IN THE SUPREME COURT OF MISSOURI

TIMOTHY HILL,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC97306
	)	
SSM HEALTH CARE ST. LOUIS,	)	
	)	
Respondent.	)	

SUBSTITUTE BRIEF OF RESPONDENT SSM HEALTH CARE ST. LOUIS

Appeal from the Circuit Court of St. Louis County
The Honorable Nancy Watkins McLaughlin, Circuit Judge

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JURISDICTIONAL STATEMENT

On June 30, 2010, Plaintiff Timothy Hill filed a petition for wrongful death against Defendant SSM Health Care St. Louis in the Circuit Court of St. Louis County. L.F. 26. The plaintiff alleged that he was a surviving son of Irvin Hill. L.F. 26. The plaintiff alleged that Mr. Hill was at SSM's place of business and "was caused to fall by the uneven walking surface leading into the Procedure Center." L.F. 27. The plaintiff alleged that Mr. Hill died as a result. L.F. 27-28.

The trial court submitted the case to the jury on the plaintiff's proposed jury instruction for wrongful death. L.F. 2435, 2449. The jury returned a verdict in favor of SSM. L.F. 2452.

On March 27, 2017, the court entered judgment in favor of SSM. L.F. 2455.

On April 26, 2017, the plaintiff filed post-judgment motions. L.F. 2457, 2466.

On July 12, 1017, the trial court denied the post-judgment motions. L.F. 2684.

On July 21, 2017, the plaintiff filed a notice of appeal. L.F. 2685.

On September 25, 2018, this Court granted transfer after an opinion by the Court of Appeals. This Court has jurisdiction to consider appeals on transfer from the Court of Appeals. Mo. Const. art V, § 10.

STATEMENT OF FACTS

Rule 84.04(c) provides that an appellant's statement of facts "shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument." The plaintiff's statement of facts wholly omits the facts supporting the jury's verdict and the trial court's rulings. The relevant facts are as follows.

The plaintiff's claims

On June 30, 2010, Plaintiff Timothy Hill filed a petition for wrongful death against Defendant SSM Health Care St. Louis in the Circuit Court of St. Louis County. L.F. 26. The plaintiff alleged that he was a surviving son of Irvin Hill. L.F. 26. The plaintiff alleged that on September 3, 2009, Mr. Hill was at SSM's place of business and "was caused to fall by the uneven walking surface leading into the Procedure Center." L.F. 27. The plaintiff alleged that Mr. Hill died as a result. L.F. 27-28.

Count I of the petition was captioned "WRONGFUL DEATH/INTENTIONAL SPOLIATION OF EVIDENCE/DANGEROUS CONDITION OF PROPERTY." L.F. 26. Count II was for premises liability. L.F. 30. Count III was for "IMPAIRMENT OF A CIVIL CLAIM." L.F. 32. Counts II and III prayed for an award of damages for aggravating circumstances. L.F. 31, 33.

The trial court granted SSM's motions to dismiss Counts I and III as well as the prayers for aggravating circumstances for failure to state a claim. L.F. 65. In this appeal, the plaintiff raises no issue as to the dismissal of Counts I and III and the prayers for aggravating circumstances.

In his petition, the plaintiff claimed that SSM had improperly destroyed a video of the incident in which Mr. Hill fell. L.F. 26-33. The plaintiff provided to the trial court an incident report from SSM dated September 3, 2009, in which a security officer named Robert Rieder stated that Mr. Hill's wife, Mrs. Pat Hill, reported to him "that Mr. Hill has had recent right leg problems and had fallen just a couple days previously on a Sunday on his way to breakfast." L.F. 76.

The report stated that Mrs. Hill had reported to Mr. Rieder that Mrs. Hill dropped Mr. Hill off and left to park their car. L.F. 76. When Mr. Rieder arrived at the scene, Mr. Hill was "in front of the Procedure Center automatic door where he had fallen." *Id*. The report stated that Mr. Rieder had reviewed security video of the incident, and "it appeared to this officer that as Mr. Hill was entering the Procedure Center he lost his balance by placing his right foot on the pavement and as he brought his left foot forward he misjudged and his left foot stopped behind his right foot and his momentum carried him [prostrate] unto the ground creating the fall." L.F. 76.

The plaintiff also filed a letter to the plaintiff's counsel from Anne Turner Mardis of SSM dated February 11, 2010. L.F. 80. In her letter, Ms. Mardis acknowledged receipt of counsel's lien letter dated January 7, 2010, and stated: "According to the security officer who viewed the video of the fall, Mr. Hill was already on the slightly raised area when he fell. The area was dry and free of debris. There was no defect that caused Mr. Hill to fall." L.F. 80. Ms. Mardis stated "the digital video was not capable of being saved to a hard drive or CD at the time of Mr. Hill's fall. The video could be saved for three days at the time and then it was automatically taped over. The hospital now has

the capability to save the video to a hard drive and to a CD but, in early September of 2009 that capability did not exist." L.F. 80.

The pre-trial rulings

On October 18, 2013, the plaintiff filed a motion for partial summary judgment. L.F. 8, 219-287. In the motion, the plaintiff asserted that, due to the absence of the security video, the trial court should enter judgment in favor of the plaintiff on liability: "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 walking surface at the entrance to the Procedure Center, causing his fall, his injuries, and his death on October 27, 2009." L.F. 223. SSM filed extensive suggestions in opposition and set forth additional facts showing that summary judgment should be denied. L.F. 452-571. After additional discovery, the plaintiff renewed this motion on December 24, 2014. L.F. 11, 1262. It does not appear from the record that there was a ruling on this motion.

On October 18, 2013, the plaintiff filed "PLAINTIFF'S MOTION FOR APPLICATION OF THE SPOLIATION DOCTRINE" in which he requested the court to find, and to instruct the jury at trial, that the missing video "would have shown that Mr. Hill tripped over the unlevel walkway at the entrance to the St. Clare Procedure Center, which caused Mr. Hill to fall." L.F. 292, 326. The motion prayed for this relief:

> WHEREFORE, Plaintiff moves the Court make and enter its Order finding (1) that Defendant SSM Healthcare St. Louis intentionally spoliated or in bad faith failed to preserve the video evidence showing Irvin Hill's fall on September 3,

> 2009, at the entrance to the St. Clare Procedure Center; (2) that Defendant SSM Healthcare St. Louis intentionally spoliated security guard Robert Rieder's handwritten notes describing what he saw on the video of Mr. Hill's fall when the notes were "shredded;" (3) that Defendant has admitted as a matter of law that the video and notes, if not destroyed, would have shown that Mr. Hill tripped over the unlevel walkway at the entrance to the St. Clare Procedure Center, which caused Mr. Hill to fall; (4) that the jury be instructed accordingly at trial; (5) that Rieder's report and any testimony of Mr. Rieder relating to what he saw on the destroyed video be excluded from evidence at trial; (7) [sic] that the photographs offered by Defendant at the deposition of Dr. Brennan and his testimony based on those photographs be excluded from evidence at trial; and (7) for any other and further relief the court deems just and proper, the premises considered.

L.F. 326-327.

In this motion, the plaintiff noted Mr. Rieder testified that he did not save the video because SSM policy did not require him to do so, and that he did not save his handwritten notes of what he saw on the video because those notes were incorporated into a formal report on the incident. L.F. 298. The plaintiff stated that Mrs. Hill attempted to view the video the day after the fall, but the security team leader for SSM, Rich Cunningham, was unable to find the video. L.F. 301. The plaintiff argued that SSM provided different versions of explanations for how long the video system at this new hospital stored video before it was overwritten. L.F. 298-299. The plaintiff stated that SSM's search for the video was limited to having one IT employee, Mark Burger, look for the video. L.F. 306. The plaintiff noted that Mr. Burger testified that SSM upgraded its hard drives and reformatted them in October 2009, which removed any previous data. L.F. 1272.

SSM responded that the security video was not destroyed, but rather was automatically recorded over. L.F. 595. SSM explained the reason for "contradicting" explanations from SSM employees was that, while the system that had just been installed in this new hospital was intended to store footage for seven days at the time of the fall, it would actually record over footage at varying times on a first-in-first-out basis due to internal system factors, such as resolution settings and the recording of operating room procedures. L.F. 593-595. SSM noted that Mr. Cunningham had no memory of meeting Mrs. Hill. L.F. 593.

On August 6, 2015, the trial court (in the person of the Honorable Thomas J. Prebil, to whom the case was assigned), entered a pre-trial order stating: "The Court finds that the record does not demonstrate intentional acts by Defendant to support Plaintiff's contention that the spoliation doctrine applies. However, Mr. Rieder's description of what the video showed is not the best evidence of that event. Therefore, on this basis, and in the interest of fairness to both parties, neither that portion of Mr. Rieder's report nor his testimony describing what the video showed shall not [sic] be admissible at trial." L.F. 1650-1651.

After a trial continuance, the case was assigned to the Honorable Nancy Watkins McLaughlin. L.F. 19.

On Thursday, March 16, 2017, the plaintiff moved to exclude certain photographs of the area where Mr. Hill fell and testimony of Dr. Robert Brennan about the photos and about what he witnessed when Mr. Hill fell. L.F. 2264. The plaintiff stated that the photos should be excluded because they were taken after work was done in the area and

did not accurately represent the conditions at the time of the fall. SSM responded that the photos were merely used as demonstrative exhibits to show Mr. Hill's positioning, not to show the presence or absence of any dangerous condition. L.F. 2303-2304.

The court took up the motion about Dr. Brennan, the photos, and other pre-trial matters on Friday, March 17, 2017. L.F. 2278. The court ordered the motion "to exclude based on the photograph issue denied based on counsel's representation that the photos used in Dr. Brennan's deposition were taken on January 13, 2011." L.F. 2282.

As to the lost video, the court did not find that SSM had intentionally or in bad faith caused the video to be unavailable and ordered as follows: "Mr. Rieder cannot testify to any observations of Mr. Hill's fall as reflected in the video of the fall." L.F. 2278. The court ordered that "a redacted copy of the report will be admitted. [Mr. Rieder's observations] of 'dry, no defect, no debris' are excluded. . . . He will not be permitted to testify to any observations at the scene. Mrs. Hill's statement is admitted. He can also testify to his direct involvement with Mr. Hill." L.F. 2278.

On the plaintiff's claim of spoliation, the court's pre-trial order stated: "The Court will not give a spoliation instruction. The Court will permit evidence about spoliation and Defendant's explanation of the missing evidence. The parties will be permitted to argue the law as the Court determines." L.F. 2278-2279. The court issued an 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 that effect." L.F. 2382.

The motion for sanctions

The hearing on pre-trial motions was held at 10:00 a.m. on Friday, March 17, 2017. L.F. 2352. On the following Sunday, March 19, 2017, the plaintiff filed a motion for sanctions. L.F. 2350. The motion asserted that at the Friday hearing SSM's counsel, Tim Gearin, had represented that the photos mentioned in Dr. Brennan's deposition had been taken on January 13, 2011, by another lawyer for SSM, Dave Ott. L.F. 2352-2353. The motion stated that on Sunday morning, March 19, 2017, Mr. Gearin sent an email to the plaintiff's counsel stating that Mr. Gearin had met with Mr. Ott over the weekend and clarified when the photos were taken:

> Dear Doug,
>
> At your request Dave Ott and I have just met and looked at Exhibits A, B, C, & D from Dr. Brennan's deposition taken 4-29-11, along with the video of his deposition.
>
> I represented to Judge Watkins that all of those photos were taken on 1-13-11. I was wrong.
>
> Exhibits A&B were taken on or about 10-21-10.
>
> Exhibits C&D, which illustrate Dr. Brennan demonstrating where he saw Mr. Hill standing, were taken on April 29-2011 before Dr. Brennan's deposition. We assume this based on the clothing worn by Dr. Brennan in the photo looks the same as the clothing he wears in his deposition.
>
> We understand that you want renew your Motion to Exclude, which we continue to oppose said motion.
>
> I have copied Judge Watkins to advise her promptly of this issue.

L.F. 2353, 2366.

The plaintiff requested the trial court to exclude all of Dr. Brennan's testimony as well as all photos used in his deposition. L.F. 2355. The plaintiff also requested the court to strike SSM's affirmative defense of comparative fault. L.F. 2356.

