2019 IL App (1st) 173169-U
No. 1-17-3169
February 11, 2019

FIRST DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JASON WEIGAND, Plaintiff-Appellant, v. NINE-FIFTY, LTD., d/b/a KINCADE'S CHICAGO TITLE LAND TRUST COMPANY, No. 2016 L 000877 successor to LaSalle Bank NATIONAL ASSOCIATION successor trustee to AMERICAN NATIONAL BANK and TRUST COMPANY OF CHICAGO, not Personally, but as trustee under Trust Agreement date January 21, 1997 and known As Trust Numbers 122553 & 12252-04 Armitage Building Corp., Bobby Burleson and Kevin Killerman, Defendants-Appellees.	Appeal from the Circuit Court Of Cook County. No. 16 L 000877 The Honorable Patricia O'Brien Sheahan, Judge Presiding.

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mikva and Justice Griffin concurred in the judgment.

ORDER

¶ 1 *Held*: A defendant has a duty to preserve a video that includes evidence relevant to the cause of an injury if the defendant should have foreseen that the evidence would be material to a potential civil action. A trier of fact may infer from the defendant's failure to preserve a

video that the video included evidence adverse to the defendant. That evidence together with other evidence raised issues of fact that made summary judgment in favor of defendants improper.

¶ 2 Jason Weigand (Weigand) sued the owners and operators of Kincade's, a bar, to recover for injuries he suffered when a ceiling tile fell on him. The circuit court granted defendants' motion for summary judgment. We find Weigand presented sufficient evidence to support a finding that he lost a viable cause of action as a result of defendants' negligent spoliation of evidence. An adverse inference from the destruction of the evidence and the defendants' answer to the complaint, along with other evidence in the record, could support a finding in favor of Weigand on his negligence claims against the defendants as owners of the premises where the injury occurred. We reverse and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 On May 28, 2014, Weigand and Matthew Berrey (Berrey) went to Kincade's to watch the Chicago Blackhawks on television. When the Blackhawks scored in overtime, a roar went up and a ceiling tile came down, hitting Weigand's head and arm. Weigand took pictures showing the broken ceiling tile on the floor, with Weigand's blood on it, and the hole in the ceiling where the tile had been. Weigand asked the bartender to call an ambulance. Weigand suffered a gash on his arm, a cut to his face, and several broken teeth. Doctors in the emergency room sterilized the wounds and used eight stitches to close the gash on Weigand's arm. A dentist later performed root canals to repair the broken teeth.

¶ 5 Kincade's general manager, Tod Collins, learned of the incident that evening. A few hours later he watched the video recording made by the bar's cameras.

¶ 6 Two days after the incident, Kincade's insurer called Weigand to discuss his claim against the bar. Weigand sent an email that day to confirm that he described the incident and his injuries for the insurer.

¶ 7 On January 27, 2016, Weigand sued Nine Fifty, Ltd., the owner of Kincade's, and several parties named as owners of the land and the building. Weigand alleged that each defendant allowed the ceiling to remain in an unsafe condition and failed to make reasonable inspections of the ceiling tiles. After taking depositions, Weigand amended the complaint to add a count for negligent security, alleging that Nine Fifty used inadequate security measures and "[f]ailed to properly and adequately train its agents, servants and employees, including Security, to control unruly and disruptive patrons and to prevent injury or harm." Weigand also added a count for spoliation, alleging that the bar's cameras recorded images of the incident, and the "video of the incident contained evidence crucial to the present case, including, but not limited to, evidence regarding the identity of the persons involved in the incident." He claimed that Nine Fifty breached its duty to preserve the video, and, as a result of the breach, he could not prove his cause of action against Nine Fifty for premises liability, and he could not identify other potential defendants who caused his injury.

