IN THE
SUPREME COURT OF MISSOURI

No. SC 97306

TIMOTHY HILL,
Plaintiff/Appellant,
v.
SSM HEALTH CARE ST. LOUIS,
Defendant/Respondent.

Appeal from the Circuit Court of the County of St. Louis
Honorable Nancy Watkins

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is a civil action for money damages wherein Plaintiff Timothy Hill, the son of Irvin Hill, and on behalf of Mrs. Hill and the other five Hill children, sought damages for the wrongful death of Irvin Hill on October 27, 2009. Plaintiff alleged Defendant SSM HealthCare St. Louis was negligent in maintaining a dangerous walkway to the Procedure Center at St. Clare Hospital in Fenton, Missouri.

This is a civil action for money damages, and the matter was heard and a final judgment was entered under section § 512.020 RSMO after the trial resulted in a jury verdict and judgment in favor of Defendant. Plaintiff's Motion for a New Trial was timely filed and denied by the trial court. Plaintiff timely filed the notice of appeal and appealed the judgment. The Missouri Court of Appeals for the Eastern District filed its Opinion on May 29, 2018, reversing the trial court's judgment and remanding for a new trial. This Honorable Court sustained the Defendant's application for transfer on September 25, 2018.

STATEMENT OF FACTS

This appeal arises from a six day trial of a wrongful death claim which was filed as a result of the death of Irvin Hill, who fell and struck his head while entering Defendant's Procedure Center on September 3, 2009 at St. Clare Hospital in Fenton, Missouri. Mr. Hill was emergently admitted to St. Clare, suffered an intracranial bleed the night of the fall, went into coma and died on October 27, 2009.

On September 3, 2009, Pat Hill and her husband Irvin Hill returned to St. Clare for a repeat of a blood test for Mr. Hill in connection with the prescription drug Coumadin which he had been taking. Mrs. Hill dropped her husband Irv off at the entrance to the Procedure Center and proceeded to park their car. (T.834-835) As she was getting out of the car, she noticed a commotion at the entrance to the Procedure Center and saw her husband was down on the ground. (T. 835) He had visible signs of injury, including a large bump on his head. (T. 836) Security Guard Rieder and one of the nurses helped Mr. Hill into a wheelchair and took him over to the Emergency Room. (T. 838)

Debbie Owens was working in the reception area at the Procedure Center at St. Clare on the day in question, and her primary duties were to take patients in, answer the phone and keep families informed. (T. 132-133) Her work station was located right in front of the door and it was probably twelve feet from the second set of doors going into the Procedure Center. (T. 133) She testified that there were two gray slabs of concrete leading up to the Procedure Center and that Mr. Hill was on the concrete slab closest to the door. From where she was sitting Mr. Hill was kind of in the middle of the slab. (T.

134) Mr. Hill was probably five feet from the outside entrance door to the middle of the slab. (T. 135)

Security Guard Rieder arrived on the scene approximately five minutes after Mr. Hill's fall. Rieder testified that he went with the Hills to the Emergency Department, then took photographs of the scene, and then immediately went to the "Hospital Fire Command Center", a room where the computerized security camera system was located. According to Rieder, he then used the computer to locate and view Mr. Hill's fall. (T. 197 – 203) There were no witnesses to Mr. Hill's fall, only the video that showed what happened. Rieder was the only person to view the video of Mr. Hill's fall. (T. 203) Rieder testified that he then prepared a "Security / Incident Report" in which he described Mr. Hill's fall based on his viewing of the video. (T. 219) Mr. Rieder did not take any pictures of the seam where Mr. Hill fell. (T. 200) He did not take any measurements of the area of the fall. (T. 201) Mr. Rieder chose not to save the video or to ask anyone from the IT Department to save it. (T. 205)

Sometime during the night of September 3, 2009 blood in Mr. Hill's brain began seeping into his skull. Mr. Hill's family was notified that Mr. Hill had a brain bleed, a subdural hematoma. Doctors at St. Clare Hospital performed brain surgery on Mr. Hill, a bilateral craniotomy. Mr. Hill never left the hospital, and died on October 27, 2009 from the injuries he sustained in the fall. (T. 69-70)

On September 4, 2009, the day after Mr. Hill's fall, Plaintiff Timothy Hill left his father's hospital room to examine the Procedure Center entrance walking surface and saw the security/ surveillance camera above the entrance. He told his mother Patricia Hill that

there was a camera and there should be a video of the fall. (T. 757; L.F. 000352) Mr. Hill testified that he later went back out and took a few pictures of the area where Irvin Hill fell. The pictures showed that the two gray slabs were raised. (T. 758) Mr. Hill testified that he walked around and observed the edges of the pad closest to the glass and the pad closest to the door were all raised. (T. 759-760) Mr. Hill testified that exhibit 150 was a photo of his brother Gary putting his foot up against the concrete slab and that this picture accurately and fairly represented the condition he observed on the day Irving was having surgery on September 4, 2009. (T. 761-762)

On September 4, 2009, Mrs. Hill asked to see the video, and attempted to view it with Mr. Cunningham, a supervisor who Mrs. Hill knew from when she previously volunteered at St. Joseph Hospital. (T. 851-852) Mrs. Hill testified that she and Mr. Cunningham watched the camera for about an hour and only saw one lady come in, but could not locate the video of Mr. Hill's fall. (T. 853)

Although SSM has asserted that the video had somehow been automatically overwritten by the video system, given the storage capacity of that system, Plaintiff's forensic computer expert Pete Puleo testified that it was not possible for the video to have been automatically overwritten within that time. (T. 676-677)

On October 23, 2009, SSM installed additional hard drives on the computer system, in the process destroying the existing array of drives and "wiping" anything that was on the previous array. (T. 666) As Plaintiff's expert Pete Puleo testified, this "data wipe" included the destruction of activity logs which would have shown everything that had happened on that server, every user logging in, any change to any video, when it was

configured, and what scripts were run. (T. 661) The erased activity logs would have also shown who had looked at the video and when they looked at the video. (T. 663-664) Mr. Puleo testified that he was hampered in his investigation by the lack of information between September 3 and October 22, 2009 because of the missing activity logs. (T. 687) If he had those logs he could have determined who viewed the video, if it was deleted or if it was automatically overwritten. (T. 687) SSM did nothing to preserve any of the data on the computer system, including the activity logs, before destroying it.

On January 8, 2010, Plaintiff's safety engineer expert Keith Vidal examined the walkway and performed a "surface profile" using a contour gauge that documents the shape of the surface, and which showed a rise between the two pieces of concrete in the walkway at St. Clare Hospital. (T. 269-272) He testified that the edge he examined and measured did not meet the St. Louis County Building Code, the ANSI Codes, or any other codes, explaining that there were two slabs of concrete with an expansion joint that had caulking material in it. The higher piece of concrete was raised above the lower piece by .35 to .52 inches, which is greater than the quarter of an inch change allowed by code. (T. 281-282)

On February 28, 2011, SSM employee Linda Kniepmann sent Ms. Hausmann, the president of SSM, an e-mail through the hospital intranet system, stating:

> At the entrance to Procedure Center, there are two large slabs of gray concrete that are higher in elevation than the rest of the sidewalk/entrance. I have witnessed a gentleman about dump his elderly wife out of her wheelchair due to hitting this raised surface. (T. 147)

In response to Nurse Kniepmann's e-mail President Hausmann sent an e-mail and copied Ms. Kniepmann, Mr. Enderling and Diane Brown on March 3, 2011. She said:

> Linda, Wow. Thanks so much for raising this issue. Sounds dangerous. Eric, can you please look into this and let Linda and I know what you think? Thanks, Sherry. (T. 149)

Ms. Hausmann believed the raised surface was a dangerous situation because Nurse Kniepmann said she witnessed a gentleman nearly dump his elderly wife out of her wheelchair due to hitting this raised surface. (T. 149) Mr. Enderling, who headed up maintenance at St. Clare, then sent an e-mail to Ms. Hausmann stating:

> Good afternoon. A couple of options would be to caulk between the uneven slabs to minimize the transition as long as it meets code requirements, or replace the heaved slabs. I contacted Jim Baker today to communicate the urgency, and we will look into it this Monday. Thank you for bringing this to my attention. Eric. (T. 150)

Mr. Enderling, team leader of plant operations at St. Clare Heath Center at the time of Mr. Hill's fall, testified by deposition that after receiving Nurse Kniepmann's e-mail he looked at the area of the two large gray concrete slabs and found her observation matched up with his observation. (T. 723) Mr. Enderling also testified that he did not disagree with Nurse Kniepmann's description that the slabs of gray concrete were higher in elevation than the rest of the sidewalk entrance. (T. 725)

Ann Mardis, senior claims specialist for SSM health, testified that the concrete slab was "slightly raised". (T. 358) She testified that during her deposition she agreed that

the area where Mr. Hill fell was not level with the other portions of the entrance, (T. 362) there was no evidence that there were any changes made between March 30, 2009 and September 3, 2009, and that the raised level of the concrete slab had been there since March 30, 2009. (T. 364) She also testified that hospital employees were going in and out of that Procedure Center every day, and so they could have known that the raised section of that concrete slab was out of code. (T. 363) There was no evidence at trial that, at any time prior to Mr. Hill's fall, SSM took any action to remove, barricade, or warn of the unlevel condition in the concrete of the entrance walkway.

In March of 2011 the slabs were removed and the entrance walkway to the Procedure Center was leveled. (T. 370; 739-740) Although this action was pending at the time, no notice was provided to Plaintiff of the levelling of the walkway.

After a six day trial, on March 27, 2017, the jury returned its verdict in favor of Defendant. On April 26, 2017, Plaintiff filed a Rule 78.01 Motion for New Trial and a Rule 78.02 Motion for New Trial. (L.F. 002457-002534) The trial court denied both motions on July 12, 2017. (L.F. 002684)

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR APPLICATION OF THE SPOLIATION DOCTRINE BECAUSE PLAINTIFF PRESENTED OVERWHELMING EVIDENCE OF SSM'S BAD FAITH SPOLIATION OF THE VIDEO OF MR. HILL'S FALL AND A SPOLIATING PARTY IS HELD TO ADMIT THE SPECIFIC FACTS THE SPOLIATED EVIDENCE WOULD HAVE SHOWN IN THAT DEFENDANT SHOULD HAVE BEEN HELD TO ADMIT THAT THE VIDEO WOULD HAVE SHOWN THAT MR. HILL TRIPPED OVER THE RAISED CONCRETE SLAB.

Degraffenreid v. R. L. Hannah Trucking, 80 S.W.3d 866 (Mo.App. W.D. 2002)

Garrett v. Terminal R. Ass'n of St. Louis, 259 S.W.2d 807 (Mo. 1953)

Marmaduke v. CBL and Associates Management., Inc., 521 S.W.3d 257 (Mo.App. E.D. 2017)

Schneider v. G. Guilliams, Inc., 976 S.W.2d 522 (Mo.App. E.D. 1998)

II. THE TRIAL COURT ERRED IN OVERRULING PLAINTIFF'S OBJECTION TO SSM'S INTENTIONAL AND KNOWING MISSTATEMENT OF THE LAW DURING CLOSING ARGUMENT REGARDING SPOLIATION BECAUSE DEFENSE COUNSEL MADE PREJUDICIAL MISTATEMENTS OF LAW TO THE JURY IN THAT DEFENSE COUNSEL (1) INCORRECTLY TOLD THE JURY THAT BECAUSE THERE WAS NOTHING IN THE JURY INSTRUCTIONS REGARDING SPOLIATION, THE LAW DID NOT SUPPORT PLAINTIFF'S ADVERSE INFERENCE ARGUMENT, AND (2) COMPOUNDED THE PREJUDICE BY ARGUING TO THE JURY THAT SSM WAS BARRED FROM DISCUSSING THE CONTENTS OF THE VIDEO AND THAT SSM "REGRET[TED]" NOT HAVING THE VIDEO IN VIOLATION OF THE TRIAL COURT'S PRIOR ORDER REGARDING PERMISSIBLE STATEMENTS CONCERNING THE DESTROYED VIDEO.