The court took up the motion for sanctions on Monday, March 20, 2017. Tr. 9. Mr. Gearin explained the background of the sanctions issue:

> Your Honor, as a matter of background, on Thursday, at about 7:15 p.m., plaintiffs filed a motion to exclude the deposition of Dr. Brennan. The deposition had been taken on April 29, 2011. And I saw that some time later that evening, spoke with Mr. Ott, who was in New York, and our assistant, who was in Boston, tried to come up with -- and what it related to is, to exclude some pictures, which I'm going to give you the pictures in question, which are Exhibits A, B, C, and D, from Dr. Brennan's deposition.
>
> ***
>
> The fall and the incident in this case occurred on September 3rd, 2009. And concrete -- part of the concrete pad or two aprons of the concrete were changed on or about March 18, 2011, about a year and a half later. And then plaintiff's motion to exclude speaks for itself, but the issue that I -- in our -- in good faith, as we huddled together late in the evening on Friday -- Thursday evening, counsel did, we thought that the -- all four photographs were taken on or about January 13th, 2011. Okay? That's when we thought that those photographs were taken.
>
> THE COURT: January?
>
> MR. GEARIN: 13, 2011, which would be about roughly two months and a week before the changes were made to the concrete. And I represented that to the Court off the record, or in chambers. There was no -- so after that hearing on Friday, Mr. Dowd asked us to get an affidavit from Mr. Ott on that regard. The Court initially ruled that my representation was sufficient, and so we proceeded. So Mr. Ott and I met on Sunday morning with our assistant and really looked at everything much more closely. And that was our first opportunity to do so. And what we did was, we found that the statement I made to the Court that all four of those photographs were taken on January 13, 2011, that statement was incorrect. What we believe is Defendant's Exhibit A and B, which are before the Court right there, were taken on or about October 21st, 2010.

***

> And C and D were taken on or about, to the best of our information, April 29, 2011. And that is based upon -- and I put this in an email to Mr. Dowd, when we -- you know, with our best belief, and I copied the Court on it on Sunday afternoon. Our best belief is that, if you look at Exhibit D and Exhibit C, the clothing that is being worn by Dr. Brennan, it actually matches the clothing that is worn on his videotaped deposition taken later that afternoon.
>
> ***
>
> So, and the plaintiffs have their motion, and they are going to argue that. I just wanted to -- when I determined that what I told the Court on Friday was incorrect, I sent that email and, unadulterated, said I was wrong, and gave my best information as soon as I knew it. And that's what I've done.

Tr. 10-14.

As the court took up the motion for sanctions, Mr. Gearin stated: "The only other thing I'd like to say is, my notification to the Court and plaintiff's counsel that I was incorrect on what I stated to the Court was made prior to any filing of motion for sanctions. Now I'll answer any questions about anything." Tr. 16-17.

The court seriously considered the motion for sanctions: "Without having looked at -- this is obviously a very serious motion. The Court's not going to give it short shrift, due to the serious nature of the motion." Tr. 36. The court stated:

> THE COURT: And I'm not going to jump to the conclusion that when Mr. Gearin was in on Friday, that he intentionally misrepresented. I am more troubled about photos being taken on the morning of deposition, and that representation not having been made during the deposition that those photos were taken this morning, is that correct? You were in the photos this morning, correct? I am more troubled by that. I don't know that that rises to the level of an ethical violation, but I think it would have been more helpful to everyone if that disclosure had been made, so that when counsel was cross-examining Dr. Brennan, counsel knew what photos he was referencing in his cross-examination.

Tr. 44.

As to the photos identified as Exhibits A and B, the court examined documentation showing that they were taken on October 21, 2010:

> So those photos at least, taken on -- there's no reason to believe that there was any misrepresentation about those photos. Mr. Gearin, it is correct that he did say on Friday that they were taken in January of '11, but that wouldn't be a material misrepresentation here, because they were both -- whether or not it was purposeful, there would be no basis for prejudice, I assume, because October of '10 versus January '11 were both prior to the remedial measures, correct?
>
> [PLAINTIFF'S COUNSEL]: Yes, your Honor.
>
> THE COURT: All right. So there's no issue with A and B.

Tr. 65.

As to the photos identified as Exhibits C and D, the court asked the lawyers for both sides to confer:

> So without looking very carefully at this deposition, the Court's going to ask the lawyers, if the questions as to Exhibits C and D were redacted from the deposition, would the attorneys be able to come to a resolution of this matter such that we can try this lawsuit this week and have the lawyers stay in the case?
>
> [PLAINTIFF'S COUNSEL]: Yes, we can meet and confer and discuss that process.

Tr. 65-66.

After the parties conferred, the court entered an order signed by both sides denying the motion for sanctions: "Plaintiff's motion for sanctions called, heard, and denied." L.F. 2380. As to the photos mentioned in Dr. Brennan's deposition, the order stated:

> On plaintiff's motion in limine to exclude the testimony of Dr. Brennan and the photos used therein, the Court rules Exhibits A & B are admissible as well as testimony regarding the same. Exhibits C & D are also admissible as well as testimony regarding the same provided another witness first authenticates these photographs, including explaining the changes appearing in the photographs that weren't present on September 3, 2009. Defendant hereby withdraws its motion

in limine regarding subsequent remedial measures.

L.F. 2380.

At trial, Don Wojtkowski testified as to the changes between the day of the fall and the day when the photos of Dr. Brennan were taken. Tr. 984-986. Exhibits C and D were admitted. Tr. 989. Exhibits A and B were admitted without objection. Tr. 1025. In this appeal, the plaintiff raises no issue as to the admission of these exhibits.

At trial, SSM introduced Dr. Brennan's video deposition without objection. Tr. 1018, 1022-1023. Prior to playing his deposition testimony for the jury, Mr. Gearin read a stipulation agreed to by the parties:

> At this point, we're going to play the -- or show you the videotape deposition of Dr. Robert Brennan that was taken on April 29, 2011. And we've agreed to read this stipulation to you in advance of that deposition.
>
> A, the deposition of Dr. Brennan occurred on April 29, 2011. B, the photographs depicted in Exhibits C and D to Dr. Brennan's deposition were taken on the morning of April 29, 2011, prior to Dr. Brennan's deposition. Mr. David Ott was present when those photos were taken. C, Mr. Doug Dowd was not told prior to Dr. Brennan's deposition that Exhibits C and D were taken on April 29th, 2011 prior to the deposition, or B, changes were made to the walkway prior to the April 29, 2011 deposition.

Tr. 1022-1023.

The evidence at trial

In opening statement, the plaintiff's counsel told the jury that there were no witnesses to the fall: "But there was a video, a video that showed what happened to Irv Hill that day as he walked up. So that's the third reason that we're suing St. Clare Medical Center. They did not preserve the videotape and they did also not preserve the activity logs that would show when that video tape was watched, that would show when

that videotape -- who watched the videotape, when they watched the videotape, from whose desktop they watched it." Tr. 85.

The plaintiff called retired SSM security supervisor Mike Fitzhenry to testify, and he stated that the security video system automatically recorded over itself: "It spins around, and it spins around, and the video records what is going on on this record. Well, once the record gets to the end, it goes back to the beginning, and then it starts to record again. So whatever it's looking at at the time, it just writes over it. It just keeps writing over and over and over." Tr. 179. Mr. Fitzhenry testified that he tried to download the security video of Mr. Hill's fall on September 9, 2009, but it had already been recorded over. Tr. 180-181. He did not intentionally record over it. Tr. 182.

The plaintiff called Mr. Rieder to testify, and, contrary to the plaintiff's assertion that Mr. Rieder chose not to save the video of the fall, Appellant's Substitute Brief at 12, Mr. Rieder stated that he viewed the security video on the day of the fall and didn't record it because he didn't know how to do that. Tr. 220. When Mr. Rieder mentioned the fall to his supervisor Mr. Fitzhenry a few days later, he asked Mr. Fitzhenry to look at the video with him, but it had already been overwritten:

> So when you looked at it, when you looked for the surveillance footage on September 9th with Mr. Fitzhenry, did you expect it to be there?
>
> A. I did expect it to be there.
>
> Q. Okay. But it wasn't there, right?
>
> A. Correct.

Tr. 221.

Mr. Rieder testified that no one erased the security video:

> Mr. Rieder, I don't think there's been a direct accusation against you, but I want to ask you directly, did you purposely erase the surveillance footage of September 3rd, 2009?
>
> A. No, I didn't.
>
> Q. Do you know of anybody else --
>
> A. No.
>
> Q. -- who purposefully erased the surveillance footage of September 3rd, 2009?
>
> A. No, I don't.
>
> Q. Did you ask anyone to erase the surveillance footage of September 3rd, 2009?
>
> A. No, I didn't. There was no reason to.

Tr. 222.

The plaintiff called SSM senior claims specialist Ann Mardis to testify, and she stated that her investigation did not reveal that anybody intentionally destroyed or caused to be destroyed the surveillance footage from the day of the fall. Tr. 388.

The plaintiff called SSM's manager of information systems Frank Wassilak to testify. Mr. Wassilak was in charge of overseeing the purchase, installation, and configuration of the video security system at St. Clare hospital when it first opened in March of 2009. Tr. 533, 571. This was the first hospital Mr. Wassilak had been in charge of opening. Tr. 573. The initial goal was to be able to maintain security footage for seven days. Tr. 572. Mr. Wassilak noted that the security system was a "first-in/first-out" system. Tr. 554-555. As explained by Mark Burger, SSM's network analyst who looked into recovering the video footage of Mr. Hill's fall, the system is set up to overwrite the oldest video footage once the system reaches capacity. Tr. 642.

Mr. Wassilak explained that the hospital had fifty cameras on campus, including cameras in the operating rooms to monitor surgical procedures. Tr. 572-573. Because the hospital had just opened in March of 2009, SSM was still making changes and updating the system at the time Mr. Hill fell in September of 2009. Tr. 574. Although the system was supposed to preserve video for seven days, SSM discovered after Mr. Hill's fall that the system had been saving video footage from all fifty cameras, which was not the intent. Tr. 573.

As Mr. Burger elaborated, SSM intended the cameras in the operating rooms to have been set up for real-time viewing only; however, the outside vendor who installed the system had set the cameras in the operating rooms to record and save this video footage. Tr. 631. Further complicating matters, all fifty cameras throughout the hospital were set to record both motion and motionless activity, meaning the system was continuously saving video footage from all fifty cameras, regardless of whether anyone was in that portion of the hospital at the time. Tr. 631. This meant that more video footage than expected was being stored on a server with limited capacity. Tr. 642. When the server was full, the first-in/first-out system would overwrite the oldest video footage to make room for the newest. *Id*. As a result, instead of saving video for seven days, the system only saved up to three days of footage. Tr. 650. SSM was not aware of this issue before Mr. Hill's fall. Tr. 642, 577.

After discovering the issue, SSM directed the vendor to install additional hard drives to boost the capacity of the system. Tr. 545. The system now has the ability to save all video recorded at the hospital for thirty days. Tr. 576. At the time of Mr. Hill's

fall, SSM's goal was to save video for seven days. Tr. 576-577. Mr. Wassilak admitted that while they had hoped to have the capacity to save thirty days of video in 2009, SSM's budget did not allow for it, instead opting to purchase a two-million-dollar MRI machine. Tr. 576. Mr. Wassilak acknowledged that expanding the security system's capacity had deleted the activity logs on the security system, but that it was necessary to update and upgrade the system. Tr. 545-546.

Mr. Wassilak testified that security personnel did not have computer access rights to delete anything off the video server. Tr. 574-575. No one on his information systems staff deliberately deleted anything from the system. Tr. 577.

Gavin Manes, a Ph.D. in computer science, testified that the security video from the day of the fall was overwritten, not deleted. Tr. 877-878, 882-883. Dr. Manes testified that the video was not deleted by human intervention: "It's just not something a user can do to the system. So to suggest someone went into the system and deleted the video, it's just not possible." Tr. 883-884.

The condition of the walkway

At his deposition, the plaintiff testified that he took two photographs of the scene of the fall two or three days after the fall. Tr. 761-762, 775, 778. When asked at his deposition whether there were any other pictures that he took, the plaintiff said no. Tr. 778. On the fourth day of trial, the plaintiff testified that he actually took five photos of the scene of the fall and gave them to his counsel. Tr. 778.

One of the photos that was not disclosed at the plaintiff's deposition was Plaintiff's Exhibit 148, which showed a blue X in the corner by the door, where the

plaintiff testified at trial that Mr. Rieder said to the plaintiff that he saw Mr. Hill fall. App 1; Tr. 778-779. The plaintiff obtained the admission of this photo with the X into evidence on the third day of trial during his examination of one of his expert witnesses, Robert Illo. Tr. 467. The next day, during the testimony of the plaintiff, the plaintiff's counsel displayed a version of Plaintiff's Exhibit 148 that had been doctored to remove the X, and the plaintiff's counsel admitted to the court that, when he displayed Plaintiff's Exhibit 148 to the jury on the fourth day of trial during the examination of the plaintiff, it was altered to remove the X. App 2; Tr. 798. The plaintiff was made to submit the altered photo as Plaintiff's Exhibit 148A. App 2; Tr. 798-799.

Plaintiff's Exhibit 151 was another photo that the plaintiff took of the walkway and did not disclose at his deposition. App 3; Tr. 779. SSM's forensic engineering expert, George Widas, testified that Plaintiff's Exhibit 151 -- a close-up view of the walkway -- showed that there was no dangerous condition at the time of Mr. Hill's fall. Tr. 916-917. "So it's better than the standard. It is clearly not a defined hazard of significant risk with respect to tripping in September of 2009." Tr. 917-918.

