

Weigand v. Nine Fifty, Ltd.: Lack of Video Preservation Exposes Defendant to Spoliation Claim

By Peter E. Cooper

INTRODUCTION

In a recent unpublished opinion, the Illinois Appellate Court held that a person has a duty to preserve video recordings, if that person reasonably should have foreseen that the video might contain material evidence to a potential civil action. *Weigand v. Nine Fifty Ltd.*, 2019 IL App (1st) 173169, (February 11, 2019). Failure to maintain and preserve such recordings justifies an inference that the deleted video contained evidence adverse to the defendant and support an action for spoliation.

CASE SUMMARY

In *Weigand*, the plaintiff and a friend went to the defendant bar to watch the Chicago Blackhawks on television. When the Blackhawks scored in overtime, a roar went up and a ceiling tile came down, hitting the plaintiff's head and arm, resulting in severe lacerations and a few broken teeth. The bar's general manager learned of the incident that evening, and later watched the bar's video recording of the proceedings during the game.

The plaintiff sued the bar and its owners, contending that the bar improperly maintained its premises, allowing the ceiling to remain in an unsafe condition, and that the bar failed to make reasonable inspections of the ceiling tiles. After deposition testimony revealed that the defendants had failed to preserve a video from the bar's cameras showing the incident, the plaintiff amended his complaint to add a claim of spoliation. After discovery, the trial court granted the defendants' motion for summary judgment dismissing the complaint.

The Appellate Court reversed the Circuit Court's decision, finding that the plaintiff had sufficiently alleged a claim of spoliation.

Citing the Illinois supreme court holding in *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188 (1995), the court reaffirmed that "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." *Weigand*, ¶21, citing *Boyd*, 166 Ill. 2d at 194-96.

In this case, the defendants had substantial notice of the imminence of a lawsuit and the import of the video recording. The defendant's liability insurer had contacted the plaintiff just two days after the injury, from which the court inferred that the defendants knew or should have known of the plaintiff's potential cause of action. *Weigand*, ¶122. Moreover, the defendants' representatives had watched the video and had concluded that a beer bottle thrown during the incident had caused the accident. *Id.* Despite the likelihood that evidence of causation would be central to the plaintiff's case, the defendants did not preserve the video record.

Failure to preserve evidence, alone, does not support a claim for spoliation. Rather, "[a] plaintiff must demonstrate...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." *Id.* at ¶125, citing *Boyd*, 166 Ill2d at 196, n2. The court concluded that the plaintiff in *Weigand* presented evidence establishing a "reasonable probability" that he could have identified and sued the person causing him injury, as well as discovered evidence of causation for the ceiling tile falling, had the defendants preserved the relevant video.

As a result, the Appellate Court reversed the Circuit Court's dismissal of the spoliation claim.

CONCLUSION AND TAKE-AWAY

While the Appellate Court's ruling does not create a new standard for the preservation of evidence, its application of the existing Illinois standard to the preservation of video recordings requires some acknowledgement. The number and types of video recordings seem to expand almost daily. These include devices ranging from security devices to video doorbells to automobile cameras to mobile phones. Under the court's holding in *Weigand*, a party owes a duty of care to preserve video recordings if the party reasonably should have foreseen their relevance. Failure to preserve the evidence may expose the party to a claim for spoliation, separate and apart from any other liability arising out of the incident.

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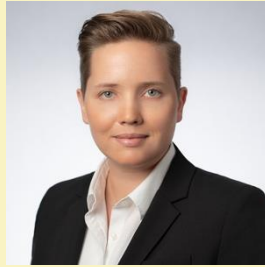
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