¶ 8 In his third amended complaint, Weigand alleged:

> "8. At the aforesaid time and place, the Defendant, Nine-Fifty, Ltd., as the owner, manager, and/or maintainer of the aforementioned premises, either individually or by and though its agents, servants, and/or employees, acted with less than reasonable care and was then and there guilty of one or more of the following careless and negligent acts and/or omissions:

a. Improperly operated, managed, maintained and controlled its premises in allowing the ceiling tile to remain in a dangerous and unsafe condition;

b. Failed to warn the Plaintiff and other persons lawfully on said premises of the dangerous condition when it knew or should have known in the exercise of ordinary care that said warning was necessary to prevent injury to the Plaintiff;

c. Failed to make a reasonable inspection of its premises when it knew or in the exercise of ordinary care should have known that said inspection was necessary to prevent injury to the Plaintiff and others lawfully on said premises;

d. Failed to correct a dangerous condition on its premises;

e. Failed to provide adequate safeguards to prevent Plaintiff from injury while Plaintiff was lawfully upon said premises;

f. Caused and/or created a dangerous and/or unsafe hazard/condition to exist on its premises."

¶ 9 Weigand voluntarily dismissed his claim against Chicago Title Land Trust Company, identified as trustee of a trust with an ownership interest in the property. The remaining defendants filed a joint motion for summary judgment on the third amended complaint, supported by depositions and an answer to interrogatories. Defendants Bobby Burleson (Burleson) and Kevin Killerman (Killerman), identified as beneficiaries of the trust that had an ownership interest in the property, said in their answer to discovery that "[n]o witness" saw the incident. They said Kincade's staff provided "[r]outine maintenance," but "[c]eiling not cleaned."

¶ 10 Contradicting Burleson and Killerman, Katrina Prospero (Prospero), a waitress for Kincade's, testified in her deposition that she saw a bottle go up from a group of men standing between tables one and two. She saw the bottle hit the ceiling tile and she saw the tile hit Weigand. She said "[t]here was blood everywhere." Everyone in that section quickly paid their bills and left. She said:

> "no one would admit to knowing exactly what happened in the group of people who were drinking at tables one and two. [Some customers] were trying to close out with me ***.
>
> [T]here was a group of people who left the bar pretty immediately after the beer bottle was thrown. I think it's safe to assume that one of the guilty members was in there, but I can't be sure about that because, again, I didn't see who threw the beer bottle."

¶ 11 Prospero testified that she and other staff members cleaned up the broken tile while keeping customers away from the area.

¶ 12 Collins testified that Prospero told him she saw the bottle hit the tile. Collins said busboys and other staff cleaned up the debris that night.

¶ 13 Contradicting Collins and Prospero, Rafael Class (Class), who worked as the "maintenance guy" for Kincade's, testified that he found broken tile still on the floor of the bar when he came to work on May 29, 2014. He found a broken beer bottle near the broken tile. He replaced the ceiling tile. He testified that he worked at Kincade's for 23 years, and at no other time had he replaced a ceiling tile, because none had ever fallen or broken. Class

testified that twice a month he got on a ladder and touched all the ceiling tiles to make sure they were not loose.

¶ 14 Gregg Weinstein (Weinstein), operations manager for Nine Fifty, contradicted Collins and Prospero, as Weinstein testified that Prospero said she did not see the bottle thrown or the tile falling. Contrary to the answer Burleson and Killerman filed, Weinstein said Class "wiped down" the ceiling tiles three times a year. Weinstein watched the video of the incident. The video showed an arm rising, the bottle flying out of a hand, something falling, and "you see the guy go like this (indicating), who threw the bottle. He knows he's done something bad, and he tells a friend what he just did. You can see him go (indicating), and they scramble around."

¶ 15 Collins confirmed the video showed a person tossing up a beer bottle. The video showed that person "[put his] hand over his mouth, oh, crap, what did I do, something to that effect, and then run out the door." The video also showed the tile falling after the bottle went up. Collins concluded, from the video and from what Prospero told him, that the thrown bottle hit the ceiling tile and caused it to fall, causing Weigand's injury. Both Collins and Weinstein admitted that they did not preserve the video recording.

¶ 16 Berrey and Weigand stated in their affidavits that they did not see any bottle on the floor at the time of the injury. The pictures Weigand took show the broken ceiling tile on the floor, with blood, but no beer bottle. The circuit court granted the defendants' motion for summary judgment based on plaintiff’s third amended complaint. Weigand now appeals.

