

ILLINOIS OFFICIAL REPORTS
Appellate Court

***Combs v. Schmidt*, 2012 IL App (2d) 110517**

Appellate Court Caption	PATRICIA COMBS, as Personal Representative of the Estates of Harvey Combs, Trenell Combs, and Niesha Combs, Deceased, Plaintiff-Appellant, v. GARY SCHMIDT, CYNTHIA SCHMIDT, and PEKIN INSURANCE COMPANY, Defendants-Appellees.
District & No.	Second District Docket No. 2-11-0517
Filed	September 12, 2012
Held <i>(Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.)</i>	In an action for spoliation of evidence arising from the death of plaintiff's husband and two children in a fire at their rented home, summary judgment for plaintiff's landlords and their insurer was reversed, since plaintiff raised questions of material fact as to defendants' awareness of the potential for litigation, who had control and possession of the premises, and whether plaintiff had an adequate opportunity to inspect the house before it was demolished.
Decision Under Review	Appeal from the Circuit Court of Winnebago County, No. 01-L-479; the Hon. Eugene G. Doherty, Judge, presiding.
Judgment	Reversed and remanded.

Counsel on Appeal Devon C. Bruce and Kathryn L. Conway, both of Power, Rogers & Smith, P.C., of Chicago, and Joseph A. Morrissey, of Morrissey Law Offices, and John J. Holevas and Marc C. Gravino, both of WilliamsMcCarthy LLP, both of Rockford, for appellant.

David J. Brassfield and Erik E. Carlson, both of Brassfield, Krueger & Ramlow, Ltd., of Rockford, for appellees Gary Schmidt and Cynthia Schmidt.

Robert Marc Chemers, William W. Elinski, and Scott L. Howie, all of Pretzel & Stouffer, Chtrd., of Chicago, for appellee Pekin Insurance Company.

Panel JUSTICE HUDSON delivered the judgment of the court, with opinion. Justice Zenoff concurred in the judgment and opinion. Justice Burke specially concurred, with opinion.

OPINION

¶ 1 I. INTRODUCTION

¶ 2 Plaintiff, Patricia Combs, in her capacity as the personal representative of the estates of Harvey Combs, Trenell Combs, and Niesha Combs (who are deceased), appeals an order of the circuit court of Winnebago County granting summary judgment in favor of defendants, Gary Schmidt, Cynthia Schmidt, and Pekin Insurance Company, regarding three counts of a complaint filed by Patricia. These counts allege spoliation of evidence. For the reasons that follow, we reverse and remand.

¶ 3 II. BACKGROUND

¶ 4 Patricia lived in a house located at 3614 West State Street in Rockford with her husband, Harvey, and her children, Trenell and Niesha. The family rented the house from Gary and Cynthia Schmidt. The house was insured by a policy issued by Pekin. On December 20, 1999, the house caught fire. Harvey, Trenell, and Niesha died in the blaze.

¶ 5 The Schmidts had owned the house since 1994. The electrical system had been installed in the 1940s or 1950s. It consisted, in part, of an older type of Romex-style wiring and an older electrical panel that used screw-in fuses rather than circuit breakers. The Schmidts' first tenant, Lisa Lewis, reported an electrical problem in the basement. Their second tenants, Carolyn and Edward Anderson, testified that the lights would flicker and fuses would blow. They informed the Schmidts of these problems. The Combses were the next tenants. Patricia

testified that her family experienced problems with the electrical system similar to those experienced by the Andersons. Cynthia Schmidt told Patricia that she would send an electrician to repair the system, but she never sent one.

¶ 6 Thomas Hinton, a retired life insurance agent who knew the Combs family, reported that he visited the Combses' house at 5:15 p.m. on the day of the fire. He observed the lights flickering. Patricia was not home at the time. Hinton returned about 20 minutes later, and he noted that the lights were still flickering. The fire occurred at about 9 p.m. while Patricia was at work.

¶ 7 The Rockford fire department investigated the fire. Patricia informed the department of the electrical problems with the house. Patrick Keehnen, an investigator from the department, explained that the department's investigation of a fire is limited to determining whether the cause of the fire was intentional, accidental, an act of God, or undetermined. The department generally leaves further investigation to interested parties. Keehnen believed that the "fire scene suggest[ed] a possible electrical cause, but due to the extensive damage, the specific cause was not identified." Keehnen also reported that the house's wiring was a "potential" cause of the fire. Pekin conducted an investigation as well. The Schmidts executed a document allowing Pekin to enter the property, conduct an investigation, and remove evidence (hereinafter, the consent agreement). In the course of these two investigations, a section of wiring from the living room and some smoke alarms were preserved. Robert Avery, a supervisor from Pekin, testified that, based on Pekin's investigation, he believed that an electrical problem was the "most probable" cause of the fire. He also concluded that there did not appear to be any liability on the part of the Schmidts.