Plaintiff's Exhibits 148, 148A, and 151 are included in the appendix to this brief. App 1-3.

The next morning, the plaintiff's counsel moved to strike the plaintiff's own testimony on direct examination, and instruct the jury to disregard it, because the plaintiff had failed to disclose that he had taken the three additional photographs. Tr. 791, 794-795. SSM's counsel objected: "I've never heard that before. I'd like to see a case that says that when the plaintiffs put on evidence and it goes badly for them, horribly badly

for them, that they can just withdraw that." Tr. 797. The plaintiff's motion to strike his own testimony was denied. Tr. 798.

The plaintiff claimed 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. The plaintiff's engineering expert, Keith Vidal, testified he found the slab to be elevated when he measured it on January 8, 2010, more than four months after the fall, but another of the plaintiff's experts, Robert Illo, conceded that frost heaving could cause an elevated walkway at the time that Mr. Vidal was measuring it, so that there was no way to know if it was elevated on the day of the fall: "The information we've been given doesn't give us enough data to make that determination." Tr. 454-455. Don Wojtkowski testified that the conditions described by Mr. Vidal in the winter of 2010 were not the same condition as when Mr. Hill fell. Tr. 988-989.

SSM's forensic engineering expert, George Widas, testified that even if the condition described by Mr. Vidal existed as of September 3, 2009, it did not constitute a dangerous condition. Tr. 914. Rather, Mr. Widas testified the entrance walkway was reasonably safe: "The walkway was safe." Tr. 919. Mr. Widas testified that Mr. Hill fell at the door, nine feet away from the concrete slab identified by the plaintiff, at the spot marked with an X in Plaintiff's Exhibit 148. App 1; Tr. 920-921. Several witnesses testified they traversed this walkway daily without difficulty. Tr. 136, 140, 959.

Mr. Hill told several witnesses that he did not know why he fell. Tr. 853 ("He didn't know. He couldn't tell me."), 1013. Mrs. Hill testified that her husband suffered another fall four days before the fall at issue. Tr. 854-855. Multiple witnesses, including

Mrs. Hill, testified they responded immediately after the fall and found Mr. Hill at or near the Procedure Center doors, approximately nine feet from the alleged trip point. Tr. 196-197, 201, 856, 1022-1023; Defendant's Exhibit Y at 15.

Mr. Hill's condition

Dr. Randall Huss was a physician specializing in geriatric medicine, and he testified without objection that at the time of the fall in 2009 Mr. Hill suffered from "near end-stage" congestive heart failure. Tr. 469-470, 481-482. Dr. Huss testified without objection that Mr. Hill had a mechanical heart valve that was placed in the summer of 2007, at the same time as coronary artery bypass surgery. Tr. 482.

Dr. Huss testified without objection about the problems that Mr. Hill experienced with his legs after the coronary surgery in 2007:

> I know he had some trouble recovering from those. Had a very frustrating course of rehabilitation with the weakness in his legs from that, and was very frustrated with that. But it became soon evident that he also suffered from numbness and poor gait, difficulty walking, numbness in his legs, they didn't feel right. And evaluation led to the diagnosis of idiopathic peripheral neuropathy, which means the nerve endings in the legs have gone dead, basically. The things that give you the sense of balance that you need to stay upright, and tell your muscles to do what they need to do in response to, if you're a little bit off balance.

Tr. 482. Dr. Huss testified at length and without objection about the adverse effect of peripheral neuropathy on a patient's sense of balance. Tr. 483-485. As a result, Mr. Hill had trouble walking. Tr. 500.

Dr. Huss testified without objection that Mr. Hill also had chronic kidney disease, severe pulmonary hypertension, and gallbladder disease. Tr. 485-486. Dr. Huss testified without objection that Mr. Hill was too ill to have surgery to address his gallbladder

disease. Tr. 486-487. Due to Mr. Hill's gravely ill health, Dr. Huss testified without objection that Mr. Hill's life expectancy at the time of the fall was "weeks to months at the most. Probably in the -- you know, in the weeks range, up to three months, but on the very outside, six months." Tr. 496.

Dr. Huss testified without objection that Mr. Hill was on medication that caused him to be severely dehydrated at the time of his fall. Tr. 488-490. When there was an objection to a question as to whether the dehydration caused or directly contributed to cause Mr. Hill's fall, counsel for SSM pointed to the portion of Dr. Huss's deposition where he opined that Mr. Hill suffered from low blood pressure (or static hypotension) due to dehydration. Tr. 490-493. The court overruled the objection, and Dr. Huss stated: "I believe that degree of dehydration almost certainly was a contributing factor to his fall." Tr. 493. Dr. Huss testified without objection that "because of that peripheral neuropathy, the leg muscles don't always do exactly what you want them to do, and it may have been just been a general weakness. But certainly if you're running around that dehydrated, you're very likely when you're upright to get light-headed, faint, and kind of stagger down, or go down." Tr. 495.

Dr. Huss testified without objection that someone like Mr. Hill would not move forward after stumbling: "And someone with peripheral neuropathy, their brain says, make that step, it isn't going to happen. They'll drop right where they are. If they stumbled right there, they're going to be going forward, they will fall forward, and they'll be exactly -- their feet will be right where they stumbled." Tr. 505-506.

The jury instructions

At the instruction conference, the trial court accepted the plaintiff's proposed verdict director, Instruction 7, over SSM's objection. Tr. 1049-1055. The court accepted SSM's converse instruction, Instruction 8. Tr. 1055; L.F. 2436, 2411. The following colloquy was held relating to SSM's converse instruction, Instruction 8:

> [THE COURT]: The next instruction I have is MAI 37.04 and MAI 33.15(3) submitted by defendant. That is Instruction Number 8. In your verdict you must not assess percentage of fault to defendant SSM Healthcare St. Louis unless you believe SSM Healthcare St. Louis failed to use ordinary care as submitted in Instruction Number blank. And such failure directly caused or directly contributed to cause the death of Irvin Hill.
>
> [PLAINTIFF'S COUNSEL]: I think that tracks the language.
>
> THE COURT: All right.
>
> [SSM'S COUNSEL]: It does.
>
> THE COURT: That will be Instruction Number 8. And then it says, as submitted in Instruction Number, that's Instruction Number 7. Correct?
>
> [SSM'S COUNSEL]: Correct, the verdict director. Yes, your Honor.

Tr. 1055.

The next day, before the jury was instructed, the plaintiff raised an objection to Instruction 8:

> [PLAINTIFF'S COUNSEL]: Just briefly, Judge, our objection is is that the law in Missouri under MAI3301 is mandatory and that the -- a converse, which purports to be a true converse, has to mirror the verdict directing language on any element that the defendant is challenging as being insufficiently proved, and the court has already indicated that you don't agree with us on that, and that's -- so that's our position.
>
> [SSM'S COUNSEL]: And briefly, Your Honor, the defense's position is 3301, H, it states defendant has the option to converse one or more elements to verdict director. The only

> limitation on defense's right to converse as much or as little of the verdict director as desired is with respect to disjunctive submissions.
>
> The elements in this case are conjunctive, not disjunctive; therefore, we believe defendant has the right to converse as much or as little of the verdict director as they so choose.
>
> THE COURT: The court is going to offer the defendant's converse instruction number 8, and I believe it should refer to instruction number 7 within that, is that correct?
>
> [SSM'S COUNSEL]: You are right, Your Honor.

Tr. 1068-1069.

The closing argument

In his closing argument, the plaintiff's counsel stated to the jury what "the law provides" and what "the law says" as to an adverse inference from SSM's inability to obtain the security video of Mr. Hill's fall:

> Well, here we are after seven years, 27 depositions in a fall-down case. Thousands of documents filed with this court. You seen all these boxes in this court over the last week, thousands and thousands of pages of work. And now we know what happened. We know the answer to what happened, because the law provides it.
>
> The answer is that, if that video did not show that Mr. Hill tripped over that raised slab going into that procedure center, that video would have been in. You would have seen the video.
>
> The law says it's called an adverse inference. It's just common sense. It's like walking through the snow. You don't have to see somebody walking through the snow in the front yard if you see -- if you see footprints in the snow, you are entitled to infer from the footprint that somebody walked through the snow.
>
> In this case, you are entitled to infer from the fact that they destroyed or failed to preserve that video, that the video would have shown that Mr. Hill tripped and fell on that raised slab. You are entitled to believe that based on that fact alone. That's called an adverse inference.

Tr. 1078-1079.

In his closing argument, the plaintiff's counsel also stated to the jury that the court's instructions included information about an adverse inference:

> So in any event, now, on the adverse inference, as you recall, there was -- in the instruction that you are given, it's instruction number 11, I believe -- no, it's the behavior of the witness, his credibility, instruction number 1, paragraph 11, deliberations.

Tr. 1078-1079, 1086.

In response, SSM's counsel reminded the jury that the court had not provided any jury instruction on the law of spoliation of evidence:

> 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.
>
> You are not -- in the instructions that -- here are the instructions which I will leave up here. 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.
>
> [PLAINTIFF'S COUNSEL]: Well, Judge, I object to that. He knows that we can't give an instruction on that. I think that's -- I think that's improper.
>
> THE COURT: Overruled.
>
> ***
>
> The lost surveillance and video log, let me just very quickly, because I have about six minutes left, I think. You've heard about our security staff. Look, they are just regular people, regular guys, Vietnam vets. They are, you know, at work. Robert Rieder, Officer Rieder knew Mrs. Hill. He did investigate. He did a good investigation. He didn't preserve the video log that day. He didn't know how to preserve video log that day.
>
> But the important thing is he came back six days later. . . . But the first time that Mr. Fitzhenry and Mr. Rieder got

> together to prepare the final reports and have it typed up and to look at the surveillance logs, it was gone. That was at day six.
>
> Every expert in this case says, "You know what, looking at the calculations, it's going to be gone. Only have it for about four day."
>
> We know that Rich Cunningham tried to look for the video when he had Mrs. Hill there a couple of days, day after the fall, a couple days after the fall. And we heard about on a new system, even plaintiff's expert Puleo said, searching for video on the system is much more difficult than even saving it," and that's part of the problem we have. And we paid the price for that.

Tr. 1102-1103, 1118-1119.

The trial court submitted the case to the jury on the plaintiff's proposed jury instruction for wrongful death. L.F. 2435, 2449. The jury returned a verdict in favor of SSM. L.F. 2452.

ARGUMENT

The plaintiff's brief lacks any showing of error or abuse of discretion by the trial court. The plaintiff's incomplete and argumentative statement of facts violates Rule 84.04(c) and resolutely ignores the evidence detailed above that both supports the trial court's judgment and the jury's verdict and refutes the plaintiff's points relied on.

The judgment should be affirmed for three main reasons. First, this is not a spoliation case. Judge Watkins McLaughlin never found that SSM committed any intentional or bad faith spoliation of evidence. Judge Prebil explicitly found that the record did not support a finding of spoliation against SSM: "The Court finds that the record does not demonstrate intentional acts by Defendant to support Plaintiff's contention that the spoliation doctrine applies." L.F. 1650. The evidence set forth above amply supports this finding. In his substitute brief, the plaintiff refuses to set forth the evidence that supports the rulings of these experienced trial judges. No fair reading of the record supports the plaintiff's claim for reversal of the judgment.

Second, the plaintiff did not preserve the spoliation claims that he advances in his substitute brief. He effectively seeks a partial directed verdict or partial judgment notwithstanding the verdict as to liability, but he never preserved a claim to any such relief in the trial court. He asserts that the Court should authorize an adverse-inference instruction, but he never preserved any such claim in the trial court. Rule 84.04(e) requires that, for each claim of error, an appellant's argument must include a concise statement describing whether the error was preserved for appellate review and, if so, how it was preserved. The plaintiff's brief provides no such statements.

Third, the plaintiff is incorrect in declaring that "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." *See* Appellant's Substitute Brief at 23. To the contrary, these were all controverted issues, and the plaintiff failed to establish ***any*** of the elements of his claim. As shown by the plaintiff's own key evidence, there was no dangerous condition at SSM's facility on the day that Mr. Hill fell, and Mr. Hill fell nine feet away from the alleged but unproven condition. Plaintiff's Exhibits 148, 148A, and 151 show the condition of the walkway immediately after the fall. App 1-3. These exhibits demonstrate that, ***at the time of the fall***, there was no dangerous condition, and the plaintiff's only evidence of a different condition was from months later, when his own expert conceded that the walkway may have moved due to frost heaving so that there was no way to know if it was elevated on the day of the fall. Tr. 454-455, 988-989, 914, 919, 136, 140, 959. And Mr. Hill fell by the entrance doors to the building, nine feet after he safely passed the location identified by the plaintiff. Plaintiff's Exhibit 148; Defendant's Exhibit Y at 15; App 1; Tr. 920-921, 196-197, 201, 856, 1022-1023. The plaintiff calls so loudly for an adverse inference because he cannot fill these evidentiary gaps in his case.

