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YES, I DESTROYED THE EVIDENCE – SUE ME? INTENTIONAL SPOLIATION OF EVIDENCE IN ILLINOIS

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I. INTRODUCTION

Many Illinois litigators have encountered spoliation of evidence, which is the loss, destruction, or alteration of evidence.[1] Examples of spoliation are seemingly endless and include the failure to preserve the scene of a train derailment,[2] the accidental destruction of evidence on a lawyer's desk by a janitor,[3] the loss of a heater that exploded,[4] the removal of wires from a car that caught on fire,[5] the loss and alteration of medical equipment,[6] and the intentional erasing of a computer image relevant to a copyright lawsuit.[7] To combat spoliation, Illinois and many other states have developed common law and statutory methods to remedy and deter spoliation.

Illinois' spoliation law, however, is somewhat unclear. Although Illinois does not recognize negligent spoliation as an independent cause of action, a party can state such a claim under traditional negligence law.[8] That is, a litigant can bring an ordinary negligence claim for spoliation of evidence; the law need not make any special provision.[9] In contrast to

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1. *See, e.g.*, Midwest Trust Servs., Inc. v. Catholic Health Partners Servs., 910 N.E.2d 638, 642-43 (Ill. App. Ct. 1st Dist. 2009).

2. Burlington N. & Santa Fe Railway Co. v. ABC-NACO, 389 Ill. App. 3d 691, 710-15 (Ill. App. Ct. 2009).

3. *See, e.g.*, Velasco v. Commercial Bldg. Maint. Co, 215 Cal. Rptr. 504 (Cal. Ct. App. 1985).

4. *See, e.g.*, Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 269 (Ill. 1995).

5. *See, e.g.*, Am. Family Ins. Co. v. Village Pontiac-GMC, Inc., 223 Ill. App. 3d 624 (Ill. App. Ct. 2d Dist. 1992).

6. *See, e.g.*, *Midwest Trust Servs*., 910 N.E.2d 638.

7. *See, e.g.*, Mohawk Mfg. & Supply Co. v. Lakes Tool Die & Eng'g, Inc., No. 92 CV 1315, 1994 WL 85979, at *1 (N.D. Ill. Mar. 14, 1994).

8. Boyd v. Travelers Ins. Co., 652 N.E.2d 267 (Ill. 1995).

9. *Id.*

negligent spoliation, whether Illinois permits an independent cause of action for intentional spoliation remains an "open question."[10] The Illinois Supreme Court has expressly declined to decide the question,[11] and courts applying Illinois law are split.[12]

This Article argues that Illinois should recognize the tort of intentional spoliation of evidence. Section I discusses spoliation generally, including its history and status in jurisdictions throughout the nation. Section II considers spoliation under Illinois law and examines the leading case of *Boyd v. Travelers Insurance Company*.[13] The Section also considers the availability of judicial sanctions for spoliation of evidence in federal courts sitting in Illinois, namely Rule 37 of the Federal Rules of Civil Procedure and the inherent power doctrine.[14] Under either approach, the trial court has broad discretion to fashion an appropriate sanction.[15] The sanction of dismissal or default judgment, though, is reserved for the most serious bad-faith conduct, including, perhaps, the fabrication of evidence.[16]

Section III argues that Illinois should resolve the uncertainty in its spoliation law by recognizing an independent cause of action for intentional spoliation of evidence. Specifically, it argues that adopting the tort of intentional spoliation will further the policy interests of deterrence, remediation, and certainty. The Section also details how existing sanctions for spoliation are often not enough. The Article concludes by arguing that any concerns raised by recognizing the tort of intentional spoliation do not outweigh the benefits of doing so.

II. SPOLIATION OF EVIDENCE

A. Background

Spoliation of evidence refers to the "act of damaging evidence."[17] The precise definition of spoliation, however, varies greatly across juris-

10. *See* Jones v. O'Brien Tire & Battery Serv. Ctr., Inc., 871 N.E.2d 98, 115 (Ill. App. Ct. 2007).

11. *Boyd,* 652 N.E.2d 267.

12. *See* Midwest Trust Servs., Inc. v. Catholic Health Partners Servs., 910 N.E.2d 638 (Ill. App. Ct. 2009); *see also Jones*, 871 N.E.2d at 115; *see also* Am. Family Ins. Co. v. Village Pontiac-GMC, Inc., 223 Ill. App. 3d 624 (1992).

13. *Boyd,* 652 N.E.2d 267.

14. *See infra* Part II(c).

15. *Id.*

16. *Id.*

17. Shannon D. Hutchings, Note, *Tortious Liability for Spoliation of Evidence*, 24 Am. J. Trial Advoc. 381, 383 (2000). The word "spoliation" is derived from the Latin phrase *omnia praesumuntur contra spoliatorum*, which means "all things are presumed against a despoilor or wrongdoer." Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 Emory L.J. 1085, 1087 (1987).

dictions. At its narrowest, spoliation is defined as the "intentional destruction of evidence . . . or the significant and meaningful alteration of a document or instrument."[18] Most jurisdictions reject this narrow approach and define spoliation more broadly to include "the destruction or significant alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[19] The Sixth Circuit in an older case recited perhaps the broadest definition of spoliation when it suggested that spoliation "occurs along a continuum of fault ranging from innocence through the degrees of negligence to intentionality."[20] In Illinois, courts define spoliation as the "destruction, mutilation, alteration, or concealment of evidence."[21]

Although jurisdictions vary, spoliation claims can be divided into either claims of negligent spoliation or intentional spoliation.[22] Negligent spoliation is predicated on the existence of a duty to preserve evidence. To make out a claim—either independently or under existing negligence law—a party must show the following: 1) the existence of a lawsuit or potential lawsuit; 2) a duty that the spoliator owes to preserve the evidence or potential evidence; 3) the spoliator's breach of this duty; and 4) damages to the non-spoliator that the breach proximately caused.[23]

In contrast to negligent spoliation, intentional spoliation assumes the existence of a duty and instead focuses on a party's intent to thwart another party's claim by manipulating evidence.[24] To make out a claim of intentional spoliation, the moving party generally must show: 1) pending or probable litigation; 2) defendant's knowledge of such litigation; 3) defendant's willful destruction of evidence for the purpose of thwarting the litigation; 4) disruption of the litigation; and 5) damages that the

18. *See, e.g.*, BLACK'S LAW DICTIONARY 1401 (6th ed. 1990).

19. *See, e.g.*, West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

20. Welsh v. United States, 844 F.2d 1239, 1246 (6th Cir. 1988).

21. Midwest Trust Servs., Inc. v. Catholic Health Partners Servs., 910 N.E.2d 638, 643 (2009) (citing BLACK'S LAW DICTIONARY 1409 (7th ed. 1999)).

22. Regardless of the label that one attaches to spoliation, many share the same negative view. *See, e.g.*, Wichita Royalty Co. v. City Nat'l Bank, 109 F.2d 299, 302 (5th Cir. 1940) (noting that spoliation is "synonymous with pillaging, plundering, and robbing"); Stefan Rubin, *Tort Reform: A Call for Florida to Scale Back its Independent Tort for the Spoliation of Evidence*, 51 FLA. L. REV. 345, 346 (1999) (noting that spoliation implicates the "integrity of the judicial system"). Spoliation is not a new concept; the common law developed a number of methods to address spoliation. *See* Bart S. Wilhoit, Comment, *Spoliation of Evidence: The Viability of Four Emerging Torts*, 46 UCLA L. REV. 631, 633, 637-39 (1998). Yet modern technology has forced many jurisdictions to apply traditional spoliation law to digital evidence. *See generally* Steven W. Teppler, *Spoliation of Digital Evidence: Changing Approach to Challenges and Sanctions*, 4 SCI. TECH. LAWYER 22 (2007).