¶ 8 On January 11, 2000, the City of Rockford building department issued a demolition order to the Schmidts, stating that the building was an unsafe structure. The Schmidts informed Pekin of the order. Gary Schmidt testified that, as the City of Rockford had told him that the house had to be demolished, he contacted a contractor and authorized the demolition. Pekin paid for the demolition. The house was demolished on February 16, 2000. There is ample evidence in the record to conclude that, had anyone sought an extension of time to allow all parties to inspect the house, the request would have been granted. Kim Mniszewski, a professional fire investigator, testified that, because of the lack of evidence, he could not formulate an opinion regarding the cause of the fire.

¶ 9 Patricia set forth significant evidence regarding defendants' control over the fire scene: Pekin's internal policies regarding how to proceed following a fire, which include giving notice to interested parties, conducting an investigation, and handling evidence, and industry standards concerning such issues. We will not set forth this evidence here; rather, we will discuss it as it pertains to the issues raised by the parties. The trial court granted summary judgment in favor of defendants, holding that they owed no duty to Patricia to preserve the fire scene or notify her of its impending destruction. Patricia now appeals.

¶ 10

III. ANALYSIS

¶ 11

The principal issue raised in this appeal—upon which the trial court granted summary judgment—is whether under existing law defendants had a duty to preserve the fire scene for

Patricia's benefit. Alternatively, she asks that, as a matter of public policy, we impose such a duty. Patricia also contends that the trial court's conclusion that no such duty existed violates the law-of-the-case doctrine. Finally, she asserts that she should have been granted leave to amend her complaint a sixth time.

¶ 12 The first three issues are subject to *de novo* review. *Empress Casino Joliet Corp. v. Giannoulis*, 231 Ill. 2d 62, 69 (2008) (summary judgment); *Vancura v. Katris*, 238 Ill. 2d 352, 373-74 (2010) (existence of a duty); *In re Christopher K.*, 217 Ill. 2d 348, 363-64 (2005) (law-of-the-case doctrine). Therefore, we owe no deference to the trial court on these issues (*Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 595 (2011)), and we may freely disregard its judgment and substitute our own (*People v. Davis*, 403 Ill. App. 3d 461, 464 (2010)). However, to the extent that the existence of a duty depends on issues of disputed fact, such decisions should be committed to the trier of fact. *Martin v. Keeley & Sons, Inc.*, 2011 IL App (5th) 100117, ¶ 25. The final issue is reviewed for an abuse of discretion (*I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 218 (2010)), which means that we will disturb the trial court's decision to deny leave to amend the complaint only if no reasonable person would agree with the decision (*1515 North Wells, L.P. v. 1513 North Wells, L.L.C.*, 392 Ill. App. 3d 863, 870 (2009)). With these standards in mind, we now turn to Patricia's arguments.

¶ 13 A. Duty

¶ 14 Patricia first argues that the trial court erred in holding that defendants did not owe her a duty to preserve the fire scene or notify her of its impending destruction so that she could conduct an investigation of it. The trial court granted summary judgment, finding that no such duty existed. Summary judgment is proper where there are no disputed issues of material fact and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). It is a drastic remedy that should be granted only when the movant's right to prevail is clear and free from doubt. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). The record, and all reasonable inferences that can be drawn therefrom, must be construed strictly against the movant and liberally in favor of the opponent of the motion. *Id.* Nevertheless, summary judgment can also provide an expeditious process to dispose of a lawsuit, and, to that end, it is to be encouraged. *Id.* As noted above, our review is *de novo*. *Id.*

¶ 15 We will begin by setting forth the law as it pertains to a party's potential duty to preserve evidence. Spoliation of evidence is not an independent tort; rather, it is a subspecies of negligence. *Burlington Northern & Santa Fe Ry. Co. v. ABC-NACO*, 389 Ill. App. 3d 691, 711 (2009). Thus, a plaintiff must plead and prove the traditional elements of a negligence action—duty, breach, causation, and damages. *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 194-95 (1995). At issue in this case is duty. Generally, no duty exists to preserve evidence. *Thornton v. Shah*, 333 Ill. App. 3d 1011, 1020 (2002). However, a duty can arise by virtue of a contract, an agreement, a statute, or some other special circumstance. *Boyd*, 166 Ill. 2d at 195. Additionally, through affirmative conduct, a party may voluntarily assume a duty to preserve evidence. *Id.* Any of these considerations can establish the requisite

relationship between the parties to impose a duty, and they have come to be known as the relationship prong of the inquiry. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 336 (2004). A plaintiff must also satisfy the foreseeability prong of the test by showing that it was foreseeable that the evidence in question was material to a potential civil action. *Id.* If a plaintiff fails to satisfy either prong, no duty exists. *Id.* We will first consider the relationship prong.