The plaintiff's other arguments are equally meritless. His points relied on should be denied, and the judgment of the trial court should be affirmed.

I. The plaintiff's Point I should be denied.

The plaintiff ignores that the trial court granted him extensive relief due to the absence of the security video. The court ordered that the security officer who saw the video would not be allowed to testify about what he saw: "Mr. Rieder cannot testify to any observations of Mr. Hill's fall as reflected in the video of the fall." L.F. 2278. The court redacted the officer's report. L.F. 2278. The court permitted the plaintiff to put on extensive evidence about alleged spoliation and to argue about spoliation at length in opening statement and closing argument. L.F. 2278-2279; Tr. 85, Tr. 1078-1079. The court ordered that SSM "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." L.F. 2382.

Under the best evidence rule, testimony about what a witness saw on surveillance video can be inadmissible when the testimony is offered to prove the contents of a video that has not been produced. *See, e.g., State v. Stufflebean,* 548 S.W.3d 334, 350 (Mo. App. 2018). The court precluded evidence about what was on the missing video.

All of these rulings were within the trial court's discretion. Indeed, the trial court would have been well within its discretion to deny any relief on the plaintiff's claim of spoliation. The plaintiff never proved that SSM intentionally, deceitfully, fraudulently, or in bad faith destroyed the surveillance video. Rather, it was shown by the testimony of SSM's security officer, his supervisor, SSM's loss prevention manager, SSM's information technology manager, and a Ph.D. in computer science that the video was overwritten in the course of business and not deleted as a result of human intervention. Tr. 179, 182, 220-222, 388, 532-534, 570-577, 877-878, 882-884.

In the Court of Appeals, the plaintiff declared that the trial court was somehow required, as a matter of law, to enter an order "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 to the procedure center causing him to fall, strike his head and die." Appellant's Brief at 23. Contrary to Rule 83.08(b), which provides that a substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief," the plaintiff has changed his argument in this Court, declaring that the trial court should have entered an order "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." Appellant's Substitute Brief at 24.

Either way, the plaintiff never established that there was a "raised slab" or any dangerous condition on September 3, 2009, or that Mr. Hill fell anywhere near the location identified by the plaintiff. ***At trial, the plaintiff's own photographs from very shortly after the fall showed that there was no "raised slab."*** Plaintiff's Exhibit 148; Plaintiff's Exhibit 151; App 1, 3. The plaintiff's engineering expert only measured the area on January 8, 2010, more than four months after the fall, and another of the plaintiff's experts conceded that frost heaving due to cold weather made it so that there was no way to know if it was elevated on the day of the fall. Tr. 454-455. The conditions described in the winter of 2010 were not the same condition as when Mr. Hill fell. Tr. 988-989. Plaintiff's Exhibit 148 shows that Mr. Hill fell nine feet away from the location identified by the plaintiff, a fact confirmed by witness testimony. App 1; Defendant's Exhibit Y at 15; Tr. 920-921, 196-197, 201, 856, 1022-1023.

A. The standard of review is abuse of discretion.

The plaintiff is incorrect in declaring that the trial court's discretionary ruling on the plaintiff's spoliation motion should be reviewed de novo as a question of law. In the plaintiff's only cited case on the standard of review, there was no mention of spoliation, and the Court stated that the issue on appeal was whether a JNOV was proper "under sovereign immunity or the public duty doctrine." *See Jungerman v. City of Raytown,* 925 S.W.2d 202, 204 (Mo. banc 1996). This case does not involve a JNOV, sovereign immunity, or the public duty doctrine. *Jungerman* has nothing to say about this case. And the plaintiff fails to note that *Jungerman* was abrogated in *Southers v. City of Farmington*, 263 S.W.3d 603 (Mo. banc 2008).

Rather, as shown by several ***other*** cases cited by the plaintiff, an appellate court defers to the trial court's discretion on questions of spoliation. *Marmaduke v. CBL & Assocs. Mgmt., Inc.,* 521 S.W.3d 257, 274 (Mo. App. 2017); *Pisoni v. Steak 'N Shake Operations, Inc.,* 468 S.W.3d 922, 928 (Mo. App. 2015) (holding "Appellant's additional requested remedies exceeded the relief authorized by the spoliation doctrine, and the trial court did not abuse its discretion in denying these requests."); *Carroll v. Kelsey,* 234 S.W.3d 559, 566 (Mo. App. 2007).

The plaintiff's Point I does not seek relief from the trial court's denial of his two motions for new trial. *See* L.F. 2457, 2466, 2684. The standard of review for a trial court's order denying a motion for a new trial is also abuse of discretion. *Stewart v. Partamian,* 465 S.W.3d 51, 56 (Mo. banc 2015).

An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances and is so unreasonable and arbitrary that it shocks one's sense of justice and indicates a lack of careful consideration. *Id.* In considering whether the trial court abused its discretion, appellate courts view the facts in the light most favorable to the trial court's order. *Id.*

SSM's brief in the Court of Appeals pointed all of this out to the plaintiff, yet the plaintiff continues to misstate the standard of review.

B. The plaintiff did not preserve his arguments in Point I.

In addition to being wrong on the merits, as explained in detail below, the plaintiff's arguments in Point I are not properly before the Court because the plaintiff failed to preserve them for review.

1. Interlocutory rulings are not reviewable.

In his Point I, the plaintiff purports to appeal from the trial court's ruling on his pre-trial motion for application of the spoliation doctrine. This is not an appealable order. The ruling is akin to a ruling on a motion in limine, which is not appealable: "A ruling in limine is interlocutory only and is subject to change during the course of the trial. The motion in limine, in and of itself, preserves nothing for appeal." *See Smith v. Brown & Williamson Tobacco Corp.,* 410 S.W.3d 623, 636 (Mo. banc 2013).

The order that the plaintiff now attempts to appeal was entered before trial and addressed numerous evidentiary motions. L.F. 2278-2282. The language of the order reflects the tentative nature of an interlocutory ruling, allowing the parties to introduce evidence supporting and refuting the plaintiff's spoliation claims and "to argue the law as

the Court determines." L.F. 2279. The trial court could have altered its pre-trial ruling at any time during trial. *See Smith*, 410 S.W.3d at 636. The plaintiff never renewed his spoliation argument during trial as a motion, objection, offer of proof, or otherwise. The pre-trial ruling that the plaintiff seeks to challenge was undoubtedly interlocutory and cannot be appealed.

2. There was no motion for JNOV or a directed verdict.

Further, while the plaintiff's Point I is styled as an appeal of the trial court's denial of his motion for application of the spoliation doctrine, the plaintiff effectively argues the court should have directed a partial verdict as to liability. This issue is not preserved.

The plaintiff argues that the trial court should have found that the plaintiff was "entitled" to a ruling that "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" and "that the dangerous walkway caused Mr. Hill's fall." Appellant's Substitute Brief at 24. In this Court, the plaintiff improperly included in the appendix to his brief a proposed instruction that would require the jury to find in his favor: "As a result of the Defendant's failure to produce the video of Mr. Hill's fall, you are instructed to infer that the video would have shown that Mr. Hill tripped over the raised slab of concrete at the entrance to the Procedure Center at St. Clare's Health Center." The plaintiff is effectively arguing that the trial court should have directed a partial verdict on liability.

To preserve the argument that the trial court should direct a verdict, a party must move to do so prior to submission to the jury. *Heifetz v. Apex Clayton, Inc.,* 554 S.W.3d 389, 395 (Mo. banc 2018). A motion for a directed verdict must be renewed in a motion

for JNOV in order to preserve the issue for appellate review. *Id.* Because the plaintiff failed to move for directed verdict at the close of the evidence and failed to file a motion for JNOV, he has not preserved his argument in Point I.

3. The plaintiff preserved no spoliation-instruction issues.

Likewise, the plaintiff failed to preserve his argument that the trial court should have granted the plaintiff an adverse-inference instruction as to spoliation. "Any party may, and a party with the burden of proof on an issue shall, submit written requests for instructions on the law applicable to the issues. Requests shall be submitted prior to an instruction conference or at such time as the court directs." Rule 70.02(a). The plaintiff made no request for an adverse-inference instruction on spoliation.

Further, the plaintiff failed to object when the trial court submitted the jury instructions without an adverse-inference instruction on spoliation. "No party may assign as error the giving or failure to give instructions unless that party objects thereto on the record during the instructions conference, stating distinctly the matter objected to and the grounds of the objection. The objections must also be raised in the motion for new trial in accordance with Rule 78.07." Rule 70.03. The plaintiff did not object to the lack of such an instruction at the instruction conference, and he did not include such an issue in his motion for new trial.

Indeed, the plaintiff concedes that Missouri law forbids a spoliation or adverse-inference instruction. Appellant's Substitute Brief at 49. Accordingly, the plaintiff has waived any issue as to whether an instruction should have been given.

C. The trial court did not abuse its discretion.

The cases cited by the plaintiff show that the trial court did not abuse its discretion in its orders relating to the missing video. There was no spoliation, and the court certainly was not ***required*** to grant the plaintiff more relief or order severe sanctions against SSM. As shown by the plaintiff's cited cases, discussed in detail below, Missouri appellate courts defer to trial courts and affirm judgments as to the scope of proper relief even when spoliation has been shown (as it was not in this case).

Contrary to the plaintiff's implication, there is no presumption that the harshest possible sanction -- or any particular sanction -- should be imposed. The plaintiff's cited authority emphasizes that a court considering a claim of spoliation should always employ the least severe sanction necessary: "Although different remedies are appropriate based on the facts of a particular case, courts agree that they should impose the least severe sanction necessary to remedy prejudice to the non-spoliating party." Margaret M. Koesel & Tracey L. Turnbull, *Spoliation of Evidence: Sanctions and Remedies for Destruction of Evidence in Civil Litigation* 53-54 (2d ed. 2006); *see Dorchester Fin. Holdings Corp. v. Banco BRJ S.A.,* 304 F.R.D. 178, 185 (S.D.N.Y. 2014) (it is well accepted that a court should always impose the least harsh sanction that can provide an adequate remedy).

1. *Pisoni.*

In the plaintiff's cited case *Pisoni v. Steak 'N Shake Operations, Inc.,* 468 S.W.3d 922 (Mo. App. 2015), a customer slipped and fell on a wet floor in a restaurant, completed an incident report immediately after the fall, and later filed a petition for negligence and premises liability against the restaurant. During discovery, the customer

requested a copy of video footage of the fall. *Id*. at 924. The restaurant responded that the video was no longer available, the footage was automatically recorded over a short time after the incident, and a DVD copy was not made. *Id*.

The customer in *Pisoni* moved for relief based on the spoliation doctrine, requesting a jury instruction that the restaurant should be held to admit (a) that the floor where she fell was wet, causing her fall, (b) that the floor was wet because a restaurant employee mopped it, and (c) that there were no wet floor signs present. *Id.* at 925. The customer also asked the circuit court to prohibit the restaurant from offering testimony about the disputed facts the video would have shown. *Id.*

The circuit court in *Pisoni* refused to submit any adverse-inference instruction to the jury, but ruled that the restaurant would not be able to present witness testimony regarding what they saw on the video. *Id*. The circuit court also granted the customer permission to argue the adverse inference from the missing videotape in closing argument, which the customer did. *Id.*

On appeal, the court in *Pisoni* held that the circuit court had not abused its discretion in its spoliation ruling. *Id.* at 928. The court noted that spoliation is the intentional act of destruction or significant alteration of evidence. *Id.* at 926. "The destructive act must be intentional; mere negligent destruction of evidence does not constitute spoliation." *Id.* The spoliator must destroy or alter the evidence under circumstances indicating fraud, deceit, or bad faith. *Id.* Under certain circumstances the spoliator's failure to adequately explain the evidence's destruction may give rise to an

adverse inference. *Id.* The party seeking to invoke the doctrine bears the burden of making a prima facie showing of the spoliator's fraudulent intent. *Id.*

If the trial court finds spoliation of evidence occurred and grants a party relief, the spoliation doctrine provides that the court may grant an adverse evidentiary inference in favor of the opposing party as a remedy. *Id.* The adverse inference holds the spoliator to admit the missing evidence would have been unfavorable to its position, but "does not prove the opposing party's case. Instead, the spoliator is left to determine whether any remaining evidence exists to support his or her claim in the face of the inference." *Id.* (quoting *Schneider v. G. Guilliams, Inc.*, 976 S.W.2d 522, 526 (Mo. App. 1998)).

In *Pisoni,* the court held that, having prohibited the restaurant from presenting evidence as to what the videotape showed and having granted the customer permission to argue the adverse inference from the missing videotape in closing argument, no additional sanctions were required. *Id.* at 927-928. In particular, the court rejected the argument that the restaurant should have been prevented from presenting testimony from a restaurant employee who witnessed the customer's fall because a spoliator is still permitted to put on any remaining evidence on the claim. *Id.* at 928.