23. *See, e.g.*, Joe Wetzel, *Spoliating an Illinois Personal Injury Plaintiff's Spoliation Claim for Routinely Maintained Items*, 28 S. ILL. L.J. 455, 461 (2004).

24. *See* Welch v. Wal-Mart Stores, Inc., No. 04 CV 50023, 2004 WL 1510021, at *4 (N.D. Ill. July 1, 2004).

destruction proximately caused.[25]

The leading case on intentional spoliation is *Smith v. Superior Court*,[26] a 1984 California decision that recognized intentional spoliation as an independent cause of action under California law.[27] In *Smith*, the plaintiff was driving southbound in her car, while the defendant's van proceeded northbound on the same road.[28] As the vehicles approached each other, the left rear wheel flew off the defendant's van and crashed through the plaintiff's front window.[29] Upon impact, glass flew into the plaintiff's eyes and face, which caused the plaintiff to sustain permanent blindness and loss of smell.[30] At some point after the accident, Abbot Ford, a representative of the dealership that customized the wheels on the defendant's van, took possession of the wheel that injured the plaintiff.[31] Abbott subsequently "destroyed, lost, or transferred" the wheel, rendering it impossible for the plaintiff to determine the cause of the accident.[32]

The plaintiff brought suit against Abbot, alleging a number of causes of action including spoliation of evidence.[33] Abbot moved to dismiss the spoliation counts, and the trial court granted his motion, holding that a cause of action for intentional spoliation does not exist under California law.[34] The plaintiff appealed, and the California Supreme Court reversed.[35] Against a common law backdrop that extends a civil remedy to every legal wrong, the court held the policy considerations weighed in favor of the plaintiff.[36] The court downplayed policy concerns about permitting an independent cause of action, and opined that any concerns about difficulties in computing damages and finality were not that grave.[37] Such concerns could be minimized, and, in any event, placing

25. *See, e.g.*, Owca v. Fed. Ins. Co., 95 Fed. Appx. 742, 745 (6th Cir. 2004). Note that some jurisdictions even recognize reckless spoliation. *See, e.g.*, Nix v. Hoke, 139 F. Supp. 2d 125, 136 n.10 (D.D.C. 2001).

26. *See* Smith v. Superior Court, 198 Cal. Rptr. 829 (Cal. Ct. App. 1984), *overruled by*, Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 519 n.3 (Cal. 1998); *see also* MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 83 (Daniel F. Gourash, ed., 2006).

27. *See Smith*, 198 Cal. Rptr. 829; *see generally* Wilhoit, *supra* note 24, at 640-43 (noting that "[t]he most significant development in the evolution of the tort of spoliation occurred" in *Smith*).

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

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id*.

34. *Smith*, 198 Cal. Rptr. at 832.

35. *Id.* at 831.

36. *Id.* at 831-37.

37. *Id.* at 835.

too much weight here would undercut the value of deterrence.[38]

Smith represents but one jurisdiction's approach to intentional spoliation at one fixed point in time. Indeed, the nature and scope of spoliation law varies across the nation.[39] A recent publication notes that "only a minority of state high courts have recognized an independent claim for spoliation of evidence."[40] These jurisdictions include the District of Columbia,[41] Alabama,[42] Alaska,[43] Montana,[44] New Mexico,[45] Ohio,[46] and West Virginia.[47] Yet, many jurisdictions have declined to recognize the tort of spoliation.[48] Some jurisdictions, including Illinois,[49] Idaho,[50] Louisiana,[51] New Jersey,[52] and Pennsylvania,[53] recognize a quasi-cause of action that permits a plaintiff to state a claim for spoliation under an existing cause of action such as negligence.

B. Spoliation of Evidence in Illinois

Any discussion of spoliation law in Illinois must begin with *Boyd v.*

38. *Id.*

39. *See, e.g.,* Met. Life Auto & Home Co. v. Joe Basil Chevrolet, Inc., 809 N.E.2d 835 (N.Y. 2004); Hannah v. Heeter, 584 S.E.2d 560 (W. Va. 2003); Rosenbilt v. Zimmerman, 766 A.3d 749 (N.J. 2001); Smith v. Atkinson, 771 So. 2d 429 (Ala. 2000); Nicholas v. State Farm Fire & Cas. Co., 6 P.3d 300 (Alaska 2000); Oliver v. Stimson, 991 P.3d 11 (Mont. 1999); Holmes v. Amerex Rent-a-Car, 710 A.2d 846, 847 (D.C. Cir. 1998); Elias v. Lancaster Gen. Hosp., 710 A.2d 65 (Pa. Super. Ct. 1998); Bethea v. Modern Biomedical Servs., Inc., 704 So. 2d 1227 (La. Ct. App. 1997); Coleman v. Potas, 905 P.2d 185 (N.M. 1995).

40. *See* Koesel & Turnbull *supra* note 28, at 81.

41. *Holmes*, 710 A.2d at 847.

42. *Atkinson*, 771 So. 2d 429.

43. *Nicholas*, 6 P.3d 300; Hazen v. Anchorage, 718 F.2d 456 (Alaska 1986).

44. *Oliver*, 991 P.3d 11.

45. *Coleman*, 905 P.2d at 189.

46. Smith v. Howard Johnson Co., 615 N.E.2d 1037 (Ohio 1993). Ohio answered the question of whether it recognizes intentional spoliation as an independent tort upon a certified question from the U.S. District Court for the Southern District of Ohio. *Id*. at 1038. The court held that the elements of intentional spoliation are the following: 1) pending or probable litigation involving the plaintiff; 2) knowledge on the part of defendant that litigation exists or is probable; 3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case; 4) disruption of the plaintiff's case; and 5) damages proximately caused by the defendant's acts. *Id*.

47. Hannah v. Heeter, 584 S.E.2d 560, 567 (W. Va. 2003).

48. Met. Life Auto & Home Co. v. Joe Basil Chevrolet, Inc., 809 N.E.2d 835 (N.Y. 2004).

49. Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 271 (Ill. 1995).

50. Ricketts v. Eastern Idaho Equip. Co., 51 P.3d 392 (Idaho 2002); Yoakum v. Hartford Fire Ins. Co., 923 P.2d 416 (Idaho 1996).

51. Bethea, et al. v. Modern Biomedical Servs., Inc., 704 So. 2d 1227 (La. Ct. App. 1997).

52. Rosenbilt v. Zimmerman, 766 A.3d 749, 758 (N.J. 2001).

53. Elias v. Lancaster Gen. Hosp., 710 A.2d 65, 67-69 (Pa. Super. Ct. 1998).

Travelers Insurance Co,[54] which has been termed the Illinois Supreme Court's "watershed pronouncement" on the matter.[55] In *Boyd*, Tommie and Fannie Boyd brought actions for both negligent and intentional spoliation against Tommie Boyd's employer's workers' compensation insurer after the insurer had misplaced a propane heater that was central to the plaintiffs' products liability claim.[56]

The events leading up to the claim began on February 4, 1990, when Tommie Boyd used a propane catalytic heater to keep himself warm while using his employer's van.[57] An explosion occurred and Boyd was severely injured; plaintiffs alleged the heater caused the explosion.[58]