¶ 16 Patricia first attempts to establish the requisite relationship by relying on three contracts or agreements: the insurance policy issued by Pekin, the consent agreement (entered into by Pekin and the Schmidts), and the lease for the property. In *Dardeen*, 213 Ill. 2d at 336-37, our supreme court explained, “When we said, in *Boyd*, that a duty to preserve evidence could arise by an agreement or contract, we meant an agreement or contract between the parties to the spoliation claim.” This rule eliminates the consent agreement as a possible source of a duty, as Patricia was not a party to it.

¶ 17 Pursuant to that same rule, the lease, to which Pekin was not a party, could impose a duty only on the Schmidts. Patricia points to a provision in the lease that allowed the Schmidts to enter the premises to supply necessary services. This passage reads as follows:

“ENTRY AND INSPECTION: *Owner shall have the right* to enter the premises (a) in case of emergency, (b) to make necessary or agreed repairs, decorations, alterations, improvements, supply necessary or agreed services, exhibit the premises to actual or agreed purchasers, mortgagors, tenants, workmen, or contractors, or (c) when tenant has abandoned the premises.” (Emphasis added.)

Contracts are, of course, interpreted by their plain language if possible. *C.A.M. Affiliates, Inc. v. First American Title Insurance Co.*, 306 Ill. App. 3d 1015, 1020 (1999). Here, the language emphasized in the portion of the contract set forth above clearly indicates that this provision was intended to create a right on behalf of the Schmidts rather than impose a duty on them. Hence, contrary to Patricia’s argument, we do not find that this passage raises a question of fact as to the existence of a duty.

¶ 18 Finally, we come to the insurance policy, which, like the consent agreement, was between Pekin and the Schmidts. As such, in accordance with *Dardeen*, 213 Ill. 2d at 337, it would appear that this document could not be the source of a duty to preserve evidence. However, citing *Dix Mutual Insurance Co. v. LaFramboise*, 149 Ill. 2d 314 (1992), Patricia claims co-insured status under the policy. See also *Nationwide Mutual Fire Insurance Co. v. T&N Master Builder & Renovators*, 2011 IL App (2d) 101143; *Cincinnati Insurance Co. v. DuPlessis*, 364 Ill. App. 3d 984 (2006). In *Dix*, 149 Ill. 2d at 323, the supreme court held that a “tenant, by payment of rent, has contributed to the payment of the insurance premium, thereby gaining the status of co-insured under the insurance policy.” *Dix* and its progeny all involved subrogation (see also *Auto Owners Insurance Co. v. Callaghan*, 2011 IL App (3d) 100530), which makes equitable considerations relevant (see *Nationwide Mutual Fire Insurance Co.*, 2011 IL App (2d) 101143, ¶ 9). Central to these cases was the notion that subrogation is appropriate where it prevents unjust enrichment by placing responsibility for a loss where it ought to be borne. *Dix*, 149 Ill. 2d at 319. Because the tenant is functionally paying for the insurance by paying rent (as the cost is passed on to the tenant), it would be

inequitable to deny the tenant the benefit of the insurance policy. See *Dix*, 149 Ill. 2d at 322-23.

¶ 19 Such considerations are not present here, and Patricia cites no case where *Dix* has been applied outside of the context of subrogation. Indeed, the Fifth District of this appellate court has expressly (and properly, in our opinion) declined to apply *Dix* where a tenant argued that an insurer had a duty to defend the tenant against a claim brought by a third party under the landlord's liability policy covering the leased premises. *Hacker v. Shelter Insurance Co.*, 388 Ill. App. 3d 386, 394 (2009) ("There is neither a rule of law nor a principle of equity that requires the landlord's liability insurance company to defend a tenant against third-party liability claims when the terms of the policy do not require the insurance company to do so."). Accordingly, we hold that *Dix* does not apply in the present factual and legal context. Thus, the insurance policy cannot be the source of a duty running from defendants to Patricia.

¶ 20 Having concluded that none of the documents relied on by Patricia form the basis of a duty on the part of any defendant, we now turn to the next possible source of a duty set forth in *Boyd*: a "special circumstance." *Boyd*, 166 Ill. 2d at 195. The case law regarding what constitutes a special circumstance is not well developed. One well-defined special circumstance sufficient to impose a duty to preserve evidence—not present here—is a fiduciary relationship. *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 624 (2007). Beyond this relationship, a number of considerations have been suggested that provide some insight into the issue. While the supreme court did not define "special circumstance" in *Boyd*, 166 Ill. 2d at 195, in *Dardeen*, 213 Ill. 2d at 338, the supreme court provided some guidance:

"We hinted at what special circumstances might give rise to a duty to preserve evidence in *Miller v. Gupta*, 174 Ill. 2d 120, 220 (1996). In *Miller*, a medical malpractice plaintiff's attorney requested X rays from the plaintiff's doctor. The doctor complied and obtained the X rays. Before taking the X rays to the hospital to copy them, he placed them on the floor of his office near the wastebasket. The X rays disappeared. A housekeeping employee who cleaned the doctor's office guessed that she disposed of the X rays, which were later incinerated. We remanded to allow the plaintiff to amend her negligent spoliation claim to satisfy *Boyd*. *Miller*, 174 Ill. 2d at 129.

