Matter: Res Ipsa and or Spoliation
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Res Ipsa Loquitur and Negligent Spoliation: How They Fit Together, Where They Conflict, and What Missing Out-Gate Images Can Support

Question presented. How do res ipsa loquitur and negligent spoliation of evidence, along with evidentiary remedies for spoliation, interact in an Illinois wrongful death action? Must they be pleaded and tried together, do they conflict, and how can the Railroad's loss of intermodal-yard out-gate images support the estate's claims under either theory or both?

Short answer. The two doctrines do not exclude each other. They do pull against each other on causation, and the estate has to manage that tension deliberately.

- **What each doctrine is.** In Illinois, res ipsa loquitur is not a claim. It is an evidentiary method of proving the negligence counts already pleaded against the Railroad. Negligent spoliation is a separate negligence count. The supreme court encourages joining it with the underlying claim and trying both to one jury.
- **Where they conflict.** A spoliation plaintiff recovers only if the loss of evidence cost it a reasonably probable win on the underlying claim. The supreme court has said that a plaintiff who can prove the underlying claim through circumstantial evidence has not been injured by the loss. Res ipsa is exactly that kind of circumstantial proof. So the estate's best case on the res ipsa count is its worst case on a spoliation count, and the reverse.
- **How the conflict is resolved.** Alternative pleading, plus a conditional instruction: the jury reaches spoliation only if it first finds against the estate on the underlying count. A First District Rule 23 order (persuasive only) affirms that structure in a same-defendant case.
- **The tort is the weaker tool.** The duty element is comparatively strong here, because written preservation demands and subpoenas went out within weeks. But the count faces four serious obstacles:
    - The Railroad's position that the images never existed. If credited, that defeats breach.
    - The First District's insistence on specific facts showing that the lost evidence, not something else, would cost the plaintiff the case.
    - The timeline gap between the evening out-gates and the later impact.
    - Unsettled limitations law.

- **The evidentiary tools may matter more at trial**, and they do not depend on winning a separate tort:
  - IPI Civil 5.01 (the missing-evidence instruction).
  - The non-disclosing party's burden to explain a discovery failure.
  - Rule 214(c)'s affidavit of completeness and examination on possession Ill. S. Ct. R. 214(c).
  - The policy against a party that lost evidence offering its own substitute account of it.
  - Rule 1004's admission of secondary evidence when an opponent with notice controlled the originals Ill. R. Evid. 1004.
- **The denial of sanctions does not foreclose a negligent spoliation count.** The Rule 219(c) Ill. S. Ct. R. 219(c) remedy and the tort are separate, and the tort requires only negligence. Expect the Railroad to use the court's "no bad faith" and "lack of diligence" findings against the 5.01 instruction and against the amendment.

Propositions.

Res ipsa loquitur

1. Res ipsa loquitur is not a claim in itself but "an evidentiary doctrine that allows a plaintiff to prove negligence under a unique set of proofs." *Johnson v. Armstrong*, 2022 IL 127942, ¶ 23
2. Its ordinary procedural effect is "not that of a rebuttable presumption but, rather, that of the creation of a permissible inference or deduction of negligence from the facts and circumstances of the case." *Imig v. Beck*, 115 Ill. 2d 18 (1986)
3. Where plaintiffs relied on the res ipsa inference, "The burden of proof never shifted to the defendants." *Imig v. Beck*, 115 Ill. 2d 18 (1986)
4. The inference does not vanish when contrary evidence appears; it remains to be weighed by the jury against the defendant's direct evidence. *Metz v. Central Illinois Electric & Gas Co.*, 32 Ill. 2d 446 (1965)
5. The inference also does not disappear when evidence of specific negligence is admitted, and both remain for the jury to consider. *Kolakowski v. Voris*, 83 Ill. 2d 388 (1980)
6. The doctrine's purpose is "to allow proof of negligence by circumstantial evidence when the direct evidence concerning cause of injury is primarily within the knowledge and control of the defendant." *Metz v. Central Illinois Electric & Gas Co.*, 32 Ill. 2d 446 (1965)
7. A plaintiff relying on res ipsa is not required to show that the defendant had superior knowledge of the facts or superior access to the evidence. *Heastie v. Roberts*, 226 Ill. 2d 515, 19 (2007)
8. The control element is flexible; the key question is whether the probable cause of the injury was one the defendant had a duty to the plaintiff to anticipate or guard against. *Johnson v. Armstrong*, 2022 IL 127942, ¶ 48

9. "[T]he requisite degree of control is not a rigid standard." *Lynch v. Precision Machine Shop, Ltd.*, 93 Ill. 2d 266 (1982)
10. Quoting a treatise with approval, the supreme court explained that the inference may be drawn against a defendant who shares control with another or who owes the plaintiff a duty it cannot delegate. *Lynch v. Precision Machine Shop, Ltd.*, 93 Ill. 2d 266 (1982)
11. Exclusive control does not mean actual physical control at the time of the accident where the instrumentality is one the defendant must maintain at all times and the responsibility cannot be delegated by consent, agreement, or usage. *Metz v. Central Illinois Electric & Gas Co.*, 32 Ill. 2d 446 (1965)
12. A defendant's lack of control at the time of injury does not by itself defeat the inference; the question is whether the intervening possession or control destroys it. *Kruger v. Newkirk*, 40 Ill. App. 3d 581 (5th Dist. 1976)
13. A res ipsa plaintiff need not show which defendant more likely caused the injury or eliminate all other causes, but "in a multiple-defendant situation, the plaintiff must ensure that all defendants who could have been at fault are included." *Johnson v. Armstrong*, 2022 IL 127942, ¶ 44
14. In that case, control was established because the plaintiff identified all parties responsible for all reasonable causes of the injury, without identifying the precise instrumentality or actor. *Johnson v. Armstrong*, 2022 IL 127942, ¶ 45
15. To survive summary judgment, a res ipsa plaintiff need only raise a fact issue as to whether the defendant had control, need not eliminate other possible causes, and the jury decides who proximately caused the injury. *Gatlin v. Ruder*, 137 Ill. 2d 284 (1990)
16. Where defendants exercised concurrent control over a plaintiff who could not know the cause, the control element is met and "The burden will then shift to the hospital to dispel the inference that it exercised the control necessary to the application of res ipsa loquitur." *Kolakowski v. Voris*, 83 Ill. 2d 388 (1980)
17. Under the retained-control exception for independent contractors, "A general right to enforce safety, however, does not amount to retained control under section 414." *Carney v. Union Pacific R.R. Co.*, 2016 IL 118984, ¶ 47
18. Illinois law allows a party to plead alternative grounds for recovery regardless of their consistency, if the alternatives are made in good faith and with genuine doubt as to which is true, and a trier of fact decides which theory has merit. *Heastie v. Roberts*, 226 Ill. 2d 515, 32 (2007)
19. By statute, a party in doubt about which of two or more statements of fact is true "may, regardless of consistency, state them in the alternative or hypothetically in the same or different counts or defenses." 735 ILCS 5/2-613(b)

Negligent spoliation: duty

1. Spoliation of evidence is a form of negligence that requires a duty to preserve, a breach by losing or destroying the evidence, proximate causation of the plaintiff's inability to

prove an underlying lawsuit, and actual damages. *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 26