After the explosion, plaintiffs filed a claim against Boyd's employer and its insurer, Travelers, for workers compensation benefits.[59] Then, on February 6, 1990, two Travelers representatives visited the plaintiffs' residence and took possession of the heater that allegedly caused the explosion.[60] In removing the heater, the employees told Fannie Boyd, Tommie's wife, that they needed the heater in order to investigate the cause of the accident.[61] The employees brought the heater to a Travelers office and thereafter "stored it in a closet."[62]

The relevant controversy arose when plaintiffs requested that Travelers return the heater.[63] After Travelers refused, claiming it had inadvertently misplaced the heater, plaintiffs filed suit on September 27, 1991, seeking to compel the heater's return.[64] In its answer to the suit, Travelers admitted that it had lost the heater and had not tested it while it was in its possession.[65] As a result, the plaintiffs filed a lawsuit against Travelers, alleging, among other things, that they suffered injury and irrevocable prejudice arising from "Travelers' loss of the heater[,] because no expert could testify with certainty as to whether the heater was defective or dangerously designed."[66] Travelers filed a motion to dismiss the spoliation allegations, which the trial court granted, even though it stated that Illinois would recognize an independent cause

54. *Boyd*, 652 N.E.2d 267. In Illinois, spoliation of evidence is the non-preservation of evidence relevant to pending or future litigation. *See* Boyd, 652 N.E.2d at 271; Adams v. Bath & Body Works, 830 N.E.2d 645, 654 (Ill. App. Ct. 2005).

55. Darden v. Kueling, 213 Ill. 2d 329, 335 (Ill. 2004).

56. *Boyd*, 652 N.E.2d at 269.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Boyd*, 652 N.E.2d at 269.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

of action for spoliation "given the right facts."[67] The trial court reasoned that the "plaintiffs' claims were premature unless and until they lost the underlying suit against [the manufacturer]."[68] The plaintiffs subsequently took their appeal to the Illinois Supreme Court.[69]

The Illinois Supreme Court noted that Illinois, like a "majority of jurisdictions," had not recognized spoliation as an independent cause of action.[70] Although courts have "long afforded redress for the destruction of evidence," the court opined that traditional remedies were sufficient to address the problem.[71]

The court held that the plaintiffs could state a claim for negligent spoliation under existing negligence law, but reserved judgment on whether intentional spoliation is actionable under Illinois law.[72] The court analyzed the claim under the traditional negligence principles, finding that the plaintiffs alleged "sufficient facts supporting the theory that they have suffered an inability to succeed in their otherwise valid products liability action against [the manufacturer]."[73]

1. *Types of Spoliation*

a. Negligent Spoliation

As explained above, *Boyd* made clear that Illinois law does not recognize the tort of negligent spoliation[74]; rather, it permits a party to state such a claim under traditional negligence law.[75] It follows that to state a claim for negligent spoliation under Illinois law, a party must plead the four traditional elements of negligence: 1) existence of a duty; 2) breach of that duty; 3) proximate causation; and 4) damages.[76]

Turning to the first element,[77] although one does not generally owe

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67. *Id.*

68. *Boyd*, 652 N.E.2d at 267. The trial court dismissed these claims without prejudice, thus permitting the plaintiffs the opportunity to re-file their spoliation action after resolution of the underlying products liability action against the manufacturer. *Id.* at 269.

69. *Id.*

70. *Id.* at 270 & n.1 (collecting cases).

71. *Id.*

72. *Boyd*, 652 N.E.2d at 270-73.

73. *Id.* at 272.

74. *Id*. at 270.

75. *Id.*

76. *Id.* (citing *inter alia*, Estate of Johnson v. Condell Mem. Hosp., 119 Ill. 2d 496, 503 (Ill. 1988)); *see also* Burlington N. & Santa Fe Railway Co. v. ABC-NACO, 906 N.E.2d 83, 100-01 (Ill. App. Ct. 2009); Wetzel, *supra* note 25, at 457-59.

77. *Boyd*, 652 N.E.2d at 270; *see generally* James T. Killelea, *Spoliation of Evidence: Proposals for New York State*, 70 BROOK. L. REV. 1045, 1049-52 (1995) (discussing the existence of duty in a spoliation action and opining that "[s]poliation liability arises from a party's duty to preserve evidence").

a duty to preserve evidence,[78] such a duty may arise in certain circumstances,[79] even prior to litigation.[80] To determine whether a duty exists, Illinois courts apply a two-step process,[81] considering first whether the defendant assumed a duty through agreement, contract, statute, other special circumstance, or voluntarily assumption,[82] and, if so, whether a "reasonable person in the defendant's position would have foreseen the evidence was material to a potential civil action."[83]

The next element is breach, where the plaintiff must show that the spoliating party did not "take reasonable measures to preserve the integrity of relevant and material evidence."[84] The third element, causation, requires the plaintiff to allege the spoliation "caused the plaintiff to be *unable to prove an underlying lawsuit*."[85] The causation element is particularly difficult to prove.[86] The plaintiff need not prove that she would have otherwise prevailed in the action; instead, the plaintiff must prove that but for the spoliation, she would have had a "reasonable probability of succeeding in the underlying suit."[87] Finally, the fourth element is damages, under which the plaintiff must plead "actual damages," such as "an inability to succeed" in an otherwise valid action.[88]

b. Intentional Spoliation

It is an "open question" whether Illinois recognizes an independent

78. *Boyd*, 652 N.E.2d at 270-71.

79. *Id.* at 270.

80. *See, e.g.*, Shimanovsky v. Gen Motors Corp., 692 N.E.2d 286, 290 (Ill. 1998) (noting that plaintiff's duty in this regard is premised on the "court's concern that, were it unable to sanction a party for pre-suit destruction of evidence, a potential litigant could . . . simply [destroy] the proof prior to the filing of a complaint").

81. *See* Dardeen v. Kuehling, 821 N.E.2d 227, 232 (Ill. 2004).

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

83. *Id.* at 272; *see also* Burlington N. & Santa Fe Railway Co. v. ABC-NACO, 906 N.E.2d 83, 101 (Ill. App. Ct. 2009); Jones v. O'Brien Tire & Battery Serv. Ctr., Inc., 752 N.E.2d 8 (Ill. App. Ct. 2001).

84. Shimanovsky v. Gen. Motors Corp., 692 N.E.2d 286, 290 (Ill. 1998).

85. *Boyd*, 652 N.E.2d at 271, n.2 (opining that plaintiff need not show that plaintiff would have prevailed but for the spoliation) (emphasis in original); *see also* Midwest Trust Servs., Inc. v. Catholic Health Partners Servs., 910 N.E.2d 638, 643 (Ill. App. Ct. 2009) (dismissing claim for negligent spoliation in a medical malpractice case where plaintiff "[failed]" to demonstrate that but for the alleged missing cardiac monitoring strips, it had a reasonable probability of succeeding against [the [doctor] in the underlying medical malpractice action").

86. *See Burlington N.*, 906 N.E.2d 83; Cangemi v. Advocate South S. Sub. Hosp., 364 Ill. App. 3d 446, 471 (Ill. App. Ct. 2006) (noting that the success of a spoliation claim often turns on ability to prevail on the underlying claim).