Unlike the plaintiff in *Miller*, *Dardeen* never contacted the defendant to ask it to preserve evidence. *Dardeen* never requested evidence from State Farm, and he never requested that State Farm preserve the sidewalk or even document its condition. And though he visited the accident site hours after he was injured, he did not photograph the sidewalk. Additionally, unlike the doctor in *Miller*, State Farm never possessed the evidence at issue and, thus, never segregated it for the plaintiff's benefit."

To better understand what constitutes a "special circumstance," we must look closely at the insight the supreme court has given us in *Miller* (*Dardeen*, 213 Ill. 2d at 338).

¶ 21 The first consideration identified in *Miller* and *Dardeen* is a request to preserve evidence. *Id.* At first blush, this factor appears out of place. Such a request would seem pertinent to the foreseeability prong, rather than the relationship prong, of the duty inquiry. A request to preserve evidence should certainly put the other party on notice "that the evidence was

material to a potential civil action.” *Boyd*, 166 Ill. 2d at 195. Nevertheless, the *Dardeen* court expressly considered it in assessing whether a special circumstance gave rise to a duty, which is a part of the relationship prong. *Dardeen*, 213 Ill. 2d at 338. Thus, we must consider what a request to preserve evidence may also say about the relationship between the parties beyond what it says about the materiality of the evidence. Considered in this light, its relevance to the relationship prong becomes clear. If the request makes it foreseeable that the evidence is “material to a potential civil action” (*Boyd*, 166 Ill. 2d at 195), it must, *a fortiori*, provide notice of the possibility of a civil action. In turn, the relationship between the parties becomes that of potential litigants.

¶ 22 This is a substantial step in the evolution of the relationship between the parties. In *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 121-22 (1998), our supreme court held that “a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence.” The failure to preserve pertinent evidence constitutes a sanctionable discovery violation; otherwise, as the supreme court explained, “[A] potential litigant could circumvent the discovery rules or escape liability simply by destroying the proof prior to the filing of a complaint.” *Id.* at 121; *cf. Balmoral Racing Club, Inc. v. Illinois Racing Board*, 151 Ill. 2d 367, 408 (1992) (“The opportunity to cross-examine witnesses and to inspect the evidence offered against a party have both been determined to be part of guaranteeing the exercise of due process before an administrative tribunal.” (Emphasis added.)). Once the possibility of litigation becomes foreseeable to a potential party, the party is thereby made aware that, pursuant to the discovery rules, it is subject to a duty to preserve relevant and material evidence. See also *American Family Insurance Co. v. Village Pontiac-GMC, Inc.*, 223 Ill. App. 3d 624, 627 (1992) (“In this case, plaintiffs intentionally allowed the most crucial piece of evidence in this case to be destroyed. Plaintiffs should have known that potential defendants to a case alleging negligence and product liability would undoubtedly want to inspect, as plaintiffs’ experts had done, and perhaps test the object alleged to have caused the damage. Further, Farmers Insurance Company had title to the car and, as an insurance company, unquestionably knew the importance of the car in allowing defendants to prepare a defense. Indeed, Farmers Insurance in anticipation of a subrogation claim allowed the car to be destroyed only after its experts had thoroughly examined the car and had issued their opinions on the cause of the fire.”).

¶ 23 While there was no *per se* request to preserve evidence in this case, there was the functional equivalent of one. In *Brobbeey v. Enterprise Leasing Co. of Chicago*, 404 Ill. App. 3d 420, 435 (2010), the First District treated the fact that the plaintiffs complained of a defect in a vehicle’s brakes similarly to a request to preserve evidence. *Brobbeey* involved an accident caused by an allegedly defective vehicle. After discussing the factors set forth in *Dardeen*, the *Brobbeey* court first observed that the “plaintiffs specifically complained both before and after the accident that there was some defect that caused the van to wobble, the steering wheel to shake, and the brakes to malfunction.” *Id.* An actual request to preserve the evidence was not made until after the van was destroyed. *Id.* at 424. However, it is apparent that the complaints in *Brobbeey* served the same function as a request to preserve evidence. Such complaints raise a question of fact as to whether a party had been made aware of the potential for litigation, depending on the nature of the complaints, evidence, and damages.