Fahy v. Dresser Industries, Inc. 740 SW 2d 635 (Mo. banc 1987).

Bradley v. Waste Mgmt. of Mo., Inc., 810 S.W.2d 525 (Mo.App. E.D.1991).

Barron v. Missouri-Kansas-Texas R. Co., 696 SW 2d 338 (Mo.App. E.D.1985)

III. THE TRIAL COURT PREJUDICIALLY ERRED IN SUBMITTING INSTRUCTION NO. 8 BECAUSE MISSOURI LAW REQUIRES A CONVERSE BE IN SUBSTANTIALLY THE SAME LANGUAGE AS THE VERDICT DIRECTOR IN THAT INSTRUCTION NO. 8 DID NOT USE SUBSTANTIALLY THE SAME LANGUAGE AS THE VERDICT DIRECTOR AND DID NOT MAKE ANY SPECIFIC REFERENCE TO THE NEGLIGENCE DESCRIBED IN PLAINTIFF'S VERDICT DIRECTOR.

McLaughlin v. Han, 199 SW 3d 211 (Mo.App. W.D. 2006)

Sooter v. Magic Lantern, Inc., 771 SW 2d 359 (Mo.App. S.D. 1989)

MAI 33.01

IV. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR SANCTIONS SEEKING EXCLUSION OF DR. BRENNAN'S VIDEO-TAPED DEPOSITION BECAUSE THE EVIDENCE DEMONSTRATED THAT DEFENSE COUNSEL INTENTIONALLY CONCEALED THE FACT THAT THEY TOOK PICTURES OF THE SCENE ON THE MORNING OF DR. BRENNAN'S DEPOSITION, BUT DID NOT TELL PLAINTIFF'S COUNSEL OF THE TRIP TO THE SCENE IN THAT PLAINTIFF'S COUNSEL WAS THEREBY UNABLE TO CROSS-EXAMINE DR. BRENNAN REGARDING THE LEVELING OF THE WALKWAY AND PLAINTIFF WAS DEPRIVED OF THE RIGHT TO CROSS-EXAMINE DR. BRENNAN ABOUT SSM TAKING HIM TO THE PROCEDURE CENTER FOR A RE-ENACTMENT ON THE MORNING OF HIS DEPOSITION.

Lilly v. Virginia, 527 U.S. 116 (1999)

Doughty v. Dir. of Revenue, 387 S.W.3d 383 (Mo. 2013)

Goldberg v. Kelly, 397 U.S. 254, 269 (1970)

Pettus v. Casey, 358 S.W.2d 41 (Mo. 1962)

V. THE TRIAL COURT ERRED IN OVERULING PLAINTIFF'S OBJECTION TO DR. HUSS' TESTIMONY REGARDING DEHYDRATION BECAUSE DR. HUSS OPINED AT TRIAL THAT MR. HILL'S FALL WAS LIKELY A RESULT OF A PRE-EXISTING DEHYDRATION CONDITION IN THAT THIS WAS A NEW OPINION ON THE CENTRAL ISSUE OF THE CAUSE OF MR. HILL'S FALL AND SUBSTANTIALLY PREJUDICED PLAINTIFF'S CASE.

Coon v. Dryden, 46 S.W.3d 81 (Mo.App. W.D. 2001)

POINT RELIED ON I

I. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR APPLICATION OF THE SPOLIATION DOCTRINE BECAUSE PLAINTIFF PRESENTED OVERWHELMING EVIDENCE OF SSM'S BAD FAITH SPOLIATION OF THE VIDEO OF MR. HILL'S FALL AND A SPOLIATING PARTY IS HELD TO ADMIT THE SPECIFIC FACTS THE SPOLIATED EVIDENCE WOULD HAVE SHOWN IN THAT DEFENDANT SHOULD HAVE BEEN HELD TO ADMIT THAT THE VIDEO WOULD HAVE SHOWN THAT MR. HILL TRIPPED OVER THE RAISED CONCRETE SLAB.

(A) Standard of Review.

Appellate review of a trial court's order denying Plaintiff's Motion for Application of the Spoliation Doctrine is a question of law. Issues of law are reviewed de novo. *Jungerman v. City of Raytown*, 925 S.W.2d 202, 204 (Mo. banc 1996).

(B) Argument.

On September 3, 2009, Plaintiff Timothy Hill's father Irvin S. Hill was walking on unlevel concrete slabs at the entrance to Defendant SSM's St. Clare "Procedure Center" in St. Louis County when he tripped and fell and struck his face and head on the concrete, causing severe intra-cranial bleeding, a left frontal head trauma, a large hematoma over the left supraortibal area, and bilateral subdural hematomas. These injuries caused Mr. Hill to be admitted to St. Clare Health Center where he went into a coma for nearly 7 weeks, incurred over $500,000.00 in medical bills, and where he died from his injuries on October 27, 2009.

As set forth in Plaintiff's verdict director, the elements Plaintiff was required to prove at trial in this case were that: (1) There was a raised concrete slab on the entrance walkway to the Procedure Center and as a result the entrance walkway was not reasonably safe; (2) Defendant SSM Healthcare St. Louis knew or by using ordinary care could have known of this condition; (3) Defendant SSM Healthcare failed to use ordinary care to remove, barricade, or warn of the dangerous condition; and (4) Defendant SSM Healthcare's failure directly caused or directly contributed to cause the death of Irvin Hill. (L.F. 002435)

As crucial context for the spoliation issue in this case, Plaintiff respectfully submits that, as set forth in the Statement of Facts, the evidence at trial overwhelmingly demonstrated the first three elements of the verdict director, such that the fundamental fact that remained in dispute was causation, i.e., **whether Mr. Hill in fact tripped over the raised concrete slab**.

On this all-important point, there was only one "eyewitness" to Mr. Hill's fall – a security camera positioned over the Procedure Center doorway which recorded Mr. Hill's fall. This witness was silenced by SSM when SSM's Security Guard Robert Rieder, who was in charge of preserving this evidence, chose "not to preserve the video" and then "shredded" his notes of what he claims to have seen on the video. As set forth herein, that evidence was destroyed under circumstances manifesting fraud, deceit and bad faith. *See Schneider v. G. Guilliams, Inc.*, 976 S.W.2d 522, 527 (Mo.App. E.D. 1998).

Subsequently, Defendant repaired the dangerous unlevel concrete slabs by leveling them, without notice to Plaintiff, shortly before the deposition of "witness" Dr. Robert

Brennan. At the deposition, Defendant showed Dr. Brennan pictures of the concrete slab, and Dr. Brennan testified where he claimed he saw Mr. Hill standing immediately before his fall and where he landed, but the pictures were taken after the concrete slabs had been leveled, creating the impression that Mr. Hill's fall could not have been caused by the unlevel concrete slabs.

Because SSM willfully destroyed and willfully failed to preserve critical evidence, under Missouri law, Plaintiff is entitled to an adverse evidentiary presumption by which SSM is held to admit that the video, if preserved, would have shown that Mr. Hill tripped over the uneven walkway at the entrance to the Procedure Center.

In Plaintiff's Motion for Application of the Spoliation Doctrine, Plaintiff set out in 37 pages of pleadings with attached exhibits demonstrating that the only proper remedy for SSM's destruction of the conclusive evidence in this case warranted a holding that SSM was held to admit that the dangerous walkway caused Mr. Hill's fall. (L.F. 000292-000450) Plaintiff sought an order from the trial court holding that SSM, because of its spoliation of the video, should be held to admit that Mr. Hill tripped over the raised slab of concrete at the entrance. (L.F. 000315-000316) The trial court erroneously and prejudicially denied that Motion, instead holding that "the Court will permit evidence of spoliation and Defendant's explanation of the missing evidence." (L.F. 002292)

At trial, and based on substantially the same evidence as had previously been presented in the Motion for Application of the Spoliation Doctrine, the trial court held that the Plaintiff would be allowed to argue an "adverse inference" due to the evidence of Defendant's spoliation of the video of Mr. Hill's fall, however, the court did not properly

hold Defendant to have thereby admitted the contents of the video, nor permit Plaintiff to so inform the jury. Indeed, throughout the trial, Defendant presented evidence and vigorously contested whether Mr. Hill tripped over the raised concrete slab of concrete, the very question the video would have answered.

In an era where massive quantities of data, including video and audio recordings, can be erased with the simple click of a button, the law of spoliation has never been more relevant or important. This has been reflected in the evolution of the law of spoliation, and the remedies therefore, in many jurisdictions. The vast majority of states now sanction deliberate spoliation, and many courts impose sanctions for negligent or reckless destruction of relevant evidence. *See* Margaret M. Koesel and Tracey L. Turnbull, *Spoliation of Evidence: Sanctions and Remedies for Destruction of Evidence in Civil Litigation*, at 125 (2nd Ed. American Bar Association 2006). A number of courts have also adopted an independent cause of action against spoliators. *Id*.; *see also Marmaduke v. CBL & Associates Management, Inc*., 521 S.W.3d 257, 273-274 (Mo.App. E.D. 2017).

The development of spoliation law in the federal courts is representative of this trend. Federal law grants wide flexibility in allowing courts to exercise their inherent judicial power to remedy the bad faith destruction of evidence. "Among many different sanctions, [federal courts] may give a jury instruction on the 'spoliation inference,' an inference which permits the jury to assume that the destroyed evidence would have been unfavorable to the position of the offending party; exclude certain evidence of the offending party; enter judgment of default in favor of the prejudiced party; and/or impose

the prejudiced party's attorney's fees on the offending party." *Ameriwood Industries, Inc. v. Liberman*, 2007 WL 5110313, at *4 (E.D.Mo 2007), citing Fed.R.Civ.P. 37(b)(2).

Missouri courts have long decried the spoliation of evidence. However, as discussed within, while the law of spoliation has developed in the direction of more flexibility and greater power to address the destruction of evidence in other jurisdictions, Missouri law has remained focused on the traditional remedy of an adverse evidentiary inference which holds the Defendant to a binding admission of the Plaintiffs' allegations regarding the contents of the spoliated evidence.[1] Because this is the primary remedy under Missouri law for the spoliation of evidence, it is of the utmost importance that the adverse inference be applied properly and in full force against those who have destroyed evidence in bad faith.

While the Court of Appeals correctly found that the spoliation doctrine applied because of SSM's bad faith, it misconstrued the scope of the doctrine. Instead of a specific admission that the video would have shown Mr. Hill tripping over the raised slab, the Court of Appeals believed that Plaintiff is only entitled to a generalized

[1] Where discovery misconduct occurs during litigation, and results in prejudice to the other party, additional remedies may be available to a party on a motion for sanctions under Mo.R.Civ.P. 61.01. *See Marmaduke v. CBL & Associates Management, Inc.*, 521 S.W.3d 257, 271 (Mo.App. E.D. 2017). This remedy is distinct from the adverse inference under the spoliation doctrine, which requires no showing of prejudice and is intended to punish the spoliator. *See Id.*

inference that the evidence would have been "unfavorable" to SSM under the spoliation doctrine. As set forth herein, that is incorrect as a matter of well-settled Missouri law.

1. THIS HONORABLE COURT'S PRECEDENT REGARDING THE SPOLIATION OF EVIDENCE.

Some 144 years ago, this Honorable Court stated the principle that, "**If [a] defendant destroys testimony to prevent its use against him, the law furnishes a stringent rule to deal with the case. All things are presumed against the spoliator**." *Pomeroy v. Benton*, 57 Mo. 531, 532 (Mo. 1874).[2] *Pomeroy* related to a claim against a fraudulent trustee who had concealed large profits from investments in the sale of whiskey. When the case was reheard in 1882, this Honorable Court addressed the fact that the trustee had burned a ledger which would have shown these profits. *See Pomeroy v. Benton*, 77 Mo. 64, 72-73 (Mo. 1882). This Court found that no "secondary evidence" regarding the contents of the destroyed evidence was required to be presented by the plaintiff in order to apply the spoliation doctrine. *Id. at 85-86*. Instead, the Court stated: "It is because of the very fact that the evidence of the plaintiff, the proofs of his claim or the muniments of his title, have been destroyed, that the law, in hatred of the spoiler, baffles the destroyer, and thwarts his iniquitous purpose, **by indulging a presumption**

[2] Indeed, the principle of *in odium spoliatoris omnia præsumuntur* was referenced by this Honorable Court as early as 1845. *See State, to Use of Darland v. Porter*, 9 Mo. 356, 357 (Mo. 1845).

which supplies the lost proof, **and thus defeats the wrong-doer by the very means he had so confidently employed to perpetrate the wrong**."

