IN THE
SUPREME COURT OF MISSOURI

No. SC 97306

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

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

APPELLANT'S SUBSTITUTE REPLY BRIEF

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I. PLAINTIFF PROVED THAT SSM DESTROYED THE VIDEO OF MR. HILL'S FATAL FALL IN BAD FAITH, AND THEREFORE UNDER THIS HONORABLE COURT'S PRECEDENT SSM SHOULD HAVE BEEN HELD TO ADMIT THAT THE VIDEO WOULD HAVE SHOWN MR. HILL TRIPPING OVER THE UNEVEN CONCRETE SLAB.

A. STANDARD OF REVIEW.

While SSM is correct that courts have reviewed spoliation rulings and denials of motions for new trial under an abuse of discretion standard, Plaintiff respectfully submits that pertinent legal issues relating to the scope of the proper remedy under the spoliation doctrine, squarely raised by Plaintiff's appeal, are issues of law and as such are reviewed de novo. *See Grado v. State*, 2018 WL 4572722, at *3 (Mo. September 25, 2018).

B. PLAINTIFF HAS PRESERVED HIS SPOLIATION OBJECTION.

SSM contends that Plaintiff's Motion for Application of the Spoliation Doctrine was merely an "interlocutory" motion in limine which is not appealable, and that Plaintiff did not otherwise preserve the spoliation issues raised in that motion. SSM relies on *Smith v. Brown & Williamson Tobacco Corp.*, 410 S.W.3d 623, 636 (Mo. banc 2013) a case which did not involve a spoliation motion and related only to an uncontested motion in limine.

However, Plaintiff's Motion for Application of the Spoliation Doctrine was not a motion in limine, but was clearly in the nature of a motion for sanctions, namely seeking an admission, as a result of SSM's destruction of evidence, of what the spoliated video would have shown. Plaintiff's Rule 78.01 Motion for New Trial set forth that the trial

court erred in denying the request in Plaintiff's Motion that SSM should have been held to admit Plaintiff's allegations "regarding what the evidence would have shown" on the video and that SSM should have been held to "an admission of specific facts as a matter of law by the spoliating party[.]" (L.F.2481) These issues were fully briefed and argued before the trial court in relation to Plaintiff's Motion for New Trial. (T.1156-1158)

Therefore the trial court's rulings relating to the motion became final and appealable at the time of judgment. *See Heintz v. Swimmer*, 922 S.W.2d 772, 776 (Mo.App. 1996) (stating, where defendant contended that motion for sanctions was never ruled on by trial court and thus not reviewable on appeal, "Client's motion for sanctions was made a part of his motion for new trial/reconsideration. The trial court denied client's motion for new trial/reconsideration, and in doing so, denied the motion for sanctions. Thus, the court's ruling on this motion is final for purposes of appeal.")

SSM also contends that "the plaintiff effectively argues the court should have directed a partial verdict as to liability" and that plaintiff waived this "effective" argument by not submitting a motion for directed verdict. Resp. Brief at 36. This is a straw man. Despite SSM's mischaracterization of Plaintiff's spoliation argument, what Plaintiff was seeking was not entry of judgment on an element of Plaintiff's claim, but instead a specific admission of what the spoliated video evidence would have shown. Therefore SSM's implication that Plaintiff should have filed a motion for directed verdict misses the mark.

C. SSM MISCHARACTERIZES THE APPLICABLE CASE LAW, WHICH DEMONSTRATES THAT THE PROPER APPLICATION OF THE SPOLIATION DOCTRINE IN THIS CASE IS AN ADMISSION OF WHAT THE SPOLIATED VIDEO EVIDENCE WOULD HAVE SHOWN.

SSM contends the trial court did not abuse its discretion because it excluded Officer Rieder's testimony of what he claimed to have seen on the video and allowed Plaintiff's counsel to argue an adverse evidentiary inference, while permitting both parties to argue and present evidence as to whether the video was spoliated. SSM argues that the spoliation doctrine provides no further remedy for SSM's destruction of evidence. As set forth below, SSM mischaracterizes Missouri case law and the precedent of this Honorable Court, which firmly supports Plaintiff's position.

1. Garrett v. Terminal R. Association

SSM contends that *Garrett v. Terminal R. Ass'n.*, 259 S.W.2d 807 (Mo. 1953) does not support Plaintiff's position because it is "a case about the best evidence rule" and characterizes the Court's discussion of the spoliation doctrine as "dicta." However, the Court in *Garrett* only briefly touched on the best evidence rule, noting that the doctrine could apply "If it were possible to conclude from the preliminary proof that the original was still in existence[]." *Id*. at 811.

However, the Court turned away from the best evidence rule because it concluded on the record that "the only reasonable conclusion to be drawn from the above quoted admissions and testimony from the preliminary proof is that respondent intentionally destroyed the original of exhibit 1." *Id.* Therefore the Court applied the spoliation

doctrine. And despite SSM's assertion to the contrary, the Court explicitly indicated that its discussion of the spoliation doctrine was *not* dicta, but instead the Court's holding in the case: "**we must hold under the facts in this record that respondent must, in law, admit to the truth of appellant's contention that the words, '& Flat Wheels,' were not on the original bad order card**." *Id*. at 812. [Emphasis supplied.]