Put differently, a party who knows that another has been injured in a manner related to something the other had been complaining about should typically be aware of the possibility of future litigation in which that party is a potential litigant.

¶ 24 In this case, there is ample evidence regarding complaints that had been communicated to the Schmidts. As for Pekin, the evidence is not as clear. Patricia told an investigator from the Rockford fire department—Keehnen—that there were “some electrical problems” with the house. She later told Keehnen that fuses would blow when the television set was on. In turn, Keehnen told a Pekin employee that the house’s wiring was a potential cause of the fire. While this evidence is somewhat equivocal, a motion for summary judgment should be granted only where the movant’s right to judgment is clear and free from doubt. *Adams*, 211 Ill. 2d at 43. We cannot say that this is the case here.

¶ 25 We acknowledge that in *Andersen v. Mack Trucks, Inc.*, 341 Ill. App. 3d 212, 217 (2003), this court stated, “We decline to hold that a mere request that a party preserve evidence is sufficient to impose a duty absent some further special relationship.” We clarified by stating, “We will not speculate as to what other facts [the plaintiff] could plead to establish the existence of a duty.” *Id.* at 217-18. Thus, it is clear that our ruling was a narrow one—strictly limited to situations involving mere requests to preserve evidence. Notably, though there were facts indicating that the defendant had possession of the evidence (*id.* at 214), we expressly considered only the mere existence of a request to preserve evidence (*id.* at 217-18). Moreover, we did not base our holding on whether the request was sufficient to make the parties aware of the potential for litigation. Accordingly, we do not find *Andersen* to provide significant guidance here. In this case, there was not a mere request for evidence; instead, there was, *inter alia*, the functional equivalent of a request *sufficient to put defendants on notice that they were potential litigants.*

¶ 26 We also observe that the *Dardeen* court expressly distinguished *Shimanovsky*, explaining: “*Shimanovsky* is inapposite. In that case, we agreed with the appellate court that a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant, material evidence. *Shimanovsky*, 181 Ill. 2d at 121. But we never mentioned *Boyd*, or spoliation, because the central issue in *Shimanovsky* was whether the trial court could dismiss the plaintiff’s complaint as a discovery sanction for the plaintiff’s presuit destruction of evidence. Further, when Kuehling called Couch, she had not yet spoken with Dardeen. We decline to characterize State Farm as a potential litigant at that point.” *Dardeen*, 213 Ill. 2d at 339-40.

Earlier, the court had observed: “Unlike the plaintiff in *Miller*, Dardeen never contacted the defendant to ask it to preserve evidence. Dardeen never requested evidence from State Farm, and he never requested that State Farm preserve the sidewalk or even document its condition.” *Id.* at 338. Thus, State Farm was not aware of the potential for litigation. In this case, a question of fact exists as to whether defendants were on notice of potential litigation and, in turn, whether they could be characterized as potential litigants. Hence, the supreme court’s basis for distinguishing *Shimanovsky* is not present here.

¶ 27 The *Dardeen* court also considered whether the plaintiff had an adequate opportunity to inspect and document the evidence or the evidence was otherwise sufficiently documented.

Dardeen, 213 Ill. 2d at 338 (“And though he visited the accident site hours after he was injured, he did not photograph the sidewalk.”). Here, the house stood for less than two months following the fire, and Patricia did not have notice of its impending demolition. We have found little direct guidance, and the parties do not point to any, as to what would constitute an adequate opportunity for an inspection. On this issue, then, a question of fact exists, which is best guided by considerations of reasonableness. *Cf. American Family Mutual Insurance Co. v. Golke*, 2009 WI 81, ¶ 31, 319 Wis. 2d 397, 768 N.W.2d 729 (“We have already answered the substance of this question, stating that notice sufficient to discharge the duty to preserve evidence requires: (1) reasonable notice of a possible claim; (2) the basis for that claim; (3) the existence of evidence relevant to the claim; and (4) *reasonable opportunity to inspect that evidence.*” (Emphasis added.)); *Ortega v. Kmart Corp.*, 36 P.3d 11, 13 (Cal. 2001) (“[E]vidence of the owner’s failure to inspect the premises within a reasonable period of time is sufficient to allow an inference that the condition was on the floor long enough to give the owner the opportunity to discover and remedy it.”). Further, nothing in the record indicates that the condition of the house was sufficiently documented such that this consideration would make a grant of summary judgment appropriate.

¶ 28 The *Dardeen* court also considered whether the defendant was in possession or control of the evidence at issue. *Dardeen*, 213 Ill. 2d at 338. It declined to decide whether possession is always necessary to sustain a spoliation case; however, it held that either possession or control must be present. *Id.* at 339 (“The record here indicates that State Farm had neither possession nor control over Kuehling’s sidewalk and, therefore, owed *Dardeen* no duty to preserve it.”). Unlike the defendant in *Dardeen*, here, there was ample evidence in the record from which a jury could conclude that defendants possessed or controlled the premises.