In *Hays v. Bayliss*, 82 Mo. 209, 212, 1884 WL 9022, at *2 (Mo. 1884), the referee was unable to establish an exact accounting of the dispute between the plaintiff and the defendant because of the condition of the records maintained by the plaintiff. This Court stated that, where "it appears that the entire business of the partnership was in the hands and under the control of plaintiff … from the mutilated, torn, erased, scratched condition of the books, **every inference favorable to defendant should have been drawn**." [Emphasis supplied.]

In *Haid v. Prendiville*, 238 S.W. 452, 455 (Mo. 1921), this Court discussed the rule laid down in *Pomeroy*, stating that "We do not wish to abate one 'jot or tittle' from this doctrine, and hold that, by reason of defendant's fabrication of said account books, the whole of the other testimony, it all being verbal, offered by her as to the rents collected, must also be disregarded" and awarded plaintiff the amount claimed.

In *Hunt v. Sanders*, 232 S.W. 456, 459 (Mo. 1921), the Court reaffirmed that "willfully despoiling a document would justify a presumption of law against the despoiler; **that the contents of the document were not as stated by him, but as by his adversary**." [Emphasis supplied.]

In *Gaugh v. Gaugh*, 11 S.W.2d 729, 748, 321 Mo. 414, 454 (Mo. 1928), this Court noted that it "has several times given effect to the rule that **where a party to a suit has been guilty of spoliation of documentary evidence, he is held thereby to admit the truth of the allegation of the opposite party, and this upon the ground that the law,**

in consequence of the fraud practiced, in consequence of the spoliation, will presume that the evidence destroyed will establish the other party's demand to be just." *See Id*. at 748 (collecting cases). [Emphasis supplied.]

In *Welborn v. Rigdon*, 231 S.W.2d 127, 134 (Mo. 1950) the Court stated "The receipts Defendant destroyed were evidence of [Plaintiff's] advancements and of his rights and her liabilities under the contract, and **her destruction of this evidence was an admission of plaintiff's claim**."

In *Osborne v. Purdome*, 250 S.W.2d 159, 162 (Mo. 1952), in the context of a habeas corpus proceeding arising from a criminal conviction, the Court noted that "An attempt to fabricate evidence, procure false evidence or destroy evidence is evidence of the main facts charged; **such an attempt is construed as being in the nature of an admission of guilt**."

In *Garrett v. Terminal R. Ass'n.*, 259 S.W.2d 807, 812 (Mo. 1953), this Court stated that "the spoliation doctrine and resulting adverse presumption **holds the spoliator to admit the allegations of the opposing party regarding what the evidence would have shown on that issue.**" In *Garrett*, a railroad brakeman was injured when he was knocked down by the "rough riding and jumping" of the rail car on which he was riding. *Garrett*, 259 S.W.2d at 809. He claimed that his injury was caused by flat wheels, with loose bolts on the rail car. After his injury he took possession of a "bad order card" where a railroad employee had noted problems with the rail car prior to the brakeman's injury. *Id.* at 808. At trial, the railroad proved that the injured brakeman destroyed the original bad order card but introduced into evidence a photostatic copy of the card which read,

"Cotter Keys Missing in Pin Lifter Brackets in A End & Flat Wheels." *Id.* at 808, 811-12. The railroad claimed that "& Flat Wheels" was not on the original bad order card. *Id.* at 811-12. The Supreme Court found that the plaintiff lacked a "satisfactory explanation" for the destruction of the original version of the bad order card, and therefore an adverse inference under the spoliation doctrine applied. *Id*. at 12. Specifically, the Court held that "respondent **must, in law, admit to the truth of appellant's contention** that the words, '& Flat Wheels,' were not on the original bad order card." *Id.* [Emphasis supplied.]

In *Brown v. Hamid,* 856 S.W.2d 51, 56 (Mo. 1993), this Court reaffirmed these principles of Missouri law regarding evidence spoliation. The Court stated:

> In addition to the crime of tampering with evidence, Missouri has, for over a century, enforced an evidentiary spoliation inference, omnia praesumuntur contra spoliatorem (**all things are presumed against a wrongdoer**). *Pomeroy v. Benton*, 77 Mo. 64, 86 (1882); Brian E. Howard, Spoliation of Evidence, 49 J. Mo. Bar 121 (1993). [Emphasis supplied.]

2. AS THE COURT OF APPEALS CORRECTLY FOUND, PLAINTIFF PRESENTED OVERWHELMING EVIDENCE TO THE TRIAL COURT IN HIS MOTION FOR APPLICATION OF THE SPOLIATION DOCTRINE DEMONSTRATING THAT SSM HAD A DUTY TO PRESERVE THE VIDEO OF MR. HILL'S FALL BUT INSTEAD DESTROYED IT UNDER CIRCUMSTANCES MANIFESTING DECEIT AND BAD FAITH.

As set forth in Plaintiff's Motion for Application of the Spoliation Doctrine, the spoliation doctrine clearly applies to Defendant's destruction of the evidence from the digital video system in this case because: (I) The evidence was destroyed under circumstances manifesting fraud, deceit or bad faith; (II) Under the circumstances, SSM

had duty to preserve the video and Mr. Rieder's notes rather than destroy them; and (III) SSM has never provided a "satisfactory explanation" for the destruction of the video and the handwritten notes purportedly describing it, which were in SSM's exclusive possession and control. (L.F. 000292)

Generally, the burden on the party seeking the benefit of the spoliation doctrine is "to make a prima facie showing that the opponent destroyed the missing [evidence] under circumstances manifesting fraud, deceit or bad faith." *Schneider v. G. Guilliams, Inc.*, 976 S.W.2d 522, 527 (Mo.App. E.D. 1998). Bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another. *State ex rel. Twiehaus v. Adolf,* 706 S.W.2d 443, 447 (Mo. 1986).

Furthermore, "In [some] circumstances, 'it may be shown by the proponent that the alleged spoliator had a duty, or should have recognized a duty to preserve the evidence.'" *Schneider v. G. Guilliams, Inc.*, 976 S.W.2d 522, 527 (Mo.App. E.D. 1998), citing *Morris v. J.C. Penney Life Ins. Co.*, 895 S.W.2d 73, 77-78 (Mo.App. W.D. 1995). Under other circumstances, the spoliator's failure to satisfactorily explain the destruction of the evidence may give rise to an adverse inference against the spoliator. *Schneider v. G. Guilliams, Inc.*, 976 S.W.2d 522, 526 (Mo.App. E.D. 1998), citing *Brown v. Hamid*, 856 S.W.2d 51, 57 (Mo. 1993); see also *Garrett v. Terminal R. Ass'n of St. Louis*, 259 S.W.2d 807, 812 (Mo. 1953).

Missouri courts have specifically recognized a duty to preserve video evidence where a party has been made aware that an individual has fallen on that defendant's property, and the defendant has investigated the incident and filled out a contemporaneous report for liability reasons, just as occurred in this case. *See Marmaduke,* 521 S.W.3d at 273 (Mo.App. E.D. 2017). Furthermore, the Eastern District in *Marmaduke*, in the same context of the failure to preserve video evidence of a fall in a premises liability claim, held that the destruction of such evidence is the equivalent of silencing an eyewitness. *Id.* at 268 (noting that "**a party's spoliation of critical case-related information strikes to the heart of our system of justice with no less damage than a party that has through intimidation or violence caused a critical witness to go missing or to refuse to testify**.")

Intent is proven by circumstantial evidence in nearly every case. *Butler v. Mitchell-Hugeback, Inc.,* 895 S.W.2d 15, 20 (Mo. 1995). Courts have noted that the intent to destroy evidence "rarely is proved by direct evidence." *Morris v. Union Pac. R.R.*, 373 F.3d 896, 902 (8th Cir. 2004) (Noting that the court may determine intent to destroy evidence "through consideration of circumstantial evidence, witness credibility, motives of the witnesses in a particular case, and other factors.")

The Court of Appeals, after reviewing the Record on Appeal, correctly found that the evidence overwhelmingly supported a finding of bad faith spoliation. As the court summarized the evidence in its Opinion:

> A summary of the evidence includes: shifting versions of what happened to the video, varying time length explanation for overwriting video, Reider

> stating that he did not feel the video should be in the record, Reider failing to disclose his handwritten notes about the incident, false statements by an SSM risk manager that SSM did not have the capacity to save video in September 2009, denial of the meeting with Mrs. Hill to view the video the day after the fall, insufficient explanation of why the video was missing the day after the fall, and SSM's minimal effort to try to find the video on the system. Court of Appeals Opinion, p. 8. ("Opinion")

The Court of Appeals also specifically, and astutely, noted the similarities between this case and this Honorable Court's opinion in *Garrett*: "Reider's statement in reference to the video that he 'didn't feel that it should be in the record' and he thought that writing down what he saw was sufficient is similar to the statement in *Garrett*, which the Missouri Supreme Court found to be an unsatisfactory explanation of what happened to evidence in that case." Opinion, p. 8.

The Court of Appeals' findings are absolutely correct. It is uncontroverted that the video showing Mr. Hill's fall was in Defendant's possession and control when it was destroyed. In its efforts to "explain" this missing evidence, Defendant offered mutating and inconsistent accounts of what happened to the video, revolving around the assertion that the video recorded on a "loop" that would begin "writing over" itself at some point. Defendant's changing versions of events were repeatedly disproven by Plaintiff, only to see the explanations change again. Furthermore, all of Defendant's explanations were directly contradicted by Plaintiff's expert witness at trial. (T. 675-677)

Furthermore, the very individual charged under the law and SSM's own policies

with preserving the evidence admitted that he made a conscious choice not to preserve it. Security Guard Rieder arrived on the scene approximately five minutes after Mr. Hill's fall. Rieder testified that he went with the Hills to the Emergency Department, then took photographs of the scene, and then immediately went to the "Hospital Fire Command Center", a room where the computerized security camera system was located. (T.197-198) According to Rieder, he then used the computer to locate and view Mr. Hill's fall. (T. 197-203) Rieder was the only person to view the video of Mr. Hill's fall. (L.F. 000347) Rieder testified that he then prepared a "Security / Incident Report" in which he described Mr. Hill's fall based on his viewing of the video. (L.F. 000343)

Rieder testified that when he finished writing the report, he left it in the lead security office area so his supervisor Mike Fitzhenry could see it. (L.F. 000343; T. 193-194) According to Fitzhenry, the report was *not* prepared on Thursday, September 3, 2009. Fitzhenry testified at deposition that he and Rieder prepared the report together from Rieder's handwritten notes on Monday, September 7, 2009. (L.F. 000384-000385) A report regarding an incident like Mr. Hill's was supposed to have been made within 24 hours of the incident. (L.F. 000379) After preparing the typed report, Fitzhenry testified that he gave the notes back to Rieder, the notes were not saved in the file. (L.F. 000385) Rieder testified at trial that he shredded the notes. (T. 194)

Plaintiff presented overwhelming evidence that SSM had a duty to preserve the video and Officer Rieder's associated handwritten notes describing it. *See Schneider v. G. Guilliams, Inc.*, 976 S.W.2d 522, 527 (Mo.App. E.D. 1998). Defendant's record retention policies clearly required that the video be preserved in anticipation of litigation because

Mr. Hill fell on their property. (L.F. 000434-000436; T. 328-330) SSM's own policies required that records be preserved "regardless of storage medium," including any "electronic medium." (L.F. 000434; T. 332) SSM's security guards were aware that, when an incident such as Mr. Hill's occurs at an institution such as St. Clare where someone falls and is severely injured as Mr. Hill was, litigation can arise from that type of a situation. (L.F. 000358-000359) It is uncontroverted that Rieder's actions constituted the "commencement of an investigation" and therefore the records relating to the incident involving Mr. Hill should have been retained until the investigation or the threatened or filed litigation was resolved. (L.F. 000358; T. 337)