Thus, the court in *Pisoni* rejected the ***exact*** argument put forth by the plaintiff in this case. SSM could not properly be held to be barred from contesting the facts of this case with evidence besides the security video, and the trial court did not abuse its discretion in its ruling.

2. *DeGraffenreid.*

Similarly, the plaintiff is mistaken in relying on *DeGraffenreid v. R.L. Hannah Trucking Co.,* 80 S.W.3d 866 (Mo. App. 2002) (overruled on other grounds by *Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220, 223, 225 (Mo. banc 2003)).

In *DeGraffenreid*, a truck driver suffered a stroke in his parked truck and filed a claim for workers' compensation, alleging the trucking company forced its drivers to drive more hours than federal regulations allowed, causing stress that contributed to the stroke. *Id.* at 870. In discovery, the driver sought a set of telephone logs maintained by the trucking company allegedly demonstrating the federal violation, but without explanation the trucking company failed to provide the complete logs. *Id.* at 873-874. The workers' compensation commission found the trucking company's failure to explain the missing logs triggered the spoliation doctrine, and as a result the trucking company was required to admit that driving in excess of federal regulations was a substantial factor in the driver's stroke, entitling him to benefits. *Id.* at 871.

On appeal, the Court of Appeals agreed that the spoliation doctrine was triggered, but held that the commission's remedy was excessive. The Court held that the spoliator is deemed to admit only that the document in question would state what the opposing party claims it states, ***not the ultimate conclusion of the claim***. *Id.* at 877-878. Thus, it would be presumed that the driver drove in excess of the hours allowed by federal regulations, but the trucking company did not admit that the violation was a substantial factor in the stroke, and the driver was not automatically entitled to benefits. *Id.* at 878.

In this case, the plaintiff seeks the same result rejected in *DeGraffenreid*, arguing that the trial court should have entered an order holding that SSM should be held to admit that Mr. Hill tripped over a raised slab of concrete, causing him to fall, strike his head, and die. As in *DeGraffenreid*, the plaintiff's request in this case goes too far, and it would have been reversible error for the trial court to grant it.

3. *Marmaduke.*

The plaintiff is not aided by his reliance on *Marmaduke v. CBL & Assocs. Mgmt., Inc.,* 521 S.W.3d 257 (Mo. App. 2017), in which a shopper walking through the common area of a mall slipped and fell on cheese sauce that had apparently been spilled on the floor. Depositions revealed that, contrary to the mall's discovery responses, the mall had the capacity to create dispatch logs and video recordings on the day of the fall, and video recordings were made.

The shopper filed a motion for sanctions seeking an adverse evidentiary inference against the mall, seeking to be able to tell the jury that it may draw an adverse inference to the effect that, had the video recording been maintained it would show the cheese spill on the floor for some period of time prior to the fall, the fall itself, the response of the mall employees, and the shopper's actions before and after the fall. *Id*. at 263. The shopper also requested the court to bar the mall from making any argument or presenting any evidence that employees were not aware of the cheese spill prior to the fall. *Id*.

The trial court held that, while the shopper was not entitled to an adverse-inference instruction, she could question witnesses on the subject of the mall's usual practice of maintaining dispatch logs and the use of video cameras related to incidents like her fall.

Id. at 264. The court allowed the shopper to read to the jury the mall's contradictory discovery responses about the absence of dispatch logs or video of the fall, and the shopper was allowed to assert in closing argument that the mall had security personnel who monitored the video screens and would have seen the cheese spill. *Id.* at 264-265. The shopper also was allowed to argue that the mall lied about not having evidence of a dispatch log and video recording and that the mall allowed it to be destroyed when they should have preserved it because they were on notice of her claim. *Id.* at 265. The shopper argued that the jury could infer that the mall did not keep the video because it showed something unfavorable to the defense. *Id.* The mall was allowed to argue that it did not destroy any evidence. *Id.*

In *Marmaduke,* the court affirmed the circuit court's judgment, emphasizing the trial court's discretion to fashion a remedy, and holding that "Missouri has opted to allow the trial court to address the issue by impacting the evidence the jury may hear regarding the subject matter of the spoliated evidence. In doing so, courts have been cautioned to tailor the remedy to the problem, and to take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms." *Id.* at 270 (internal quotation omitted). In a case of spoliation, an adverse inference holds the spoliator to admit that the missing evidence would have been unfavorable to its position, but that admission is limited specifically to that evidentiary question, and the party asserting the doctrine is not entitled to any further inferences as a matter of law regarding that evidence. *Id.* The adverse inference does not prove the opposing party's case. *Id.* The court in *Marmaduke* found that the circuit court "did not abuse its discretion." *Id*. at 272.

4. *Schneider*

It is mystifying that the plaintiff purports to rely on *Schneider v. G. Guilliams, Inc.,* 976 S.W.2d 522 (Mo. App. 1998), which reverses a spoliation sanction, emphasizes that destruction of evidence must be intentional to rise to the level of spoliation, and makes clear that a spoliation ruling cannot result in a judgment in favor of the opposing party. In *Schneider*, homeowners sued a contractor that installed a furnace at their home, which was later destroyed by a fire. *Id*. at 524. The homeowners claimed that parts of the furnace were negligently installed, including the flue base, the pipe connector, and the flue. *Id.* at 525. These parts were discarded by inspectors for the homeowners' insurance company. *Id.* The trial court entered summary judgment in favor of the contractor on the basis of spoliation of evidence, holding that, without the missing parts, the plaintiff would be unable to show the cause of the fire. *Id.*

This judgment was reversed because spoliation only applies when a party "has intentionally spoliated evidence, indicating fraud and a desire to suppress the truth." *Id.* at 526. "Specifically, the spoliation doctrine and the resulting adverse inference punishes the spoliators by holding them to admit that the destroyed evidence would have been unfavorable to their position. ***The adverse inference, however, does not prove the opposing party's case.***" *Id.* (emphasis added). In *Schneider*, the court stated that the mere loss of the furnace components did not give rise to a presumption of spoliation and that spoliation cannot entitle the opposing party to judgment in its favor:

> Defendants failed to show that [the homeowners or their insurer] intentionally destroyed or discarded the flue components. Neither did Defendants present any evidence that a party in bad faith directed, encouraged, or in any other

> way took part in destroying evidence. Instead, they alleged only that [the insurer's] retained expert, Mr. Richardson, discarded such evidence. In the deposition offered by Defendants, Mr. Richardson stated that the disposal of the evidence was unintentional and that he was not directed to dispose of the evidence. Without any evidence in the record manifesting bad faith or intent to defraud on the part of a party, application of the spoliation doctrine is inapplicable. We note, however, that our holding does not preclude Defendants from offering evidence indicating bad faith on remand if such evidence exists. If, however, Defendants succeed in proving spoliation and become entitled to an adverse inference, Appellant must be allowed to pursue her claim and attempt to overcome the adverse inference as she may determine remaining evidence allows.

Id. at 528.

Thus, *Schneider* is squarely contrary to the plaintiff's argument, most particularly the plaintiff's contention that he somehow came to be entitled to a judgment in his favor. Notably, the plaintiff in this case filed a motion for summary judgment just like the one in *Schneider*, but he did not obtain a ruling on it. L.F. 219. Under *Schneider*, summary judgment would have been denied. Similarly, the plaintiff's request in this Court for relief akin to a directed verdict or JNOV should be denied.

D. The plaintiff's cited cases support affirmance.

Marmaduke, Pisoni, and *DeGraffenreid* all make it clear that a trial court has discretion to fashion an appropriate remedy in a case of spoliation. Further, if SSM had committed spoliation (which it did not), these cases confirm the propriety of the trial court's remedies for the lost video evidence in this case -- exclusion of testimony about the missing video, closing argument about an adverse inference based on the absence, etc. ***The trial court in this case imposed the same restrictions that were affirmed in the plaintiff's cited cases -- Marmaduke, Pisoni, and DeGraffenreid.***

The plaintiff's cited cases make it clear that an "adverse inference does not prove the opposing party's case." *Schneider,* 976 S.W.2d at 526; *Marmaduke,* 521 S.W.3d at 270; *Pisoni,* 468 S.W.3d at 926; *see DeGraffenreid,* 80 S.W.3d at 875 (inference does not admit "the ultimate conclusion" of opposing party's claim). The plaintiff's argument that the trial court was required to find against SSM is squarely contrary to the law. Even if the plaintiff had met his burden to show intentional destruction of evidence, fraud, deceit, or bad faith on SSM's part -- which the trial court rejected and which SSM continues to deny -- the plaintiff would not have been entitled to an order holding that, as a matter of law, an allegedly dangerous walkway caused Mr. Hill's fall.

The plaintiff provides a list of this Court's cases recognizing some form of the spoliation doctrine back to 1845, but these cases do not support reversal of the trial court's judgment. Indeed, as far back as 1874, this Court in *Pomeroy v. Benton,* cautioned against application of the spoliation doctrine as the plaintiff requests: "To say that once you prove spoliation you may take it for granted that the thing spoliated was what it is alleged it was, may be going a great length in many cases." 57 Mo. 531, 533 (1874) (internal quotation omitted). The Court in *Pomeroy,* although citing spoliation generally in its syllabus before the opinion, refrained from discussing whether spoliation applied in the case and noted that "the rule is certainly one of great stringency, and therefore should not be resorted to but in extreme cases, and where other means of proof fail." *Id.* at 549. Similarly, in *State ex rel. Darland v. Porter,* 9 Mo. 356 (1845), the Court merely mentioned the spoliation doctrine, never discussing or applying it.

In both *Pomeroy v. Benton,* 77 Mo. 64 (1882), and *Haid v. Prendiville,* 238 S.W. 452 (Mo. 1921), the Court found that the destruction of evidence was deliberate and intentional. In *Haid,* the Court held there was conclusive evidence that the defendant had destroyed evidence and fabricated new evidence. *Haid,* 238 S.W. 452 at 453. The trial court in this case never found any spoliation on the part of SSM, much less a deliberate attempt to destroy or fabricate evidence.

In *Hays v. Bayliss,* 82 Mo. 209 (1884), the Court never applied the spoliation doctrine, but actually passed upon even reviewing the judgment because of the lack of evidence presented and the condition some of that evidence was in at the hands of the appellant. The books of the partnership -- in the sole possession of the appellant -- were mutilated and torn, making it difficult for the circuit court's referee to come to a decision regarding damages. *Id.* at 212. The Court held that because every inference favorable to the respondent should have been drawn, had the referee come to a decision less favorable to the appellant, the Court would not interfere with the judgment because there was nothing for it to review. *Id*.

While *Hunt v. Sanders,* 232 S.W. 456, 459 (Mo. 1921), noted the general presumption against a spoliator where a party "willfully" destroys a document, it held that the trial court erred in instructing the jury on this presumption because "it is for the jury to pass on the weight of the evidence and credibility of the witnesses." Similarly, in *Gaugh v. Gaugh,* 11 S.W.2d 729, 748 (Mo. 1928), although the Court held that a finding of spoliation "will establish the other party's demand to be just," *DeGraffenreid*

explained that this line, in light of *Garrett*, did not require a finding of spoliation to result in an entry of judgment for the plaintiff. *DeGraffenreid,* 80 S.W.3d at 876.

Welborn v. Rigdon, 231 S.W.2d 127 (Mo. 1950), and *Osborne v. Purdome,* 250 S.W.2d 159 (Mo. 1952), are not spoliation cases. The vague reference to the destruction of evidence in *Welborn* cited in the plaintiff's brief related to the Court's refusal to apply the doctrine of unclean hands. *Welborn,* 231 S.W.2d at 132. *Osborne* was a habeas case in which the Court, citing two criminal cases, held that an attempt to fabricate evidence, procure false evidence, or destroy evidence is construed as being in the nature of an admission of guilt. *Osborne,* 250 S.W.2d at 162.

The plaintiff also relies on *Ameriwood Indus., Inc. v. Liberman,* 2007 WL 5110313 (E.D. Mo. July 3, 2007), in which the plaintiff claimed that the defendants improperly used the plaintiff's computers, confidential files, and confidential information. On June 16, 2006, the plaintiff served the defendants with discovery requests seeking, among other things, all computer hard drives used by three individuals. *Id*. at *2. On October 6, 2006, the plaintiff's counsel reminded the defendants' counsel to preserve the information on those hard drives. *Id*. After the plaintiff filed a motion to compel and before the court granted it, all three individuals installed a program called "Window Washer" on their respective computers -- a program designed to permanently delete or scrub files from a computer's hard drive. *Id*. On December 27, 2006, the court issued an order granting the plaintiff's motion to compel production of the hard drives. *Id*. All three individuals ran Window Washer on their computers ***after the court's order and before allowing the plaintiff to image the hard drives***. *Id*. In response to these

absurdly brazen discovery violations, the court struck the defendants' answer and entered a default judgment in favor of the plaintiffs on all claims. *Id.* at *8.