2. There is no general duty to preserve evidence, but one may arise through an agreement, contract, statute, or other special circumstance, and "a defendant may voluntarily assume a duty by affirmative conduct." *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995)
3. The plaintiff must satisfy both a relationship prong and a foreseeability prong (whether a reasonable person should have foreseen that the evidence was material to a potential civil action), or there is no duty. *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 27
4. Possession and control alone do not create a duty; "something more than possession and control are required, such as a request by the plaintiff to preserve the evidence," or segregation of the evidence for the plaintiff's benefit. *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 45
5. "A voluntary undertaking requires a showing of affirmative conduct by the defendant" evincing its intent to assume a duty to preserve evidence. *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 31
6. "A voluntary undertaking requires some affirmative acknowledgment or recognition of the duty by the party who undertakes the duty." *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 36
7. A preservation letter, a complaint, and a preservation order served within days of the occurrence, together with the defendant's possession and control of the evidence, sufficed to plead a special circumstance under the relationship prong. *Kilburg v. Mohiuddin*, 2013 IL App (1st) 113408, ¶ 31
8. Possession and control, segregation of the evidence, and the plaintiffs' request to inspect together constituted a special circumstance. *Brobbey v. Enterprise Leasing Company*, 404 Ill. App. 3d 420, 21 (1st Dist. 2010)
9. An insurer that directed its insured to keep the evidence voluntarily assumed a duty to preserve it, and its authority to direct preservation was enough control to fulfill that duty. *Jones v. O'Brien Tire and Battery Service Center, Inc.*, 374 Ill. App. 3d 918, 10 (5th Dist. 2007)
10. No duty arose where the plaintiff did not request preservation until nearly two years after the occurrence. *Caburnay v. Norwegian American Hospital*, 2012 IL App (1st) 101740, ¶ 57
11. For purposes of discovery sanctions, the supreme court agreed that a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence before suit. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112 (1998)
12. The supreme court has held that the test applied to that sanctions duty is not relevant to the duty element of a negligent spoliation claim, which is governed by the two-prong test. *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 51

13. "Illinois courts have not adopted a separate cause of action for intentional spoliation of evidence," and intentional conduct by a potential litigant may be addressed through Rule 219(c) sanctions. *Wofford v. Tracy*, 2015 IL App (2d) 141220, ¶ 41 Ill. S. Ct. R. 219(c)
14. A Rule 219(c) dismissal and a negligent spoliation claim "are separate and distinct" remedies; dismissal requires deliberate or contumacious conduct, while the spoliation claim "requires mere negligence." *Adams v. Bath & Body Works, Inc.*, 358 Ill. App. 3d 387 (1st Dist. 2005) Ill. S. Ct. R. 219(c)

Negligent spoliation: causation, joinder, and damages

1. A spoliation plaintiff "need not show that, but for the loss or destruction of the evidence, the plaintiff would have prevailed in the underlying action," but must show a reasonable probability of succeeding in the underlying suit but for the loss. *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995)
2. The supreme court encouraged joinder of the spoliation claim with the underlying suit. *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995)
3. The supreme court held that "a single trier of fact may be allowed to hear an action for negligent spoliation concurrently with the underlying suit on which it is based," because only that trier of fact would know the real reason a plaintiff lost. *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995)
4. The supreme court rejected an evidentiary presumption against the spoliator, reasoning that if plaintiffs can prove the underlying suit without the missing evidence, including through circumstantial evidence, "then they have not been injured" by its loss. *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995)
5. The supreme court expressly declined to state the measure of spoliation damages: "We, however, express no opinion on the appropriate measure of damages." *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995)
6. The First District has applied the rule that the spoliation claim is heard concurrently with the underlying suit, without an evidentiary presumption. *Brobbey v. Enterprise Leasing Company*, 404 Ill. App. 3d 420, 23 (1st Dist. 2010)
7. In a persuasive First District Rule 23 order, both claims went to one jury, which was told to consider spoliation only after finding for the defendant on the underlying claim, and to find spoliation only if the loss proximately caused the plaintiffs' inability to prove that claim; the appellate court found that consistent with the supreme court's framework. *Seats v. Village of Dolton*, 2024 IL App (1st) 230763-U, ¶ 40
8. The Fifth District held that causation can be met "when a critical piece of evidence is lost even if it is not the sole piece of evidence available to the party." *Jones v. O'Brien Tire and Battery Service Center, Inc.*, 374 Ill. App. 3d 918, 16 (5th Dist. 2007)
9. The Second District majority required the pleader to allege specific facts showing that, because of the loss, it will lose the underlying case, not merely that one defense became unavailable. *Andersen v. Mack Trucks, Inc.*, 341 Ill. App. 3d 212 (2d Dist. 2003)

10. The First District held a spoliation count deficient where it did not assert specific facts explaining how the missing records caused the plaintiffs to be unable to prove the underlying lawsuit. *Thornton v. Kumudcha Shah*, 333 Ill. App. 3d 1011 (1st Dist. 2002)
11. The First District affirmed summary judgment on causation where the plaintiff's expert had enough information to give his opinions without the lost evidence. *Midwest Trust Services, Inc. v. Catholic Health Partners Services*, 392 Ill. App. 3d 204, 8 (1st Dist. 2009)
12. The First District held that no spoliation claim could be stated where the allegedly destroyed document had been provided to the plaintiffs and was in the record. *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 38 (1st Dist. 2006)
13. The First District affirmed judgment for the defendant on a spoliation count where the plaintiff could not explain how the lost device would have supplied additional information to prove its claims. *Brian J. Wanca, J.D., P.C. v. Oppenheim*, 2023 IL App (1st) 220273, ¶ 49
14. As quoted by a later Fifth District decision, the supreme court explained that the spoliator's liability and the underlying tortfeasor's liability arise from two different injuries, so contribution does not apply between them. *Stinnes Corp. v. Kerr-McGee Coal Corp.*, 309 Ill. App. 3d 707 (5th Dist. 1999)

Evidentiary remedies without a separate tort

1. IPI Civil 5.01 lets the jury infer that evidence a party failed to produce would be adverse to it, and the instruction requires "some foundation evidence" on each of its four elements. *Marsh v. Sandstone North, LLC*, 2020 IL App (4th) 190314, ¶ 25
2. The instruction is warranted only if there was no reasonable excuse for the failure to produce, and whether to give it is within the trial court's discretion. *Bailey v. Mercy Hospital & Medical Center*, 2020 IL App (1st) 182702, ¶ 101
3. The instruction is not warranted if the missing evidence is merely cumulative of facts already established. *Kersey v. Rush Trucking, Inc.*, 344 Ill. App. 3d 690 (2d Dist. 2003)
4. A trial court properly considered whether the missing evidence was cumulative and whether the conduct was likely done to hide unfavorable evidence. *Marsh v. Sandstone North, LLC*, 2020 IL App (4th) 190314, ¶ 30
5. When the court decides the jury should be instructed on a subject that an IPI instruction covers, "the IPI instruction shall be used, unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 239(a)
6. "Once a failure to comply with discovery rules has been shown, the burden is on the non-disclosing party to explain that failure." *Delvecchio v. General Motors Corp.*, 255 Ill. App. 3d 189 (5th Dist. 1993)
7. "As a matter of sound public policy, an expert should not be permitted intentionally or negligently to destroy such evidence and then substitute his or her own description of it." *American Family Insurance v. Village Pontiac-GMC, Inc.*, 223 Ill. App. 3d 624 (2d Dist. 1992)

8. Barring evidence was upheld where the loss of part of the product created a reasonable possibility that the truth about the cause would never be ascertained. *Shelbyville Mutual Insurance v. Sunbeam Leisure Products Co.*, 262 Ill. App. 3d 636 (5th Dist. 1994)
9. Failure to preserve evidence will support sanctions, including debarment of evidence. *Kambylis v. Ford Motor Co.*, 338 Ill. App. 3d 788 (1st Dist. 2003)
10. The First District reversed a dismissal sanction and remanded for a less drastic sanction, after the plaintiff had suggested, among other options, a jury instruction on failure to produce evidence. *Wakefield v. Sears, Roebuck & Co.*, 228 Ill. App. 3d 220 (1st Dist. 1992)