It was plainly Rieder's job on September 3, 2009, to preserve evidence related to accidental injuries that took place at St. Clare Hospital. (L.F. 000339; T. 192) And indeed, Rieder took photographs of the scene in order to preserve evidence of what had occurred. (L.F. 000338; T. 197-198) Nevertheless, Rieder testified at deposition that he chose not to preserve the video evidence because he claimed St. Clare's "didn't have a procedure" for storing surveillance footage of injuries, and therefore **"I didn't feel that it should be in the record**." (L.F. 000340; T. 205-206) Mr. Rieder claimed that he had preserved evidence of the fall because he "wrote down exactly what I saw" on the video in his report. (L.F. 000341) Mr. Rieder claimed that his description of the video was sufficient to preserve evidence of the fall because "As an observed trained observer [sic] with detail, being a photographer and in security, I saw him fall." (L.F. 000342)

Despite being a "trained observer," Mr. Rieder got significant details in his report wrong, such as his assertion that Mr. Hill was wearing "light-colored tennis shoes in good

condition" when in fact Mr. Hill was wearing black leather loafers. (L.F. 000343-000344)(L.F. 000437-000440) Mr. Rieder is a trained photographer, and admits that photography can be described as "painting with light," (L.F. 000350; T. 200) and nonsensically claims that video recordings are not "subject to interpretation" and denied that the video itself would have shown what had happened any better than his secondhand description. (L.F. 000342) Mr. Rieder even refused to agree with the time-honored expression "a picture's worth a thousand words." (L.F. 000342; T. 204) Mr. Rieder's claims for why he didn't "feel that the video should be in the record" simply do not make sense and manifest deceit, bad faith, and a desire to suppress the truth. On their face, they demonstrate that the SSM employee charged with preserving this evidence deliberately chose not to do so and thereby acted in bad faith.

Plaintiff presented evidence that, **when security guard Cunningham and Mrs. Hill went to look for the video the day after Mr. Hill's fall, it was already missing from the system**. (L.F. 000333-000336; T. 842) On September 4, 2009, the day after Mr. Hill's fall, Plaintiff Timothy Hill left his father's hospital room to examine the Procedure Center entrance walking surface and saw the security/surveillance camera above the entrance. He told his mother Patricia Hill that there was a camera and there should be a video of the fall. (L.F. 000352; T. 757) Patricia Hill had a conversation with Rieder about the camera. Patricia Hill asked Rieder whether there was a tape that would show the area where Mr. Hill fell, and that she wanted to see what Mr. Hill had hit and how he fell. During this conversation Rieder did not state to Patricia Hill that he had already watched the video depicting Mr. Hill's fall. (L.F. 000335)

Rieder said he would have to check whether Mrs. Hill could go to the security center to see the video. After asking again she was allowed to go to the security command center, where she went through the video with security team leader Rich Cunningham. The guards told Patricia Hill that they were looking at video of the day Mr. Hill fell. They could not find the video of Mr. Hill's fall. Mrs. Hill testified that they watched the camera for about an hour and only saw one lady come in. (L.F. 000333-000336; T. 841-842) Patricia Hill testified repeatedly that this occurred on the day that her husband was operated on. (L.F. 000336; T. 841) Mr. Hill had his operation on September 4, 2009. (L.F. 000355) Timothy Hill's testimony makes clear that, by the time he inspected the entrance for the second time with his brother on September 5 or 6, 2009, he was already aware there was nothing on the surveillance video that showed Mr. Hill's fall. (L.F. 000354)

Rich Cunningham testified that he did not recall meeting with Mrs. Hill. (L.F. 000359) But he was not saying "it didn't happen," he was saying he didn't "remember it happening." (L.F. 000359) Rich Cunningham testified at deposition that he did not remember whether he was at the Hospital on September 4, 2009. (L.F. 000357) After taking Mr. Cunningham's deposition, Plaintiff requested Mr. Cunningham's time records. The time records verify that Mr. Cunningham worked on September 4, 2009, as did Mr. Rieder. (L.F. 000360-000363)

The family received its first explanation from SSM more than a week after the fall. Nine days after Mr. Hill fell a hospital risk management person came into Mr. Hill's room and explained that the surveillance system records over a tape in seven days.

Timothy Hill said to her, “We asked you the day of the fall. What happened to the last six days?” She said “I don't know, I was at other hospitals, and I just got this case today, and the tapes are recorded over in seven days. There is not a tape.” (L.F. 000353) Deborah Luetkemeyer, a risk manager at St. Clare Hospital, testified that she did not remember meeting with the Hill family in the week after the fall or discussing the videotape, but, “I could not say that didn’t happen.” (L.F. 000365)

Thereafter, SSM gave endlessly changing and deceptive explanations for how the video had purportedly disappeared from the video system. As stated, an SSM risk manager at the hospital told the Hill family nine days (September 12, 2009) after the fall that the video system was on a “**seven day loop”**, and more than seven days had elapsed, so the video had been erased. (T. 353) At his deposition, Security Guard Rieder testified that the video recorded on a “**three day loop”**, and while he had the ability to save the video, Rieder decided not to preserve the video because he did not believe SSM policies required him to preserve it (even though they did), and he made no effort to do so. (L.F.000347-000348) Four months after Mr. Hill’s fall, SSM’s Risk Manager wrote to counsel for Plaintiff, claiming that the surveillance system could only record for three days, and **that SSM did not have the ability to save the video in September, 2009, a statement which was patently false**. (L.F. 000370; L.F. 000382 – 000383) More than two and one-half years after Mr. Hill’s fall, SSM took the new position that the surveillance system was “designed and intended” to record for seven days before deletion, but because the system was accidentally recording footage from Operating Room cameras, it was only recording a **“three to five day loop”**, and was not preserved.

(L.F. 000397) SSM's expert at trial, Gavin Manes, testified that the video system would have been recording from three to six days. (T. 883) Manes admitted that the video could have been saved by Mr. Rieder when he viewed the video or by someone else at SSM. (T. 885-886)

Furthermore, the evidence demonstrated that Defendant made no real effort to locate the video, and in fact permitted the system to be altered in a way that completely erased any record of what had occurred. According to Defendant, it was aware of the "loss" of the video within 4 days of Mr. Hill's fall. Yet, based on its own description, SSM's efforts to recover the video were limited to having an I.T. employee, Mark Burger, with no experience on the system, look for it at some time in the "week after Labor Day,"[3] i.e. between September 7, 2009, and September 14, 2009. (L.F. 000396 – 00039 and L.F. 000402; T. 630) Burger testified that "several months later" he looked on the computer hard drive and SSM's networks just in case the video might have been saved by the security guards. (L.F. 000402; T. 588) Berger did not look for any audit logs or activity logs that would have shown what happened to the video. (T. 619-620; 623)

SSM did nothing else to try to recover the video. Although its IT employees were aware that deleted data can be recovered in many instances, SSM did not contact the vendor who sold the surveillance system or the manufacturer for assistance, nor did it

[3] Plaintiff asks the Court to take judicial notice that Labor Day occurred on Monday, September 7, 2009.

contact a forensic computer engineer. (L.F. 000399; 000403-404; T. 597) Because of these actions, Plaintiff never had a chance to determine whether the video could be recovered, or how the video was erased in the first place.

Plaintiff's expert Pete Puleo testified at trial regarding the spoliation of evidence by Defendant. Mr. Puleo was retained as a computer forensic expert to see if he could retrieve the video, determine whether the video would have been overwritten during the normal course of operations and to determine whether it was intentionally deleted, meaning whether the machine automatically overwrote it or a human intervened. (T. 657-658) He obtained a forensic copy of the existing system which included "activity log" files that describe everything that had happened on that server, every user logging in, any change to any video, when it was configured, and what scripts were run. (T. 661) It also had a list of video files that had been stored at the time the logs were backed up. So they had done work in April of 2010 and in August of 2010 and when they did work on the system they made backup copies of the files at that time. (T. 661)

Mr. Puleo testified that at the time SSM's employee Mr. Burger was purportedly looking for the videotape, **the data logs would have been on the system which would have shown who had looked at the video and when they looked at the video**. (T. 663-664) Mr. Puleo testified that the data on the log file stays on the system until someone removes it. (T.665) So if SSM had chosen to go back and get the data log file with all of that information, they could have done it any time from the date the video was recorded on September 3, 2009 until October 23, 2009. (T. 665)

On October 23, 2009, SSM added hard drives to the file server to increase the storage, doubling the capacity of the storage. **The method they used to install those drives was to destroy the existing array of drives and add the new drives to the old array which had the net effect of wiping anything that was on the previous array**. (T. 666) **This process rendered all of the preexisting data, including activity logs, unrecoverable**. (T. 666) Mr. Puleo testified that easier ways to install the additional drives existed, which would have also preserved all the information. (T. 680) Mr. Puleo testified that when they wiped the system they ran a script file from July 2009, to put all the camera names and settings back, so we know that the system was configured identically on October of 2009, to how it was in July of 2009. (T. 667)

Mr. Puleo testified that in his review of the forensic data, St. Clare did similar work on the computer system drives on April 16, 2010 and August 19, 2010. (T. 667-668) **Both times SSM preserved the activity log files when they made those changes**. (T. 668) When they repartitioned the drives in April of 2010 that would have wiped any information on the system and the logs that were kept were from prior to that. (T. 668; 678-679) I**n October of 2009 they wiped the system without preserving backup copies of logs**, but on at least two other instances they had wiped the system and had made appropriate backup copies of the logs. (T. 669) Mr. Puleo testified that it was readily apparent that after the amount of time that had passed, **and after the system had been "scrubbed" a couple of times** there was no chance for retrieving the video. (T. 672) *See Dorchester Financial Holdings Corp. v. Banco BRJ S.A.*, Case No. 1:11-cv-01529 at 14 (S.D.N.Y. December 15, 2014) (where laptop had purportedly "crashed" and

plaintiff destroyed laptop, thereby preventing any attempt at forensic examination or recovery of the data therein, court sanctioned plaintiff by applying "mandatory adverse inference" such that "**the factfinder will be compelled to infer that Dorchester destroyed electronic information**, including emails and metadata, favorable to BRJ's claim that it did not participate in the transactions at issue in this action.") [Emphasis supplied.]

With regard to whether or not the video had been overwritten versus deleted through human intervention, initially Plaintiff was told that it was overwriting video within three days, but that was statistically unrealistic. (T. 675) Mr. Puleo testified that given a 4.3 day retention period, which would have been by the end of the work day on Monday, **it was statistically impossible for the video to have been overwritten in that amount of time**. And even when he adjusted for the reduced storage space, or when Defendant claimed a smaller storage capacity, the video still would have been there. The system should have been getting at least five and a half to six days of storage. (T. 676 – 677) These opinions and statements were based on eighteen months of data that Mr. Puleo was able to download and analyze. (T. 678)

Mr. Puleo testified that he didn't have the data log information for the period from March of 2009 when the hospital opened to September 3, 2009 because that information was lost when SSM scrubbed the system. (T. 678-679) However, the data was still on the system when St. Clare Hospital chose to add storage to their system. (T. 679) Mr. Puleo testified that St. Clare could have added storage in a much easier, cheaper and faster fashion without any risk of losing the activity log files. (T. 679-680) **Mr. Puleo testified**

that he was hampered in his investigation by the lack of information between September 3 and October 22 of 2009 because of the missing activity logs. (T. 687) **If he had had those logs he could have determined who viewed the video, if it was deleted or if it was automatically overwritten**. (T. 687)

In other words, the evidence conclusively demonstrates that SSM not only failed to preserve (at the very least) the original video due to the "choice" of Mr. Rieder, SSM subsequently had all records relating to who viewed the video, and when, permanently erased and "scrubbed." SSM has never provided an explanation for this destruction of evidence.