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

88. *Id.* at 272.

cause of action for intentional spoliation.[89] Although some lower courts suggest that "[s]poliation of evidence is not an independent cause of action," these overly-broad and perhaps sloppy statements generally refer to negligent spoliation.[90] This is because the Illinois Supreme Court has explicitly declined to decide whether Illinois recognizes an independent action for intentional spoliation.[91]

In the aftermath of *Boyd*, courts applying Illinois law are split as to whether intentional spoliation exists as an independent tort. [92] On one hand, many courts have used *Boyd*'s failure to create a claim for intentional spoliation to bar such claims.[93] For instance, in a recent Seventh Circuit decision applying Illinois law, the court construed a claim for intentional spoliation as a claim for negligent spoliation, reasoning that Illinois does not support the former claim.[94] Similarly, an Illinois state court dismissed an intentional spoliation claim, reasoning that "plaintiffs cite to no case that specifically recognizes intentional spoliation as a tort in Illinois."[95]

On the other hand, a number of federal district courts have held that Illinois law does (or would) permit an action for intentional spoliation of evidence.[96] In *Williams v. General Motors Corporation*,[97] for example, the court permitted an independent cause of action for intentional spoliation under Illinois law, reasoning that "[i]t would make no sense, after all, for the court to hold a defendant liable for its merely negligent conduct but not for intentional conduct that resulted in the same harm."[98] Similarly, in *Broadnax v. ABF Freight Systems, Inc.*,[99] the court recognized an intentional spoliation claim under Illinois law, but it dismissed

89. Jones v. O'Brien Tire & Battery Serv. Ctr., Inc., 871 N.E.2d 98, 115 (Ill. App. Ct. 2007).

90. *See, e.g.*, *Midwest Trust Servs.*, 910 N.E.2d at 643 (discussing negligence and citing *Boyd*); *Burlington N.*, 906 N.E.2d at 100 (stating "Illinois does not treat spoliation of evidence as a separate claim").

91. *Boyd*, 652 N.E.2d 267.

92. *Compare* Borsellino v. Goldman Sachs Group, Inc., 477 F.3d 502, 510 (7th Cir. 2007) (declining to recognize claim) *with* Broadnax v. ABF Freight Sys., Inc., No. 96 CV 1974, 1998 WL 140884, at *4 (N.D. Ill. Mar. 26, 1998) (recognizing claim).

93. *See, e.g.*, *Borsellino*, 477 F.3d at 510; Anthony v. Sec. Pacific Fin. Servs., Inc., 75 F.3d 311, 317 (7th Cir. 1996); Farrar v. Yamin, 261 F. Supp. 2d 987, 994 (N.D. Ill. 2003); Cangemi v. Advocate S. Sub. Hosp., 845 N.E.2d 792, 815 (Ill. App. Ct. 2006).

94. *See, e.g., Borsellino*, 477 F.3d at 510.

95. *Cangemi*, 845 N.E.2d at 815.

96. *See, e.g.*, Welch v. Wal-Mart Stores, Inc., No. 04 CV 50023, 2004 WL 1510021, at *4 (N.D. Ill. July 1, 2004).

97. Williams v. Gen. Motors Corp., No. 93 CV 6661, 1996 WL 420273, at *3 (N.D. Ill. July 25, 1996).

98. *Id.*

99. Broadnax v. ABF Freight Sys., Inc., No. 96 CV 1974, 1998 WL 140884, at *4 (N.D. Ill. Mar. 26, 1998).

the claim for insufficient pleading.[100]

Nonetheless, to the extent Illinois recognizes a claim for intentional spoliation, the elements of such a claim have been set forth in a pre-*Boyd* case from the Northern District of Illinois.[101] In *Mohawk Manufacturing & Supply Co. v Lakes Tool Die & Engineering, Inc.*, the plaintiff alleged the defendant intentionally erased material from defendant's computer that was copyrighted.[102] In considering the claim, the court set forth the elements of intentional spoliation as: 1) the existence of a potential civil action; 2) defendant's knowledge of that action; 3) destruction of relevant evidence; 4) intent; 5) a causal connection between the destruction and the plaintiff's inability to prove the claim; and 6) damages.[103]

2. *Spoliation in Illinois Courts*

a. Sources of Authority

The Rules of the Illinois Supreme Court authorize courts to sanction parties for failure to preserve evidence.[104] Specifically, Rule 219(c) permits a court to sanction a party for failure to comply with discovery rules or orders handed down under those rules.[105] The Illinois Supreme Court has held that the Rule may even extend to conduct that occurred before litigation commenced.[106] Beyond Rule 219, non-spoliating parties may also assert a cause of action sounding in traditional negligence law as discussed above.[107]

b. Remedies

Once spoliation has occurred, the next question is what, if any, remedy to apply.[108] The typical remedies for spoliation, which either "punish a spoliator or reward an innocent party,"[109] are discovery sanctions, adverse jury inferences,[110] preclusion of evidence, and dismissal or de-

100. *Id.*

101. *See Welch*, 2004 WL 1510021, at *4 (citing Mohawk Mfg. & Supply Co. v. Lakes Tool Die & Eng'g., Inc., No. 92 CV 1315, 1994 WL 85979, at *1 (N.D. Ill. Mar. 14, 1994)).

102. *Mohawk Mfg.*, 1994 WL 85979, at *1.

103. *Id.*; *see also* Hutchings, *supra* note 19, at 384 (detailing the elements of intentional spoliation generally).

104. *See* ILL. SUP. CT. R. 219(c).

105. *See* KOESEL & TURNBULL, *supra* note 28.

106. *See, e.g.*, Shimanovsky v. Gen. Motors Corp., 692 N.E.2d 286, 289 (Ill. 1998).

107. Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 270 (Ill. 1995).

108. *See, e.g.*, Kambylis v. Ford Motor Co., 788 N.E.2d 1 (Ill. Ct. App. 2003). For a discussion of remedies in federal court, see *supra* Section II.B.c.2.

109. Wetzel, *supra* note 25, at 465.

110. *See, e.g.*, ILLINOIS PATTERN JURY INSTRUCTION, CIVIL, NO. 5.01 (2000).

fault judgment.[111] Although criminal penalties might be available,[112] "[m]ost courts have a tendency to prefer civil remedies, because, among other reasons, the criminal sanctions may appear to be too harsh."[113]

3. *Spoliation in Federal Court*

a. Sources of Authority

Federal courts have two primary sources of authority to sanction spoliation of evidence.[114] The first source is Rule 37 of the Federal Rules of Civil Procedure, and the second source is the inherent power doctrine.[115] This Article discusses both in turn.

Federal Rule 37 provides federal courts with a rule-based remedy.[116] Under Rule 37(b), a district court may sanction a party for failure to comply with a discovery order.[117] Although the Rule requires a violation of a court order, "a formal, written order to comply with discovery is not required."[118] Indeed, the Seventh Circuit in *Brandt v. Vulcan, Inc.*[119] held that courts have broadly interpreted the meaning of an "order."[120] Some courts have even held that Rule 37 may extend to conduct that occurred before the commencement of discovery.[121] As one court noted, "[e]ven though a party may have destroyed evidence prior to issu-

111. Wetzel, *supra* note 25, at 465.

112. *See* Virginia L. H. Nesbitt, Note, *A Thoughtless Act of a Single Day: Should Tennessee Recognize Spoliation of Evidence as an Independent Tort?*, 37 U. MEM. L. REV. 555, 570 (2007).

113. Wetzel, *supra* note 25, at 465 n.85; *see also* Nesbitt, *supra* note 120, at 570 (considering criminal sanctions for spoliation as "theoretical"). For a discussion of criminal penalties for spoliation, see generally Wetzel, *supra* note 25, at 469-70 n.128-34.

114. *See* Am. Family Mutual Ins. Co. v. Roth, No. 05 CV 3839, 2009 WL 982788, at *4 n.6 (N.D. Ill. Feb. 20, 2009) (noting the distinction between spoliation under state law and federal law). Note that no independent cause of action exists for spoliation under federal law. *See, e.g.*, Trentadue v. United States, 386 F.3d 1322, 1342-43 (10th Cir. 2004); Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001); Lombard v. MCI Telecomm'ns Corp., 143 F. Supp. 2d 621, 626-27 (N.D. Ohio 1998).