Effect of the sanctions ruling

1. Rule 219(c) applies where a party, or a person acting at its instance or in collusion with it, "unreasonably fails to comply with any provision of part E of article II of the rules of this court" or with an order entered under them. Ill. S. Ct. R. 219(c)
2. In a persuasive Rule 23 order, the court restated that Rule 219(c) sanctions aim to coerce compliance, not punish, and are governed by six factors that include the movant's diligence and the producing party's good faith. *McKinney v. Newgent*, 2021 IL App (5th) 200010-U, ¶ 56 Ill. S. Ct. R. 219(c)
3. A trial court's refusal to impose any sanction is not an automatic abuse of discretion. *Boatmen's National Bank v. Martin*, 155 Ill. 2d 305 (1993)
4. Discovery sanction orders entered under Rule 219 are interlocutory and reviewable only on appeal from the final judgment. *Dolan v. O'Callaghan*, 2012 IL App (1st) 111505, ¶ 40 Ill. S. Ct. R. 219(c)
5. In a persuasive First District Rule 23 order, unreasonable noncompliance was described as a deliberate and pronounced disregard for a discovery rule, measured in part by the importance of the information withheld. *Howard Brown Health Center v. 1023 W. Irving Park Road*, 2026 IL App (1st) 241754-U, ¶ 49
6. In the same persuasive order, the trial court denied Rule 219(c) relief for alleged spoliation but restricted how the spoliating party could present its experts, and the appellate court affirmed. *Howard Brown Health Center v. 1023 W. Irving Park Road*, 2026 IL App (1st) 241754-U, ¶¶ 25, 50 Ill. S. Ct. R. 219(c)
7. Under Rule 214, "The producing party shall furnish an affidavit stating whether the production is complete in accordance with the request," and a party claiming an item is not in its possession or control may be ordered to submit to examination on that claim. Ill. S. Ct. R. 214(c)
8. Rule 214 also imposes "a duty to seasonably supplement any prior response" as documents come into the party's possession or control or become known to it. Ill. S. Ct. R. 214(d)
9. A Rule 206(a)(1) designee must "testify as to matters known or reasonably available to the organization." Ill. S. Ct. R. 206(a)(1)

10. Every discovery motion must incorporate a statement of personal consultation and reasonable attempts to resolve differences. Ill. S. Ct. R. 201(k)
11. The supreme court has warned that "Our discovery procedures are meaningless unless a violation entails a penalty proportionate to the gravity of the violation." *Buehler v. Whalen*, 70 Ill. 2d 51 (1977)

Amendment, limitations, and trial structure

1. "At any time before final judgment amendments may be allowed on just and reasonable terms," including adding new causes of action. 735 ILCS 5/2-616(a)
2. Leave to amend turns on four factors: whether the amendment cures the defect, prejudice or surprise to others, timeliness, and prior opportunities to amend. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263 (1992)
3. The supreme court has read the "just and reasonable" standard as requiring amendment if it will further the ends of justice. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263 (1992)
4. The Second District has held that discretion to amend should be exercised liberally, with doubts resolved in favor of amendment, particularly where the law is unsettled. *Andersen v. Mack Trucks, Inc.*, 341 Ill. App. 3d 212 (2d Dist. 2003)
5. A persuasive Second District Rule 23 order places on the movant the burden of showing that all four factors favor amendment. *Siemer v. Reetz*, 2024 IL App (2d) 230293-U, ¶ 40
6. The supreme court approved giving a plaintiff the opportunity to amend a spoliation count to conform to the newly announced duty framework. *Miller v. Gupta*, 174 Ill. 2d 120 (1996)
7. "Any plaintiff or plaintiffs may join any causes of action, against any defendant or defendants" 735 ILCS 5/2-614(a), but the court "may, in its discretion, order separate trial of any causes of action" 735 ILCS 5/2-614(b) that cannot conveniently be tried with the other issues.
8. Personal injury actions must be commenced "within 2 years next after the cause of action accrued." 735 ILCS 5/13-202
9. The Second District has noted conflicting appellate authority on the limitations period for spoliation, describing a First District decision that treated negligent spoliation as derivative and applied the underlying action's limitations period. *Skridla v. General Motors Co.*, 2015 IL App (2d) 141168, ¶ 10
10. A pre-framework First District decision treated a spoliation claim as premature until the underlying claim was lost. *Mayfield v. Acme Barrel Co.*, 258 Ill. App. 3d 32 (1st Dist. 1994)
11. Relation back under section 2-616(b) is liberally construed, and its guiding element is notice to the defendant of the facts forming the basis of the claim. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 8 (2008)

Proving the lost images

1. "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Ill. R. Evid. 1002
2. Other evidence of contents is admissible if all originals are lost or destroyed (unless the proponent did so in bad faith), or if the opponent controlled an original and "was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing." Ill. R. Evid. 1004
3. "If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'" Ill. R. Evid. 1001
4. Authentication may be shown by "Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." Ill. R. Evid. 901
5. The First District held, quoting earlier authority, that a party who has voluntarily destroyed an original cannot prove its contents by secondary evidence unless it rebuts every inference of fraud, and found it unfair to treat photocopies as duplicates where the record suggested the party destroyed the originals after being joined as a defendant. *Lam v. Northern Illinois Gas Co.*, 114 Ill. App. 3d 325 (1st Dist. 1983)
6. A persuasive First District Rule 23 order held that Rule 1004's grounds are alternatives, and that under Rule 1004(1) the proponent must prove the original's prior existence, its unavailability, and its own diligence. *In re Marriage of Greenberg*, 2021 IL App (1st) 210325-U, ¶¶ 26, 27 Ill. R. Evid. 1004(1)
7. A persuasive Fifth District Rule 23 order held that witness testimony about a recording's contents is inadmissible unless a Rule 1004 circumstance applies. *Eldridge v. Kochanski*, 2024 IL App (5th) 231100-U, ¶ 32 Ill. R. Evid. 1004

Analysis

How the doctrines fit together.

Res ipsa loquitur and spoliation answer different questions. Res ipsa answers: *how can the estate prove the Railroad's negligence without direct evidence of what happened at the intermodal yard?* It is a method of proof within the negligence counts, not a separate claim *Johnson v. Armstrong*, 2022 IL 127942, ¶ 23.

Negligent spoliation answers: *what if the Railroad's failure to preserve the direct evidence is what keeps the estate from proving that negligence at all?* It is a second negligence count with its own duty, breach, causation, and damages elements *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 26.

The connection between them is causation. The supreme court refused a presumption against the spoliator precisely because a plaintiff who can win through circumstantial evidence has not been injured by the loss *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995). Res ipsa is the paradigm of circumstantial proof, so success on the res ipsa counts leaves a spoliation count with no damages. That outcome is acceptable: it is the price of avoiding double recovery, not a defect.

The real risk is the opposite case. If the jury rejects res ipsa against the Railroad, the Railroad will argue that the jury rejected it for reasons unrelated to the images, for example the gap between out-gate and impact times, or the rail-to-road alternative. If that argument succeeds, the spoliation count fails for want of causation *Midwest Trust Services, Inc. v. Catholic Health Partners Services*, 392 Ill. App. 3d 204, 8 (1st Dist. 2009) *Brian J. Wanca, J.D., P.C. v. Oppenheim*, 2023 IL App (1st) 220273, ¶ 49.

The structure that reconciles the two theories is:

- alternative pleading 735 ILCS 5/2-613(b) *Heastie v. Roberts*, 226 Ill. 2d 515, 32 (2007);
- a single jury *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995); and
- a conditional instruction that reaches spoliation only after a defense verdict on the underlying count, the approach a First District panel approved in a nonprecedential order *Seats v. Village of Dolton*, 2024 IL App (1st) 230763-U, ¶ 40.

I1. Res ipsa against the Railroad: control, the contractor, and the "name everyone" rule.

The supreme court's flexible control standard favors the estate. The question is whether the probable cause was one the Railroad had a duty to anticipate or guard against *Johnson v. Armstrong*, 2022 IL 127942, ¶ 48 *Lynch v. Precision Machine Shop, Ltd.*, 93 Ill. 2d 266 (1982). Control may rest on shared control or on a duty that cannot be delegated *Lynch v. Precision Machine Shop, Ltd.*, 93 Ill. 2d 266 (1982). Physical control at the moment of injury is not required where the defendant bears a responsibility that cannot be delegated *Metz v. Central Illinois Electric & Gas Co.*, 32 Ill. 2d 446 (1965).

The court's recent order found a nondelegable duty on the yard-to-road theory. That finding maps directly onto the nondelegable-duty route to control. Whether the Railroad separately retained control over the yard contractor under the Restatement retained-control test is the weaker alternative. A general safety-enforcement right is not retained control *Carney v. Union Pacific R.R. Co.*, 2016 IL 118984, ¶ 47, and the court did not reach that question.