In a recent case from Georgia, *Walters v. Kroger Co.*, Civil Action No. 2009C-14740-4, aff'd in relevant part and rev'd in part by *Kroger Co. v. Walters*, 319 Ga. App. 52 (Ga.App. 2012)[4] the court found bad faith spoliation of video evidence under nearly identical circumstances as those presented here. In *Walters*, the plaintiff slipped and fell on a banana in defendant's store. Kroger maintained a video surveillance system in the store with one camera that monitored the area near where the plaintiff slipped and fell. (L.F. 000442) Although an incident report was prepared, the video was not preserved. The video was claimed to be on a recording "loop." Videos were only saved for 17 days unless there was a reason to hold them, and Kroger asserted it had no reason to believe the plaintiff was contemplating litigation. (L.F. 000442-443) While Kroger produced still

[4]The Court of Appeals of Georgia held in relevant part that, "In sum, we find no abuse of discretion in the trial court's finding of spoliation." *Id*. at 57.

shots from the video camera suggesting it would not have shown the fall, an inspection by plaintiff at the store itself revealed that the camera was centered on the location of the fall, and could have shown the exact condition on the floor at the time of the fall. (L.F. 000443) The court found that Kroger had spoliated the video, stating:

> The video could have been maintained at minimal expense to Kroger. The destruction of the evidence prejudiced Walters, the prejudice cannot be cured, and the evidence was of great importance to the case. The Court further finds that Kroger acted in bad faith in failing to preserve the evidence and manipulating evidence to excuse its actions. (L.F. 000444)

As a result the court struck the defendant's affirmative defenses and held that "Kroger is hereby precluded from introducing any evidence contesting its negligence in causing Plaintiff's injuries." (L.F. 000444)

What actually happened to the video of Irvin Hill's fatal fall on Defendant's premises is information that is known only to SSM. However, the circumstantial evidence surrounding the destruction of the video demonstrated SSM's deceit and bad faith because SSM's various explanations for its destruction were consistently contradictory. Defendant delayed, procrastinated, and misrepresented to Plaintiff whether the video still existed even though it was well aware the video had been destroyed. According to its own description, Defendant made no more than a pro forma attempt to recover the video. In short, SSM provided demonstrably false, deceptive and misleading information in support of its various explanations for the destruction of the video, indicating bad faith and a desire to suppress the truth.

While the trial court held that the parties would be able to argue the adverse inference at trial due to Defendant's spoliation of the video of Mr. Hill's fall, (L.F. 002278-2279), the Court of Appeals correctly noted that this was "insufficient to address the overwhelming evidence of spoliation." Opinion, p. 8. As the Court noted, statements made during opening and closing argument are not evidence. *Id*. Instead, "the proper remedy for such varying accounts of what happened to the only eye witness account of the fall and inadequate explanations is an adverse inference." *Id.*

Plaintiff respectfully submits that the Court of Appeals was correct, and permitting the victim of evidence spoliation to argue the evidence regarding that spoliation to a jury is a very far cry from an adequate remedy for this type of misconduct. During the trial of this case, **SSM's witnesses admitted that if the video had not been destroyed there would have been no need for a lawsuit or a trial**. The video would have shown, one way or the other, whether Mr. Hill tripped over the raised slab. After destroying the video, SSM demanded that Plaintiff file suit to seek justice. (T. 360-361) Justice did not occur in this case when the jury returned its verdict for SSM when the evidence was overwhelming that there was a dangerous and defective unlevel walkway into the procedure center, that it had been there for at least nine or ten months if not over a year prior to Mr. Hill's fall, and where the remaining evidence was consistent with Mr. Hill tripping over the dangerous condition.

Plaintiff proved that SSM destroyed the video under circumstances manifesting fraud, deceit or bad faith, and when it should have recognized a duty to preserve that evidence. It was the only eyewitness evidence of what occurred. Therefore, as the Court

of Appeals correctly found, the trial court prejudicially erred in denying Plaintiff's Motion for Application of the Spoliation Doctrine, requiring reversal and remand for a new trial.

3. THE COURT OF APPEALS MISAPPLIED THE SCOPE OF THE ADVERSE INFERENCE, UNDER MISSOURI'S SPOLIATION DOCTRINE AND THIS HONORABLE COURT'S PRECEDENT, BECAUSE THE SPOLIATING PARTY IS HELD TO ADMIT THE SPECIFIC FACTS THAT THE SPOLIATED EVIDENCE WOULD HAVE SHOWN.

Although the Court of Appeals correctly reversed the judgment because of the failure of the trial court to properly apply the spoliation doctrine, the Court misapplied the legal effect of its application. Specifically, the Court of Appeals held that: "In the instant case, the adverse inference would hold SSM to admit that the content of the video was unfavorable to its position, not that the video would show the fall was caused by the dangerous condition at issue as Appellant contends." Opinion, p. 5. However, Missouri law is clear that the adverse inference is more than a generalized admission that evidence is "unfavorable." Under Missouri law, spoliation is a specific admission of what the evidence *would have shown*.

Missouri precedent is clear that the "adverse inference" under the spoliation doctrine takes the form of an admission of specific facts as a matter of law by the spoliating party: "This court has several times given effect to the rule that where a party to a suit has been guilty of spoliation of documentary evidence, **he is held thereby to admit the truth of the allegation of the opposite party**, and this upon the ground that the law, in consequence of the fraud practiced, in consequence of the spoliation, will

presume that the evidence destroyed will establish the other party's demand to be just." *Garrett v. Terminal R. Ass'n*, 259 S.W.2d 807, 812 (Mo. 1953). *See also Dove v. Fansler*, 112 S.W. 1009, 1010 (Mo.App. 1908) ("when the evidence attempted to be destroyed is produced at the trial, the presumptions by which its interpretation is to be determined are of the same nature and governed by the same rules as those which pertain to cases where the evidence is destroyed and cannot be produced. **As the words erased from the check were susceptible of the interpretation we have placed on them, the court should have placed such construction on them as a matter of law, and not treated the question of intention as an issue of fact for the jury**.") [Emphasis supplied.]

In *Garrett,* 259 S.W.2d at 812, this Court further stated that "the spoliation doctrine and resulting adverse presumption **holds the spoliator to admit the allegations of the opposing party regarding what the evidence would have shown on that issue.**" [Emphasis supplied.] This clearly remains the law. *See Degraffenreid v. R. L. Hannah Trucking*, 80 S.W.3d 866, 878 (Mo.App. W.D. 2002) (holding that under spoliation doctrine employer's concealment of evidence warranted presumption, contrary to employer's position, that employee drove in excess of the hours and miles allowed under federal regulations, and that he lacked requisite sleep); *Pisoni v. Steak 'N Shake Operations, Inc.*, 468 S.W.3d 922, 927 (Mo.App. E.D. 2015) ("the spoliator must admit what the evidence *would have shown* had it been available" on that evidentiary question) [emphasis in original], and *Marmaduke v. CBL and Associates Management., Inc.*, 521 S.W.3d 257, 270 (Mo.App. E.D. 2017) (same).

In addition to this Court's application of the doctrine in *Pomeroy* and *Garrett*,

discussed above, in *Degraffenreid v. R. L. Hannah Trucking*, 80 S.W.3d 866, 878 (Mo.App. W.D. 2002), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003), the Court of Appeals applied the doctrine to find an admission of what the destroyed evidence would specifically have shown, stating that "The proper application of the spoliation doctrine, then, is for **the Commission to find that the destroyed records would show that Mr. DeGraffenreid drove in excess of the hours and miles allowed under federal regulations, and that he lacked the requisite sleep**." [Emphasis supplied.] In other words, the court in *DeGraffenreid* correctly applied the spoliation doctrine, as set forth by this Court in *Garrett*, and found the spoliator was "deemed to admit" what the document would have shown regarding the driver's violations of federal driving safety standards. Similarly, in *Marmaduke*, while pointing out that the spoliation doctrine, standing alone, does not "prove the opposing party's case," the Court of Appeals still noted that the spoliator must admit what the evidence *would have shown* had it been available." 521 S.W.3d at 270. Here, whether the video would have shown Mr. Hill tripping over the concrete slab is no different than the question of what the burnt ledger book would have shown in *Pomeroy* or the destroyed driving logs would have shown in *DeGraffenreid*.

SSM may rely on *Pisoni v. Steak 'N Shake Operations, Inc.*, 468 S.W.3d 922 (Mo.App. E.D. 2015) for the proposition that it can offer other evidence of what the video would have shown. This case is distinguishable for the simple reason that, in addition to the videotape footage, there was an eyewitness to the fall in that case. Those facts simply do not apply here, where the *only* "eyewitness" to the fall was the video

itself. *See Garrett v. Terminal R. Ass'n of St. Louis*, 259 S.W.2d 807, 812 (Mo. 1953) (holding that spoliator was required to admit phrase "& flat wheels" was not on original bad order card, which spoliator had destroyed, where there was no independent eyewitness evidence that railroad car had flat wheels). In other words, the firsthand evidence of what occurred that the Court of Appeals suggested could be admitted in *Pisoni* simply does not exist in this case. Furthermore, permitting a spoliating party to offer evidence of what the spoliated evidence "would have shown" would effectively deny what that party is bound in the law to admit, and would leave the spoliation doctrine under Missouri law a toothless tiger.

4. THE COURT OF APPEALS' REFERENCE TO THE NECESSITY OF A JURY INSTRUCTION ON SPOLIATION IS WELL-TAKEN.

In this case, the parties had agreed during pretrial discussions in chambers during the week of March 13, 2017 that no adverse inference instruction would be permitted under Missouri law, including specifically discussing *Pisoni v. Steak 'N Shake Operations, Inc*., 468 S.W. 3d 922 (Mo.App. E.D. 2015), as well as *Berger v. Copeland Corp. LLC*, 505 S.W.3d 337 (Mo.App. S.D. 2016), which both held that it is impermissible to give a jury instruction on the adverse inference. Therefore Plaintiff did not submit any such instruction and did not otherwise preserve any objection regarding the failure to give a jury instruction on appeal.

However, the Court of Appeals raised the issue *sua sponte* in its opinion, noting the near impossibility of properly communicating the adverse inference to the jury in the absence of an instruction from the court:

> The ban on giving a "spoliation instruction" may need to be re-visited by the Missouri Supreme Court's civil committee on jury instructions. The practical difficulty of somehow inserting the required admission that the spoliated evidence would be unfavorable to the spoliating party poses complicated issues. Perhaps once a court has determined that spoliation has occurred, the giving of an instruction advising the jury that they are to consider that the missing evidence would be unfavorable to the "guilty" party would alleviate the practical problems encountered in attempting to place the concept before the jury. Opinion, at p. 9 note 1.

To the extent this Honorable Court intends to address the issues raised by the Court of Appeals regarding a jury instruction on spoliation, Plaintiff fully agrees that such an instruction would be helpful in communicating the adverse inference to the jury. *Pisoni* reasoned that instructing the jury regarding the adverse inference was an improper comment on the evidence, inappropriate in a jury instruction, because "The spoliation doctrine only addresses evidence." The court relied for this proposition on this Court's opinion in *Hartman v. Hartman*, 314 Mo. 305, 284 S.W. 488, 489 (1926), which is not a spoliation case and related instead to the adverse inference arising from the failure to call a witness. The Court of Appeals in *Berger v. Copeland Corporation, LLC*, 505 S.W.3d 337, 339 (Mo.App. S.D. 2016) pointed to two other civil cases that it contended supported a purported ban on giving instructions under the spoliation doctrine, *Crapson v. United Chatauqua Co.*, 37 S.W.2d 966, 968 (Mo.App. 1931) and *Smith v. Kansas City Public Service Co.*, 227 Mo.App. 675 (Mo.App. 1933). However both cases, like

Hartman, related instead to the adverse inference arising from the failure to call a witness.