SSM contends that the Court in *Garrett* gave the same relief as the trial court did here in barring Officer Rieder's testimony regarding what he saw on the video, because "this Court prohibited the brakeman from presenting the copy of the card he had created because he had destroyed the original[.]" Resp. Brief at 52. But of course this misstates the holding of the Court in *Garrett,* which was instead that the brakeman must "in law, admit to the truth of appellant's contention" regarding what the spoliated evidence would have shown. *Id*. at 812.

The remedy prescribed by the Supreme Court in *Garrett* is a specific, binding admission regarding the contents of the spoliated evidence. As pointed out in Appellant's Brief, ***Garrett* has never been overruled or modified by the Missouri Supreme Court, and SSM does not point to any Supreme Court case to the contrary**. SSM claims that the holding in *Garrett* was "clarified" by *DeGraffenreid v. H.L. Hannah Trucking Co.,* 80 S.W.3d 866 (Mo.App. W.D. 2002), a case from the Court of Appeals (and which is discussed below), but otherwise points to no authority of this Court overruling or modifying *Garrett.*

SSM also unconvincingly asserts that the facts of *Garrett* are distinguishable because "the brakeman in *Garrett* admitted that he intentionally destroyed the original

bad order card, finding the copy to be sufficient" whereas "Mr. Rieder expressly denied that he intentionally deleted the video of Mr. Hill's fall[.]" Resp. Brief at 52. This ignores Mr. Rieder's admissions, under oath, that he chose not to preserve the video because he "didn't feel that it should be in the record" and believed that his own viewing of the video as a "trained observer" and his written description of the fall were sufficient. App. Brief at 35-36. This is indistinguishable from the circumstances of *Garrett*. *See Id*. at 812. ("His testimony was very unsatisfactory in reference to the original card and what became of it. It is to be remembered that he testified, 'I had no more use for it after I had the photostat, that is all I wanted. '")

Clearly *Garrett* represents the most recent and controlling authority of this Honorable Court, addressing indistinguishable circumstances from this case, and Plaintiff respectfully requests that the Court should apply the same holding here.

2. DeGraffenreid v. H.L. Hannah Trucking Co.

SSM attempts to distinguish *DeGraffenreid v. H.L. Hannah Trucking Co.*, 80 S.W.3d 866 (Mo.App. W.D. 2002) by incorrectly arguing that "the plaintiff seeks the same result rejected in *DeGraffenreid*," namely that spoliation should prove the Plaintiff's "entire case." See Resp. Brief at 41-42. However, Plaintiff's argument is not that the trial court should have applied the spoliation doctrine to prove Plaintiff's entire case. As SSM states in its own words: "The Court [in *Degraffenreid*] **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." Resp. Brief at 41. [Emphasis supplied.]

This is precisely the point. The court in *DeGraffenreid* correctly applied the spoliation doctrine and found the spoliator was "deemed to admit" *what the document would have shown*:

> 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 <u>presumed</u> 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. [Emphasis supplied.]

As noted above, Plaintiff does not contend that the trial court should have entered judgment on the element of causation as a matter of law, or otherwise applied the spoliation doctrine to establish legal conclusions. Again, this is a straw man argument. The evidentiary question of what the logs in *DeGraffenreid* would have shown is indistinguishable from the evidentiary question of what the video would have shown in this case. Just as in *DeGraffenreid*, SSM should have been held to an evidentiary admission of what the video, **the only "eyewitness" evidence to the fall**, would have shown. And this is what the trial court refused to do.

3. Marmaduke v. CBL & Associates

Marmaduke v. CBL and Associates Management., Inc., 521 S.W.3d 257, 270 (Mo.App. E.D. 2017) involved a slip and fall with evidence that video and dispatch logs had not been preserved. However, "Marmaduke failed to convince the trial court that

Appellants had spoliated the evidence. Thus, the trial court did not grant Marmaduke an adverse evidentiary inference." *Id.* at 266. The court did permit the plaintiff to offer evidence relating to the spoliation, and allowed the parties to argue over whether spoliation had occurred. Indeed, the court noted that the defendant in that case could not possibly have been prejudiced and entitled to relief, since the record before the trial court would have warranted the trial court's consideration of additional sanctions. *Id*. at 270.

SSM contends that *Marmaduke* supports its position because the Court of Appeals found no abuse of discretion by the trial court. What SSM fails to note is that *Marmaduke* involved an appeal *by defendant*, i.e., the only question before the Court of Appeals was whether the trial court abused its discretion because the remedies were *too harsh* and prejudicial to defendant.