¶ 29 Like a request to preserve evidence, whether a defendant segregated evidence would initially seem to be better addressed elsewhere—namely, in determining whether the defendant voluntarily assumed a duty to preserve it. As it relates to the relationship prong, such conduct could, perhaps, speak to some element of reliance between the parties that is not present in this case. In any event, the *Dardeen* court did expressly mention this factor while discussing what constitutes a special circumstance. *Id.* at 338.

¶ 30 Moreover, it is important to note that, to be relevant here, the act of segregation must be “for the plaintiff’s benefit.” *Id.* Initially, we note that Pekin did segregate a few items (some wires and smoke detectors); however, at issue here is evidence that Pekin did not segregate (*i.e.*, the rest of the house). Indeed, there is no evidence that Pekin or the Schmidts did anything to segregate the fire scene. We decline to equate having control over something with segregating it, as segregation requires some affirmative act to separate the evidence from the rest of the world. See, *e.g.*, *Boyd*, 166 Ill. 2d at 195 (defendant assumed duty to preserve evidence by taking possession of it and placing it in a closet). Patricia points to nothing defendants did to isolate the scene or separate it from its surroundings, such as fencing it off or posting a guard. This factor weights against finding that defendants owed Patricia a duty.

¶ 31 As noted, Patricia presented substantial evidence regarding the customs and practices of the insurance industry as well as Pekin’s own internal policies—a factor not articulated in

Dardeen. For example, an internal letter circulated to Pekin personnel stated: “An insurer has a duty to preserve evidence including the fire scene. Failure to preserve a fire scene is spoliation.” Another letter stated that Pekin personnel should try to notify all parties prior to conducting a destructive investigation. It continued, “Do not destroy evidence until all parties have been completely notified that it is going to be destroyed.” Avery explained Pekin’s policy on the preservation of evidence as follows: “[O]bviously, if there’s any indication of any liability on the part of our insured or the liability of anybody else that may have caused the situation, obviously we’re not going to do anything until all the parties are notified.” Dennis Dyl, an electrical engineer retained by Pekin, testified that “whoever owns or controls the property *** has a responsibility to notify the interested parties.” This evidence is not relevant to the question before us. This court has previously held that, while such customs and policies may be relevant to defining the standard of care, they are insufficient to establish a duty. *Rogers v. Clark Equipment Co.*, 318 Ill. App. 3d 1128, 1135 (2001).

¶ 32 Having considered the factors identified in *Miller*, 174 Ill. 2d at 129, and discussed in *Dardeen*, 213 Ill. 2d at 338, we note that Patricia has raised questions of material fact regarding whether defendants were aware of the potential for litigation and thus became potential litigants; whether defendants had possession or control of the premises; and whether Patricia was given an adequate opportunity to inspect the premises. These issues of material fact preclude the entry of summary judgment in this case. Furthermore, nothing indicates that the condition of the premises was otherwise adequately documented. Weighing in favor of defendants, there is no indication that defendants segregated the premises for Patricia’s benefit. The resolution of these questions of fact will be determinative of whether defendants owed her a duty to preserve evidence. On remand, the trier of fact should resolve these questions. See *Martin*, 2011 IL App (5th) 100117, ¶ 25 (“ ‘Ordinarily, the existence of a duty is a question of law to be determined by the court.’ [Citation.] Where the existence of a duty is dependent on disputed facts, however, the existence of the relevant facts is a question for a trier of fact to resolve.” (citing *Jones v. O’Brien Tire & Battery Service Center, Inc.*, 374 Ill. App. 3d 918, 933 (2007))).

¶ 33 Patricia also contends that defendants engaged in a voluntary undertaking sufficient to impose a duty. *Boyd*, 166 Ill. 2d at 195. She first reiterates that defendants had control of the scene. It is unclear to us, however, how possessing something could represent a voluntary undertaking to preserve it, and Patricia does not elaborate on this point. During oral argument, Patricia’s attorney argued that the fact that defendants allowed the house to stand until it was demolished means that they preserved it during this time. We find this assertion unpersuasive—“not destroying” and “preserving” are not the same thing. “Preserve” is a verb that means “to keep safe from injury, harm, or destruction” or “to keep alive, intact, in existence, or from decay.” (Emphases added.) Webster’s Third New International Dictionary 1794 (2002). Thus, to preserve something, one must take some action to facilitate its continued existence. The passive act of allowing something to exist does not constitute preservation.