The Railroad's central argument at the hearing was that the estate cannot use res ipsa without naming every entity that had control. That argument has a real foothold: the supreme court has said that in a multiple-defendant case the plaintiff must ensure that all defendants who could have been at fault are included *Johnson v. Armstrong*, 2022 IL 127942, ¶ 44. There are three answers:

1. **What the rule actually requires.** The same opinion found control met where the plaintiff identified all parties responsible for all reasonable causes, without identifying the precise actor *Johnson v. Armstrong*, 2022 IL 127942, ¶ 45.
2. **The yard contractor is no longer absent.** The Railroad itself made the yard contractor a third-party defendant. The court has signaled that the third-party claim may be stayed or severed, so the estate should be ready to argue that the joinder concern is satisfied, or is beside the point because the Railroad's nondelegable duty makes the Railroad responsible

for the contractor's yard work *Metz v. Central Illinois Electric & Gas Co.*, 32 Ill. 2d 446 (1965).

3. **The unknown motor carrier is the gap the missing images created.** The Railroad will say the carrier who pulled the box out of the intermodal yard is another possible cause who is not before the court. The out-gate images are the evidence that would have identified that carrier. A defendant cannot well invoke a "name everyone" rule while the evidence needed to name them was in its custody. The res ipsa cases recognize that where the plaintiff cannot know the cause, defendants with concurrent control bear the burden of initial explanation *Kolakowski v. Voris*, 83 Ill. 2d 388 (1980).

The intervening-carrier problem also runs through the cases on a defendant's later loss of control. A defendant's loss of control before the injury does not defeat the inference unless the intervening possession destroys it *Kruger v. Newkirk*, 40 Ill. App. 3d 581 (5th Dist. 1976). The Railroad will frame the motor carrier's inspection duty as that intervening control. Losing the images is what makes that argument difficult to test.

Two cautions:

- *Nichols v. City of Chicago Heights*, 2015 IL App (1st) 122994, ¶ 46 (the First District decision the trial court relied on for "eliminating the responsibility of any other person") carries a yellow treatment flag. The Second District declined to follow it. Cite the supreme court passages instead.
- The Railroad's own late-produced images, and its expert, will be offered as specific evidence of due care. The inference remains for the jury regardless *Metz v. Central Illinois Electric & Gas Co.*, 32 Ill. 2d 446 (1965) *Kolakowski v. Voris*, 83 Ill. 2d 388 (1980), and the burden of proof stays with the estate *Imig v. Beck*, 115 Ill. 2d 18 (1986).

I2. Duty to preserve the gate images.

The relationship prong is the estate's strongest spoliation element. Possession alone is not enough; the supreme court requires "something more than possession and control" *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 45, with a request to preserve as its first example. The estate's record of requests is unusually strong:

- a preservation demand transmitted within weeks of the occurrence, naming the intermodal yard and the evening window;
- several subpoenas over the following months;
- a narrowing offer made within minutes of the Railroad's burden objection.

The closest published First District decision found a special circumstance from a preservation letter, complaint, and order combined with possession *Kilburg v. Mohiuddin*, 2013 IL App (1st) 113408, ¶ 31. The contrast case found no duty where the first request came nearly two years later *Caburnay v. Norwegian American Hospital*, 2012 IL App (1st) 101740, ¶ 57.

Foreseeability is also strong. The Railroad's receipts carried its own printed legend stating that damage is captured on recorded images, and the estate's first communication tied the death to the intermodal yard.

The Railroad's best duty arguments are these:

1. **It was a nonparty when the requests arrived.** Every duty case in the packet involved either a party or a defendant who had evidence and a direct request. None squarely addresses a nonparty served with subpoenas. That is a gap.
2. **The images resided in purchased legacy software.** The Railroad may argue it lacked possession or control. The answer is that authority to direct preservation is enough control *Jones v. O'Brien Tire and Battery Service Center, Inc.*, 374 Ill. App. 3d 918, 10 (5th Dist. 2007), and the Railroad admitted it purchased the software.
3. **The pre-suit "potential litigant" duty does not transfer.** The supreme court recognized a pre-suit duty for sanctions purposes *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112 (1998), but it has since held that duty test is irrelevant to the spoliation tort *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 51. The tort count must stand on the two-prong test alone.

The "voluntary undertaking" route is weaker. It requires affirmative conduct acknowledging a duty to preserve *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 31 *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 36. Partial production in response to a subpoena may not qualify, though the Railroad's earlier retrieval and transmission of native images for one rig is the best fact for it.

A separate fact deserves development. The sanctions motion states that the Railroad's yard video was kept for only a short retention period, and that the preservation demand reached the Railroad before that period ended. If the 206(a)(1) witness confirms the video was overwritten after the demand arrived, that is a cleaner spoliation fact than the gate images. It should be included in the amended count.

I3. Causation and damages: the core tension.

The causation standard is a reasonable probability of success but for the loss, not proof that the plaintiff would have won *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995). Four features of this case make it hard:

1. **The images may never have existed.** If the 206(a)(1) witness establishes a camera or software failure and the court credits it, there was nothing to lose. Breach and causation then fail together. The estate's best evidence that the images existed:
    - the employee testimony described at the hearing (the system captured the events and had all the data);
    - thumbnails visible earlier for some events;
    - the "Image not available" placeholders.

2. **The First District demands specifics.** The forum's district has rejected spoliation counts that do not explain how the missing evidence caused the inability to prove the case *Thornton v. Kumudcha Shah*, 333 Ill. App. 3d 1011 (1st Dist. 2002). It has granted summary judgment where the plaintiff's expert had enough to proceed without the lost item *Midwest Trust Services, Inc. v. Catholic Health Partners Services*, 392 Ill. App. 3d 204, 8 (1st Dist. 2009), and where the plaintiff could not say what the lost item would add *Brian J. Wanca, J.D., P.C. v. Oppenheim*, 2023 IL App (1st) 220273, ¶ 49. The amended count must therefore plead concretely:

    - which events are missing and how many images each lacks;
    - that the overhead line-scan views are the only views that show a container's bottom corner castings (where a loose connector would sit);
    - why those views, unlike the views produced, would have shown whether a connector left the yard on those boxes.

3. The Fifth District's more lenient view, that losing a critical piece suffices even if other evidence exists *Jones v. O'Brien Tire and Battery Service Center, Inc.*, 374 Ill. App. 3d 918, 16 (5th Dist. 2007), is helpful but not controlling in the First District. The Second District's stricter "will lose the underlying case" pleading standard *Andersen v. Mack Trucks, Inc.*, 341 Ill. App. 3d 212 (2d Dist. 2003) is the authority the Railroad will cite.

4. **The timeline.** The court openly questioned how a truck leaving the intermodal yard connects to an impact nearly two hours later. The estate's answer was that the connector was shaken loose at an expansion joint and lay in the roadway until a vehicle kicked it up. If the jury rejects that mechanism, it rejects the underlying claim for a reason independent of the images. Under the causation rule, a reason independent of the lost evidence defeats spoliation *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995).
5. **Success on res ipsa extinguishes the count.** A verdict for the estate on the res ipsa counts makes spoliation damages unavailable *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995). That is acceptable, but it means the spoliation count is insurance, not additional recovery.

On damages, the supreme court declined to define the measure *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995). The spoliation count does not seek contribution against other tortfeasors *Stinnes Corp. v. Kerr-McGee Coal Corp.*, 309 Ill. App. 3d 707 (5th Dist. 1999). The logical measure is what the jury would have awarded against the Railroad under the Wrongful Death Act, but no packet authority says so.

The Act's damages section, in its current text, provides for damages "including damages for grief, sorrow, and mental suffering, and punitive damages when applicable" 740 ILCS 180/2. It also states that "The changes made to this Section by this amendatory Act of the 103rd General Assembly apply to actions filed on and after the effective date of this amendatory Act of the 103rd General Assembly" 740 ILCS 180/2. This action was filed after the August 11, 2023 effective date, so the current text appears to govern by its own terms. The index holds no text of the section as of the date of death 740 ILCS 180/2, and the system does not decide retroactivity.

I4. Evidentiary remedies that work with res ipsa rather than against it.

These remedies are where the two doctrines reinforce each other instead of conflicting.