In fact, the court in *Marmaduke* suggested that spoliation should have been found by the trial court under evidence very similar to that present here:

> The record demonstrated that on the day of the incident Appellants were fully aware that Marmaduke had suffered a fall and that Appellants were subject to a claim being made arising from the fall. We know this because Appellants investigated the incident, interviewed Marmaduke at the scene of her fall, and McNeil filled out a report that he testified was made for liability reasons. Moreover, two weeks after the fall Appellants received a letter from Marmaduke's attorney formally notifying Appellants of Marmaduke's claim. **Thus, we find that under these circumstances Appellants had a duty to preserve all evidence relevant to Marmaduke's claim**.

> Additionally, there was a stark contradiction between Appellants' deposition testimony that Appellants had the capability of preserving the videotape but failed to do so and Appellants' sworn discovery responses that they did not have the capability to create a videotape or dispatch log of Marmaduke's fall.[1] **All of these circumstances would have justified a finding of spoliation**.
>
> *Id*. at 273. [Emphasis supplied.]

While SSM relies on statements in *Marmaduke* that "The adverse inference does not prove the opposing party's case," the Court of Appeals nevertheless clearly restated that "The spoliator must admit what the evidence would have shown had it been available" on that specific evidentiary question. *Id*. at 270. *Marmaduke* therefore clearly stands for the proposition that the trial court should have found bad faith spoliation in this case and should have granted Plaintiff an adverse inference as to what the video evidence would have shown.

4. Schneider v. Guilliams

SSM contends that *Schneider v. G. Guilliams, Inc.*, 976 S.W.2d 522 (Mo. App. E.D. 1998) is "squarely contrary to the plaintiff's argument" because it "emphasizes that destruction of evidence must be intentional to rise to the level of spoliation." Respondent's Brief at 44. SSM relies apparently on the self-evident proposition stated by the Court that, where there is *no evidence* "in the record manifesting bad faith or intent to

[1] SSM similarly lied in this case about its ability to save the video. (L.F. 000370; L.F. 000382 – 000383)

defraud on the part of a party, application of the spoliation doctrine is inapplicable." *Id.* at 528. The evidence at issue in *Schneider* was destroyed by a non-party with no evidence that it was done at the instruction of any party. *See Id.*

To the contrary, the law set forth in *Schneider* clearly supports Plaintiff's position. As the Court of Appeals noted therein, "Not concerned with whether the opposing party suffers prejudice as a result of the destroyed evidence, the [spoliation] doctrine works only to punish the spoliator." *Id*. at 526. While the court held that, for the spoliation doctrine to apply, a party must have "destroyed the missing [evidence] under circumstances manifesting fraud, deceit or bad faith[,]" the court further stated that "under certain circumstances, the spoliator's **failure to satisfactorily explain the destruction of the evidence** may give rise to an adverse inference against the spoliator" and that "[i]n other circumstances, 'it may be shown by the proponent that **the alleged spoliator had a duty, or should have recognized a duty to preserve the evidence**.'" *Schneider v. G. Guilliams, Inc*., 976 S.W.2d 522, 527 (Mo.App. E.D. 1998). [Internal cit. omit.]

Here, Plaintiff has already set forth at length the evidence demonstrating SSM's duty to preserve the video, evidence that SSM's employees intentionally destroyed the video or affirmatively chose not to preserve it, and SSM's destruction of evidence, including computer activity logs, which would have shown exactly what happened to it. *See* App. Brief at 30.

5. **Pisoni v. Steak 'N Shake**

SSM relies on *Pisoni v. Steak 'N Shake Operations, Inc.*, 468 S.W.3d 922 (Mo.App. E.D. 2015), which primarily concerns the separate issue of the permissibility of an adverse inference jury instruction under the spoliation doctrine, discussed in the following section.

In addition to seeking such a jury instruction, the plaintiff in *Pisoni* argued that the defendant should be barred from offering the testimony of eyewitnesses as to what caused the fall. The Court of Appeals noted that "it is unclear whether the trial court found that Appellant met her burden of proving Respondent spoliated the missing videotape." *Id.* at 928. The court further found that the trial court did not abuse its discretion in allowing the eyewitness testimony.

Pisoni is distinguishable on this point for the simple reason that there was an eyewitness to the fall in that case, but not in this one. Those facts do not apply where the *only* "eyewitness" to the fall was the video itself. *See Garrett v. Terminal R. Ass'n of St. Louis*, 259 S.W.2d 807, 812 (Mo. 1953) (holding that spoliator was required to admit phrase "& flat wheels" was not on original bad order card, which spoliator had destroyed, where there was no independent eyewitness evidence that car had flat wheels).

Furthermore, to the extent the Court in *Pisoni* would permit a spoliating party to deny what it is bound in the law to admit on that evidentiary question, i.e. what a spoliated document would have shown, by offering counter-vailing evidence this would both contradict the remedy for spoliation set forth by this Court in *Garrett* and leave the spoliation doctrine completely ineffective.