¶ 17 ANALYSIS

¶ 18 Standard of Review

¶ 19 We review *de novo* the order granting the motion for summary judgment. *Deutsche Bank National Trust Co. v. Payton* 2017 IL App (1st) 160305, ¶ 17. "A circuit court may grant a motion for summary judgment only if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Payton* 2017 IL App (1st) 160305, ¶ 17.

¶ 20 Spoliation

¶ 21 Weigand argues that he has presented sufficient evidence to create an issue of material fact as to whether the defendants bear liability for spoliation of the evidence. Our supreme court set out the principles governing a claim for spoliation in *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188 (1995). The court said:

> "An action for negligent spoliation can be stated under existing negligence law without creating a new tort. [Citation.] To state a cause of action for negligence, a plaintiff must plead the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, an injury proximately caused by the breach, and damages. [Citation.]
>
> *** [A] defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.

* * *

*** [I]n a negligence action involving the loss or destruction of evidence, a plaintiff must allege sufficient facts to support a claim that the loss or destruction of the evidence *caused the plaintiff to be unable to prove* an underlying lawsuit." (Emphasis in original.) *Boyd*, 166 Ill. 2d at 194-96.

¶ 22 Here, defendants' liability insurer contacted Weigand two days after the injury occurred. One could infer that defendants knew or should have known that Weigand had a potential civil action against the people who caused his injury. Collins and Weinstein testified that they watched the video recording and concluded that a thrown bottle caused the injury. They knew or should have known that Weigand in a civil action would need to produce evidence of causation. Thus, defendants "should have foreseen that the [video recording] was material to a potential civil action." *Boyd*, 166 Ill. 2d at 195. Weigand has presented sufficient evidence to support the conclusion that the defendants had a duty to Weigand to preserve the video recording.

¶ 23 Weinstein and Collins admitted in their depositions that they did not preserve the video recording. Weigand has presented sufficient evidence to show the defendants breached their duty.

¶ 24 Due to the failure to preserve the video recording, Weigand never had an opportunity to see the image that both Collins and Weinstein saw of the person who threw the bottle. Defendants' acts deprived Weigand of the opportunity to conduct his own investigation to try to identify the tortfeasor. See *H & H Sand & Gravel Haulers Co. v. Coyne Cylinder Co.*, 260 Ill. App. 3d 235, 244 (1994) (tort of spoliation designed to protect party's right to inspect

evidence relevant to the party's investigation); *American Family Insurance Co. v. Village Pontiac GMC, Inc.*, 223 Ill. App. 3d 624, 628 (1992).

¶ 25 In a footnote, the *Boyd* court clarified the plaintiff's burden of proof for showing that spoliation caused damages:

> "A plaintiff need not show that, but for the loss or destruction of the evidence, the plaintiff would have prevailed in the underlying action. This is too difficult a burden, as it may be impossible to know what the missing evidence would have shown.
>
> A plaintiff must demonstrate, however, that but for the defendant's loss or destruction of the evidence, the plaintiff had a reasonable probability of succeeding in the underlying suit. In other words, if the plaintiff could not prevail in the underlying action even with the lost or destroyed evidence, then the defendant's conduct is not the cause of the loss of the lawsuit. This requirement prevents a plaintiff from recovering where it can be shown that the underlying action was meritless." *Boyd*, 166 Ill. 2d at 196, fn2.

¶ 26 We find that Weigand has presented evidence establishing a reasonable probability that he could have identified and sued the person who threw the bottle if defendants had preserved the video recording of the incident. The video recording may also include other evidence relevant to causation, such as images showing that defendants' security personnel should have recognized potential violence from an intoxicated and dangerous patron. According to defendants' account of what the video showed, Weigand would have had a claim, with a reasonable probability of succeeding, against the person who threw the bottle.

The evidence supports a finding that Weigand lost a cause of action due to the failure to preserve the video recording. We reverse the judgment entered in favor of defendants on the count for spoliation of evidence.

¶ 27 Restatement (Second) of Torts § 344

¶ 28 Weigand argues the evidence could support a finding that defendants breached their duty to protect Weigand from the acts of another patron. For this argument, Weigand relies on section 344 of the Restatement (Second) of Torts, adopted as Illinois law in *Hills v. Bridgeview Little League Ass'n*, 195 Ill. 2d 210, 243-44 (2000). Section 344 provides:

> "A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
>
> (a) discover that such acts are being done or are likely to be done, or
>
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it." Restatement (Second) of Torts § 344 (1965).

