

191. See *infra* notes 208-16 and accompanying text for a discussion of how the tort would solve problems left unresolved by other spoliation remedies, even though some authors feel that existing remedies are adequate to deter and resolve evidence spoliation. Bell et al., *supra* note 107, at 532.

192. 652 N.E.2d at 273.

193. *See* Boyd v. Traveler's Ins. Co., 652 N.E.2d 267, 273 (Ill. 1995) (stating

order to protect an "individual [party's] right to sue for damages" caused by the intentional spoliation of evidence.[194] Spoliation of evidence is extremely prevalent in medical malpractice cases, where records that the plaintiff needs to prove his case are usually in the possession of the defendant doctor or hospital.[195] One author asserted that as many as fifty percent of all medical malpractice cases involve altered records; of that number, "ten percent of all malpractice cases deal with fraudulently altered records."[196]

Miller v. Gupta,[197] the facts of which began this Comment, illustrates the need for a spoliation tort in medical malpractice cases. In that case, the plaintiff Miller was injured, allegedly by defendant Dr. Gupta's malpractice.[198] However, the x-rays that Miller needed in order to file and prove her case were lost by Dr. Gupta when he placed the x-rays on the ground near his wastebasket, knowing that the cleaning woman would throw them out with the rest of his trash.[199] Thus, Miller was unable to file a malpractice case against Dr. Gupta.[200] Furthermore, she could not even state a cause of action against the doctor under the x-ray Retention Act[201] because the Act flatly does not apply to private physicians such as Dr. Gupta.[202] Finally, if Miller does attempt to

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that plaintiffs' complaint failed to establish the tort of intentional spoliation of evidence due to "factual insufficiency").

194. Philip A. Lionberger, *Interference with Prospective Civil Litigation by Spoliation of Evidence: Should Texas Adopt a new Tort?*, 21 ST. MARY'S L.J. 209, 221 (1989). There is no pressing need at this time to adopt the tort of negligent spoliation of evidence, as Illinois recognizes that a cause of action for negligent spoliation can be stated under existing negligence law. *Boyd*, 652 N.E.2d at 270. Thus, in Illinois, negligent spoliation of evidence is a cause of action in negligence theory, not a separate negligence tort. Frossard & Gainsberg, *supra* note 76, at 707. However, a short discussion of the negligent spoliation tort will be provided here. There are two different contexts in which negligent spoliation of evidence can arise. Stipancich, *supra* note 132, at 1140. One such context is where one party unintentionally spoliates evidence which then has a favorable result on his position. *Id.* The second context is that in which an a disinterested third party spoliates evidence. *Id.* However, in order to state a cause of action in negligence in either context, the plaintiff must first establish a duty on the defendant's part to protect evidence against loss or destruction. Wilson, *supra* note 15, at 978-79.

195. Harold L. Hirsh, *Tampering with Medical Records*, 1978 MED. TRIAL TECH. Q. 450, 452 (1978).

196. Casamassima, *supra* note 14, at 236-37. Often, medical records are altered after suit is filed in an attempt by the doctor to conceal mistakes in judgment for which he may not even be legally liable. Hirsh, *supra* note 195, at 451. However, in the end the record has still been intentionally altered by a health care provider who is conscious of his possible legal liability. *Id.*

197. 672 N.E.2d 1229 (Ill. 1996).

198. *Id.* at 1231.

199. *Id.*

200. *Id.* at 1232.

201. 210 ILCS 90/1 (West 1994).

202. *Miller*, 672 N.E.2d at 1233.

state a cause of action under negligence, as per *Boyd*, she will find it very difficult to prove that Dr. Gupta had a duty to preserve her x-rays.[203]

Thus, in order to prevent such a situation, and in order to provide adequate relief to parties in spoliation cases, Illinois must adopt the spoliation tort.