The missing-evidence instruction. IPI Civil 5.01 lets the jury infer that evidence a party failed to produce would have been adverse to it *Marsh v. Sandstone North, LLC*, 2020 IL App (4th) 190314, ¶ 25. It requires foundation on each element, including "no reasonable excuse" *Bailey v. Mercy Hospital & Medical Center*, 2020 IL App (1st) 182702, ¶ 101, and is unavailable for merely cumulative evidence *Kersey v. Rush Trucking, Inc.*, 344 Ill. App. 3d 690 (2d Dist. 2003). Rule 239(a) Ill. S. Ct. R. 239(a) requires the pattern instruction where the court instructs on the subject.

The fight will be over "reasonable excuse." The Railroad will offer the malfunction or legacy-software explanation, and the court's "no bad faith" finding will be argued as support. The decision cited in proposition 51 shows that courts weigh whether the loss was likely done to hide unfavorable evidence *Marsh v. Sandstone North, LLC*, 2020 IL App (4th) 190314, ¶ 30. That weighs against the estate here, so the instruction's success depends on the 206(a)(1) testimony.

How the inference supports res ipsa. The supreme court has described res ipsa's purpose in terms of direct evidence being primarily within the defendant's knowledge and control *Metz v. Central Illinois Electric & Gas Co.*, 32 Ill. 2d 446 (1965), though superior knowledge is not a prerequisite *Heastie v. Roberts*, 226 Ill. 2d 515, 19 (2007). The adverse inference does not create res ipsa control. What it does is answer the Railroad's rebuttal. The Railroad's expert, served hours after the late production, apparently relies on the out-gate imagery to say nothing left the intermodal yard with a connector attached. Three points follow:

1. Once a discovery failure is shown, the burden falls on the non-disclosing party to explain it *Delvecchio v. General Motors Corp.*, 255 Ill. App. 3d 189 (5th Dist. 1993).
2. Sound policy forbids a party from losing evidence and then substituting its own description of it *American Family Insurance v. Village Pontiac-GMC, Inc.*, 223 Ill. App. 3d 624 (2d Dist. 1992).
3. Debarment is an available remedy where a loss forecloses the truth *Shelbyville Mutual Insurance v. Sunbeam Leisure Products Co.*, 262 Ill. App. 3d 636 (5th Dist. 1994) *Kambylis v. Ford Motor Co.*, 338 Ill. App. 3d 788 (1st Dist. 2003).

A motion in limine, or the cross-examination the court suggested at the hearing, should confine the Railroad's experts to opinions that do not depend on the missing events. The court itself observed at the hearing that if the experts did rely on those events, the Railroad would have problems.

Avoid relying on a presumption. In the tort context the supreme court rejected an evidentiary presumption *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995), and the First District follows that rule *Brobbey v. Enterprise Leasing Company*, 404 Ill. App. 3d 420, 23 (1st Dist. 2010). Rule 301 Ill. R. Evid. 301 governs presumptions generally. The estate should frame its request as the IPI 5.01 permissive inference, not a presumption.

I5. The sanctions ruling.

The denial does not bar a negligent spoliation count:

- The two remedies are distinct. The tort requires only negligence, while Rule 219(c)'s Ill. S. Ct. R. 219(c) severest sanctions require deliberate disregard *Adams v. Bath & Body Works, Inc.*, 358 Ill. App. 3d 387 (1st Dist. 2005).
- Intentional conduct is addressed through sanctions, not a separate tort *Wofford v. Tracy*, 2015 IL App (2d) 141220, ¶ 41.
- Sanction orders are interlocutory *Dolan v. O'Callaghan*, 2012 IL App (1st) 111505, ¶ 40, and a refusal to sanction is discretionary *Boatmen's National Bank v. Martin*, 155 Ill. 2d 305 (1993).

The court's own remarks also confine the ruling. It said it did not really consider the missing images for sanctions purposes, treated spoliation as a separate pending matter, and directed a Rule 206(a)(1) Ill. S. Ct. R. 206(a)(1) witness plus an affidavit on whether the images exist.

The Railroad will still argue that the "lack of diligence" and "no bad faith" findings carry over:

- **Bad faith.** It is irrelevant to the tort *Adams v. Bath & Body Works, Inc.*, 358 Ill. App. 3d 387 (1st Dist. 2005), but relevant to IPI 5.01's "reasonable excuse" element *Bailey v. Mercy Hospital & Medical Center*, 2020 IL App (1st) 182702, ¶ 101 and to any later sanction.
- **Diligence.** It is a sanctions factor *McKinney v. Newgent*, 2021 IL App (5th) 200010-U, ¶ 56, not an element of the spoliation tort. The court's finding rested partly on the absence of a motion to compel and of a Rule 201(k) Ill. S. Ct. R. 201(k) conference. That makes the record built from here forward important.

Next, the estate should:

1. Serve a Rule 214 Ill. S. Ct. R. 214 request specific to the missing events, demanding the affidavit of completeness and invoking the possession-or-control examination Ill. S. Ct. R. 214(c), and the duty to supplement Ill. S. Ct. R. 214(d).
2. Define the 206(a)(1) topics to cover the matters "known or reasonably available to the organization" Ill. S. Ct. R. 206(a)(1): the gate-system vendor, retention settings, litigation holds, and the most recent retrieval.
3. Document 201(k) conferences in writing.

A persuasive 2026 First District order shows a middle path the court may find attractive. It denied Rule 219(c) Ill. S. Ct. R. 219(c) spoliation sanctions but restricted how the spoliating party could use its experts *Howard Brown Health Center v. 1023 W. Irving Park Road*, 2026 IL App (1st) 241754-U, ¶¶ 25, 50.

I6. Amendment, limitations, and trial structure.

Leave to amend. Section 2-616(a) permits new causes of action before judgment 735 ILCS 5/2-616(a). The supreme court's four factors govern *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263 (1992) under an ends-of-justice standard *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263 (1992). On each factor:

- **Timeliness and prior opportunity.** Both favor the estate, because the loss became apparent only with the late production and the hearings that followed.
- **Prejudice.** This is the Railroad's argument. Trial is approaching, and the Railroad will say a new count requires new discovery. The answer is that the discovery needed is the 206(a)(1) deposition the court has already ordered.

Expect the Railroad to cite the persuasive order placing the burden on the movant *Siemer v. Reetz*, 2024 IL App (2d) 230293-U, ¶ 40. The estate can answer with the Second District's liberal-amendment standard *Andersen v. Mack Trucks, Inc.*, 341 Ill. App. 3d 212 (2d Dist. 2003) and the supreme court's allowance of amendment to plead spoliation *Miller v. Gupta*, 174 Ill. 2d 120 (1996).

Single or separate trial. The supreme court favors joinder and one trier of fact *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995) *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995). Section 2-614(b) nonetheless allows separate trials 735 ILCS 5/2-614(b). The estate should oppose severance of the spoliation count from the negligence counts against the Railroad. The court has indicated only that the third-party claim against the yard contractor would be stayed.

Limitations is the most underdeveloped risk. Personal injury claims carry a two-year period from accrual 735 ILCS 5/13-202. The appellate courts conflict on the spoliation limitations period, and a First District decision treated the claim as derivative of the underlying action *Skridla v. General Motors Co.*, 2015 IL App (2d) 141168, ¶ 10.

- On an accrual-based view, a count filed now for a loss first revealed in recent months is timely.
- On a derivative view tied to the underlying limitations period (two years from the death), the count is late unless it relates back. Relation back focuses on notice *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 8 (2008). The estate's preservation demands, subpoenas, and First Amended Complaint gave the Railroad notice of the intermodal-yard imagery, but the spoliation loss is arguably a distinct occurrence.

The Railroad will also cite the older First District prematurity rule *Mayfield v. Acme Barrel Co.*, 258 Ill. App. 3d 32 (1st Dist. 1994). The supreme court's later approval of concurrent trial *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995) answers that rule.

I7. Proving the images and their absence.

Two different proof problems arise.

Proving that the images existed is not a contents question, so the original-writing rule does not govern it. The evidence is:

- the gate-system logs;
- the gate-event list;
- the thumbnails and "Image not available" placeholders;
- the employee testimony that the system captured the events.

Rule 901's process-or-system authentication fits that proof Ill. R. Evid. 901.