115. *See, e.g.*, Larson v. Bank One Corp., No. 00 CV 2100, 2005 WL 4652509, at *8 (N.D. Ill. Aug. 18, 2005).

116. *See* FED. R. CIV. P. 37.

117. *See*, *e.g.*, FED. R. CIV. P. 37(b)(2) (listing possible sanctions); United States v. Certain Real Prop., 126 F.3d 1314 (11th Cir. 1997) (requiring violation of actual court order); Transatlantic Bulk Shipping Ltd. v. Saudi Chartering, S.A., 112 F.R.D. 185, 189 (S.D.N.Y. 1986) (noting that Rule 37(b) "provides for sanctions where a party fails to honor its disclosure obligations, especially after court orders").

118. Quela v. Payco-Gen. Am. Creditas, Inc., No. 99 CV 1904, 2000 WL 656681, at *6 (N.D. Ill. May 18, 2000).

119. Brandt v. Vulcan, Inc., 30 F.3d 752 (7th Cir. 1994).

120. *Id.* at 756 n.7.

121. Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991) (citing In re Air Crash Disaster near Chgo. Ill. on May 25, 1979, 90 F.R.D 613, 620-21 (N.D. Ill. 1981)).

ance of the discovery order and thus be unable to obey, sanctions are still appropriate under Rule 37(b) because this inability was self-inflicted."[122]

A federal court may also rely on its inherent power to remedy spoliation.[123] This authority was recognized in *Chambers v. NASCO, Inc.*,[124] where the U.S. Supreme Court held that a federal court's inherent power to remedy litigation abuse extends to "a full range of litigation abuses,"[125] and "can be invoked even if procedural rules exist which sanction the same conduct."[126] Although *Chambers* did not specifically treat spoliation, it is well-recognized that the inherent power doctrine extends to judicial sanctions for spoliation of evidence.[127] The Ninth Circuit, for example, has upheld a district court's reliance on its inherent power to dismiss a claim where a plaintiff intentionally deleted computer data.[128]

b. Remedies

Under either Rule 37 or the federal court's inherent power to remedy spoliation, the analysis regarding the appropriate sanction is "essentially the same."[129] Similar to Illinois courts, federal courts that impose spoliation sanctions have broad discretion to fashion an appropriate sanction, which might include adverse jury inferences,[130] exclusion of evidence, and dismissal or default judgment.[131] In crafting an appropriate sanction, district courts should seek "to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine."[132] Indeed,

122. *Id.*

123. *See* Chambers v. NASCO, Inc., 501 U.S. 32 (1991); Kronisch v. United States, 150 F.3d 122, 126-27 (2d Cir. 1998).

124. *Chambers*, 501 U.S. 32.

125. *Id.* at 46.

126. *Id.* at 49.

127. *See, e.g.*, Leon v. IDX Sys. Corp., 464 F.3d 951, 958 (9th Cir. 2006).

128. *Id.*

129. Larson v. Bank One Corp., No. 00 CV 2100, 2005 WL 4652509, at *8 (N.D. Ill. Aug. 18, 2005) (collecting cases); *see also* China Ocean Shipping (Group) Co. v. Simone Metals, Inc., No. 97 CV 2694, 1999 WL 966443 (N.D. Ill. Sept. 30, 1999) (relying on both Rule 37 powers and the federal court's inherent powers to dismiss a claim as a sanction for spoliation).

130. *See* Midwest Trust Servs., Inc., v. Catholic Health Partners Servs., 910 N.E.2d 638, 642-43 (noting that spoliation "can support an inference that the evidence would have been unfavorable to the party responsible for its destruction or nonproduction") (citing cases); Nesbitt, *supra* note 120, at 560-66 (detailing how courts may employ an adverse inference in spoliation cases).

131. *See, e.g.*, Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 642 (1976); Marrocco v. Gen. Motors Corp., 966 F.2d 220, 223 (7th Cir. 1992); Patterson v. Coca-Cola Bottling Co., 852 F.2d 280, 283 (7th Cir. 1988). *Cf.* Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) ("Because of their very potency, inherent powers must be exercised with restraint and discretion").

132. West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

courts tend to evaluate sanctions across three dimensions: the culpability of the spoliating party;[133] the degree of prejudice to the aggrieved party; and the availability of appropriate lesser sanctions.[134]

Because the sanction of dismissal or default judgment is "considered 'draconian,'" courts that impose this sanction are required, at minimum, to make a finding of "willfulness, bad faith, or fault."[135] In *Kapetanovic v. Stephen J. Products, Inc.*, for instance, the court denied a sanctions motion because of the movant's inability to obtain specific documents did not necessarily show bad-faith destruction of such documents.[136] A finding of "willfulness, bad faith, or fault,"[137] however, does not *require* dismissal, where, for instance, the spoliation caused only a small degree of prejudice.[138]

Accordingly, litigation ending sanctions, such as dismissal or default judgment, are reserved for the most serious abuses of the judicial process, including evidence fabrication and perjury.[139] In *REP MCR Reality*, the third-party defendant moved for sanctions after discovering that the third-party plaintiff fabricated three critical documents submitted

133. *See* Am. Family Mutual Ins. Co. v. Roth, No. 05 CV 3839, 2009 WL 982788, at *4 (N.D. Ill. Feb. 20, 2009) ("Spoliation sometimes permits, but rarely if ever requires, the ultimate sanction of dismissal of the case against the plaintiff or entry of default judgment against the defendant.") (citing Mathis v. John Morden Buick, Inc., 136 F.3d 1153 (7th Cir. 1998)).

134. West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

135. Maynard *v.* Nygren, 332 F.3d 462, 467-68 (7th Cir. 2003) (citation omitted); *see also* China Ocean Shipping (Group) Co., v. Simone Metals, Inc., No. 97 CV 2694, 1999 WL 966443 (N.D. Ill. Sept. 30, 1999) (relying on Rule 37 and inherent power to dismiss claim against defendant, where plaintiff destroyed a shipping container material to the litigation); Rodgers v. Lowe's Home Ctrs., No. 05 CV 0502, 2007 WL 257714, at *10 (N.D. Ill. Jan. 30, 2007) (opining that default judgment is "only to be employed in the most extreme situations as a last resort and only where the plaintiff can show willfulness, bad faith, or fault"). *Cf.* APC Filtration, Inc. v. Becker, No. 07 CV 1462, 2007 WL 3046233, at *5 (N.D. Ill. Oct. 12, 2007) (denying motion for default judgment, notwithstanding bad-faith conduct, because small degree of prejudice).

136. Kapetanovic v. Stephen J. Products, Inc., No. 97 CV 224, 2002 WL 475193 (N.D. Ill. Mar. 27, 2002).

137. *Maynard*, 332 F.3d at 467-68 (citation omitted); *see also China Ocean Shipping (Group.) Co.,* 1999 WL 966443 (relying on Rule 37 and the federal court's inherent power to dismiss a claim against defendant, where plaintiff destroyed a shipping container material to the litigation); *Rodgers,* 2007 WL 257714, at *9-10 (opining that default judgment is "only to be employed in the most extreme situations as a last resort and only where the plaintiff can show willfulness, bad faith, or fault"). *Cf. APC Filtration, Inc*., No. 07 CV 1462, 2007 WL 3046233, at *5 (N.D. Ill. Oct. 12, 2007).

138. *See APC Filtration, Inc.,* 2007 WL 3046233 at *5.