Similarly, the plaintiff relies on *Dorchester Fin. Holdings Corp. v. Banco BRJ S.A.,* 304 F.R.D. 178, 181 (S.D.N.Y. 2014), in which Dorchester first filed suit in 2002. Before the action was commenced, a man named Morrow (who was both an officer of Dorchester and an attorney) gathered all documents that related to the dispute on a computer hard drive. In 2012, while the litigation was still ongoing, Morrow destroyed the computer. *Id*. Unsurprisingly, this was held to be improper: "The Court thus concludes that Dorchester committed spoliation meriting sanctions when it destroyed Morrow's computer." *Id.* at 184. Later in the litigation, the defendant moved for summary judgment based on an adverse inference due to the spoliation, but the court held that the spoliation did not entitle the defendant to summary judgment: "However, for the purposes of deciding this summary judgment motion, the Court has not applied any adverse inference, but instead has followed the general summary judgment standard and construed the facts in the light most favorable to the nonmoving party." *Dorchester Fin. Holdings Corp. v. Banco BRJ, S.A.,* 2016 WL 1169508, at n.2 (S.D.N.Y. Mar. 21, 2016). Instead, the court entered summary judgment in favor of the defendant because the documents on which Dorchester relied to state a claim were forgeries. *Id.* at *8.

This case is nothing like *Ameriwood* or *Dorchester.* This plaintiff does not claim any discovery violations, and SSM has never been accused of any conduct like the defendants' conduct in those cases. Unlike the courts in *Ameriwood* and *Dorchester,* the trial judges in this case did not find any intentional or improper conduct by SSM.

In *Kroger Co. v. Walters,* 735 S.E.2d 99, 104 (Ga. Ct. App. 2012), cited by the plaintiff, the Georgia appellate court agreed with the trial court's admission of evidence that the defendant spoliated and altered video evidence. However, the appellate court reversed the judgment because the trial court had not allowed the defendant to call a witness to explain its conduct. *Id*.

These cases do not support reversal of the trial court's judgment in this case.

E. The plaintiff's reliance on *Garrett* is misplaced.

The plaintiff misconstrues the holding of *Garrett v. Terminal R. Ass'n of St. Louis,* 259 S.W.2d 807 (Mo. 1953). *Garrett* is a case about the best evidence rule, and it discusses spoliation only in dicta. *Garrett* does not aid the plaintiff.

In *Garrett,* a railroad brakeman was injured while riding in a rail car. *Id.* at 809. After his injury, the brakeman took a "bad order card" from the rail car, which he alleged showed that a railroad employee noted problems with the rail car. *Id.* At trial, the railroad proved that the brakeman had intentionally destroyed the original bad order card, and instead the brakeman sought admission of a photostatic copy of the card that the brakeman had made before destroying the original, which read, "Cotter Keys Missing in Pin Lifter Brackets in A End & Flat Wheels." *Id.* at 811. The railroad argued that the words "& Flat Wheels" did not appear on the original. *Id.* at 811-812. Over the railroad's "best evidence" objection, the trial court admitted the photostatic copy as an exhibit, and the jury found in favor of the plaintiff. *Id.* at 808-809.

This was the issue on appeal in *Garrett* as framed by this Court: "Was it error for the trial court to admit in evidence respondent's exhibit 1, which was a photostatic

reproduction of what was purported to be a bad order card which respondent said he removed from the car in which he was riding on the day of his alleged injury? . . . This offer was objected to by appellant for the reason that it was not the best evidence. In other words, this exhibit was not the original bad order card but only a photostatic copy of the original." *Id.* at 809.

This Court reversed the judgment, holding that the trial court abused its discretion in admitting the copy of the card into evidence and that -- in the absence of the card -- the brakeman failed to make a submissible case: "There is no other evidence that the wheels were flat. . . . The case was submitted to the jury on the theory that flat wheels in connection with loose and missing center bolts were the direct and proximate cause of respondent's injuries. Of course, from what we have just ruled with reference to exhibit 1, such submission was error." *Id.* at 812.

Garrett could not be more clearly distinguishable from this case. The plaintiff in this appeal raises no issue as to admission of evidence, the best evidence rule, or the submissibility of a claim.

Discussing the spoliation doctrine, the Court stated that that the brakeman "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*. As *DeGraffenreid* later clarified, however, "the Court did not rule the brakeman's entire claim against him." 80 S.W.3d at 877. Rather, the Court merely prevented the brakeman from introducing the copy after he had intentionally destroyed the original. *Id.*

Just as in *Garrett*, in which this Court prohibited the brakeman from presenting the copy of the card he had created because he had destroyed the original, the trial court in this case prevented Mr. Rieder -- who was the only person to see the security video -- from testifying "to any observations of Mr. Hill's fall as reflected in the video of the fall," and the trial court redacted Mr. Rieder's report describing what he saw on the video. L.F. 2278. This is precisely the relief that this Court in *Garrett* gave the railroad.

In this case, the Court of Appeals found that "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." Appellant's Substitute Brief at 33 (quoting Opinion at 8). Unlike Mr. Rieder's testimony, however, the brakeman in *Garrett* ***admitted*** that he intentionally destroyed the original bad order card, finding the copy to be sufficient. 259 S.W.2d at 811. Mr. Rieder expressly denied that he intentionally deleted the video of Mr. Hill's fall, instead explaining that he did not save the video because there was no retention policy for St. Clare hospital at the time and he did not know how. Tr. 220-222 ; L.F. 340. Mr. Rieder's statement is not comparable to the brakeman's in *Garrett*.

As *DeGraffenreid* cautioned, this Court's holding in *Garrett* should not be broadened to the point where a finding of spoliation results in an entry of judgment for the other party. 80 S.W.3d at 876-877. This would essentially result in a directed verdict in favor of the plaintiff, a result that would not be warranted by *Garrett* or any other Missouri case.

F. An adverse-inference instruction is not permitted.

Missouri law does not permit adverse-inference instructions. *Pisoni,* 468 S.W.3d at 925-928; *Berger v. Copeland Corp.,* 505 S.W.3d 337 (Mo. App. 2016). In *Berger,* a new trial was affirmed because of the trial court's error in issuing this instruction: "If you should find that a party willfully destroyed evidence in order to prevent its being presented in this trial, you may consider such destruction in determining what inferences to draw from the evidence or facts in this case. You may, but are not required to, assume that the contents of the files destroyed would have been adverse, or detrimental to that party." *Berger,* 505 S.W.3d at 338.

In *Berger,* the court explained that, since at least 1926, "if not earlier, Missouri has prohibited adverse-inference jury instructions. Counsel can argue the inference to the jury, but no jury instruction should be given." *Id.*

This appeal presents no basis to deviate from the settled law. As the plaintiff concedes, this appeal presents no issue as to whether the trial court erred in failing to issue an adverse-inference instruction because the plaintiff never asked for one: "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* and *Berger*], 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." Appellant's Substitute Brief at 49.

In addition to being barred by the settled law and the plaintiff's waiver of the issue, an adverse-inference instruction would be contrary to the system of instruction set forth in the Missouri Approved Instructions, which are approved by the Court. Pursuant to Article V, section 5 of the Missouri Constitution, rules established by the Supreme Court "shall have the force and effect of law." This Court's Rule 70.01 allows for its approval of instructions in civil actions by order of the Court.

The MAI, as approved by the Court, makes it clear that an adverse-inference instruction is improper. A Missouri instruction cannot comment on the evidence or make abstract statements of law: "Every lawyer knows that a deceased accident victim is presumed to have exercised care for decedent's own safety until evidence of lack of care appears; that every person is presumed to know the law; that there is an arguable adverse inference that a civil litigant who fails to testify on that party's own behalf would not have helped a particular position, that an adverse presumption arises against the spoiler of evidence, ad infinitum. ***Nevertheless, none of those presumptions or inferences or abstract statements of law has any place in a jury instruction.***" App 7; Mo. Approved Jury Instr. (Civil) Why and How to Instruct a Jury (7th ed) (emphasis added).

The Committee on Instructions recently considered and rejected the very argument advanced by this plaintiff. App 6-7. In a new comment to MAI 1.00 on prohibited instructions (by the Court April 15, 2016, and effective January 1, 2017), the Committee reaffirmed that an adverse-inference instruction does not comply with the MAI:

> The Committee notes that in *Pisoni v. Steak 'N Shake Operations, Inc.,* 468 S.W.3d 922 (Mo. App. 2015), the court reviewed the Missouri case law on the subject of "spoliation" in the context of an adverse inference instruction. The *Pisoni*

> court stated that spoliation, when established, may result in different remedies allowed by the trial court - including an adverse inference argument, preclusion of the offending party's evidence as to what the missing evidence showed, and/or an "admission" against the offending party – but that a jury instruction on "spoliation" has not been approved under current Missouri case law. *Cf: Freight House Lofts Condo Association v. VSI Meters Services, Inc.,* 402 S.W.3d 586, 594-596 (Mo. App. 2013). The court cited with approval the Committee's observations in MAI (Civil), Why and How to Instruct a Jury, at LXXV-LXXVI, as follows:
>
> "Every lawyer knows that . . . an adverse presumption arises against the spoiler of evidence, ad infinitum. Nevertheless none of those presumptions or inferences or abstract statements of law has any place in a jury instruction."
>
> The Committee continues to adhere to that view, but notes that other remedies may be properly fashioned by the trial court under circumstances different from those in reported Missouri decisions. The Supreme Court has not definitively addressed these issues.

App 6; Mo. Approved Jury Instr. (Civil) 1.00, General Comment D (7th ed).

The new comment makes it clear that the lack of an instruction does not limit other remedies that may be available: "Because an instruction is prohibited on a subject does not necessarily mean that evidence and argument are also prohibited. The classic example is the prohibited 'sole cause' instruction. See MAI 1.03. It is well established that 'sole cause' evidence and argument are permissible, though an instruction on the subject is not." App 6; *Id.,* General Comment C. So it is with an adverse inference -- a party may present evidence and argument, but there cannot be a jury instruction.

A copy of the Court's order approving these comments is included in the appendix to this brief. App 4-8.

As Judge Elwood Thomas explained, prior to the adoption of the MAI in 1965, Missouri instructions were long and complex, partially due to the practice of requiring the

jury to find evidentiary facts rather than ultimate issues. *Rogers v. Bond,* 839 S.W.2d 292, 294 (Mo. banc 1992). Missouri ushered in a whole new approach to instructing the jury in civil cases by adopting the MAI in 1965. *Id.* The prohibition on adverse-inference instructions is part of the overall plan of the MAI "that argumentative matters have been eliminated from instructions. Missouri Approved Instructions were adopted so that questions of fact may be accurately and concisely submitted to a jury in lieu of the vast amount of surplusage that formerly was found in many instructions." *See Stemme v. Siedhoff,* 427 S.W.2d 461, 466 (Mo. 1968).

The plaintiff in this case does not attempt to explain how an adverse-inference instruction could comport with the MAI. He does not point to any Missouri authority since 1965 authorizing anything like an adverse-inference instruction. And he does not explain why the entire system of jury instructions in Missouri should be changed for him.

The plaintiff notes that some federal cases have permitted the use of an adverse-inference instruction. Federal courts, however, do not follow the MAI.

And even in federal cases, "there must be a finding of intentional destruction indicating a desire to suppress the truth" before an adverse-inference instruction is justified. *See Stevenson v. Union Pac. R.R. Co.,* 354 F.3d 739, 746 (8th Cir. 2004). The Eighth Circuit has explained that the most important consideration is the district court's own finding regarding the alleged spoliator's intent. *Morris v. Union Pac. R.R.,* 373 F.3d 896, 901 (8th Cir. 2004). If the district court concludes that the party did not intentionally destroy the record, an adverse-inference instruction is not warranted in federal court. *Id.* at 902-903.

In this case, Judge Prebil explicitly found that "the record does not demonstrate intentional acts by Defendant to support Plaintiff's contention that the spoliation doctrine applies." L.F. 1650-1651. Judge Watkins McLaughlin also rejected the plaintiff's argument that there was intentional spoliation. Under the plaintiff's cited federal cases, no adverse-inference instruction would be proper.

In this Court, the plaintiff improperly included in the appendix to his brief a proposed instruction that was never submitted in the trial court. Appellant's Appendix at 12. This new proposed instruction would direct a verdict in favor of the plaintiff: "As a result of the Defendant's failure to produce the video of Mr. Hill's fall, you are instructed to infer that the video would have shown that Mr. Hill tripped over the raised slab of concrete at the entrance to the Procedure Center at St. Clare's Health Center."

This proposed instruction goes much farther than the improper instruction in *Berger,* which told the jury that it "may consider such destruction in determining what inferences to draw from the evidence or facts in this case. You may, but are not required to, assume that the contents of the files destroyed would have been adverse, or detrimental to that party." *Berger,* 505 S.W.3d at 338.

The *Berger* instruction was clearly improper and led to the setting aside of the resulting judgment. The plaintiff's proposal goes leagues beyond the *Berger* instruction. The trial court was never asked to issue an adverse-instruction, and it would have committed reversible error if it had adopted the plaintiff's proposal in this Court.