6. Carroll v. Kelsey

SSM relies heavily on *Carroll v. Kelsey*, 234 S.W.3d 559 (Mo. App. W.D. 2007) contending that it is "the closest analog to this case." Respondent's Brief, at 58. SSM's claim that *Carroll* closely resembles the facts of this case is remarkable. *Carroll* involved a wrongful death complaint against a defendant driver after the plaintiffs' son was struck and killed while riding his bicycle in the street. The defendant had the damage to his vehicle repaired shortly after suit was filed.

In that case, **the *only* evidence of spoliation was the timing of the repair three weeks after suit was filed**. *Id*. at 566. The defendant testified that "[N]o one ever told [defendant] he could not repair the truck and that neither Carrolls' counsel or their expert ever contacted him to inspect the truck or ask that he not repair the damage." *Id*. In fact, the defendant testified that right after the accident his insurance company affirmatively told him he could have the damage repaired if he so chose. *Id.* Furthermore, *Carroll* involved a private individual, not a sophisticated corporation with its own security guards designated with investigatory duties, IT employees well-trained in the use of the company's computer systems, and written policies requiring the preservation of evidence *See* App. Brief at 34-35. Based on these circumstances, the trial court determined that the defendant had provided a "satisfactory explanation" that outweighed the minimal timing evidence presented by the Plaintiff. *See Id*.

But as explained in Appellants' Brief, Plaintiff presented both overwhelming evidence of spoliation and that SSM has never provided a "satisfactory explanation" of what occurred to the video evidence, which it had a clear duty to preserve. *See* App. Brief

at 30-43. In fact, the computer logs which would have shown what happened to that evidence, i.e. who had accessed the video and when, were themselves destroyed by SSM. App. Brief at 42-43. SSM cannot now claim to have provided a "satisfactory explanation" when it destroyed that very explanation.

D. AN ADVERSE-INFERENCE INSTRUCTION ON SPOLIATION IS APPROPRIATE AND NECESSARY.

SSM argues that Plaintiff did not preserve any objection relating to a jury instruction because it did not submit a proposed instruction at trial. As Plaintiff explained in the Appellant's Brief, the propriety of a jury instruction was put at issue by the Court of Appeals' *sua sponte* discussion in its Opinion and suggestion that the matter should be reviewed by the Committee on Instructions. And the need for such an instruction could not be clearer. In this very case, as set forth in Point II, SSM's counsel manipulated the lack of an approved instruction for its own ends through its improper argument to the jury that the lack of a spoliation instruction meant that the jury should ignore any adverse inference from SSM's spoliation of evidence. Therefore Plaintiff respectfully joins in the Court of Appeals' suggestion and requests that the Court address this issue.

SSM relies on the opinions in *Pisoni* and *Berger v. Copeland Corp. LLC*, 505 S.W.3d 337 (Mo.App. S.D. 2016), previously addressed in Appellant's Brief, and further relies on a comment to MAI 1.00 (effective January 1, 2017) to the effect that the Committee still believes that a jury instruction on "spoliation" is not approved under current Missouri case law. Mo. Approved Jury Instr. (Civil) 1.00, General Comment D (7th ed). Notably, the Comment is premised on the Court of Appeals' opinion in *Pisoni*,

which, as set forth in Appellant's Brief, relied overwhelmingly on case law unrelated to the issue of spoliation. Furthermore, the Committee's recent comment specifically states that "**The Supreme Court has not definitively addressed these issues**." *Id*. [Emphasis supplied.] Of course, this Honorable Court is the final arbiter of the interpretation of Missouri law and the manner of instructing the jury on that law. And the Committee on Instructions clearly recognizes that this issue remains unsettled.

SSM argues that "The plaintiff in this case does not attempt to explain how an adverse-inference instruction could comport with the MAI." But Plaintiff did explain just that: Namely that the MAI already addresses the obvious need in jury instructions to explain what evidence is properly before the jury and for what purposes it may be considered in the form of withdrawal and limiting instructions, as well as MAI 2.01's instructions to the jury regarding evaluating the credibility of witness testimony.

As noted in Appellants' Brief, *Pisoni* and *Berger* rely on case law addressing the propriety of a jury instruction in the context of the adverse inference arising from the failure to call a witness. *See* App. Brief at 50-51.

Plaintiff respectfully submits that the Court of Appeals in *Pisoni* and *Berger* excessively analogized the adverse inference involved in the spoliation context with the adverse inference involved in the failure to call a witness, ignoring the radically different nature and underlying policies behind the two doctrines. The adverse inference related to witnesses requires no showing of bad faith and is not a punishment for the destruction of evidence. Plaintiff respectfully submits that it makes little sense for the primary remedy

for the intentional instruction of evidence to be treated on the same footing and with the same scope as the remedy for counsel's strategic decision not to call a witness.