The court in *Pisoni* also relied on the fact that "Appellant does not identify any Missouri case law demonstrating that, upon a finding of spoliation, a party is entitled to relief in the form of an adverse-inference jury instruction." *Pisoni v. Steak 'N Shake Operations, Inc.*, 468 S.W.3d 922, 927–28 (Mo.App. E.D. 2015). However, Missouri courts clearly have given spoliation instructions to the jury in situations where, under the adverse inference, the spoliator has been found to admit certain facts and where inferences should be drawn against the spoliator as a matter of law. *See Dove v. Fansler*, 112 S.W. 1009, 1010 (Mo.App. 1908) (discussing spoliation instruction given by trial court and holding that a stronger, peremptory instruction should have been given).

The Court of Appeals in *Pisoni* and *Berger* also relied on a Comment by the Missouri Supreme Court Committee on Jury Instructions to the effect that instructions are not proper with regard to the spoliation doctrine. *See Pisoni*, 468 S.W.3d at 928. However, all of these sources clearly arise from conflating two very different adverse inferences. As set forth above, the proper adverse inference for spoliation is more than merely permissive and holds a party to *admit what the evidence would have shown*.[5]

[5] Consistent with the Court of Appeals' suggestion that an instruction should be considered on this issue, Plaintiff has respectfully submitted herewith a proposed jury instruction regarding spoliation for the Court's consideration. *See* Appendix at A12.

It is also noteworthy that, while federal law, like Missouri, permits an adverse inference as one sanction for the bad faith spoliation of evidence, the federal adverse inference is accompanied by a jury instruction. *See Stevenson v. Union Pacific R. Co.*, 354 F.3d 739, 746 (C.A.8 (Ark.) 2004). Furthermore, the general proposition that it is never the purpose of a jury instruction to "comment" on the evidence is not accurate. Withdrawal and limiting instructions are commonly employed to instruct the jury on the manner and extent to which a jury is permitted to rely on certain evidence. Moreover, M.A.I. 2.01, given in every case, clearly comments on the evidence. Among other things, it states "In considering the weight and value of the testimony of any witness, you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of the case, the relation of the witness to any of the parties, the inclination of the witness to speak truthfully or untruthfully and the probability or improbability of the witness' statements." *See* MAI 2.01(11) Plaintiff respectfully submits that Missouri should follow other courts, including the federal courts, in properly instructing the jury regarding the spoliation of evidence.

5. THIS HONORABLE COURT SHOULD NOT COUNTENANCE SSM'S DESTRUCTION OF EVIDENCE.

The destruction of evidence is a crime. *See* § 575.100 R.S.Mo. This Honorable Court should not countenance SSM's misconduct in (1) spoliating the video evidence of Mr. Hill's fall and (2) "scrubbing" its servers to erase any record of what occurred to that video. Instead, in the interests of justice, this Court should reaffirm the inherent power of Missouri courts under the spoliation doctrine to grant a mandatory adverse inference

which admits what the spoliated evidence would have shown. Plaintiff respectfully submits that, by doing so, this Court would send a powerful message across the State of Missouri that this type of behavior will not be tolerated.

POINT RELIED ON II

THE TRIAL COURT ERRED IN OVERRULING PLAINTIFF'S OBJECTION TO SSM'S INTENTIONAL AND KNOWING MISSTATEMENT OF THE LAW DURING CLOSING ARGUMENT REGARDING SPOLIATION BECAUSE DEFENSE COUNSEL MADE PREJUDICIAL MISTATEMENTS OF LAW TO THE JURY IN THAT DEFENSE COUNSEL (1) INCORRECTLY TOLD THE JURY THAT BECAUSE THERE WAS NOTHING IN THE JURY INSTRUCTIONS REGARDING SPOLIATION, THE LAW DID NOT SUPPORT PLAINTIFF'S ADVERSE INFERENCE ARGUMENT, AND (2) COMPOUNDED THE PREJUDICE BY ARGUING TO THE JURY THAT SSM WAS BARRED FROM DISCUSSING THE CONTENTS OF THE VIDEO AND THAT SSM "REGRET[TED]" NOT HAVING THE VIDEO IN VIOLATION OF THE TRIAL COURT'S PRIOR ORDER REGARDING PERMISSIBLE STATEMENTS CONCERNING THE DESTROYED VIDEO.

(A) Standard of Review.

A trial court's rulings on objections made to remarks by counsel during closing arguments are reviewed for abuse of discretion. *Peters v. ContiGroup*, 292 S.W.3d 380, 390 (Mo.App. W.D. 2009). "[T]he permissible field of argument is broad, and so long as counsel does not go beyond the evidence and the issues drawn by the instructions, or urge

prejudicial matters or a claim or defense which the evidence and issues drawn by the instructions do not justify, he is permitted wide latitude in his comments." *Heshion Motors, Inc. v. W. Int'l Hotels*, 600 S.W.2d 526, 534 (Mo.App. W.D. 1980). However, "[m]isstatements of law are impermissible during closing argument and a trial court has the duty, not discretion, to restrain and purge such arguments." *Peterson v. Progressive Contractors, Inc.*, 399 S.W.3d 850, 856–57 (Mo.App. W.D. 2013), citing *Bradley v. Waste Mgmt. of Mo., Inc.*, 810 S.W.2d 525, 528 (Mo.App. E.D. 1991).

(B) Argument.

1. DEFENSE COUNSEL IMPROPERLY TOLD THE JURY THAT BECAUSE THERE WAS NOTHING IN THE JURY INSTRUCTIONS REGARDING SPOLIATION, THE LAW DID NOT SUPPORT PLAINTIFF'S ADVERSE INFERENCE ARGUMENT.

During closing argument SSM stated:

> **In the instructions, which are the law, that Judge Watkins has read to you and is going to give to you, you will not find one word in here to say anything about spoliation, loss of evidence, and you should then render a verdict in favor of the Hills. Nothing about that.** (T. 1103)

Plaintiff's counsel objected stating: "Well, Judge, I object to that. He knows we can't give an instruction on that. I think that's -- I think that's improper." The trial court overruled Plaintiff's objection. (T.1103) It is beyond debate that misstatements of law are impermissible during closing argument and a trial court has the duty, not discretion, to restrain and purge such arguments. *Fahy v. Dresser Industries, Inc.* 740 SW 2d 635, 641 (Mo.banc 1987); *and see Bradley v. Waste Management of Missouri, Inc.*, 810

S.W.2d 525, 528 (Mo. App. E.D. 1991)(reversing and remanding based on misstatements of law during closing argument)

As discussed above, the parties had agreed during pretrial discussions in chambers during the week of March 13, 2017 that no adverse inference instruction was permitted under Missouri law, including specifically discussing *Pisoni v. Steak 'N Shake Operations, Inc*., 468 S.W. 3d 922 (Mo.App. E.D. 2015), as well as *Berger v. Copeland Corp. LLC*, 505 S.W.3d 337 (Mo.App. S.D. 2016), in which the Missouri Court of Appeals for the Southern District issued an opinion on October 5, 2016 affirming a trial court's order granting a new trial on a $28 million judgment because it erroneously gave an adverse inference instruction. Therefore, SSM knew that Missouri law prohibited the giving of an adverse inference instruction and also knew that *Pisoni,* quoted from MAI (7th Ed.) stated that "every lawyer knows that…an adverse presumption arises against the spoiler of evidence ad infinitum." Nevertheless SSM proceeded to argue that because there was nothing in the *instructions* from the court about spoliation or an adverse inference against SSM, the law did not support Plaintiff's adverse inference argument regarding the destruction/spoliation of the videotape of Mr. Hill's fall. This is clear and plain error.

Furthermore, because the trial court overruled Plaintiff's proper objection, the jury was given the impression that Defendant's argument regarding the law was correct, and therefore the jury could disregard Plaintiff's adverse inference arguments because they were not contained in the jury instructions. As the Court of Appeals noted:

> The pretrial order stated that "the parties will be permitted to argue the law as the court determines," but SSM denied Appellant the opportunity to argue the law of an adverse inference when SSM told the jury there was nothing about spoliation or destruction of evidence in the jury instruction, so it was not the law. SSM's closing argument prejudiced Appellant's position regarding the missing evidence and mischaracterized the law regarding the adverse inference and spoliation instruction. These misstatements are impermissible, and the court has a duty to exclude these statements that tend to confuse the jury. Opinion, pp. 11-12.

As the Court of Appeals found, the prejudicial error is clear and merits reversal.

2. DEFENSE COUNSEL VIOLATED THE COURT'S ORDER BY ARGUING TO THE JURY THAT SSM WAS BARRED FROM DISCUSSING THE CONTENTS OF THE VIDEO AND THAT SSM "REGRET[TED]" NOT HAVING THE VIDEO, SUGGESTING TO THE JURY THAT THE VIDEO WOULD HAVE BEEN HELPFUL TO THE DEFENSE.

SSM's knowing and intentional misstatement of the law regarding the spoliation doctrine and adverse inference rule and the trial court's overruling of Plaintiff's objection to this improper closing argument was highly prejudicial to Plaintiff, and merits reversal for this fact alone. But these misstatements were further exacerbated by **SSM's violation of the trial court's order** prohibiting SSM from suggesting that it "wished" it could show the video to the jury. (L.F. 002382) SSM's direct and intentional reference to what Mr. Rieder saw on the videotape was a flagrant violation of the trial court's Order restricting SSM's comments.

The Court of Appeals did not address this issue in its Opinion, because it held that, while the improper argument was timely raised in Plaintiff's post-trial motion, Plaintiff's counsel did not object at the time the improper argument was made. However, the Court may consider plain errors affecting substantial rights when it finds manifest injustice or a miscarriage of justice. *See Wheeler v. Dean*, 482 S.W.3d 877, 879 (Mo.App. S.D. 2016). Plaintiff submits that when a litigant intentionally violates a court's Order in advancing impermissible arguments, and that reference was coupled in outrageous fashion with defense counsel's incorrect adverse inference argument, to which Plaintiff's counsel properly objected, a manifest injustice occurred, providing grounds for this Court to review the issue.

During the pretrial conferences, Plaintiff asked the court for an Order directing SSM not to make any reference to what security guard Robert Rieder claimed to have seen on the video of Mr. Hill's fall. Plaintiff further argued that SSM was seeking to turn the adverse inference rule on its head by suggesting that it was "sorry" that the video had been destroyed or otherwise suggesting that the video would support SSM's position. Plaintiff argued that this spin on SSM's intentional spoliation of the video would mean that the video of the fall would have supported SSM's case, directly contrary to Missouri law.

On March 20, 2017, the trial court entered its Order stating: "Defendant **is not permitted to argue or state to the jury that 'we wish we could show the video to you'** or words to that effect. Defendant may state that they regret the destruction of the video or words to the effect." (L.F. 002382) The trial court's order permitting SSM to claim

that it "regretted the destruction of the video" was prejudicially erroneous as it permitted SSM to imply that the video supported its version of events, contrary to the adverse inference rule. Further, **SSM's argument during closing argument violated the Court's Order and in fact accomplished precisely this**.

During closing argument SSM stated to the jury:

> The evidence in this case absolutely starts with the fall. **We know the surveillance video is gone. And believe me, the hospital during the course of this case has paid the price**. **Mr. Rieder cannot, did not talk about anything that he saw in the videotape, and we absolutely regret that we don't have the videotape. And that is all that I can say about that. When Mr. Dowd talks about an adverse inference, that's all I can say. That's all I can say.** (T. 1102)

Notwithstanding the court's Order directing SSM not to say "we wish we could show the video to you" and clear Missouri law that is designed to punish the spoliator for the destruction of evidence, SSM saw fit to tell the jury that it had "**paid a price**" as a result and that "**Mr. Rieder cannot, did not talk about anything he saw in the videotape, and we absolutely regret that we don't have the videotape."** SSM therefore very deliberately told the jury what it was ordered not to tell them. Combining these statements, (i.e. that SSM "paid a price" because Mr. Rieder "cannot" talk about anything he saw in the videotape, and that "we absolutely regret we don't have the videotape") was obviously designed to give the jury the impression that the videotape and

what Mr. Rieder saw on it would have supported SSM's case rather than Plaintiff's case in direct contravention of the trial court's Order and Missouri law on the subject.