Proving what the images showed is a contents question. The original is required Ill. R. Evid. 1002 unless Rule 1004 Ill. R. Evid. 1004 applies. Rule 1004(3) fits well: the Railroad controlled the originals and was on notice through the subpoenas and pleadings that their contents would be at issue Ill. R. Evid. 1004(3). That ground does not require the proponent's diligence, which matters given the court's diligence finding. By contrast, the foundation required under Rule 1004(1) Ill. R. Evid. 1004(1) includes the proponent's diligence *In re Marriage of Greenberg*, 2021 IL App (1st) 210325-U, ¶ 27. The earlier thumbnails may each qualify as an original if shown to reflect the stored data accurately Ill. R. Evid. 1001.

The rule on a destroying party cuts against the Railroad, not the estate. A party that destroyed originals cannot use its own substitutes without rebutting an inference of fraud *Lam v. Northern Illinois Gas Co.*, 114 Ill. App. 3d 325 (1st Dist. 1983). Treating copies as duplicates is unfair where the originals were destroyed after joinder *Lam v. Northern Illinois Gas Co.*, 114 Ill. App. 3d 325 (1st Dist. 1983). That authority supports limiting the Railroad's experts and summaries.

Splits and adverse authority.

- **Causation pleading.** Three positions:
    - The First District (the forum's district, which binds the circuit court): requires specific facts showing how the loss caused the inability to prove the case *Thornton v. Kumudcha Shah*, 333 Ill. App. 3d 1011 (1st Dist. 2002), and grants summary judgment where the plaintiff can proceed without the evidence *Midwest Trust Services, Inc. v. Catholic Health Partners Services*, 392 Ill. App. 3d 204, 8 (1st Dist. 2009) *Brian J. Wanca, J.D., P.C. v. Oppenheim*, 2023 IL App (1st) 220273, ¶ 49.
    - The Second District majority: stricter, requiring allegations that the plaintiff will lose the underlying case *Andersen v. Mack Trucks, Inc.*, 341 Ill. App. 3d 212 (2d Dist. 2003).
    - The Fifth District: more lenient *Jones v. O'Brien Tire and Battery Service Center, Inc.*, 374 Ill. App. 3d 918, 16 (5th Dist. 2007).
    - The circuit court follows the First District. Plead with First District specificity.
- **Relationship prong.** Some older appellate language suggested no special relationship was needed. The supreme court has since required both prongs *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 27 and "something more" than possession *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 45. Do not rely on any passage suggesting otherwise.

- **Spoliation limitations period.** The appellate courts conflict *Skridla v. General Motors Co.*, 2015 IL App (2d) 141168, ¶ 10. The First District decision described there treats the claim as derivative. The packet does not contain it.
- **How the control element is worded.** Older appellate formulations speak of "exclusive control." The supreme court's flexible standard *Johnson v. Armstrong*, 2022 IL 127942, ¶ 48 *Lynch v. Precision Machine Shop, Ltd.*, 93 Ill. 2d 266 (1982) controls.
- **Adverse authority that must be confronted:**
    - the multiple-defendant joinder language *Johnson v. Armstrong*, 2022 IL 127942, ¶ 44;
    - the supreme court's statement that a plaintiff who can prove its case circumstantially is not injured by the loss *Boyd v. Travelers Insurance*, 166 Ill. 2d 188 (1995);
    - the First District's no-causation decisions *Midwest Trust Services, Inc. v. Catholic Health Partners Services*, 392 Ill. App. 3d 204, 8 (1st Dist. 2009) *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 38 (1st Dist. 2006) *Brian J. Wanca, J.D., P.C. v. Oppenheim*, 2023 IL App (1st) 220273, ¶ 49;
    - the voluntary-undertaking requirement of affirmative acknowledgment *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 36;
    - the holding that the sanctions duty test is irrelevant to the tort *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 51.
- **Flagged authority.** *Nichols v. City of Chicago Heights*, 2015 IL App (1st) 122994, ¶ 46 carries a yellow flag (another district declined to follow it). *Bailey v. Mercy Hospital & Medical Center*, 2020 IL App (1st) 182702, ¶ 101 was reversed in part by the supreme court on other grounds, so verify that the passage survives.

Gaps.

- **Duty of a nonparty.** No packet authority decides whether subpoenas and preservation letters served on a then-nonparty, followed by partial production, create a spoliation duty under the special-circumstance or voluntary-undertaking tests. A supreme court criminal decision about notice from a pending discovery request is referenced in an uncitable order and should be read.
- **Data held by a vendor.** No authority addresses control of electronically stored information held in purchased third-party software.
- **Limitations and accrual of the spoliation count.** The First District decision applying the underlying claim's limitations period was not read, nor were later decisions applying a discovery rule to spoliation. Whether the Wrongful Death Act's own two-year provision, rather than the general personal injury period, governs a spoliation count tied to a death claim is unresolved.

- **Measure of spoliation damages.** No authority sets the measure of spoliation damages where the underlying claim is a wrongful death claim, or says whether punitive damages "when applicable" carry over.
- **Election between remedies.** Whether a plaintiff may obtain both IPI 5.01 and a spoliation count against the same party, or must elect, is unresolved. The only authority in the packet on that election is a pre-2021 Rule 23 order that cannot be cited.
- **Revisiting the sanctions denial.** No packet authority addresses whether a circuit court may revisit an interlocutory sanctions denial on new evidence, such as the 206(a)(1) testimony, or how the court's diligence finding interacts with later remedies.
- **Liability for peculiar risk.** The decision on which the trial court rested the Railroad's nondelegable duty was read but not printed. The packet therefore cannot confirm that holding.
- **Joinder under res ipsa.** The supreme court's alternative-liability case quoted for the "all parties joined" rule was not read. Whether a third-party defendant joined by the defendant satisfies that rule is unaddressed.
- **Statutory text the index lacks.** The Survival Act and the Wrongful Death Act as of the date of death are not held in the index.
- **Proving that ESI existed.** No authority addresses how the existence (as opposed to the contents) of lost electronically stored information is proved through system logs and placeholders.

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735 ILCS 5/2-613 — cited in: Res Ipsa Loquitur and Negligent Spoliation: How They Fit Together, Where They Conflict, and What Missing Out-Gate Images Can Support

735 ILCS 5/2-614 — cited in: Res Ipsa Loquitur and Negligent Spoliation: How They Fit Together, Where They Conflict, and What Missing Out-Gate Images Can Support

735 ILCS 5/2-616 — cited in: Res Ipsa Loquitur and Negligent Spoliation: How They Fit Together, Where They Conflict, and What Missing Out-Gate Images Can Support

740 ILCS 180/2 — cited in: Res Ipsa Loquitur and Negligent Spoliation: How They Fit Together, Where They Conflict, and What Missing Out-Gate Images Can Support

740 ILCS 180/2 — cited in: Res Ipsa Loquitur and Negligent Spoliation: How They Fit Together, Where They Conflict, and What Missing Out-Gate Images Can Support

Rules

Ill. R. Evid. 1001 — cited in: Res Ipsa Loquitur and Negligent Spoliation: How They Fit Together, Where They Conflict, and What Missing Out-Gate Images Can Support

Ill. R. Evid. 1002 — cited in: Res Ipsa Loquitur and Negligent Spoliation: How They Fit Together, Where They Conflict, and What Missing Out-Gate Images Can Support

Ill. R. Evid. 1004 — cited in: Res Ipsa Loquitur and Negligent Spoliation: How They Fit Together, Where They Conflict, and What Missing Out-Gate Images Can Support

Ill. R. Evid. 301 — cited in: Res Ipsa Loquitur and Negligent Spoliation: How They Fit Together, Where They Conflict, and What Missing Out-Gate Images Can Support

Ill. R. Evid. 901 — cited in: Res Ipsa Loquitur and Negligent Spoliation: How They Fit Together, Where They Conflict, and What Missing Out-Gate Images Can Support

Ill. S. Ct. R. 201 — cited in: Res Ipsa Loquitur and Negligent Spoliation: How They Fit Together, Where They Conflict, and What Missing Out-Gate Images Can Support

Ill. S. Ct. R. 206 — cited in: Res Ipsa Loquitur and Negligent Spoliation: How They Fit Together, Where They Conflict, and What Missing Out-Gate Images Can Support

Ill. S. Ct. R. 214 — cited in: Res Ipsa Loquitur and Negligent Spoliation: How They Fit Together, Where They Conflict, and What Missing Out-Gate Images Can Support

Ill. S. Ct. R. 219 — cited in: Res Ipsa Loquitur and Negligent Spoliation: How They Fit Together, Where They Conflict, and What Missing Out-Gate Images Can Support

Ill. S. Ct. R. 239 — cited in: Res Ipsa Loquitur and Negligent Spoliation: How They Fit Together, Where They Conflict, and What Missing Out-Gate Images Can Support

Verification

VerificationThis memo cites 48 decisions in 165 citations, and 16 statutes or rules.

