

Chicago Daily Law Bulletin®

Volume 161, No. 245

New law may force spoliation showdown

Like many areas of law, spoliation of evidence has its unresolved issues. For example, there is disagreement whether the action is limited to negligence or whether it can be used to target intentional actors.

For instance, compare *Cangemi v. Advocate South Suburban Hospital*, 364 Ill.App.3d 446 (1st Dist. 2006) ("Plaintiffs cite to no case that specifically recognizes intentional spoliation of evidence as a tort in Illinois. Neither have we found such an Illinois case."), with *Williams v. General Motors Corp.*, 1996 WL 420273 (N.D. Ill. 1996) (intentional spoliation claim stated where defendant allegedly took steps to obtain van after lawsuit filed and defendant agreed to preserve van, but parts were later missing).

There is also disagreement regarding which statute of limitations applies. Compare *Schusse v. Pace Suburban Bus Division of Regional Transportation Authority*, 334 Ill.App.3d 960 (1st Dist. 2002) (because the limitations period for the commencement of a spoliation claim "is not otherwise provided for by statute," it is governed by the five-year period in Section 13-205), with *Wofford v. Tracy*, 2015 IL App (2d) 141220 (limitations period for an underlying claim applies, not the five-year catchall statute of limitations).

Still, a third area of uncertainty is under what circumstances the loss of surveillance video gives rise to potential spoli-

ation liability. Some cases dismiss spoliation claims based upon the loss of surveillance video, see e.g. *Gregorio v. Yellow Transportation Inc.*, 2009 WL 3681698 (N.D. Ill. 2009), while other courts have permitted them to move forward. See e.g. *Welch v. Wal-Mart Stores Inc.*, 2004 WL 1510021 (N.D. Ill. 2004) (spoliation claim stated where the plaintiff alleged that employees watched videotape of accident and then disposed of it).

An imminent addition to Illinois law may force a showdown on one or more of the foregoing unresolved issues.

On Jan. 1, Public Act 099-0430 becomes law in the state of Illinois. "This act may be cited as the Authorized Electronic Monitoring in Long-Term Care Facilities Act." (P.A. 099-0430 at sec. 1). "A resident shall be permitted to conduct authorized electronic monitoring of the resident's room through the use of electronic monitoring devices placed in the room pursuant to this act," Section 10(a) reads.

Under the Nursing Home Care Act, "no person shall: Intentionally prevent or interfere with the preservation of evidence pertaining to any violation of this act or the rules promulgated under this act."

The statute places ownership and control of the electronic monitoring process in the hands of the resident. "A resident choosing to conduct authorized electronic monitoring must do so at his or her own expense, including paying purchase,

THE PROCEDURAL THICKET



**ANTHONY
J. LONGO**

Anthony J. Longo is a founding partner of Brennan, Garvey LLC. He defends civil litigation matters in both state and federal court. He is an adjunct professor at The John Marshall Law School, lecturer at the Illinois College of Optometry and a speaker on issues of Illinois civil procedure.

installation, maintenance and removal costs," states Section 25.

Once a video recording is made, the legislature does not permit it to be destroyed. Under the Nursing Home Care Act, "no person shall: Intentionally prevent or interfere with the preservation of

evidence pertaining to any violation of this act or the rules promulgated under this act." See 210 ILCS 45/3-318(a)(4)(2015)

The resident must provide video recordings to any party involved in a civil action. "The resident or person who consented on behalf of the resident in accordance with Section 15 of this act shall provide a copy of any video or audio recording to parties involved in a civil, criminal or

administrative proceeding, upon a party's request, if the video or audio recording was made during the time period that the conduct at issue in the proceeding allegedly occurred," according to Section 45(c).

The resident's video recordings are admissible. "Subject to applicable rules of evidence and procedure, any video or audio recording created through authorized electronic monitoring in accordance with this act may be admitted into evidence in a civil, criminal or administrative proceeding if the contents of the recording have not been edited or artificially enhanced and the video recording includes the date and time the events occurred," Section 50 reads.

The Authorized Electronic Monitoring in Long-Term Care Facilities Act may set the stage for resolution of some of the aforementioned unresolved issues in the area of spoliation of evidence. The act may be the very first law in the history of Illinois to erect a regime encouraging the creation of surveillance videos that cannot be destroyed, but rather explicitly preserved at the legislature's command as useful evidence in later civil proceedings.

Residents who create surveillance, but are later unable to produce the recordings for later civil actions may be at risk for spoliation of evidence claims.

The efficacy of those claims will depend in large part on the resolution of the unanswered questions in spoliation law. The act may have unknowingly created the perfect storm for settling these issues.