SSM knew that this argument would mislead the jury into believing that what Mr. Rieder saw on the video would have supported SSM's case but that SSM "cannot and did not" talk about what Mr. Rieder saw. In *Barron v. Missouri-Kansas-Texas R. Co.*, 696 S.W.2d 338 (Mo.App. E.D. 1985) the court held that "direct and intentional reference" to excluded testimony in closing argument mandated a reversal and new trial. *Id.* at 341. The same circumstances are present here.

POINT RELIED ON III

THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION NO. 8 BECAUSE MISSOURI LAW REQUIRES THAT A CONVERSE BE IN SUBSTANTIALLY THE SAME LANGUAGE AS THE VERDICT DIRECTOR IN THAT SSM'S CONVERSE INSTRUCTION NO. 8 DID NOT USE SUBSTANTIALLY THE SAME LANGUAGE AS THE PLAINTIFF'S VERDICT DIRECTOR AND DID NOT MAKE ANY SPECIFIC REFERENCE TO THE NEGLIGENCE DESCRIBED IN PLAINTIFF'S VERDICT DIRECTOR.

(A) Standard of Review.

Instructional error is a matter of law reviewed de novo by the court. *Martens v. White,* 771 SW 2d 359, 557 (Mo.App. S.D. 2006). An instruction is in error where the appellant can show that the instruction misdirected, misled, or confused the jury. *Id.* However, mere error is not sufficient for reversal; the appellant must also show prejudice resulting from the error. *Carroll v. Kelsey,* 234 S.W.3d 559, 562 (Mo.App. W.D. 2007).

(B) Argument.

The court prejudicially erred in submitting Instruction No. 8, SSM's converse instruction, because it violated the mandatory dictates of MAI that require that a converse instruction be in substantially the same language as the verdict director. (L.F.002436)

In *McLaughlin v. Han*, 199 S.W. 3d 211 (Mo.App. W.D. 2006) plaintiff sued defendant on a premises liability theory for negligently leaving a carpet on a driveway during a garage sale resulting in injury to plaintiff. Plaintiff submitted a verdict director which the trial court accepted, rejected defendant's proposed verdict director and converse instruction and *sua sponte* prepared and gave defendant's converse instruction. The first two submissions in defendant's converse did not use substantially the same language as plaintiff's verdict director. *Id.* at 215-216. **The Western District reversed the plaintiff's judgment finding prejudicial error because the converse instruction failed to use substantially the same language in the duty elements and more generally as an instruction on negligence in failing to establish any duty upon which a breach could have been predicated**. *See Id*. at 216-217.

Here, Plaintiff's verdict director was a pattern MAI approved instruction (MAI 33.01); therefore, the error in SSM's converse is presumptively prejudicial and the burden of showing that SSM's deviation from MAI's mandates was non-prejudicial is on SSM. *Sooter v. Magic Lantern, Inc.,* 771 S.W. 2d 359, 362 (Mo.App. S.D. 1989).

Plaintiff's verdict director and Defendant's converse are set out verbatim below which show the patently erroneous nature of Defendant's converse and its prejudicial effect.

Instruction No. 7

Your verdict must be for plaintiff Timothy Hill if you believe:

First, there was a raised concrete slab on the entrance walkway to the Procedure Center and as a result the entrance walkway was not reasonably safe, and

Second, defendant SSM Healthcare St. Louis knew or by using ordinary care could have known of this condition, and

Third, defendant SSM healthcare St. Louis failed to use ordinary care to remove it, barricade it, or warn of it, and

Fourth, such failure directly caused or directly contributed to cause the death of Irvin Hill.

(L.F.002435)

Instruction No. 8

Your verdict must be for defendant SSM Healthcare St. Louis unless you believe defendant SSM Healthcare St. Louis failed to use ordinary care as submitted in Instruction Number 7, and such failure directly caused or directly contributed to cause the death of Irvin Hill.

(L.F. 002436)

It cannot be disputed that SSM's converse **did not use substantially the same language as Plaintiff's verdict director.** Its submissions regarding negligence did not specify wherein or why SSM failed to use ordinary care. In *McLaughlin, supra*, the court found the failure to use substantially the same language as Plaintiff's verdict director for the submission of negligence failed "to establish any duty upon which a breach can be predicated." As the court stated in *McLaughlin*, Judge Elwood Thomas' Missouri Law Review article titled "Converse Instructions Under MAI, 42 Mo. L. Rev. 175 (1977) remains the most definitive and reliable work on converse instructions in Missouri. **In**

that work Judge Thomas stated 21 times that the language of the converse must be the same as the language in the verdict director it is conversing.

SSM's error in offering instruction No. 8 and the trial court's error in giving it lies in the failure to tie a Defendant's verdict to any particular failure related to the issues in the case. The jury was told that it could find for Defendant unless it believed that SSM "failed to use ordinary care as submitted in instruction No. 7". This was not a roving commission to find SSM liable if it failed to use ordinary care in any respect, it was an abstraction. What if the jury believed that SSM failed to use ordinary care to remove the raised slab but not because it failed to barricade or warn of the defect? Then, according to SSM's instruction, SSM was not liable. This is the problem with the instruction. It permitted SSM to get a verdict without any reference to the negligence pleaded and proved. It is the same error a court would find if Plaintiff eliminated the specifications of negligence demanded by an MAI – Premises Liability verdict director that requires a specific finding of a negligent failure **to do something.** That is to say, if Plaintiff's verdict director said:

> Your verdict must be for Plaintiff if you believe:
>
> Third, Defendant failed to use ordinary care; and…

The obvious problem is that there is no direction in the verdict director for the basis of a Defendant's fault. Likewise, SSM's converse verdict directing submission, and the trial court's giving of the instruction, gave the jury no basis to determine if SSM was not at fault. For all of these reasons, SSM's Instruction No. 8 was prejudicially erroneous and the trial court prejudicially erred in giving it, thereby entitling Plaintiff to a new trial.

POINT RELIED ON IV

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR SANCTIONS SEEKING EXCLUSION OF DR. BRENNAN'S VIDEO-TAPED DEPOSITION BECAUSE THE EVIDENCE DEMONSTRATED THAT DEFENSE COUNSEL INTENTIONALLY CONCEALED THE FACT THAT THEY TOOK PICTURES OF THE SCENE ON THE MORNING OF DR. BRENNAN'S DEPOSITION, BUT DID NOT TELL PLAINTIFF'S COUNSEL OF THE TRIP TO THE SCENE IN THAT PLAINTIFF'S COUNSEL WAS THEREBY UNABLE TO CROSS-EXAMINE DR. BRENNAN REGARDING THE LEVELING OF THE WALKWAY AND PLAINTIFF WAS DEPRIVED OF THE RIGHT TO CROSS-EXAMINE DR. BRENNAN ABOUT SSM TAKING HIM TO THE PROCEDURE CENTER FOR A RE-ENACTMENT ON THE MORNING OF HIS DEPOSITION.

(A) Standard of Review.

Denial of a motion for sanctions is reviewed for abuse of discretion. *Hale v. Cottrell, Inc.*, 456 S.W.3d 481, 488 (Mo.App. W.D. 2014). The trial court abuses its discretion when its ruling "is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.*

(B) Argument.

"Any conduct that misleads one's adversary in the latter's search for truth anterior to trial impedes and impairs the integrity of the forensic fact-finding process." *In re Carey*, 89 S.W.3d 477, 497 (Mo. 2002), quoting *State ex rel. Bar Ass'n v. Lloyd*, 787 P.2d

855, 859 (Okla.1990). Intentionally making false statements and withholding material information "is an affront to the fundamental and indispensable principle that a lawyer must proceed with absolute candor towards the tribunal. In the absence of that candor, the legal system cannot properly function." *In re Caranchini*, 956 S.W.2d 910, 919–20 (Mo. 1997), *as modified on denial of reh'g* (Dec. 23, 1997). A trial court has a broad array of inherent powers. *Mitalovich v. Toomey*, 217 S.W.3d 338, 340 (Mo.App. E.D. 2007). Among these, **a court has the inherent power to sanction bad faith litigation misconduct**. *McPherson v. U.S. Physicians Mut. Risk Retention Grp.*, 99 S.W.3d 462, 478 (Mo. App. W.D. 2003). "Bad faith" misconduct for these purposes is conduct which "imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another." *A.J.H. ex rel. M.J.H. v. M.A.H.S.*, 364 S.W.3d 680, 683 (Mo.App. E.D. 2012). The court has the "inherent power, right and duty to take that action which is necessary to protect the integrity of the judicial process." *Rea v. Moore*, 74 S.W.3d 795, 799 (Mo.App. S.D. 2002).

Defendant SSM took Dr. Brennan's deposition on April 29, 2011 and sought to use it at trial. Plaintiff then filed a Motion to Exclude Dr. Brennan's testimony and the photos upon which it relied on the basis that there was no foundation for the photos, because the condition of the entrance walkway had been changed by the time of the deposition and Plaintiff was not aware of this when Dr. Brennan's deposition was taken. (L.F. 002264-002266)

On Friday, March 17, 2017 the trial court took up Plaintiff's Motion in Limine to Exclude Dr. Brennan's Testimony Concerning Defendant's Photos and the Photos Themselves. After hearing Plaintiff's argument concerning the Motion to Exclude, defense counsel stated to the court that after Defendant received the Motion to Exclude on the previous evening, a long conversation was held among counsel for SSM. It was concluded that the photographs marked as Exhibits A through D in Dr. Brennan's Deposition were taken on January 13, 2011 by David Ott. At that time Mr. Gearin stated to the court that he was making this representation to the court to resolve the issue and that Mr. Ott would either produce an affidavit to substantiate this statement of fact or that he would testify to that statement of fact.

Plaintiff's counsel then sent an email to Defense counsel stating that the Affidavit would be required. This requirement was made because the photographs reflect trees and flowers in bloom, green grass, and a sunny blue-sky day. In addition, the weather records for January 13, 2011 reflect that the temperature was in the single digits and sometimes the wind-chill made it below freezing, as well as the fact that for nearly that entire 24-hour period the sky was overcast and cloudy. Plaintiff's counsel informed defense counsel that the Motion to Exclude would be renewed by Sunday, March 19, 2017 at noon unless the Affidavit was received. (T. 19-20; L.F. 002353)

Plaintiff filed his Motion for Sanctions Pursuant to the Court's Inherent Powers for Defendant's False Representations to the Court. (L.F. 002350) The sanctions motion set out in irrefutable detail, with supporting exhibits, SSM's intentional and deliberate misrepresentations to the trial court regarding the central issue in dispute, i.e. the cause of

Mr. Hill's fall, in an effort to gain an unfair advantage. (L.F. 002350-002366) The trial court thereby deprived Plaintiff of the right to cross-examine Dr. Brennan at his deposition and at trial. Counsel for Defendant then sent an email to counsel for Plaintiff and the trial court, asserting that he was "wrong" about the date the pictures were taken, and admitting that they were taken the very same morning that Dr. Brennan was deposed, after the sidewalk had been leveled by SSM. (L.F. 002353; T. 20-21)

There can be no doubt that SSM lied to the trial court because no lawyer would forget that they had taken a witness to the scene of an accident on the morning of the witness' deposition to take photos of the witness re-enacting the victim's conduct that purported to defeat the victim's claim. During the Motion for Sanctions hearing, (T. 9-66) SSM's counsel told the court that after reviewing "the file", they determined that the photos were taken on January 13, 2011. (T. 12) When requested to produce this information from "the file", SSM refused and stated "In response to that, your Honor, he's not entitled to our file." (T. 39)

The trial court's attempt at a "remedy" for defense counsel's gross misconduct was a ruling entered on March 20, 2017 that required SSM to inform the jury that the sidewalk had been leveled prior to Dr. Brennan's deposition and that SSM had taken Dr. Brennan to St. Clare on the morning of the deposition without informing Plaintiff's counsel. (L.F. 002380-2381) This purported "remedy" still deprived Plaintiff of the right to cross-examine Dr. Brennan about the leveling and the SSM-staged reenactment, and resulted in no consequence for defense counsel deliberately misleading the trial court and Plaintiff in an effort to gain an unfair advantage. SSM engaged in serious and

prejudicially unfair discovery misconduct and should not have been "let off the hook" by merely reciting to the jury what happened without any sanction from the court indicating that what it did was misleading to the trial court and Plaintiff and was wrong.