E. CONCLUSION.

Plaintiff respectfully submits that the case before this Honorable Court demonstrates why SSM's interpretation of the spoliation doctrine results in a toothless remedy. Despite SSM's protestations, Plaintiff produced overwhelming evidence that the video of Mr. Hill's fall was destroyed by SSM under circumstances manifesting fraud, deceit and bad faith. SSM over the years gave varying explanations for the destruction that constantly mutated as they were disproven. Plaintiff also proved that SSM "wiped" hard drives and destroyed activity logs which would have shown what happened to the video. (T.668-669) SSM's own agent Robert Rieder admitted he voluntarily chose not to preserve the evidence, because he felt that he could describe Mr. Hill's fall just as well. (L.F.000338-342; T.206) The parties worked for thousands of hours and spent hundreds of thousands of dollars over eight years of litigation because SSM chose to destroy evidence which would have shown exactly what happened to Mr. Hill.

SSM destroyed in bad faith the only direct evidence of what occurred while simultaneously contesting what that evidence would have shown. Both as a matter of law and simple fairness, this Honorable Court should hold, pursuant to *Garrett*, that the trial court should have held SSM to admit that the video would have shown Mr. Hill tripping on the uneven concrete slab, and reverse and remand this case for a new trial. The alternative is that SSM will be rewarded for its bad faith destruction of evidence.

II. COUNSEL FOR PLAINTIFF'S ATTEMPT TO ARGUE TO THE JURY AN ADVERSE INFERENCE ARISING FROM SSM'S SPOLIATION OF THE VIDEO WAS COMPLETELY NEGATED WHEN THE TRIAL COURT PERMITTED SSM'S COUNSEL TO MISTATE THE LAW TO THE JURY.

SSM's counsel argued during closing over Plaintiff's objection that, because there was nothing in the *instructions* from the court about spoliation or an adverse inference against SSM, the law did not support Plaintiff's adverse inference argument regarding the destruction/spoliation of the video of Mr. Hill's fall: ***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[.]"*** (T.1103) **This effectively deprived Plaintiff of any remedy for SSM's destruction of evidence**.

SSM cites various cases for the proposition that the trial court is given "broad discretion" to rule on objections during closing and that the Court should "interpret[] the challenged comments in light of the entire record and not in isolation." Respondent's Brief at 62. [Citations omitted] However, the record and surrounding context is precisely what demonstrates the extreme prejudice to Plaintiff arising from counsel' improper argument and the overruling of counsel's objection.

Because SSM has no real excuse for its counsel's behavior, it again creates a straw man argument. SSM asserts that "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.'" Resp. Brief at 63. SSM now contends that its counsel was "responding"

when counsel improperly told the jury to disregard Plaintiff's adverse inference argument because it was not in the instructions.

The Court should note that SSM creates this straw man by cobbling together two different portions of counsel's argument. In one sentence, SSM references counsel's entirely proper adverse inference argument and immediately thereafter references a brief statement made by Plaintiff's counsel **seven pages later** in which counsel is not discussing spoliation at all, but rather the credibility of witnesses. *See* Resp.'s Brief at 63; (T.1078-1079, 1086)[2] In the midst of this discussion, which does not relate to spoliation, counsel briefly and inadvertently refers to "the adverse inference" before immediately correcting himself. (T. 1086) SSM has inserted this statement made in a different context in the same sentence with a reference to Plaintiff's adverse inference argument to create the illusion that Plaintiff suggested to the jury that there was an "adverse inference jury instruction." But this never occurred.

While SSM suggests that Plaintiff's adverse inference argument improperly instructed the jury, SSM identifies no misstatement of the law because there was none. Plaintiff's counsel correctly stated "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." It is an entirely correct statement of the law that the

[2] In SSM's original Respondent's Brief before the Court of Appeals, SSM even attempted to condense counsel's adverse inference argument with the reference to an "instruction" in one block quote, despite the seven page ellipsis. Resp. Brief at 22.

jury was entitled to infer based on SSM's spoliation that the video would have shown Mr. Hill tripping on the raised slab. (T.1078-1079)

SSM's straw man argument, and lack of a better excuse, confirms the reality that **counsel for SSM knowingly and improperly misstated the law to the jury in order to negate any effect from Plaintiff's adverse inference argument**. Plaintiff's counsel immediately objected. When the trial court overruled Plaintiff's objection, this ratified defense counsel's misstatement of the law and the message to the jury was clear that Plaintiff's adverse inference argument should be disregarded because it was not in any instruction.

A. DEFENSE COUNSEL SHOULD NOT HAVE BEEN PERMITTED TO SUGGEST TO THE JURY, IN DIRECT VIOLATION OF THE TRIAL COURT'S ORDER, THAT THE SPOLIATED VIDEO WAS FAVORABLE TO SSM.

SSM contends that Plaintiff waived this argument by failing to make an objection during closing argument. However, as set forth in Appellant's Brief, Plaintiff seeks plain error review of this point because SSM's counsel's misconduct resulted in manifest injustice and a miscarriage of justice. *See Wheeler v. Dean*, 482 S.W.3d 877, 879 (Mo.App. S.D. 2016).