G. The plaintiff's spoliation arguments should be rejected.

Rule 84.04(d)(5) requires an appellant to list under his or her point relied on the "authority upon which that party principally relies." Under the plaintiff's Point I, he lists *DeGraffenreid*, *Garrett*, *Marmaduke*, and *Schneider*. Appellant's Substitute Brief at 17. As explained above, these cases do not support the plaintiff's argument.

Of all of the many, many cases cited by the plaintiff, the closest analog to this case is *Carroll v. Kelsey,* 234 S.W.3d 559 (Mo. App. 2007), in which the claimants asserted that a driver intentionally destroyed evidence when he had his truck repaired after he was served with process in an action relating to a road accident. The claimants moved for sanctions against the driver for spoliation of evidence and asked that a negative evidentiary inference be given. *Id*. at 565. The trial court denied the motion and refused to allow the inference. *Id*. After a defense verdict, the claimants appealed. *Id*. at 562.

The court in *Carroll* explained that the spoliation doctrine requires evidence showing intentional destruction of the item, and also that such destruction must occur under circumstances which give rise to an inference of fraud and a desire to suppress the truth. *Id.* at 565-566. Destruction of evidence ***without a satisfactory explanation*** gives rise to the negative inference against the spoliator. *Id.* at 566. The driver testified that, right after the accident, his insurance company told him he could have the damage repaired if he so chose. *Id*. He stated that he wanted to wait to repair the truck until he had a second car he could drive in the interim, which he did. *Id*. He stated that no one ever told him he could not repair the truck. *Id*.

The court in *Carroll* explained that the claimants bore the burden to adduce evidence of an intentional destruction of the evidence indicating fraud and a desire to suppress the truth. *Id.* The appellate court upheld the trial court's exercise of discretion based on the record before it: "From the evidence, the trial court could reasonably conclude that [the driver] provided a satisfactory explanation that outweighed the [claimants'] evidence. The trial court's denial of the motion was neither unreasonable nor arbitrary. The trial court did not abuse its discretion in denying the motion for sanctions and refusing to allow the negative inference." *Id.*

This case is indistinguishable from *Carroll*. SSM provided a logical and reasonable explanation for what happened with the video system that had just been installed at its new hospital. This Court views the facts in the light most favorable to the trial court's order. *See Stewart v. Partamian,* 465 S.W.3d 51, 56 (Mo. banc 2015). The trial court did not abuse its discretion in its rulings on the video. Point I should be denied.

II. The plaintiff's Point II should be denied.

The plaintiff's multifarious and improper Point II accuses the trial court of abusing its discretion with respect to closing argument, but ignores what happened during that argument. At two points in his closing argument, the plaintiff's counsel purported to instruct the jury on what "the law provides," and what "the law says," and what "the instructions you are given" state as to an adverse inference from SSM's inability to provide the security video of Mr. Hill's fall:

> Well, here we are after seven years, 27 depositions in a fall-down case. Thousands of documents filed with this court. You seen all these boxes in this court over the last week, thousands and thousands of pages of work. And now we know what happened. ***We know the answer to what happened, because the law provides it.***
>
> The answer is that, if that video did not show that Mr. Hill tripped over that raised slab going into that procedure center, that video would have been in. You would have seen the video.
>
> ***The law says*** it's called an adverse inference. It's just common sense. It's like walking through the snow. You don't have to see somebody walking through the snow in the front yard if you see -- if you see footprints in the snow, you are entitled to infer from the footprint that somebody walked through the snow.
>
> ***In this case, you are entitled to infer from the fact that they destroyed or failed to preserve that video, that the video would have shown that Mr. Hill tripped and fell on that raised slab. You are entitled to believe that based on that fact alone. That's called an adverse inference.***

Tr. 1078-1079 (emphasis added).

> So in any event, now, ***on the adverse inference, as you recall, there was -- in the instruction that you are given,*** it's instruction number 11, I believe -- no, it's the behavior of the witness, his credibility, instruction number 1, paragraph 11, deliberations.

Tr. 1086 (emphasis added).

In response to these clearly improper and inaccurate arguments, SSM's counsel reminded the jury that the court had not provided any jury instruction on the law of spoliation of evidence:

> 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.
>
> ***You are not -- in the instructions that -- here are the instructions which I will leave up here. 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.***
>
> [PLAINTIFF'S COUNSEL]: Well, Judge, I object to that. He knows that we can't give an instruction on that. I think that's -- I think that's improper.
>
> THE COURT: Overruled.

Tr. 1102-1103 (emphasis added).

These statements were absolutely accurate -- the instructions given by the trial court did not include anything about spoliation. L.F. 2425-2438.

And these statements were consistent with the trial court's pre-trial orders. The court ordered: "Mr. Rieder cannot testify to any observations of Mr. Hill's fall as reflected in the video of the fall." L.F. 2278. The court also issued an 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 that effect." L.F. 2382. SSM's closing argument was proper.

A. Objections are reviewed for abuse of discretion.

The plaintiff mentions *Heshion Motors, Inc. v. W. Int'l Hotels,* and of course it is settled that the permissible field of closing 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." 600 S.W.2d 526, 534 (Mo. App. 1980).

But the plaintiff largely ignores the deference to which the trial court's judgment is entitled on matters pertaining to closing argument. Trial courts are given broad discretion when deciding whether to permit or prohibit statements during closing arguments. *Delacroix v. Doncasters, Inc.,* 407 S.W.3d 13, 46 (Mo. App. 2013).

In cases like this one, when ruling upon the propriety of closing argument, the Court interprets the challenged comments in light of the entire record and not in isolation. *Wolfe v. Cent. Mine Equip. Co.,* 895 S.W.2d 83, 89 (Mo. App. 1995). This is because "the law indulges a liberal attitude toward closing argument, particularly where the comment complained of is a fair retort or responds to prior argument of opposing counsel." *Delacroix,* 407 S.W.3d at 46.

In the exercise of its discretion, the trial court is in the best position to appraise the consequences of argument and evaluate any prejudicial effect of the overall tenor of the argument. *Butts v. Missouri Dep't. of Conservation,* 301 S.W.3d 517, 522 (Mo. App. 2009). This discretion is not lightly to be disturbed on appeal. *Hammer v. Waterhouse,* 895 S.W.2d 95, 106 (Mo. App. 1995).

B. The objection was properly overruled.

During closing argument, SSM's counsel accurately and correctly stated that the jury instructions in this case did not contain a spoliation instruction. Tr. 1103.

As shown above, not only was this an accurate recitation of the law and facts, but this statement also was invited by the plaintiff's closing argument. The plaintiff's counsel purported to instruct the jury on the law of adverse inference and stated that this was included in "the instruction that you are given." Tr. 1078-1079, 1086. The plaintiff's counsel inaccurately instructed the jury on spoliation: "In this case, you are entitled to infer from the fact that they destroyed or failed to preserve that video, that the video would have shown that Mr. Hill tripped and fell on that raised slab. You are entitled to believe that based on that fact alone." Tr. 1078-1079. SSM's counsel's remarks merely clarified for the jury that the court's instructions contained no spoliation instruction, which they did not.

SSM's counsel's remarks were proper. Even if they had not been, however, they were invited by the plaintiff's improper closing remarks. As noted in a case cited by the plaintiff, a party "is not entitled to assign as error improper arguments or remarks made at the trial by adverse counsel, where they were called forth by equally improper arguments or remarks made by his own counsel." *Fahy v. Dresser Indus., Inc.,* 740 S.W.2d 635, 641 (Mo. banc 1987).

The trial court did not abuse its discretion in overruling the plaintiff's objection to SSM's closing argument.

C. The argument regarding the video is not preserved.

The other portion of SSM's closing argument mentioned in the multifarious Point II was never the subject of an objection at trial. Tr. 1102-1103. It was the plaintiff's obligation to object to anything he deemed improper. *See Howard v. City of Kansas City,* 332 S.W.3d 772, 791 (Mo. banc 2011). "Failure to properly object to closing argument at the time it is made to a jury results in a waiver of any right to complain of the argument on appeal, even if the point is preserved in an after trial motion." *Id.* This is because "if the objection is not timely, the trial court has no opportunity to take corrective action at the time the remarks were made." *Id.* The plaintiff's argument is waived.

If not preserved, the appellate court can review the challenged argument for plain error. *State v. Hall*, 319 S.W.3d 519, 523 (Mo. App. 2010). "Plain error relief as to closing argument should rarely be granted and is generally denied without explanation." *In re Gormon,* 371 S.W.3d 100, 107 (Mo. App. 2012). In order to establish that the trial court committed plain error during closing arguments, an appellant "must make a sound, substantial showing that manifest injustice or a miscarriage of justice will result if [this Court fails to] grant relief." *State v. Crowe,* 128 S.W.3d 596, 601 (Mo. App. 2004).

In addition to being unpreserved, the plaintiff's argument is wrong. Generally, a party cannot invite error and then complain on appeal that the invited error was in fact made. *Cureau v. Cureau,* 514 S.W.3d 685, 690 (Mo. App. 2017); *State v. Bolden,* 371 S.W.3d 802, 806 (Mo. banc 2012). Plain error should not be used to impose a *sua sponte* duty on a trial court to correct an appellant's invited errors. *Bolden,* 371 S.W.3d at 806.

During the pre-trial conferences in this case, the plaintiff requested an order preventing SSM from stating it wished it could show the video of Mr. Hill's fall to the jury. As a result, the trial court entered an 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 that effect.***" L.F. 2382 (emphasis added). In closing argument, SSM's counsel complied with this ruling and stated that "we absolutely regret that we don't have the videotape." Tr. 1102-1103. Counsel for SSM was entitled to rely on the language of the order requested by the plaintiff.

III. The plaintiff's Point III should be denied.

The trial court did not err in submitting Instruction 8. Taken as a whole, the instructions in this case fairly presented the plaintiff's claims to the jury.

The Court reviews de novo whether a jury was properly instructed. *Klotz v. St. Anthony's Med. Ctr.,* 311 S.W.3d 752, 766 (Mo. banc 2010). Review is conducted in the light most favorable to the submission of the instruction. *Id.*

A defendant is entitled to a converse of a plaintiff's verdict director. *Gilleylen v. Surety Foods, Inc.,* 963 S.W.2d 15, 17 (Mo. App. 1998). In conversing a verdict director, a defendant is not required to converse the entire instruction or any particular part of it. *Lietz v. Snyder Mfg. Co.,* 475 S.W.2d 105, 109 (Mo. 1972).

The only limitation on a defendant's right to converse as much or as little of the verdict director as desired is with respect to disjunctive submissions. *Brown v. Scott-New Madrid-Mississippi Elec. Coop.,* 728 S.W.2d 303, 305 (Mo. App. 1987); MAI 33.01(H) (7th ed.). If a defendant elects to converse any element which is submitted by the verdict director in the disjunctive, he or she must converse all such disjunctive elements. MAI 33.01(H) (7th ed.).

On the other hand, if a defendant elects to converse only general negligence, he or she need not converse each and every disjunctive act of negligence asserted in the verdict director. *Graeff v. Baptist Temple of Springfield,* 576 S.W.2d 291, 305 (Mo. banc 1978); *Cole v. Plummer,* 661 S.W.2d 828, 830-831 (Mo. App. 1983). Instead, the defendant can converse the term negligence generally, and, if he or she elects, any additional conjunctive element of the verdict director.

An application of this is found in MAI 33.15(3) (7th ed.) which approves the following converse: "Your verdict must be for defendant unless you believe defendant failed to use ordinary care [as submitted in Instruction Number ____], and that as a direct result of such failure plaintiff sustained damage."

The plaintiff's Instruction 7 directed the jury to find for the plaintiff if it found that the defendant knew or by using ordinary care could have known of a raised concrete slab on the entrance walkway, "failed to use ordinary care to remove it, barricade it, or warn of it," and "such failure directly caused or directly contributed to cause the death of Irvin Hill." L.F. 2435.

Immediately following was the converse for this verdict director (Instruction 8) which stated, "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 went on to converse the causation element of Instruction 7 in the same terms as set forth in Instruction 7. L.F. 2436.

As Instruction 8 did not converse any disjunctive act of alleged negligence asserted in the verdict director (i.e., "to remove [the condition], barricade [the condition], or warn of [the condition]"), there was no need to converse each and every disjunctive act. *See Graeff,* 576 S.W.2d at 304-305. The article cited by the plaintiff in his brief as "the most definitive and reliable work on converse instructions in Missouri" ***expressly agrees with this point***. *See* Elwood L. Thomas, Converse Instructions Under MAI, 61 Mo. L. Rev. 25, 42 (1996) (stating a converse instruction should not be invalidated

because a defendant elects "to converse only the general negligence paragraph of a verdict director which also contains disjunctive submissions of negligence").