SSM's concealment of the change in the walkway at the time of Dr. Brennan's deposition precluded Plaintiff from effectively cross-examining Dr. Brennan regarding the condition of the walkway on the day of Mr. Hill's fall. Plaintiff could and would have asked Dr. Brennan concerning the changes to the walkway had Plaintiff been made aware of the repair of the defective sidewalk. In addition, as set out below, Plaintiff was prejudicially precluded from cross-examining Dr. Brennan in his deposition and at trial regarding the SSM-produced re-enactment of Mr. Hill's actions just prior to his fall, when SSM took him to the scene and "staged" these events.

1. PLAINTIFF'S INABILITY TO CROSS-EXAMINE DR. BRENNAN REGARDING THE LEVELING OF THE WALKWAY.

"Cross-examination is the greatest legal engine ever invented for the discovery of truth." John H. Wigmore, quoted in *Lilly v. Virginia*, 527 U.S. 116 (1999). "[W]here important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Doughty v. Dir. of Revenue*, 387 S.W.3d 383, 387 (Mo. 2013), quoting *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). The fundamental requisite of due process of the law is the opportunity to be heard, which includes an effective opportunity to confront adverse witnesses. *See Id*. In Missouri, parties in a civil case have a statutory right to cross-examine adverse witnesses: "A party to a cause, civil or criminal, against whom a witness has been called and given some

evidence, shall be entitled to cross-examine said witness … on the entire case." Mo. Ann. Stat. § 491.070. The right to cross-examine a witness who has testified for the adverse party is absolute and not a mere privilege. *Pettus v. Casey*, 358 S.W.2d 41, 44 (Mo. 1962) (Denial of right to cross-examine opposing witness was prejudicial error and justified the granting of a new trial). The right of cross–examination is regarded of such consequence that it is made one of the chief grounds for the exclusion of hearsay evidence. If the right to cross–examine an adverse witness be denied or unduly limited or restrained, the testimony given by the witness would, in a very marked degree, partake of the character of hearsay testimony. *Gurley v. St. Louis Transit Co. of St. Louis*, 259 S.W. 895, 898 (Mo.App. 1924).

It is an undisputed fact that the walkway into the St. Clare Procedure Center had been leveled prior to the time SSM took photographs marked as Exhibits C & D that were used in Dr. Brennan's deposition. (L.F. 002381) It is also undisputed that Plaintiff was not informed prior to Dr. Brennan's deposition that the Procedure Center walkway had been leveled approximately six weeks before his deposition was taken. (L.F. 002381) Defendant's Exhibits C and D, the photos used in Dr. Brennan's deposition, show that the concrete slab Mr. Hill encountered was level. Not having been told of this fact prevented counsel for Plaintiff from showing that there was a trip point in the area where Dr. Brennan said Mr. Hill was standing just prior to his fall. At his deposition, Dr. Brennan testified the walkway was "level" (L.F. 002494) and that he "did not know of any changes to the walkway since he had been there" (L.F. 002499) even though SSM's counsel *knew* at that time that the sidewalk's condition had changed.

Given the fact that SSM chose to conceal the leveling of the walkway from Plaintiff during Dr. Brennan's deposition and that SSM lied to the Court and to Plaintiff's Counsel, Plaintiff respectfully submits that the trial court committed prejudicial error in denying Plaintiff's request to exclude Dr. Brennan's testimony during trial.

2. PLAINTIFF WAS DEPRIVED OF THE RIGHT TO CROSS-EXAMINE DR. BRENNAN ABOUT SSM TAKING HIM TO THE PROCEDURE CENTER FOR A RE-ENACTMENT ON THE MORNING OF HIS DEPOSITION BY SSM'S CONCEALMENT OF THAT FACT.

It is an undisputed fact that Dr. Brennan was taken to the entrance to the St. Clare Procedure Center on the morning of April 29, 2011, by SSM, a fact that was not disclosed to Plaintiff until March 19, 2017, the day before trial began, thereby depriving Plaintiff of the right to cross-examine Dr. Brennan about exactly what happened when SSM took this 91-year old man to the scene of the fall to create a SSM-produced re-enactment without the presence of Plaintiff. (L.F. 002381)

SSM's concealment of the pre-deposition "staging" of Mr. Hill's pre-fall conduct was highly prejudicial to Plaintiff because Dr. Brennan was the only witness placing Mr. Hill on the far right side of the walkway as a pedestrian approaches the door. This testimony was contradicted by Mr. Rieder (T. 198-199) the security guard, and Ms. Owens, (T. 135) the receptionist, who both placed Mr. Hill approximately six feet from the trip point roughly in the center of the raised concrete slab. Significantly, Dr. Brennan was the **only witness** who placed Mr. Hill so far away from the trip point in an area where he couldn't have been, under any fair view of the facts absent the SSM staged re-enactment. (L.F. 000428)

If Plaintiff had been able to cross-examine Dr. Brennan about the re-enactment Plaintiff very likely could have shown that Dr. Brennan was "walked through" the re-enactment by SSM the same way SSM "walked through" his testimony during the deposition/trial testimony. (L.F. 000427) This is the obvious reason SSM did not disclose the fact that they had taken Dr. Brennan to the scene of the fall on the morning of his deposition. This testimony permitted SSM to create the false impression that Dr. Brennan had been photographed at the scene as part of an investigation done at some other time and not on the morning of his deposition.

Plaintiff also presented to the trial court significant evidence showing Dr. Brennan's compliant demeanor and demonstrating that Dr. Brennan, a 91-year old man, was subject to counsel's control and was merely parroting what he had been coached to testify by counsel for Defendant. (L.F. 000426-000428) Dr. Brennan frequently volunteered rambling testimony that supported SSM. He volunteered that the walkway was "level", (L.F. 000426-000427) while on the other hand, on cross-examination, Dr. Brennan testified that "he did not know of any changes to the walkway since he had been there" even though it is now undisputed that SSM leveled the walkway only six weeks before his deposition was taken. (L.F. 000167) If Plaintiff had known that the walkway had been leveled at the time of Dr. Brennan's deposition and that he was taken to the scene the morning of the deposition, Plaintiff could have cross-examined Dr. Brennan about these things. Because SSM did not call Dr. Brennan to trial, the prejudicial effect of Plaintiff's inability to cross-examine Dr. Brennan on these subjects could not be cured and was compounded.

SSM should not have been permitted to make Dr. Brennan its star witness without disclosing to Plaintiff that the walkway had been leveled prior to the photos (Trial Exhibits C & D) being taken and that SSM had taken him to the accident scene to re-enact Mr. Hill's pre-fall movements the morning of his deposition. (L.F. 002381) SSM told the jury that Dr. Brennan was such an important witness that Plaintiff should have called him in Plaintiff's case. SSM stated "Now, Doc Brennan was the first person on the scene. I can't understand why Doc Brennan's deposition was not shown to you in the Plaintiff's case. This is the guy, the first person to come up." (T. 1114) This disingenuous argument only served to reinforce the trial court's error in denying Plaintiff's Motion to Exclude Dr. Brennan's Testimony and Plaintiff's Motion for Sanctions.

For all of these reasons, Plaintiff respectfully submits that the trial court prejudicially erred when it denied Plaintiff's Motions to Exclude Dr. Brennan's testimony, and the associated "staged" photographs and when it denied Plaintiff's Motion for Sanctions that requested the trial court exclude Dr. Brennan's testimony as a sanction for knowingly misrepresenting material facts to the trial court and Plaintiff.

POINT RELIED ON V

THE TRIAL COURT ERRED IN OVERULING PLAINTIFF'S OBJECTION TO DR. HUSS' TESTIMONY REGARDING DEHYDRATION BECAUSE DR. HUSS' OPINED AT TRIAL THAT MR. HILL'S FALL WAS LIKELY A RESULT OF A PRE-EXISTING DEHYDRATION CONDITION IN THAT THIS WAS A NEW OPINION ON THE CENTRAL ISSUE OF THE CAUSE OF MR. HILL'S FALL AND SUBSTANTIALLY PREJUDICED PLAINTIFF'S CASE.

(A) Standard of Review.

The decision of the trial court to admit or exclude evidence is reviewed for an abuse of its discretion. *Romeo v. Jones,* 144 S.W.3d 324, 332 (Mo.App. E.D. 2004). "The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Nelson v. Waxman,* 9 S.W.3d 601, 603 (Mo. banc 2000).

(B) Argument.

The trial court prejudicially erred in overruling Plaintiff's objection to Dr. Randall Huss' new trial opinion (T. 490-493) that Mr. Hill's fall was likely a result of a pre-existing dehydration condition in that the trial court had sustained SSM's pre-trial "no new opinions" motion (L.F. 002281) and Dr. Huss did not testify at his deposition that Mr. Hill's fall was likely a result of his alleged dehydration but only "could have been" a contributing factor to Mr. Hill's fall. (T. 491)

In SSM's "omnibus" Motion in Limine, SSM sought and obtained an order preventing either party from having expert witnesses express opinions that they had not expressed during their depositions. (L.F. 002281) In Dr. Huss' deposition he testified that Mr. Hill's post-accident dehydration symptoms "could have been" a contributing factor to Mr. Hill's fall. (T. 491) Expert opinions that are expressed in terms of possibility instead of "reasonable and probable medical certainty" are nothing more than speculation and are "devoid of evidentiary value." *See Coon v. Dryden*, 46 S.W.3d 81, 91 (Mo.App. W.D. 2001) Here, SSM was permitted, over Plaintiff's objection, to elicit altered testimony from Dr. Huss that Mr. Hill's dehydration "probably" caused Mr. Hill to fall. (T. 493-494) This testimony violated the trial court's prior order and was prejudicial. The surprise prevented Plaintiff from properly addressing this new opinion. As previously indicated, the only real issue in the case was the cause of Mr. Hill's fall. Permitting Dr. Huss to offer his new opinion on causation was clearly prejudicially erroneous and this Honorable Court should therefore reverse and order a new trial.

CONCLUSION

"A picture is worth a thousand words" is an idiom referring to the universal understanding that a complex idea's essence can be more effectively conveyed with just a single image than with a description. In this case, Plaintiff and Defendant have worked for thousands of hours and spent hundreds of thousands of dollars in expenses and fees over more than seven years of litigation because SSM affirmatively chose to destroy and not preserve the "picture" of Mr. Hill's fall, which would have shown exactly what caused him to fall on September 3, 2009. In addition, SSM chose to "scrub" and "wipe"

all traces of the video from its computer system, including the metadata, which would have shown what happened to the video of the fall, knowing all along that it had a legal duty to preserve all of this evidence.

The evidence showed that: (a) there was a raised concrete slab on the entrance walkway to the procedure center; (b) as a result the entrance walkway was "dangerous"; (c) SSM knew or by using ordinary care could have known of the dangerous concrete slab, because it had been there since March 2009, but SSM never evaluated, analyzed, or inspected this dangerous condition prior to Mr. Hill's fall; (d) SSM did not remove, barricade, or warn of this dangerous condition; and (e) SSM destroyed the video and all traces of the video that showed the cause of Mr. Hill's fall. The only missing evidence was the video of Mr. Hill tripping over the raised concrete slab.

The trial court erroneously failed to hold that this misconduct constituted an admission that Mr. Hill tripped over the raised concrete slab. The trial court's erroneous failure to properly address SSM's bad faith spoliation of evidence and SSM's employment of fundamentally unfair tactics relating to Dr. Brennan's videotaped deposition and during closing argument deprived the Hill Family of their right to a fair trial. For all of these reasons, the Hill Family respectfully requests that this Honorable Court reverse the judgment and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Appellant's Substitute Brief and Appendix were served on registered counsel via the Missouri Courts E-filing System on October 30, 2018.

/s/ Douglas P. Dowd

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c), in that the brief contains 18,882 words. The word count was derived from Microsoft Word. The Brief was scanned using Norton Anti-Virus and were scanned and certified as virus free.

Respectfully submitted,

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