¶ 29 In *Moore v. Yearwood*, 24 Ill. App. 2d 248 (1960), the court stated,

> "[I]t is the duty of the proprietor who invites people to come upon his premises to protect customers from injury caused by misconduct of his own employees ***. The independent act of a third party is a circumstance which defendant[,]

> through his agent, would not be bound to anticipate. It is only when such act could reasonably have been anticipated that it becomes defendant's duty to protect the patron involved as against such act." *Moore v. Yearwood*, 24 Ill. App. 2d at 250-51.

¶ 30 There was contradictory evidence as to whether an employee and defendants saw the bottle thrown and little evidence on what happened before that. Weigand's ability to present evidence on these issues is severely hampered because defendants did not preserve the video recording of the incident.

¶ 31 "It is a well-established and long-standing principle of law that a party's intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction." *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998). Illinois permits triers of fact to infer from the destruction of evidence that the evidence would have shown facts adverse to the party who controlled the evidence. Illinois Pattern Jury Instructions, Civil, No. 5.01 (2011); *Wakefield v. Sears, Roebuck & Co.*, 228 Ill. App. 3d 220, 226 (1992). "Where a party has deliberately destroyed evidence, a trial court will indulge all reasonable presumptions against the party." *R.J. Management Co. v. SRLB Development Corp.*, 346 Ill. App. 3d 957, 965 (2004). The destroyed video might have shown that an employee threw a bottle at the ceiling or the patron who threw the bottle drank so much and acted so belligerently that the defendants should have anticipated he would act violently.

¶ 32 Moreover, defendants in their answer to the second amended complaint admitted all of Weigand's allegations of negligent acts. The pleadings were not verified and, in response to

the third amended complaint, defendants denied these allegations. However, defendants' earlier admissions remain as evidence subject to explanation. *Office Elecs., Inc. v. Grafic Forms, Inc.*, Ill. App. 3d 456, 461-62 (1979). Thus, defendants' answer to the second amended complaint is also evidence that creates a factual issue. We find that Weigand has presented sufficient evidence to withstand the motion for summary judgment on the issue of whether defendants negligently failed to protect Weigand from the acts of its employees or of patrons who had shown a propensity for violence.

¶ 33 Restatement (Second) of Torts § 343

¶ 34 Weigand argues that he has presented sufficient evidence to create an issue of material fact as to whether the defendants bear liability for the injury because they own and operate the premises where the injury occurred. Our supreme court adopted section 343 of the Restatement (Second) of Torts as Illinois law of premises liability in *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 468 (1976). Section 343 provides:

> "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger." Restatement (Second) of Torts § 343 (1965).

¶ 35 Again, defendants' admissions in their answer to the second amended complaint and the destruction of the video are sufficient to raise factual questions. The destroyed video might have shown screws falling from the ceiling shortly before the tile fell, thereby supporting Weigand's claim that failure to maintain the ceiling properly led to the injury. In addition, there was disputed testimony as to whether a beer bottle was thrown at the ceiling which could have been the cause of plaintiff's injury. There was also disputed evidence as to how often the tiles were inspected. We find the evidence sufficient to create an issue of material fact as to whether defendants properly maintained the premises and whether the alleged failure to maintain the premises caused the injury.

¶ 36 Because of our resolution of the claims based on sections 343 and 344 of the Restatement (Second) of Torts, we need not address the parties' arguments concerning the distinction between a cause of harm and a condition that allows harm to occur.

¶ 37 CONCLUSION

¶ 38 Weigand produced evidence that could support a finding that defendants breached a duty to preserve evidence of the cause of Weigand's injury, and the breach caused Weigand to lose a cause of action. The destruction of evidence, defendants' answer to the second amended complaint, evidence on whether any employees saw a bottle thrown, and how often the ceiling was inspected could support findings in favor of Weigand's claims based on premises liability and the duty to protect patrons from the acts of employees and other patrons. Accordingly, we reverse the judgment and remand for further proceedings in accord with this order.

¶ 39 Reversed and remanded.