Plaintiff's filed a motion in limine to bar SSM from offering evidence regarding what Mr. Rieder claimed to have seen on the spoliated video. (L.F.1408) At argument on Plaintiff's motion, counsel also sought to foreclose SSM from evading this ruling by suggesting that it "wished" it had the video. The trial court entered its Order stating:

"Defendant is **not permitted to argue or state to the jury that 'we wish we could show the video to you'** or words to that effect. Defendant may state that they regret the destruction of the video or words to the effect." (L.F.002382)

Yet SSM's counsel chose to violate this order and suggest to the jury that SSM wished it *had* the video, implying it wished it could show the spoliated video to the jury and that it was therefore favorable to SSM. (T.1102) While SSM offers only a brief reference to the statement of its Counsel in this section of its Brief, it ignores the full context of counsel's statement:

> 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.
>
> T. 1102-1103. [Emphasis supplied.]

Counsel's statement was plainly designed to telegraph to the jury that the videotape and what Mr. Rieder saw on it supported SSM's case. Just as with SSM's counsel's improper statement that Plaintiff's adverse inference argument should be ignored, defense counsel used improper argument to negate any attempt to remedy SSM's spoliation of evidence.

SSM contends that plain error review is inappropriate because Plaintiff somehow "invited" the trial court's error by "request[ing] an order preventing SSM from stating it wished it could show the video of Mr. Hill's fall to the jury." Resp. Brief, at 64-65. This is false. Plaintiff never asked the trial court to permit Defendant to say it "regretted" the

destruction and this assertion is unsupported in the record. *See* T.1151 ("Defendant may state that they 'Regret the destruction of the video' or words to that effect.' **We didn't agree with the court on that**. But that's what the court decided.") [Emphasis supplied.] Instead, this language was requested by defense counsel for the very purpose to which it was put: To suggest to the jury that the destroyed video was favorable to SSM.

Therefore, even if defense counsel had only used the erroneous language permitted by the trial court (that SSM "regretted" the destruction of the video), Plaintiff could not have "invited" error by their motion in limine to bar SSM from commenting. But defense counsel did *not* stick to the language SSM had convinced the trial court to include in the Order. Instead, counsel violated the court's Order, arguing to the jury that SSM had "**paid a price**" due to not having the video, and that "**Mr. Rieder cannot, did not talk about anything he saw in the videotape, and we absolutely regret that we don't have the videotape."** (T.1102) The assertion that SSM "paid a price" because it could not show the jury the video is the exact equivalent of asserting that SSM "wished" it had the video, and was therefore clearly in direct violation of the trial court's order.

III. SSM'S CONVERSE INSTRUCTION MISDIRECTED, MISLED, AND CONFUSED THE JURY.

SSM asserts that Respondent's converse instruction, Instruction No. 8, could not have caused any jury confusion, despite the failure to track the specific negligence language from Plaintiff's verdict director, because SSM's Instruction No. 8 referred the jury back to Instruction No. 7 for the specific acts of negligence asserted by the plaintiff. Resp. Brief at 68.

The language of elements in the converse must mirror the language of the verdict director, or at the very least, correctly state the elements in substantially the same language. *McLaughlin v. Hahn*, 199 S.W.3d 211, 216–17 (Mo.App. W.D. 2006). As set forth in Appellant's Brief, SSM's converse was a complete abstraction that provided no guidance to the jury in evaluating SSM's fault. While SSM contends that the jury could not have been confused, by way of further example, Instruction 7 uses the term "ordinary care" not only for the failure to remove, barricade, or warn of the raised slab, but separately relating to knowledge or notice, namely that SSM "knew **or by using ordinary care** could have known of this condition." (L.F.002435) SSM's converse stated that the verdict must be for defendant SSM unless it "**failed to use ordinary care as submitted in Instruction 7**[.]" (L.F.002436) Because ordinary care is referenced in both the second and third paragraph of Plaintiff's verdict director, the jury looking back at Instruction 7 would not have any basis to decide which "ordinary care" Instruction 8 was referring to.

Respondent cites *Graeff v. Baptist Temple of Springfield*, 576 S.W.2d 291, 305 (Mo. banc 1978) and *Cole v. Plummer*, 661 S.W.2d 828, 830-31 (Mo.App. W.D. 1983) for the proposition that a defendant can converse the term negligence generally. However in those cases the language at issue was "negligence" not "ordinary care," and the term negligence would have only been referred to once in plaintiff's verdict director. Here, the jury reading Instructions 7 and 8 together would not understand which failure to use "ordinary care" Instruction 8 was referring to.

SSM contends that the instruction tracks MAI 33.15(3). However, the MAI

expressly states in the Notes on Use: "Caution: … **These examples are not approved instructions for any particular litigation since the proper language for a converse instruction in any particular litigation depends upon the verdict director being conversed**."[3] [Emphasis supplied.]

Defendant's failure to use substantially the same language resulted in an instruction that misdirected, misled, and confused the jury, entitling Plaintiff to a new trial.