139. *See, e.g.*, Pope v. Fed. Exp. Corp., 974 F.2d 982, 984 (8th Cir. 1992) (holding the district court did not abuse its discretion by dismissing the claim where the party manufactured evidence); REP MCR Realty, LLC v. Lynch, 363 F. Supp. 2d 984, 998, n.12 (N.D. Ill. 2005) (collecting cases), *aff'd* 200 Fed. Appx. 592 (7th Cir. 2006).

during discovery—two letters and one contract.[140] In dismissing the claim, the court reasoned that "dismissal with prejudice is not only proportionate to the offenses at issue, but any lesser sanction under the circumstances (such as merely excluding the fabricated documents) would unfairly minimize the seriousness of the misconduct and fail to deter sufficiently such misconduct by others in the future."[141]

One should note that, at least in federal court, generally applicable rules of evidence might also remedy spoliation.[142] This is particularly true if a party attempts to use a spoliated document to refresh a witness' recollection.[143] Rule 612 of the Federal Rules of Evidence, which governs refreshing a witness' recollection in federal court,[144] permits a witness to refresh her recollection with almost anything.[145] Indeed, as Judge Hand opined: "[a]nything may in fact revive a memory; a song, a scent, a photograph, and allusion, even a past statement known to be false."[146]

Even so, a district court retains discretion over whether and with what to permit a witness to refresh her recollection.[147] As the Eighth Circuit has noted, it is improper to create a document for the purpose of refreshing recollection, and allowing such a practice is considered "subterfuge for suggestion."[148]

Reliability is one area in which parties have called upon courts to exercise their discretion to limit the means used to refresh recollection.[149] However, courts are cautious about preventing a witness from refreshing her recollection even when reliability issues are raised.

III. INTENTIONAL SPOLIATION AS AN INDEPENDENT CAUSE OF ACTION IN ILLINOIS

A. Sources of Authority

Although the Illinois legislature could create a statutory cause of action for intentional spoliation, the most practical and likely means of creating such a tort is through the development of state common law.

140. *Id.* at 995-98.
141. *Id.* at 990.
142. *See* Fed. R. Evid. 612.
143. *See id*.
144. *Id.*
145. *See* United States v. Rappy, 157 F.2d 964, 967-68 (2d Cir. 1946) (Hand, J.).
146. *Id*.; *see also* United States v. DiMauro, 614 F. Supp 461, 466 (D. Me. 1984). ("It is well established that on the laying of the proper foundation, a witness may be permitted to use anything which the witness says will refresh his recollection as to the events to which he testifies").
147. *See, e.g.*, Williams v. United States, 365 F.2d 21, 22 (7th Cir. 1966).
148. Goings v. United States, 377 F.2d 753, 759-61, n.11 (8th Cir. 1967).
149. *See, e.g., id.*

As a leading torts scholar once noted, "[n]ew and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before."[150] To this end, Illinois' recognition of a tort for intentional spoliation would be "largely a question of policy" for the Illinois judiciary.[151] The Illinois legislature has not enacted significant statutory remedies for spoliation,[152] instead deferring to the sound common law judgment of the courts.[153] For instance, in *Boyd*, where the plaintiffs brought an action for intentional and negligent spoliation, the Illinois Supreme Court held that as a matter of state common law the plaintiff could bring a claim under Illinois negligence law, rather than as a separate claim.[154]

Although the Illinois Supreme Court declined to recognize negligent spoliation as an independent cause of action, *Boyd* supports the proposition that whether to permit such a cause of action in the future is largely a question of policy left to the judiciary. Because the creation spoliation tort may be a result of common law, the courts could tailor the cause of action to address concerns that are specific to this State.[155] These possible modifications, as discussed below, include fee-shifting and requiring spoliation as a compulsory counter-claim.[156]

B. Towards an Independent Tort

This Article argues that Illinois should recognize the tort of intentional spoliation of evidence, as doing so will further the policies of deter-

150. Prosser on Torts § 1 (4th ed. 1971).

151. Donohue v. Copiague Union Free School Dist., 391 N.E.2d 1352, 1355 (N.Y. 1979) (Wachtler, J., concurring) (noting the court should consider the practical implications of creating a new cause of action).

152. *See* Koesel & Turnbull, *supra* note 28, at 82. Yet, although not the same as an independent cause of action, the Illinois Supreme Court has enacted Rule 219(c), which permits Illinois courts to sanction a party for failure to comply with discovery rules and orders.

153. *See* Emery v. Ne. Ill. Reg. Commuter R.R. Corp. 800 N.E.2d 1002, 1029 (Ill. App. Ct. 2007) (citation omitted).

154. Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 270-73 (Ill. 1995).

155. Wilhoit, *supra* note 24, at 643. Note that this Article advocates that the Illinois Supreme Court provide an independent cause of action for *intentional* spoliation, not negligent spoliation. *Id.* This is because the idea of negligent spoliation as an independent cause of action is foreclosed by *Boyd*, and, as a result, Illinois need not disturb this settled case law. *Id.* This is especially true because *Boyd* permitted the same claim to be stated under generally applicable negligence law and negligent spoliation implicates different policy concerns than intentional spoliation.

156. *See supra* Part III.1.c.

rence, remediation, and certainty.[157]

To begin, regardless of how the Illinois Supreme Court would decide the question, the court should, in the interest of certainty, expressly resolve this "open question."[158] As it currently stands, some courts applying Illinois law will permit an action for intentional spoliation,[159] while others will deny such a claim,[160] and still others will construe a claim for intentional spoliation as a claim for negligent spoliation under traditional negligence principles.[161] These disparate outcomes are a result of the Illinois Supreme Court's refusal to resolve *Boyd*'s ambiguity.[162]

One problem with the uncertainty stemming from *Boyd* is that it may give rise to forum shopping.[163] While Illinois state courts appear to be virtually unanimous in refusing to recognize intentional spoliation claims, federal courts applying Illinois law have been more willing to embrace such claims.[164] As a result, litigants seeking to assert spoliation claims may have an incentive to bring their action in federal court.[165] Although this does not directly implicate the *Erie* doctrine because both state and federal courts apply the Illinois law of spoliation,[166] the policy rationale behind *Erie*—in deterring forum-shopping—might be implicated by how some federal courts have interpreted *Boyd*'s uncertainty.[167]

In resolving the uncertainty left by *Boyd*, courts should also consider the value of deterrence. One cannot escape the reality that, whether negligent or intentional, spoliation has become increasingly problematic in litigation.[168] One commentator has proclaimed that "[w]e live in an era of spoliation,"[169] and a recent article reports that spoliation is not un-

157. *See, e.g.*, West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999); *Kronisch v. United States*, 150 F.3d 112, 127 (2d Cir. 1998); Wilhoit, *supra* note 24, at 662-63.

158. *See* Jones v. O'Brien Tire & Battery Serv. Ctr., Inc., 871 N.E.2d 98, 115 (Ill. App. Ct. 2007).

159. *See, e.g.*, Williams v. General Motors Corp., No. 93 CV 6661, 1996 WL 420273, at *3 (N.D. Ill. July 25, 1996).

160. *See, e.g.*, Farrar v. Yamin, 261 F. Supp. 2d 987, 994 (N.D. Ill. 2003).

161. *See, e.g.*, Borsellino v. Goldman Sachs Group, Inc., 477 F.3d 502, 510 (7th Cir. 2007).

162. *See* Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 270-73 (Ill. 1995).

163. *See* Killelea, *supra* note 81, at 1052 (noting that similar facts may lead to different results, depending on whether the spoliation claim is brought in state or federal court).