B. Similarity to the Tort of Intentional Interference with Prospective Business Advantage

The California case of *Smith v. Superior Court* compared the spoliation tort to the tort of intentional interference with prospective business advantage.[204] Illinois has recognized the business tort since 1980.[205] With this tort, Illinois has declared that a person's business relationships constitute a property interest, and as such, they are entitled to protection against undue interference.[206]

The elements of these two torts are very similar, and it would be both easy and practical to recognize the spoliation tort as an outgrowth of the interference with prospective business advantage tort.[207] Thus, because Illinois law already recognizes that

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203. Boyd v. Traveler's Ins. Co., 652 N.E.2d 267, 273 (Ill. 1995). *Boyd* stated that "a duty to preserve evidence may arise through an agreement, a contract, a statute," affirmative conduct by the defendant, or another special circumstance. *Id.* In Miller's case, there was no contract or agreement between the patient and the doctor to preserve her x-rays. *Miller*, 672 N.E.2d at 1233. Also, there was no applicable statute which imposed a duty on Dr. Gupta to preserve the x-rays. *Id.* It remains to be seen whether Miller can effectively plead either that Dr. Gupta affirmatively undertook to preserve Miller's x-rays by placing them in a jacket on the floor, or that Dr. Gupta's conduct fits within the undefined "other special circumstance" of *Boyd*. *Boyd*, 652 N.E.2d at 271. Ironically, one of the primary grounds on which some courts have refused to adopt the spoliation tort is the "absence of a duty to preserve evidence." Lionberger, *supra* note 194, at 216-17.

204. Smith v. Superior Court, 198 Cal. Rptr. 829, 836 (Cal. Ct. App. 1984). This tort allows a plaintiff to recover damages both for interference with business relationships and for interference with the parties' reasonable expectations of a business relationship. *Id.* California first recognized this tort in 1975. *Id.*

205. Belden Corp. v. Internorth, Inc., 413 N.E.2d 98, 101 (Ill. App. Ct. 1980).

206. *Id.* at 101. A prospective business relationship imparts to an individual an expectancy of future economic gain. *Id.* With the spoliation tort, the expectancy of future economic gain is the expectancy of winning damages in a lawsuit; "spoliation of evidence interferes with the plaintiff's right to sue for damages." Lionberger, *supra* note 194, at 221.

207. The elements of the tort of interference with prospective business advantage are: the plaintiff must have a reasonable expectancy of entering into a valid business relationship, defendant must know of the plaintiff's expectancy, and defendant must intentionally interfere and destroy the probable expectancy, thereby causing harm to the plaintiff. *Belden*, 413 N.E.2d at 101. *Compare supra* notes 63-100 and accompanying text *with Belden*, 413 N.E.2d at 101 (discussing the elements of the spoilation tort).

prospective business relationships are property rights which deserve protection, it must expand its analysis to include prospective civil litigation as a property interest which also deserves protection. To accomplish this, Illinois must adopt the tort of intentional spoliation of evidence.

C. Adoption of the Spoliation Tort Would Solve the Deficiencies of Previous Spoliation Remedies

Adoption of the spoliation tort would protect plaintiffs when essential evidence is intentionally lost or destroyed by defendants.[208] For example, the spoliation tort would enable plaintiffs in a medical malpractice case to bring a cause of action against a private doctor for destruction or loss of x-rays; thus, the spoliation tort would reach beyond the limited scope of the x-ray Retention Act.[209] Furthermore, the spoliation tort would not be limited to x-rays; rather, it would protect plaintiffs against the loss of other kinds of test results or medical records as well.[210]

A spoliation tort would also work to deter the intentional spoliation of evidence by defendants who are attempting to protect themselves financially.[211] Spoliators destroy evidence in an attempt to lessen the dollar amount of their liability, especially if the expected gain from the loss or destruction of vital evidence is greater than their chance of being discovered or punished harshly.[212] If the knowledge of spoliated evidence failed to provoke the jury into imposing higher compensatory or punitive damages, then the spoliator gains a great deal from his destruction of evidence.[213] However, if faced with a separate tort cause of action

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208. Cohn, *supra* note 16, at 129. Often, plaintiffs either lose a cause of action entirely or suffer a diminished recovery, due to the spoliation of evidence essential to their claim. *Id.* at 128. Judicial sanctions alone will not be sufficient to compensate the plaintiff for the loss of evidence. *Id.* at 129.