¶ 34 Patricia cites a number of cases from the Fifth District in support of this argument: *Martin*, 2011 IL App (5th) 100117; *Jones*, 374 Ill. App. 3d 918; *Stinnes Corp. v. Kerr-McGee Coal Corp.*, 309 Ill. App. 3d 707 (1999). We do not find these cases persuasive here.

In *Jones*, 374 Ill. App. 3d at 927, the insurer directed its insured to preserve the evidence at issue. Patricia points to no similar affirmative conduct in this case. *Stinnes Corp.* also involved similar affirmative action. See *Stinnes Corp.*, 309 Ill. App. 3d at 714. In *Martin*, 2011 IL App (5th) 100117, ¶ 20, the court concluded that, by preserving evidence for its own investigation, the defendant triggered a duty to preserve the evidence for the benefit of other potential litigants.

¶ 35 In the instant case, Patricia does not explain what acts defendants undertook to preserve the fire scene in its entirety. As noted above, she instead relies on the fact that defendants passively allowed the fire scene to exist until it was demolished—a position we have already found untenable. Pekin did segregate a few items of evidence, but there is no indication that these were not available to Patricia. Moreover, she sets forth no authority for the proposition that, by preserving a few items, Pekin became obligated to preserve the entire fire scene. We note that a voluntarily assumed duty is generally limited to the scope of the undertaking. *Jablonski v. Ford Motor Co.*, 2011 IL 110096, ¶ 123. Patricia also contends that the fact that Pekin conducted an investigation triggered a duty to preserve the fire scene, relying on *Jones* and *Martin*. In *Jones*, the court stated, “Once Country Mutual undertook to preserve the evidence for its own benefit, this voluntary undertaking imposed a duty to continue to exercise due care to preserve the evidence for the benefit of any other potential litigants.” *Jones*, 374 Ill. App. 3d at 927. In *Martin*, the court agreed with the plaintiff’s argument “that by preserving the I-beam for its own purposes, Keeley voluntarily undertook a duty to preserve the beam for other potential litigants.” *Martin*, 2011 IL App (5th) 100117, ¶ 20; see also *Stinnes Corp.*, 309 Ill. App. 3d at 715. In these cases, a duty was found because the defendant actually preserved the evidence in question, not because the defendant conducted an investigation. Thus, these cases provide no support for Patricia’s argument that by conducting an investigation Pekin assumed a duty to preserve evidence. Quite simply, defendants did nothing to preserve the fire scene, and the fact that Pekin conducted an investigation is immaterial. They did not, therefore, voluntarily assume a duty to preserve evidence.

¶ 36 Accordingly, though we reject the majority of the bases that Patricia set forth for finding a duty, we conclude that questions of material fact exist, as explained above, that, if resolved favorably to Patricia, would establish a duty. We therefore reverse the trial court’s grant of summary judgment and remand for further proceedings. On remand, the trial court may proceed in any manner it determines to be appropriate that is consistent with this decision.

¶ 37 Before closing this section, we note that, in a somewhat related argument, Patricia contends that Pekin voluntarily undertook a duty to properly investigate the fire. We disagree. Quite simply, Pekin’s investigation was not voluntary. Rather, it was part of its duties as the Schmidts’ insurer. See *Fichtel v. Board of Directors of the River Shore of Naperville Condominium Ass’n, Hillcrest Management Co.*, 389 Ill. App. 3d 951, 961 (2009) (“We reject the Gattos’ argument that State Farm assumed a duty to disclose the presence of mold by voluntarily undertaking to conduct an investigation. State Farm investigated the attic to settle the water damage claim brought by the Gattos under the insurance contract between them. The investigation was not a voluntary undertaking because State Farm was required by contract to resolve the claim.”). The investigation did not constitute a voluntary

undertaking. Moreover, we do not see how it could have been conducted for Patricia's benefit, as she is neither a co-insured nor a third-party beneficiary under the insurance contract.

¶ 38

B. Law of the Case

¶ 39

Patricia next argues that the trial court violated the law-of-the-case doctrine when it granted summary judgment. Though we are reversing the trial court's grant of summary judgment, we will nevertheless address this issue, as our decision requires the resolution of certain factual issues on remand, which would not be necessary if Patricia were to prevail on this argument. Specifically, she points out that, earlier in the proceedings, the trial court denied a motion to dismiss the spoliation counts, thereby finding that Patricia had properly alleged a duty. The existence of a duty is a question of law. *Vancura*, 238 Ill. 2d at 373-74. Hence, Patricia argues, it was improper for the trial court to revisit this question of law in granting summary judgment.