164. *See* Burlington N. & Santa Fe Railway Co. v. ABC-NACO, 906 N.E.2d 83, 100-02 (Ill. App. Ct. 2009). Additionally, resolving uncertainty in Illinois intentional spoliation law is important for choice-of-law determinations.

165. *See* Killelea, *supra* note 81, at 1052 (noting that similar facts may lead to different results, depending on whether the spoliation claim is brought in state or federal court).

166. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

167. *See* Hanna v. Plumer, 380 U.S. 460, 467 (1965).

168. *See* Gregory P. Joseph, *Rule Traps*, 30 No. 1 Litig. 9 (2003).

169. *Id.* at 9.

common.[170] "The human temptation to hide certain proof of one's wrongdoing is powerful,"[171] especially when one's adversary does not know that certain evidence exists.[172] Spoliation is particularly troublesome in products liability litigation,[173] predominantly where courts will not permit a plaintiff to use a spoliation inference to withstand summary judgment.[174] Although existing judicial sanctions for spoliation certainly deter spoliation, these sanctions are not always sufficient.[175] By recognizing a new tort, Illinois courts can further increase the cost of spoliation, thereby discouraging spoliation beyond that done by existing sanctions. Put another way, even though existing litigation sanctions certainly have their own deterrent value, creating a tort will further the idea that "extra liability will make potential tortfeasors more cautious about their actions, thereby deterring conduct that would be considered tortious and undesirable."[176]

Recognizing that potential spoliators cannot be completely deterred, and that sometimes spoliation may be economically rational, an independent tort can nonetheless lessen one's incentives to spoliate and, perhaps, make spoliators think twice before engaging in spoliation.[177] Moreover, in the case of a third-party spoliator, existing sanctions would do little, if anything, to deter the third-party who is not before the court.[178]

Additionally, increasing the penalties for spoliation, and the associated risk exposure of a spoliating party, will serve to further protect the integrity of the judicial system beyond the availability of sanctions. As the Supreme Court of Montana opined, "[t]he intentional or negligent destruction or spoliation of evidence . . . threatens the very integrity of our judicial system. There can be no truth, fairness, or justice in a civil action where relevant evidence has been destroyed before trial."[179] Another court echoed this sentiment, writing that "[t]he intentional destruction of evidence is a grave affront to the cause of justice and

170. Chris William Sanchirico, *Evidence Tampering*, 53 DUKE L.J. 1215, 1230 (2004).

171. *See* Nesbitt, *supra* note 120, at 557; *see also* Wetzel, *supra* note 25, at 457.

172. *See* Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation, The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793 (1991) ("By its nature spoliation is invisible. The evidence may have been unknown to anyone but the spoliator. The act itself need leave no trace").

173. *See, e.g.*, Laurie Kindel & Kai Richter, *Spoliation of Evidence: Will the New Millennium See a Further Expansion of Sanctions for the Improper Destruction of Evidence?*, 27 WM. MITCHELL L. REV. 687, 688 (2000).

174. *See, e.g.*, Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1175 (Conn. 2006).

175. *See, e.g.*, Ortega v. Trevino, 938 S.W. 2d 219, 221 (Tex. App. 1997).

176. Wilhoit, *supra* note 24, at 663.

177. *Id.*

178. *See id.* at 668.

179. Oliver v. Stimson Lumber Co., 993 P.2d 11, 17-45 (Mont. 1999).

deserves our unqualified condemnation."[180] Like the law of contempt, permitting an independent cause of action here will reinforce one's duties toward the court and discourage destructive behaviors.

Adequate compensation is another factor favoring the adoption of intentional spoliation as an independent tort in Illinois.[181] By adopting such a tort, Illinois courts would more adequately compensate the injured party who has sustained a separate and distinct legal injury apart from the underlying claim.[182] In other words, when spoliation so frustrates a party's claim as to prevent her from proceeding with her lawsuit, the party suffers two legally cognizable injuries: 1) the underlying injury upon which she brought suit; and 2) the denial of the opportunity to litigate that injury because of spoliation.[183]

Since deterrence focuses more on penalizing the spoliator than compensating the injured party, recognizing the tort of intentional spoliation would allow the law to focus directly on the plaintiff's right to recover. A private right of action would further allow the injured individual to concentrate on being made whole. As William Prosser notes, "[t]he common thread woven into all torts is the idea of unreasonable interference with the interests of others."[184] It follows that placing an injured party's recovery in that party's hands, rather than a court's determination of appropriate litigation sanctions (if any), would afford the individual greater protection and a better chance at achieving full recovery.

Although courts may impose sanctions on a spoliating party, or give some benefit to a non-spoliating party through granting a default judgment or other mechanism, these sanctions may be insufficient to make the injured party whole.[185] Spoliation can often result in the destruction or alteration of evidence that is critical to an on-going legal dispute; as a result, the non-spoliator may never be able to vindicate her legal interest, especially where courts are hesitant to impose litigation ending sanctions.[186]

As a basic matter, "[a] court will not always sanction a spoliating party."[187] Furthermore, even if a court imposes sanctions, those sanc-

180. Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 512 (Cal. 1998).

181. Wilhoit, *supra* note 24, at 665-66.

182. *Id.* at 663 (noting that spoliation is an important means to protect unliquidated claims or legal expectancies); *see also* Marrocco v. Gen. Motors Corp., 966 F.2d 220, 225 (7th Cir. 1992).

183. Nesbitt, *supra* note 120, at 579.

184. PROSSER ON TORTS § 1 (4th ed. 1971).

185. *See* Smith v. Superior Court, 198 Cal. Rptr. 829, 834 (Cal. Ct. App. 1984) (noting, as opposed to a criminal case, a "civil action for a tort . . . is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered, at the expense of the wrongdoer") (internal citation omitted).

186. Nesbitt, *supra* note 120, at 577-78.

187. Killelea, *supra* note 81, at 1054.

tions might be insufficient. For example, the decision whether to instruct the jury with an adverse inference instruction lies within the discretion of the trial judge,[188] and the jury is not required to follow such an adverse inference instruction.[189] Some jurisdictions will not even allow the inference to substitute for an "essential element" of a party's case.[190] As with deterrence, this concern is especially true when applied to third-party spoliators, who are not before the court, and thus not subject to any litigation sanction that the court might order.[191]

By recognizing the tort of intentional spoliation of evidence, Illinois is not giving up on the traditional remedies for spoliation.[192] Rather, Illinois would be complementing these remedies and adding another weapon to the judiciary's arsenal in its war against spoliation.[193] It would also give the non-spoliating party another means to vindicate her legal interest in the expectancy of her claim.

C. Addressing Concerns

Recognizing the tort of intentional spoliation is not without concerns. Among these concerns are the speculative nature of damages, the importance of finality in litigation, and the possibility of encouraging frivolous claims.[194] Another concern, which this Article discusses in detail above,[195] is that an independent cause of action is unnecessary given the traditional remedies.[196] However, these concerns do not outweigh the benefits of recognizing such a tort, especially when Illinois courts can modify the doctrine to address any policy concerns specific to the state.

One concern about recognizing an independent tort for intentional spoliation of evidence is the difficulty in ascertaining damages should such a claim prevail.[197] That is, damages are speculative: how can the jury award damages on the unliquidated underlying claim, especially

188. Nesbitt, *supra* note 120, 561 n.27.

189. *See, e.g.*, Killelea, *supra* note 81, at 1060 & n. 100.