209. 210 ILCS 90/1 (West 1994). The Act applies only to hospitals which produce x-rays and then lose them. *Id.* Thus, plaintiffs have no cause of action under the Act against a private physician who loses x-rays. Miller v. Gupta, 672 N.E.2d 1229, 1233 (Ill. 1996).

210. 210 ILCS 90/1 (West 1994). The X-Ray Retention Act applies only to x-rays or roentgen process photographs, not to any other test results or diagnostic tools. *Id.*

211. Cohn, *supra* note 16, at 129. Individuals may believe that "it is more advantageous to destroy crucial evidence" and address whatever meager penalty is imposed rather than produce the evidence and suffer a large money judgment. Rowse, *supra* note 16, at 191.

212. Nesson, *supra* note 15, at 795. "Civil discovery presents powerful incentives to spoliate evidence," which the possibility of sanctions or an adverse jury inference instruction cannot overcome. *Id.* In fact, no court has ever imposed on a spoliator punitive damages that were designed to offset the expected gain of spoliation. *Id.* at 803.

213. *Id.* at 802. Ironically, if a party is not under a statutory duty to preserve evidence, his lawyer may, under the guise of zealous representation, even counsel him to destroy evidence. Rowse, *supra* note 16, at 194.

for the destruction of evidence rather than weak sanctions or an even weaker jury inference instruction, a spoliator will be deterred from the destruction or spoliation of evidence.

Furthermore, a spoliation tort is a better solution than the adverse jury inference instruction. The adverse jury inference instruction is too limited as a remedy for spoliation; moreover, in many instances the spoliation of evidence prevents a case from ever getting to the jury.[214] Thus, a spoliation tort cause of action would provide a plaintiff some measure of relief that she would otherwise be denied.

Finally, a tort cause of action would provide a better remedy to victims of spoliation than do sanctions. "Sanctions cannot replace lost evidence" that would have either enabled a plaintiff to bring a lawsuit or would have substantially increased a damages award.[215] Moreover, if the act of spoliation occurs before a suit is filed, courts will usually not even issue sanctions.[216] Thus, with a separate spoliation tort remedy, plaintiffs would no longer need to depend on the court's discretion in issuing sanctions.

CONCLUSION

Traditional remedies to solve or deter spoliation of evidence are simply ineffective. Sanctions whose imposition are left to the discretion of the court do not deter a potential spoliator who feels that his acts will go undiscovered or that his punishment will be light. An adverse jury inference instruction does not compensate a plaintiff who no longer has sufficient evidence to take before a jury. The threat of criminal penalties, if never carried out, is similarly ineffective. Finally, statutory remedies that apply only in a limited set of circumstances are inadequate to remedy the problem of spoliation of evidence.

To truly solve the problem of evidence spoliation, Illinois must adopt the tort of intentional spoliation of evidence. This tort provides an effective remedy for those plaintiffs who have been injured by spoliation, yet who are unable to plead a duty on the defendant's part in order to state a negligence cause of action. The spoliation tort, particularly in medical malpractice cases, would provide the most effective remedy for all those who have been injured by the intentional spoliation of evidence.

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214. Cleveringa v. J. I. Case Co., 595 N.E.2d 1193, 1211 (Ill. App. Ct. 1992). Adverse inference instructions can only be given where the requested evidence actually exists but is simply not produced. *Id.* Thus, if the requested evidence has been completely destroyed, and no evidence exists, the adverse inference instruction is not given. *Id.*

215. Cohn, *supra* note 16, at 144.

216. *Id.*