Every citation in this memo was written by software from the archive. None was typed by an AI. Each citation is rendered from the index's record of the decision and points to a passage of the decision's own text that a local model quoted and a mechanical check verified.

Quotations: 49, each matched word for word inside the passage it cites.

Paragraph pins (¶): 65, each taken from the court's own paragraph labels in the decision's text. Page pins: 0 set by Gregory A. Patricoski in review and not machine-checked; 84 citation(s) of reporter-era decisions carry no pin.

Rule 23 orders cited (status from the court's metadata in the index):

Seats v. Village of Dolton, 2024 IL App (1st) 230763-U: Rule 23 order: persuasive only (Rule 23(e)(1))

McKinney v. Newgent, 2021 IL App (5th) 200010-U: Rule 23 order: persuasive only (Rule 23(e)(1))

Howard Brown Health Center v. 1023 W. Irving Park Road, 2026 IL App (1st) 241754-U: Rule 23 order: persuasive only (Rule 23(e)(1))

Siemer v. Reetz, 2024 IL App (2d) 230293-U: Rule 23 order: persuasive only (Rule 23(e)(1))

In re Marriage of Greenberg, 2021 IL App (1st) 210325-U: Rule 23 order: persuasive only (Rule 23(e)(1))

Eldridge v. Kochanski, 2024 IL App (5th) 231100-U: Rule 23 order: persuasive only (Rule 23(e)(1))

Treatment flags from the index as of October 31, 2026: Shimanovsky v. General Motors Corp., 181 Ill. 2d 112 (1998): declined to follow by Amcor Flexibles, Inc. v. Illinois Commerce Comm'n, 2016 IL App (1st) 152985-U; questioned by Andersen v. Mack Trucks, Inc., 341 Ill. App. 3d 212

Stinnes Corp. v. Kerr-McGee Coal Corp., 309 Ill. App. 3d 707 (5th Dist. 1999): declined to follow by Andersen v. Mack Trucks, Inc., 341 Ill. App. 3d 212

Bailey v. Mercy Hospital & Medical Center, 2020 IL App (1st) 182702: reversed (in part) by Bailey v. Mercy Hospital & Medical Center, 2021 IL 126748; reversed (on other grounds) by Bailey v. Mercy Hospital & Medical Center, 2021 IL 126748

Buehler v. Whalen, 70 Ill. 2d 51 (1977): limited

Nichols v. City of Chicago Heights, 2015 IL App (1st) 122994: declined to follow by Doe v. Coe, 2017 IL App (2d) 160875

These are evidence from the index's citation analysis, not a citator.

Support check (a model's judgment, not a verification): of 167 cited sentences, 114 rated supports, 21 partly, 0 does not support, 32 not rated.

Review: every one of the 167 propositions and 1 sections was reviewed against its cited passage and marked Agree by Gregory A. Patricoski on October 31, 2026.

Draft version: 1 · SHA-256 151ecb6895d40e7553e968a02f89d58e23a26fb93a7b697ecff23b63076439cd

Built: 2026-10-31 20:03:29 · citation check: 0 red, 103 yellow

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Gregory A. Patricoski

Coverage and method

Coverage and methodWhat the archive holds

CourtKindDecisionsFromTo

Appellate Court opinions from the courts' website 14,294 1996-09-05 2026-10-26

Appellate Court official reporter opinions 97,183 1771-10-12 2011-05-13

Appellate Court reporter table entries 10,774 1855-12-04 2009-07-14

Appellate Court Rule 23 orders 39,889 2011-01-03 2026-10-29

Supreme Court opinions from the courts' website 1,431 1998-03-19 2026-10-29

Supreme Court official reporter opinions 48,027 1819-12 2010-02-19

Supreme Court reporter table entries 351 1831-12 2007-03

All 211,949

Rule 23 orders begin 2011-01-03. The archive is current through 2026-10-31 (the last finished collection run); the index's figures above were read on 2026-11-01.

What this research searched

Scope: civil, Supreme + Appellate, types: opinion,rule23,reporter. Every query of the research plan ran against every decision in scope (keyword and meaning search), the cases the plan named were looked up, and citations were followed from the best hits; the searches ran on 2026-10-31.

IssueFound by searchNamedFrom citationsCandidates

[I1] Res ipsa control element where several entities handled the instrumentality and a contractor ran the yard. 719 24 245 981

[I2] Duty to preserve gate images arising from preservation letters and subpoenas to a then-nonparty. 800 21 180 994

[I3] Causation and damages in negligent spoliation when the underlying claim proceeds on res ipsa. 772 21 206 994

[I4] Using lost evidence to support res ipsa inferences and a missing-evidence instruction at trial. 788 20 197 999

[I5] Effect of the denied Rule 219(c) sanctions motion on later spoliation remedies against the same party. 799 18 152 961

[I6] Leave to add a spoliation count near trial; accrual, limitations, and joint or separate trial. 863 19 190 1,069

[I7] Proving the contents and existence of lost gate images through thumbnails, metadata, and testimony. 981 17 163 1,160

What was read

4,644 distinct candidate decisions were on the reading list. A local model read 137 of them (a quick read of the passages the searches matched), best first, stopping at the best 40 per issue, and gave 118 a full read, every paragraph, in 422 parts. It offered 2,148 quotations that a mechanical check found in the decisions' text.

Yield by depth, the share of decisions read at each rank that the model rated 4 or 5 (whether reading deeper was still producing strong decisions):

RanksReadRated 4–5Share

1–10 10 6 60%

11–25 49 44 90%

26–50 78 63 81%

Statutes and rules

ProvisionIn force onVersionChanged after that date

740 ILCS 180/1 — Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, including punitive damages when applicable, in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, including punitive damages when applicable, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. Nothing in this Section affects the applicability of Section 2-1115 of the Code of Civil Procedure or Section 2-102 or 2-213 of the Local Governmental and Governmental Employees Tort Immunity Act. Punitive damages are not available in an action for healing art malpractice or legal malpractice or in an action against the State or unit of local government or an employee of the State or an employee of a unit of local government in his or her official capacity. The changes made to this Section by this amendatory Act of the 103rd General Assembly apply to actions filed on and after the effective date of this amendatory Act of the 103rd General Assembly 2026-10-31 2023-08-11 to today no change recorded

740 ILCS 180/2 — (a) Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person. In every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, including damages for grief, sorrow, and mental suffering, and punitive damages when applicable, to the surviving spouse and next of kin of such deceased person. Nothing in this Section affects the applicability of Section 2-1115 of the Code of Civil Procedure or Section 2-102 or 2-213 of the Local Governmental and Governmental Employees Tort Immunity Act. Punitive damages are not available in an action for healing art malpractice or legal malpractice or in an action against the State or unit of local government or an employee of the State or an employee of a unit of local government in his or her official capacity. The changes made to this Section by this amendatory Act of the 103rd General Assembly apply to actions filed on and after the effective date of this amendatory Act of the 103rd General Assembly (cited) 2026-10-31 2023-08-11 to today no change recorded

735 ILCS 5/2-1117 — Joint liability 2026-10-31 2003-06-04 to today no change recorded

735 ILCS 5/2-621 — Product liability actions 2026-10-31 1995-03-09 to today no change recorded

735 ILCS 5/2-622 — Healing art malpractice 2026-10-31 2013-08-09 to today no change recorded

Ill. R. Prof'l Conduct (2010) R. supreme-court-order-m.r.-3140 — Supreme Court Order M.R. 3140 2026-10-31 2010-01-01 to today no change recorded