The plaintiff ignores the clear record in claiming that Instruction 8 somehow gave the jury no basis or direction to determine if SSM was at fault. Instead, Instruction 8 conversed the term "failed to use ordinary care" and referred the jury back to Instruction 7 for the specific acts of negligence asserted by the plaintiff. L.F. 2436. By so doing, all of the disjunctive acts of alleged negligence asserted in the verdict director were incorporated into the converse instruction.

In his brief, the plaintiff also incorrectly claims that the converse instruction was erroneous because it suggested that, if the jury believed SSM failed to use ordinary care to remove the raised slab, but not because it failed to barricade or warn of the defect, then SSM would necessarily be entitled to a verdict in its favor. This simply is not true. Instead, Instruction 8 stated the jury's verdict must be for SSM unless it believed SSM "failed to use ordinary care as submitted in Instruction Number 7." L.F. 2436. Instruction 7, which was drafted and submitted by the plaintiff, defined the failure to use ordinary care as the failure to remove the allegedly raised slab, barricade it, or warn of it. L.F. 2435. Therefore, when Instructions 7 and 8 are read together, it is evident the instructions would permit SSM to be found liable if the jury found any one of those three disjunctive acts to be true. The instructions, when read together, are clear and complete. *See Cooper v. Gen. Standard, Inc.,* 674 S.W.2d 117, 123 (Mo. App. 1984) (noting a verdict director and converse must be read together).

While the plaintiff sets forth certain rules and principles applicable to the MAI -- namely, that the failure to use an approved instruction is presumptively prejudicial and that the converse instruction must use substantially the same language as the verdict director -- these undisputed statements of law do not help him.

Instruction 8 tracked the form approved as MAI 33.15(3). When the court read Instruction 8 at the instruction conference, the plaintiff's counsel stated: "I think that tracks the language." Tr. 1055. There was no deviation from the MAI. The plaintiff cannot meet his burden of proving the instruction misled, misdirected, or confused the jury. *Gorman v. Wal-Mart Stores, Inc.,* 19 S.W.3d 725, 730 (Mo. App. 2000).

Unlike *McLaughlin v. Hahn,* 199 S.W.3d 211 (Mo. App. 2006), in which the converse instruction purported to converse each and every element of the verdict director but altered their language and thereby distorted the burden of proof, Instruction 8 accurately described the plaintiff's burden by using the same terms from Instruction 7. L.F. 2435-36. Accordingly, the true converse submitted by the court as Instruction 8 contained substantially the same language as the verdict director.

There are no circumstances suggesting the jury could have been misled. Instruction 8 referred directly to Instruction 7, where the specific acts of negligence alleged by the plaintiff were set forth. When the instructions were read together with all the evidence, a jury of reasonable intelligence could not have been confused. Taken as a whole, these instructions fairly and adequately submitted the issues to the jury. Thus, the judgment should not be set aside. Point III should be rejected.

IV. The plaintiff's Point IV should be denied.

The plaintiff's argument under Point IV concludes by stating: "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." Appellant's Substitute Brief at 71.

This point relied on is frivolous. ***Dr. Brennan's deposition was admitted into evidence and played for the jury without objection.*** Tr. 1018, 1022-1023. The plaintiff's arguments about the admission of this deposition are waived. *See Stewart v. Partamian,* 465 S.W.3d 51, 56 (Mo. banc 2015).

Two of the photographs mentioned by the plaintiff in Point IV (Defendant's Exhibits A and B) ***were admitted without objection.*** Tr. 1025. The plaintiff's counsel did not disagree when the court stated "there's no issue with A and B." Tr. 65.

The other two photos (Defendant's Exhibits C and D) were admitted over a (baseless) foundation objection, but the plaintiff raises no points relied on claiming error in their admission, and he does not claim any prejudice. Tr. 989. Exhibits C and D were only admitted after being authenticated by a witness other than Dr. Brennan. Tr. 984-986.

In addition to being waived for lack of objection, Point IV ignores that ***the trial court granted the plaintiff relief in connection with Dr. Brennan by agreement.*** After hearing the parties on the motion for sanctions, the court asked "would the attorneys be

able to come to a resolution of this matter such that we can try this lawsuit this week and have the lawyers stay in the case?" Tr. 65-66. The plaintiff's counsel said yes: "Yes, we can meet and confer and discuss that process." Tr. 65-66.

After the parties conferred, the court entered an order signed by both sides denying the motion for sanctions: "Plaintiff's motion for sanctions called, heard, and denied." L.F. 2380. As to the photos mentioned in Dr. Brennan's deposition, the order stated:

> On plaintiff's motion in limine to exclude the testimony of Dr. Brennan and the photos used therein, the Court rules Exhibits A & B are admissible as well as testimony regarding the same. Exhibits C & D are also admissible as well as testimony regarding the same provided another witness first authenticates these photographs, including explaining the changes appearing in the photographs that weren't present on September 3, 2009. Defendant hereby withdraws its motion in limine regarding subsequent remedial measures.

L.F. 2380.

Pursuant to this agreed order, a foundation was laid for Exhibits C and D separate from the testimony of Dr. Brennan when Don Wojtkowski testified as to the changes between the day of the fall and the day when the photos of Dr. Brennan were taken. Tr. 984-986. Exhibits C and D were admitted. Tr. 989.

At trial, SSM introduced Dr. Brennan's video deposition without objection. Tr. 1018, 1022-1023. Prior to playing his deposition testimony for the jury, SSM's counsel read a stipulation agreed to by the parties:

> At this point, we're going to play the -- or show you the videotape deposition of Dr. Robert Brennan that was taken on April 29, 2011. And we've agreed to read this stipulation to you in advance of that deposition.
>
> A, the deposition of Dr. Brennan occurred on April 29, 2011. B, the photographs depicted in Exhibits C and D to Dr. Brennan's deposition were taken on the morning of April 29, 2011, prior to Dr. Brennan's deposition. Mr. David Ott was

> present when those photos were taken. C, Mr. Doug Dowd was not told prior to Dr. Brennan's deposition that Exhibits C and D were taken on April 29th, 2011 prior to the deposition, or B, changes were made to the walkway prior to the April 29, 2011 deposition.

Tr. 1022-1023.

Thus, the plaintiff got relief in the form of an order and stipulation signed by all parties after conferring about the motion for sanctions. Exclusion of the photos (as to which there is no foundation issue on appeal) and Dr. Brennan's deposition (which was admitted into evidence without objection) is far more relief than the plaintiff could possibly justify on this record.

The standard of review, abuse of discretion, is well known:

> A trial court has broad discretion in administering the rules of discovery and in determining the proper remedy—including sanctions—for a party's non-compliance with the rules of discovery. Our review of the trial court's imposition of a discovery sanction is limited to determining whether the trial court could have reasonably concluded as it did, not whether the reviewing court would have imposed the same sanctions under the same circumstances. In addition, an appellate court will not interfere with the trial court's decision to impose sanctions unless the trial court clearly has abused its discretion. A trial court abuses its discretion only if its decision is clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration.

Frontenac Bank v. GB Investments, LLC, 528 S.W.3d 381, 390 (Mo. App. 2017) (citations and internal quotations omitted).

This record does not show any decision that was clearly against the logic of the circumstances, or arbitrary, or unreasonable, or indicating a lack of careful consideration. The record does not show any violation by SSM in need of further relief. In his brief, the plaintiff does not point to any discovery rule that was allegedly violated. He does not

point to any discovery request that was not answered. Rather, he claims that Mr. Gearin made a misstatement on Friday, March 17, 2017, when Mr. Ott was not present, about a deposition taken by Mr. Ott six years earlier, as well as the timing of some photos. L.F. 2352-2353. Mr. Gearin conferred with Mr. Ott and corrected the misstatement with the plaintiff's counsel and the court on Sunday, March 19, 2017. L.F. 2366. Thus, there was a misapprehension for a period of something less than 48 hours, over part of a weekend, which was promptly and voluntarily corrected.

The parties returned to court on Monday, March 20, 2017, and had a full hearing. Tr. 9. Mr. Gearin gave a full explanation and did not try to hide from the misstatement, which caused no prejudice to any party. Tr. 10-14, 16-17. The court did not believe that Mr. Gearin intentionally misrepresented anything. Tr. 44. The plaintiff is incorrect in accusing the trial court of an abuse of discretion.

The plaintiff is mistaken in asserting that he was prejudiced in being unable to cross-examine Dr. Brennan about changes to the walkway or his meeting with SSM's counsel prior to the deposition. Although the plaintiff's counsel was not informed of changes to the walkway prior to Dr. Brennan's deposition, the photographs used in Dr. Brennan's deposition were merely used as demonstrative exhibits to demonstrate Mr. Hill's positioning prior to and after the fall. At no time were these photographs used to show the presence or absence of any dangerous condition, ***and the plaintiff does not claim otherwise***. To the extent that the plaintiff suggests that Dr. Brennan's testimony was rehearsed (which SSM expressly denies), the plaintiff's counsel had every

opportunity during the deposition to inquire as to whether there were any prior meetings between Dr. Brennan and SSM's counsel but chose not to. Point IV should be denied.

V. The plaintiff's Point V should be denied.

The record in this case belies the plaintiff's claim of surprise as to the testimony of Dr. Huss. Most fundamentally, there was no difference between the Huss trial testimony and the Huss deposition testimony. In both, Dr. Huss opined that decedent's dehydration was a "contributing factor to his fall." Tr. 490-494; S.L.F. 6. There was no inconsistency, no new opinion, and no surprise.

The Court reviews a trial court's admission or exclusion of expert testimony for abuse of discretion. *Pisoni v. Steak 'N Shake Operations, Inc.,* 468 S.W.3d 922, 928 (Mo. App. 2015). An appellant bears the burden of proving that the trial court abused its discretion and showing that he or she has suffered prejudice. *Id.*

In determining whether expert testimony should have been excluded, the Court must ask whether that testimony constituted surprise. *Sherar v. Zipper,* 98 S.W.3d 628, 632 (Mo. App. 2003). Surprise cannot be manufactured. *Beverly v. Hudak,* 545 S.W.3d 864, 870 (Mo. App. 2018). "The attorney deposing the witness must ask for the expert's opinion and/or the underlying facts or data." *Id.* (quoting *Sherar,* 98 S.W.3d at 634).

In his brief before this Court, the plaintiff declares Dr. Huss' trial testimony constituted a surprise because "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." Appellant's Substitute Brief at 72. But when Dr. Huss expressed this opinion during his deposition, the plaintiff's counsel did not follow

up and ask Dr. Huss whether this opinion was held to a reasonable degree of medical certainty. S.L.F. 6-7. By failing to ask this question, he cannot now claim surprise.

As explained in *Sherar,* to conclude otherwise would open the door to serious concerns:

> Specifically, a fundamental hazard arising from the position advocated by Dr. Zipper's counsel is the promotion of a form of sandbagging by counsel. Under his arguments, deposition counsel could ask general questions regarding the nature of an expert's opinion, yet refrain from asking "ultimate issue" questions of the expert. (This tactic might be legitimately employed to prevent the other party from being able to use the deposition testimony in lieu of trial testimony.) Then, when the time comes for trial or "evidentiary" deposition, counsel could claim "surprise" and seek to have the testimony excluded.

Sherar, 98 S.W.3d at 634. It is error to exclude testimony under this standard unless it truly is a surprise. *Id.* at 635.

The plaintiff incorrectly asserts that the trial testimony of Dr. Huss violated SSM's motion in limine to exclude either party from presenting new expert opinions at trial. This is not a situation in which Dr. Huss previously testified he did not have an opinion as to the cause of Mr. Hill's fall. Nor is this a situation in which Dr. Huss opined that dehydration would not have contributed to cause the fall. Rather, Dr. Huss consistently opined both at trial and his deposition that Mr. Hill's dehydration was a "contributing factor to his fall." Tr. 490-494; S.L.F. 6. Thus, the plaintiff cannot properly claim that Dr. Huss' trial testimony was substantially different from his deposition testimony.

The requirement to disclose an expert's opinions prior to trial "is not intended as a mechanism for contesting every variance between discovery and trial testimony." *Sherar,* 98 S.W.3d at 634. If the plaintiff believed there was a discrepancy between Dr.

Huss' discovery and trial testimony, his counsel had the opportunity to impeach the witness. ***However, during the cross-examination of Dr. Huss, the plaintiff's counsel did not attempt to impeach Dr. Huss with any purported inconsistency between the trial testimony regarding decedent's dehydration and any other testimony or discovery response.*** Tr. 506-526. The trial record shows there was no surprise.

The trial court did not abuse its discretion in overruling the plaintiff's objection to Dr. Huss' testimony.

CONCLUSION

The judgment of the trial court is amply supported by the evidence, and the plaintiff does not argue otherwise. The record does not show any reversible error or abuse of discretion. The plaintiff's accusations against SSM, SSM's counsel, and the trial court should be rejected, and the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on November 19, 2018.

This brief includes the information required by Rule 55.03 and complies with Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 21,384 excluding the cover, signature block, and this certificate.

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/s/ Jeffery T. McPherson