IV. THE TRIAL COURT SHOULD NOT HAVE DENIED PLAINTIFF'S MOTION FOR SANCTIONS, THEREBY ALLOWING DEFENDANT TO BENEFIT FROM ITS OWN MISCONDUCT.

It is uncontroverted that SSM had the uneven concrete slab at the walkway leveled after it almost caused another serious injury, without notice to Plaintiff. SSM then took staged photographs of Dr. Brennan, its "star witness," on the now-repaired walkway indicating where he believed he saw Mr. Hill. During Dr. Brennan's deposition, SSM's counsel concealed the fact that the staged photographs had been taken after the walkway had been repaired. SSM lamely contends that the photographs were used only as "demonstrative exhibits" and not to show the absence of a dangerous condition. However, with these material facts concealed, Dr. Brennan testified that the walkway was

[3] In fact, Defendant's converse does not "track" MAI 33.15(3). SSM chose to modify 33.15(3) with MAI 19.01 rather than basing their converse on MAI 33.15(5), the phrasing to be used in a converse with an MAI 19.01 modification.

"level" and that he did not know of any changes to the walkway. (L.F.002494, 002499) Once Plaintiff moved to exclude Dr. Brennan's testimony, counsel for SSM represented that they had investigated the circumstances and that the photographs were taken prior to the repairs, and asked the court and Plaintiff's counsel to rely on this representation. The truth was only uncovered once Plaintiff's counsel realized that the photographs could not have been taken then. (L.F.002353; T.19-23)

SSM further attempts to change the subject from its counsel's misconduct by arguing that Plaintiff did not make a separate objection at the time Dr. Brennan's deposition was played. However, Plaintiff's Point Relied On is clear that the error is the trial court's denial of Plaintiff's Motion for Sanctions. Plaintiff renewed that motion as part of Plaintiff's motion for new trial (L.F.002466), and therefore the denial of the motion for sanctions is final and appealable. *See Heintz v. Swimmer*, 922 S.W.2d 772, 776 (Mo.App. E.D. 1996).

SSM alleges that Plaintiff consented to the denial of Plaintiff's Motion. SSM's twisting of the record is fundamentally misleading. At the argument on Plaintiff's Motion for Sanctions, the trial court noted, and the parties agreed, that if the court granted Plaintiff's Motion for Sanctions, then defense counsel would not be witnesses and the case could proceed to trial. (T.38) However, the Court noted that if the Court *denied* Plaintiff's motion, then this would leave defense counsel as witnesses and would cause yet another continuance of a case that had been pending for many years. Therefore the trial court ordered the parties' counsel to meet and confer to discuss how the parties could proceed if Plaintiff's motion were denied. (T.36-38)

Although the trial court was concerned that Plaintiff was prejudiced (T.65), the court nevertheless *denied* Plaintiff's Motion for Sanctions. (L.F.2380) Plaintiff did *not* consent to the denial of the Motion for Sanctions and there is nothing in the record stating that he did. A statement regarding the conduct of SSM's attorneys was necessitated by the fact that otherwise Plaintiff would be entitled to call SSM's counsel to the stand to explain his concealment of when the photographs were taken, making him a witness in the case. Plaintiff engaged in the meet and confer process as directed by the court, but did *not* consent to the trial court's denial of the motion.

The primary relief Plaintiff sought, excluding Dr. Brennan's testimony, was clearly appropriate. Indeed, trial courts addressing a motion for sanctions have discretion to do far more than exclude a witness. In a recent case before the Circuit Court of Laclede County, where the defendant concealed relevant documents in discovery, the trial court sanctioned the defendant by prohibiting them from presenting *any* evidence at trial. *See Berger v. Copeland Compressor Corp., et al.*, Case No. 10LA-CC00089 (Mo. Cir. Ct. March 20, 2018).

While trial courts have discretion in imposing sanctions for discovery violations, the trial court abuses its discretion "when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Giddens v. Kansas City S. Ry. Co.*, 29 S.W.3d 813, 819 (Mo. 2000). The facts underlying SSM's misconduct speak for themselves. Plaintiff respectfully submits that the trial court's ruling allowing SSM to benefit from this misconduct was against the logic of the

circumstances and shocks the sense of justice. Therefore the case should be reversed and remanded for a new trial.

V. DR. HUSS' NEW OPINION TESTIMONY CONCERNING THE CAUSE OF MR. HILL'S FALL SUBSTANTIALLY PREJUDICED PLAINTIFF'S CASE AND THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING IT.

In his deposition Dr. Huss testified that dehydration "could have been" a contributing factor, but at trial and over the objection of Plaintiff, Dr. Huss was permitted to testify that it "probably" caused Mr. Hill to fall, i.e. that it more likely than not was the cause (T.493-494). SSM argues there was no difference in this testimony, but of course there is a material difference between an expert stating something is a mere "possibility" versus offering a full causation opinion. This changed testimony was prejudicial to Plaintiff because it concerned the key issue in the case, i.e. what caused Mr. Hill to fall.