215 ILCS 5/367d — No claim shall be denied, under any group accident and health policy delivered or renewed in this State after the effective date of this amendatory Act, for treatment or services for rehabilitation following either a physical or mental illness, rendered in a hospital solely because such hospital lacks surgical facilities 2026-10-31 earliest held to today no change recorded

Ill. S. Ct. R. 91 — Absence of Party at Hearing 2026-10-31 2021-10-01 to today no change recorded

Ill. S. Ct. R. 204 — Compelling Appearance of Deponent 2026-10-31 2023-03-17 to today no change recorded

Ill. S. Ct. R. 214 — Discovery of Documents, Objects, and Tangible Things--Inspection of Real Estate (cited) 2026-10-31 2018-07-01 to today no change recorded

Ill. S. Ct. R. 224 — Discovery Before Suit to Identify Responsible Persons and Entities 2026-10-31 2018-01-01 to today no change recorded

Ill. R. Prof'l Conduct (2010) R. 3.3 — Candor Toward the Tribunal 2026-10-31 2010-01-01 to today no change recorded

Ill. S. Ct. R. 415 — Regulation of Discovery 2026-10-31 2020-10-23 to today no change recorded

Ill. R. Prof'l Conduct (2010) R. 3.6 — Trial Publicity 2026-10-31 2010-01-01 to today no change recorded

740 ILCS 175/6 — Subpoenas 2026-10-31 2024-07-01 to today no change recorded

740 ILCS 180/2 — (a) Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person. In every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, including damages for grief, sorrow, and mental suffering, and punitive damages when applicable, to the surviving spouse and next of kin of such deceased person. Nothing in this Section affects the applicability of Section 2-1115 of the Code of Civil Procedure or Section 2-102 or 2-213 of the Local Governmental and Governmental Employees Tort Immunity Act. Punitive damages are not available in an action for healing art malpractice or legal malpractice or in an action against the State or unit of local government or an employee of the State or an employee of a unit of local government in his or her official capacity. The changes made to this Section by this amendatory Act of the 103rd General Assembly apply to actions filed on and after the effective date of this amendatory Act of the 103rd General Assembly (cited) date of death earliest held to today P.A. 103-514, eff. 2023-08-11

755 ILCS 5/27-6 — Actions which survive date of death earliest held to today P.A. 103-514, eff. 2023-08-11

735 ILCS 5/2-613 — Separate counts and defenses (cited) date of death earliest held to today no change recorded

735 ILCS 5/2-1115.05 — Limitations on recovery of punitive damages in cases other than healing art or legal malpractice cases date of death 1995-03-09 to today no change recorded

Ill. R. Prof'l Conduct (2010) R. supreme-court-order-m.r.-3140 — Supreme Court Order M.R. 3140 date of death 2010-01-01 to today no change recorded

735 ILCS 5/2-621 — Product liability actions date of death 1995-03-09 to today no change recorded

735 ILCS 5/2-1010 — (a) In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, a party may, in lieu of answering or otherwise pleading, file an affidavit certifying that he or she was not directly or indirectly involved in the occurrence or occurrences alleged in the action. In the event such an affidavit is filed, the court shall order the dismissal of the claim against the certifying party, except as provided for in subparagraph (b) date of death earliest held to today no change recorded

735 ILCS 5/2-622 — Healing art malpractice date of death 2013-08-09 to today no change recorded

Ill. S. Ct. R. 239 — Instructions (cited) 2026-10-31 2009-09-01 to today no change recorded

Ill. S. Ct. R. 219 — Consequences of Refusal to Comply with Rules or Order Relating to Discovery or Pretrial Conferences (cited) 2026-10-31 2002-07-01 to today no change recorded

Ill. R. Evid. 301 — Presumptions in General in Civil Actions and Proceedings (cited) 2026-10-31 2011-01-01 to today no change recorded

Ill. R. Evid. 103 — Rulings on Evidence 2026-10-31 2015-10-15 to today no change recorded

Ill. R. Prof'l Conduct (2010) R. 3.4 — Fairness to Opposing Party and Counsel 2026-10-31 2010-01-01 to today no change recorded

735 ILCS 5/2-1113 — Medical malpractice - res ipsa loquitur 2026-10-31 earliest held to today no change recorded

Ill. S. Ct. R. 213 — Written Interrogatories to Parties 2026-10-31 2018-01-01 to today no change recorded

Ill. S. Ct. R. 201 — General Discovery Provisions (cited) 2026-10-31 2023-03-17 to today no change recorded

Ill. S. Ct. R. 206 — Method of Taking Depositions on Oral Examination (cited) 2026-10-31 2011-02-16 to today no change recorded

Ill. S. Ct. R. 222 — Limited and Simplified Discovery in Certain Cases 2026-10-31 2011-01-01 to today no change recorded

Ill. S. Ct. R. 375 — Failure to Comply With Rules; Frivolous Appeals--Sanctions 2026-10-31 1994-02-01 to today no change recorded

735 ILCS 5/2-616 — Amendments (cited) 2026-10-31 2002-01-01 to today no change recorded

735 ILCS 5/2-613 — Separate counts and defenses (cited) 2026-10-31 earliest held to today no change recorded

735 ILCS 5/2-614 — Joinder of causes of action and use of counterclaims (cited) 2026-10-31 earliest held to today no change recorded

735 ILCS 5/13-202 — Personal injury - Penalty (cited) 2026-10-31 2016-01-01 to today no change recorded

740 ILCS 175/4 — Civil actions for false claims 2026-10-31 2023-10-01 to today no change recorded

35 ILCS 120/5 — In case any person engaged in the business of selling tangible personal property at retail fails to file a return when and as herein required, but thereafter, prior to the Department's issuance of a notice of tax liability under this Section, files a return and pays the tax, he shall also pay a penalty in an amount determined in accordance with Section 3-3 of the Uniform Penalty and Interest Act 2026-10-31 2025-06-16 to today no change recorded

735 ILCS 5/2-2301 — Settlement of claims; payment 2026-10-31 2014-01-01 to today no change recorded

775 ILCS 5/8-105 — Settlement 2026-10-31 2026-07-01 to today no change recorded

Ill. R. Evid. 1001 — Definitions (cited) 2026-10-31 2011-01-01 to today no change recorded

Ill. R. Evid. 1002 — Requirement of Original (cited) 2026-10-31 2011-01-01 to today no change recorded

Ill. R. Evid. 1004 — Admissibility of Other Evidence of Contents (cited) 2026-10-31 2011-01-01 to today no change recorded

Ill. R. Evid. 901 — Requirement of Authentication or Identification (cited) 2026-10-31 2019-09-17 to today no change recorded

Ill. R. Prof'l Conduct (2010) R. 4.4 — Respect for Rights of Third Persons 2026-10-31 2016-01-01 to today no change recorded

705 ILCS 85/1 — Whenever the record of any judgment or order, or other proceeding, of any judicial court of this State, or any part of the record of any judicial proceeding, shall have been or shall hereafter be lost or destroyed, any party or person interested therein may, on application by petition, in writing, under oath, to such court, and on showing, to the satisfaction of such court, that the same has been lost or destroyed without fault or neglect of the party or person making such application, obtain an order from such court, authorizing such defect to be supplied by a duly certified copy of such original record, where the same can be obtained; which certified copy shall, thereafter,

have the same effect as such original record would have had, in all respects 2026-10-31 earliest held to today no change recorded

205 ILCS 705/10 — Electronic documents; digital signatures; electronic notices 2026-10-31 2026-01-01 to today no change recorded

5 ILCS 170/3 — Such photographs, microphotographs, photographic film or the result of any other process authorized by Section 2 shall be deemed to be an original record for all purposes, including introduction in evidence in all courts or administrative agencies. A transcript, exemplification or certified copy thereof shall, for all purposes recited herein, be deemed to be a transcript, exemplification, or certified copy of the original 2026-10-31 earliest held to today no change recorded

Text and dates from the index's law library (ILGA's text and the rules as the Supreme Court posts them), unofficial; verify against the official source before filing.

What this research cannot tell you: whether a petition for leave to appeal is pending or has been granted in any decision cited; legislation or rule changes after the run date; and citator status. Check every authority in KeyCite or Shepard's before filing.