190. Wilhoit, *supra* note 24, at 648.

191. Miller v. Allstate Ins. Co., 573 So. 2d 24, 30 (Fla. Dist. Ct. App. 1990)); Wilhoit, *supra*, n.24 at 648 (citing *Edwards v. Louisville Ladder Co.*, 796 F. Supp. 966 (W.D. La. 1992).

192. Nesbitt, *supra* note 120, at 583.

193. *See, e.g.*, Terry R. Spencer, *Do Not Fold, Spindle, or Mutilate: The Trend Towards Recognition of Spoliation as a Separate Tort*, 30 Idaho L. Rev. 37, 57-58 (1993).

194. Nesbitt, *supra* note 120, at 583; *see* Killelea, *supra* note 81, at 1069-71.

195. *See e.g.*, Ortega v. Trevino, 938 S.W.2d 219, 221 (Tex. App. 1997); Wilhoit, *supra* note 24, at 633, 662-68; Oliver v. Stimson Lumber Co., 993 P.2d 11 (Mont. 1999); Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 512 (Cal. 1998).

196. Nesbitt, *supra* note 120, at 584 (suggesting that detractors view an independent cause of action for destruction of evidence as "redundant and ultimately unnecessary").

197. *See* Killelea, *supra note* 81, at 1069-71.

when it has not gone to trial?[198] But, this is exactly what the courts invite the jury to do when the court instructs the jury with an adverse inference about spoliated evidence.[199] Moreover, the speculative nature of damages is not unique to spoliation;[200] other torts upon which Illinois permits recovery, including wrongful death and slander, often have a speculative quality to their damage calculations.[201]

Furthermore, it is inequitable to deny recovery in the face of intentional spoliation merely because the damages are too uncertain. This idea was discussed by the U.S. Supreme Court in an old case:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference.[202]

Consistent with this reasoning, denying recovery because of the speculative nature of damages would undercut the deterrence rationale of spoliation by reducing the consequences of spoliation.[203] To the extent this is a concern, though, Illinois courts could perhaps require the injured party to establish damages by a low standard, such as "reasonable probability," or "somewhat certain basis."

Another concern that opponents of spoliation as an independent tort cite is the importance of finality in litigation.[204] Some have even suggested that an action for spoliation would violate *res judicata*.[205] These concerns, of course, are an important policy consideration, but they cannot be dispositive of the question. *Smith*, treated at length above, recognized the concern about finality, but reasoned that an action for spoliation does not implicate the interests that the policy of finality seeks to protect.[206] That is, finality concerns seek to prevent the re-litigation of the same cause of action, or collaterally attacking the judgments of a competent tribunal.[207] However, an action for spoliation, although indirectly getting into the merits of the case, focuses on conduct affecting the

198. *See id.*

199. *See id.*

200. *See id.*

201. *See* 740 ILCS 180/1 (2010) (wrongful death); *see also* Smith v. Superior Court, 198 Cal. Rptr. 829, 835-37 (Cal. Ct. App. 1984).

202. Story Parchment Co. v. Paterson P. Paper Co., 282 U.S. 555, 563 (1931).

203. *See Smith*, 198 Cal. Rptr. at 835-36.

204. *See* Killelea, *supra note* 81, at 1069. Note that spoliation issues are often raised before the underlying case has gone to trial, thus mooting any concern about finality.

205. *Id.*

206. *See Smith*, 198 Cal. Rptr. at 833-34.

207. *Id.*

evidence in support of the underlying action.[208] An action for spoliation involves righting a wrong that was not addressed in the underlying action, namely the destruction of evidence.

To the extent this is a concern, however, Illinois courts can modify its spoliation law to address the issue. One possibility is to require a party to plead spoliation as a compulsory counter-claim once the injured party has notice of the spoliation.[209] This would consolidate the actions and, perhaps, allow the trial judge to consider all claims together.

Another concern in creating the tort of intentional spoliation might be the rise of open-ended, limitless liability for the spoliator. This concern, though, is easily addressed because the party bringing the action would be required to prove the element of intentional or willful spoliation. This is no easy task. As one commentator has noted, "[i]ntentionality is exceedingly difficult to prove, particularly when inadvertence and misunderstanding are such easy alternative explanations."[210] Problems of direct proof of intent are difficult in many areas of law and will often end up as a question for the trier of fact, if the matter survives pre-trial motions.

Similarly, recognizing the tort of intentional spoliation would not cause Illinois judges to "set sail on a sea of doubt."[211] Illinois case law is robust with discussion of spoliation;[212] in fact, a number of cases applying Illinois law treat intentional spoliation directly.[213] To the extent Illinois case law is inadequate to assist judges in applying this new tort, Illinois courts can borrow analysis from other jurisdictions that have adopted the tort.[214] These out-of-state cases would serve as persuasive authority and lay the foundation for the development of the common law of intentional spoliation in Illinois.

Finally, some might argue that creating a new opportunity for tort recovery might open the door to frivolous litigation.[215] As with any new cause of action, this concern may have merit; yet, Illinois could compen-

208. *Id.*

209. Although Illinois does not otherwise provide for compulsory counterclaims, *see* 735 ILCS 5/2-608(a) (2010) (permissive counterclaim), this might be an opportunity to create an exception along the lines of Federal Rule 13. *See* FED. R. CIV. P. 13.

210. Nesson, *supra note* 190, at 793; *see also* Kedigh, *supra note* 230, at 606-07 (1999) (suggesting that spoliators may also involve the actions of third-parties to make the intentional spoliation appear more like an accident).

211. United States v. Addyston Pipe & Steel Co., 85 F. 271, 283-84 (6th Cir. 1898) (Taft, J.).

212. *See supra* Part II.1.

213. *See supra* Part II.2.a.2.

214. Nesbitt, *supra note* 120, at 614 (2007) ("Several jurisdictions already accept the viability of the [intentional spoliation] tort, and Tennessee can be guided by their past decisions in incorporating the action in the current common law.").

215. Nesbitt, *supra note* 120, at 614.

sate for this by modifying the tort in a number of ways. For instance, as a matter of Illinois common law, if one brings an intentional spoliation claim and loses, that person could be required to pay the alleged spoliator's attorney's fees and costs, or otherwise be sanctioned by the Court. Similarly, a court might independently examine the evidence and issue an Order to Show Cause why the action was not frivolous.

IV. CONCLUSION

Spoliation of evidence is a growing problem. As one commentator proclaims, "we live in an era of spoliation."[216] Jurisdictions throughout the nation have adopted a variety of different approaches to spoliation, ranging from litigation sanctions to permitting an independent cause of action.[217] Illinois takes a somewhat hybrid approach, rejecting an independent cause of action for negligent spoliation, yet permitting a party to bring such a claim under existing negligence law.[218] Whether Illinois permits an independent cause of action for intentional spoliation remains an "open question."[219] The uncertainty has resulted in confusion.

Weighing the policy issues at stake, this Article argues that the Illinois Supreme Court should recognize the tort of intentional spoliation. This new tort, cognizable in a handful of other states and already permitted by some courts applying Illinois law, would complement existing sanctions and further the state's interests in deterrence, remediation, and certainty. Although recognizing an independent tort for intentional spoliation may raise some concerns, these concerns do not outweigh the benefits of this tort action, especially where Illinois courts may modify the tort to address policy concerns specific to the state.

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216. Killelea, *supra note* 81, at 1069-71, 1069 (quoting Gregory P. Joseph, *Rule Traps*, 30 NO. 1 LITIG. 6, 9 (2003)).

217. *Supra*, Part II.1.

218. Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 269 (Ill. 1995).

219. Jones v. O'Brien Tire & Battery Serv. Ctr., Inc., 871 N.E.2d 98, 115 (Ill. App. Ct. 2007).