When an expert who has been deposed later changes their opinion before trial, the party intending to use the expert's testimony **has the duty to disclose the new information** to the opposing party. *See Whitted v. Healthline Management, Inc.*, 90 S.W.3d 470, 475 (Mo.App. E.D. 2002) [emphasis supplied] citing *Green v. Fleishman*, 882 S.W.2d 219, 222 (Mo.App. W.D. 1994). It is well-settled that it is highly prejudicial for a party to violate this duty.

In *Whitted*, the Court held that the trial court properly awarded a new trial where the expert's deposition and trial testimony were inconsistent. During his deposition the doctor expert was asked what caused the deceased to die, he stated: "[Expert:] Well, we

don't really know. Presumably he had a malignant arrhythmia. We don't know that at all." *Id.* at 476. Yet at trial the doctor expert testified as to a specific cause of cause of death. *See Id*. at 477. The Court of Appeals approved the grant of a new trial, noting that "Allowing experts to change their opinions after deposition and before trial without notice to their adversaries would frustrate the purpose of our discovery rules because it would prevent them from eliminating, as far as possible, concealment and surprise in litigation." *Id.* at 475.

As Plaintiff pointed out in Appellant's Brief, 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. App. Brief at 72. SSM relies on certain dicta from *Sherar v. Zipper*, 98 S.W.3d 628, 632 (Mo.App. W.D. 2003) to contend that Plaintiff cannot claim surprise because "plaintiff's counsel did not follow up and ask Dr. Huss whether this opinion was held to a reasonable degree of medical certainty." Resp. Brief at 74.

In *Sherar*, the trial court excluded purportedly undisclosed expert testimony given during an "evidentiary deposition" for purposes of trial where the defendant's expert did not express his opinions to a reasonable degree of medical certainty in his prior discovery deposition. However, the Court of Appeals found that the substance of that testimony was provided during the earlier deposition, including by questions from both plaintiff's and defense counsel showing the expert's opinion that that the decedent's death would have been prevented had the defendant Dr. Zipper referred the decedent to a specialist. *Id*. at

634. Therefore the court found that the expert had "offered materially the same ultimate opinion at both depositions." *Id*. at 635.

This case does not involve merely a failure to couch Plaintiff's counsel's questions in the form of "a reasonable degree of medical certainty." SSM's argument ignores the actual, and substantial, change in Dr. Huss' testimony from deposition to trial. Dr. Huss testified at deposition that there was only a possibility dehydration played a role. Testimony to a reasonable degree of medical certainty that dehydration "could have" played a role would *still* be inadmissible, speculative testimony. *See Coon v. Dryden*, 46 S.W.3d 81, 91 (Mo.App. W.D. 2001) ("when an expert merely testifies that a given act or failure to act 'might' or 'could' have yielded a given result, though other causes are possible, such testimony is devoid of evidentiary value.") Plaintiff's counsel was not required to ask Dr. Huss whether he had a different, stronger opinion - that dehydration *likely* caused Mr. Hill's fall. Indeed, in *Sherar* the court reaffirmed the principle that an expert who "renders a substantially different opinion than the opinion disclosed in discovery" should be excluded. *Sherar*, 98 S.W.3d at 634, citing *Gassen v. Woy*, 785 S.W.2d 601(Mo.App. W.D. 1990).

Instead, as in *Whitted*, SSM's expert shifted from discussing mere possibilities to asserting a causation opinion at trial. The cause of Mr. Hill's fall was the central fact in dispute. Plaintiff was substantially prejudiced by the new opinion because Plaintiff was not prepared to rebut that opinion and had no chance to question him during his deposition. Plaintiff submits that the trial court abused its discretion when it permitted SSM to surprise Plaintiff with a new medical causation theory during trial.

CONCLUSION

SSM spoliated the video of Mr. Hill's fall, spoliated the activity logs that would have shown what happened to that video, and employed its elderly "star witness" Dr. Brennan in a staged reenactment of the incident on a concrete walkway that had been secretly repaired. While SSM attempts to deflect and downplay its misconduct, SSM's arguments do not change these fundamental facts, nor do they change the overwhelming likelihood that SSM prevailed at trial because the trial court substantially permitted SSM to benefit from its own misconduct. **A picture is worth a thousand words**.

The Hill Family respectfully requests that this Honorable Court reverse the judgment and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Appellant's Reply Brief was served on all registered counsel via the Missouri Courts E-filing System on November 29, 2018.

/s/ Douglas P. Dowd

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this Substitute Reply Brief complies with the requirements of Missouri Rule 84.06(c), in that the brief contains 7,642 words, notwithstanding the cover, certificates of service and compliance, and the signature block pursuant to Rule 84.06(b). The word count was derived from Microsoft Word. The Brief was scanned using Norton Anti-Virus and were scanned and certified as virus free.

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