¶ 40

The law-of-the-case doctrine generally prevents a previously decided issue from being relitigated. *People ex rel. Madigan v. Illinois Commerce Comm'n*, 2012 IL App (2d) 100024, ¶ 31. Pursuant to the doctrine, questions decided on a previous appeal are binding on both the trial court and the appellate court on subsequent appeals. *Norris v. National Union Fire Insurance Co.*, 368 Ill. App. 3d 576, 580 (2006). A necessary prerequisite to the application of this doctrine is that there has been a prior appeal. See *Norris*, 368 Ill. App. 3d at 580 ("Under the law of the case doctrine, *questions of law decided on a previous appeal* are binding on the trial court on remand as well as on the appellate court on a subsequent appeal." (Emphasis added.)); *Marsaw v. Richards*, 368 Ill. App. 3d 418, 425 (2006) ("The 'law of the case' doctrine provides that an issue of law that was *decided on appeal* is binding on the circuit court on remand and on the appellate court on subsequent appeal." (Emphasis added.)); *Ficken v. Alton & Southern Ry. Co.*, 291 Ill. App. 3d 635, 649 (1996) ("The parties and issues to this appeal are *the same as in the first appeal*, so the law-of-the-case doctrine requires that we affirm ***." (Emphasis added.)). Moreover, where there has been no intervening action by a court of review, a trial court "has the power to modify or revise an interlocutory order at any time prior to final judgment." *Brandon v. Bonell*, 368 Ill. App. 3d 492, 502 (2006). The law-of-the-case doctrine is prudential rather than an actual limitation upon the power of the courts. *People v. Patterson*, 154 Ill. 2d 414, 468 (1992).

¶ 41

In the instant case, the law-of-the-case doctrine does not apply. There was no earlier appeal in this case. Therefore, the trial court was free to modify its earlier interlocutory legal decision.

¶ 42

C. Leave to Amend

¶ 43

Patricia's final argument is that the trial court should have granted her request to file a sixth amended complaint. After the trial court granted summary judgment, she moved to amend in an attempt to "address the trial court's perceived defects in the pleadings." Having reversed the grant of summary judgment, we need not address this issue.

¶ 44 IV. CONCLUSION

¶ 45 In light of the foregoing, the order of the circuit court of Winnebago County granting defendants summary judgment on Patricia’s spoliation claims is reversed and this cause is remanded for further proceedings consistent with this opinion.

¶ 46 Reversed and remanded.

¶ 47 JUSTICE BURKE, specially concurring.

¶ 48 I concur in the decision to reverse and remand this case, and I agree with much of the analysis set forth in the majority opinion. In particular, the majority’s comprehensive discussion concerning the effect of notice of potential litigation on the relationship prong is well reasoned. We part company on the issue of duty. Based on the record presented to the trial court, I believe that plaintiff has established the duty element as a matter of law. See *Kelley v. Carbone*, 361 Ill. App. 3d 477, 480 (2005) (“The existence of a duty is a question of law to be decided by the court.”). On the other hand, the majority holds that the existence of a duty in this case depends on issues of disputed fact and has delineated those questions of fact, which I address in turn.

¶ 49 The first question is whether defendants were aware of potential litigation, based on the prior complaints about electrical problems in the house. The majority holds that there is ample evidence that the complaints were communicated to the Schmidts but that, as to Pekin, the evidence is not as clear. The record contains two entries in Pekin’s file status log dated January 3, 2000, which read, “per investigation widow claims home had history of blown fuses,” and “can’t rule out electrical at this time.” Further, the fire department investigator told a Pekin employee that the house’s wiring was a potential cause of the fire. This evidence shows that Pekin, like the Schmidts, had ample notice of the electrical problems.

¶ 50 The second question is whether plaintiff had an adequate opportunity to inspect or document the evidence. I agree that resolution of this question is best guided by considerations of reasonableness. I would hold that it was patently unreasonable for defendants to demolish a house where three people perished in a fire that was potentially caused by an electrical problem without notifying the widow and mother of the deceased of the pending demolition. It is undisputed that defendants never offered plaintiff access to the house or notified her of its impending demolition even though defendants were on reasonable notice of potential litigation concerning the fire.

¶ 51 The majority correctly determines that there was ample evidence presented that defendants possessed or controlled the premises. The majority then asserts that Pekin’s failure to segregate the scene for plaintiff’s benefit weighs against a finding that defendants owed a duty to preserve it. Segregation of evidence is a much more important factor in determining whether a party has voluntarily assumed a duty to preserve than in determining whether special circumstances exist. Further, when discussing segregation one must consider the nature of the evidence. Segregation of a house is a bit different and more complicated than setting aside a piece of evidence such as a propane heater, X rays or even a motor vehicle. I do not believe that defendants’ failure to segregate the house weighs against

finding that defendants had a duty to preserve, under a special circumstances analysis.

¶ 52 Again, I believe that, under the special circumstances presented by the unique facts of this case, as a matter of law defendants owed plaintiff a duty to preserve the scene of the fire until plaintiff was afforded the opportunity to conduct an investigation.