

No. 1-13-1245

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

REGINALD BROWN, as Special Administrator of)	Appeal from the
the Estate of Galissa Brown, Deceased,)	Circuit Court of
)	Cook County
Plaintiff-Appellant,)	
)	
v.)	No. 09 L 14388
)	
NITRO NIGHTCLUB, INC.,)	Honorable
)	William E. Gomolinski,
Defendant-Appellee.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Harris and Justice Liu concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted defendant's motion for summary judgment on plaintiff's claim under the Liquor Control Act of 1934 (Dramshop Act) (235 ILCS 5/6-21 (West 2008)) and his claim for negligent spoliation of evidence where plaintiff could not establish all required elements of the cause of action.

¶ 2 On November 27, 2008, Galissa Brown was killed in a hit-and-run car accident. Her father, plaintiff Reginald Brown, as special administrator of Galissa's estate, brought a dramshop action against defendant alleging that the driver of the car was an intoxicated patron of the defendant just before the accident. At the time the complaint was filed, plaintiff was unable to

identify the offending car or its allegedly intoxicated driver. Three years later, plaintiff was still unable to identify the car or the allegedly intoxicated driver. Defendant filed a motion for summary judgment arguing that without the identity of the driver, plaintiff can never prove a dramshop claim against defendant. In return, plaintiff amended the complaint adding a claim for negligent spoliation of evidence alleging that defendant taped over video surveillance footage that could have identified the allegedly intoxicated driver which would have allowed the plaintiff to establish his dramshop claim. After briefing and hearing, the circuit court granted defendant's motion for summary judgment and dismissed plaintiff's complaint with prejudice. Plaintiff timely filed this appeal. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 On November 27, 2008, Galissa Brown was present in defendant Nitro Nightclub (Nitro), located in Stone Park, Illinois. At around 1 a.m., Galissa left Nitro and walked with some friends to their parked car. Approximately two blocks from the nightclub, Galissa was struck by a vehicle in a hit-and-run accident. Galissa was taken to Loyola Medical Center and pronounced dead at 1:58 a.m. The Stone Park police department investigated the accident, however, neither the vehicle nor the driver of the vehicle were ever identified.

¶ 5 On November 23, 2009, plaintiff filed a dramshop action against defendant under the Liquor Control Act of 1934 (235 ILCS 5/6-21 (West 2008) (Dramshop Act)). Plaintiff alleged that on November 27, 2008, the club served alcoholic beverages to an unidentified individual, causing him to become intoxicated. While at the club, the allegedly intoxicated person (AIP) had an altercation with another patron and as a result of that altercation, the AIP quickly left the club and drove away, hitting and killing Galissa. Plaintiff alleged that defendant's sale of alcoholic

beverages to the AIP caused his state of intoxication and therefore, directly and proximately caused Galissa's fatal injuries.

¶ 6 After many attempts, defendant was served with summons in February 2011. Defendant moved to dismiss the complaint arguing plaintiff failed to exercise reasonable diligence in obtaining service upon defendant pursuant to Illinois Supreme Court Rule 103(b) (eff. July 1, 2007). The circuit court denied Nitro's motion. Defendant then answered the complaint and denied all material allegations.

¶ 7 Plaintiff and Nitro engaged in written and oral discovery, taking the depositions of three individuals: Stone Park Police Detective Christopher Pavini, plaintiff Reginald Brown and Nitro's registered agent, Perry Orr. The depositions failed to provide information on the identity of the AIP. On November 9, 2012, defendant filed a motion for summary judgment arguing that without the AIP's identity, plaintiff could never prove a claim under the Dramshop Act. Discovery closed on December 4, 2012. Two weeks later, on December 20, 2012, plaintiff filed a motion to reopen discovery and to compel defendant to provide more complete answers to plaintiff's written discovery. On January 11, 2013, plaintiff amended the motion to reopen discovery and sought permission to take three additional depositions of witnesses identified by plaintiff during his own deposition: Donnie Moore, Tiana Winters and Terinei Tolbert. The trial court granted plaintiff's requests.

¶ 8 On February 13, 2013, plaintiff filed a motion to re-open discovery for a second time to take additional depositions and amend the complaint. The circuit court permitted plaintiff to amend the complaint to add a claim for negligent spoliation of evidence but denied the request to re-open discovery. That same day, plaintiff filed his second amended complaint alleging that he

is unable to prove the identity of the AIP because defendant taped over the video surveillance footage from the night Galissa was killed. Plaintiff alleged that several fights broke out at the club that night; the AIP became intoxicated at the club and was fleeing from one of these fights when he struck Galissa; and witnesses from the club saw the AIP get into his car in the Nitro parking lot and drive away until he hit and killed Galissa. Plaintiff alleged these events were all captured on the video surveillance footage.

¶ 9 Defendant answered the second amended complaint denying all material allegations. However, defendant admitted it had a surveillance system in place on and before November 28, 2008. Defendant filed a supplemental response to plaintiff's written discovery stating "it does not possess any photographs, slides or motion pictures taken subsequent to the occurrence alleged in the complaint or any object involved or the scene of the occurrence" and does not have any "photographs, videotapes, movies, or audio tapes depicting the activities of [Galissa]."

¶ 10 In response to defendant's summary judgment motion, plaintiff argued that defendant's destruction of the surveillance video (taping over the footage after 72 hours) prevented him from identifying the AIP and proving the underlying Dramshop claim. According to plaintiff, defendant had a duty to retain the video because defendant's agents knew Galissa and the AIP were patrons of the club on November 28, 2008; surveillance video recorded the events at the club on the night in question; this footage was in the exclusive possession of defendant at all times; defendant had a duty to maintain the video footage because of the violent events at the club that night; and because the police had a stated intention to inspect the club's video footage as it related to Galissa's death. Lastly, defendant breached its duty to preserve the tapes by taping over the security footage which is a proximate cause of his inability to prove his underlying

claim.

¶ 11 In support of and opposition to defendant's motion for summary judgment, the parties submitted discovery depositions and other documents that are summarized below.

¶ 12 Stone Park police detective Christopher Pavini was deposed five years after the accident. He testified that a call reporting Galissa's accident was received at 1:14 a.m. According to the police report, Galissa stepped into the north side of Lake Street near the intersection with 43rd Street when she was struck by unidentified vehicle and driver. Initial witness reports suggested that the car was a burgundy Impala traveling westbound on Lake Street. After the accident, the car made a u-turn to head eastbound on Lake Street and then Southbound on Manheim Road. Later, a witness called the Stone Park police department reporting a partial plate description and describing the offending vehicle as a blue Chevy Caprice. The collected evidence included various leads, witness statements and traffic camera footage, however, no evidence could confirm the identity of the driver. Detective Pavini testified that it was a "crazy night" with "a lot of fights" at Nitro. However, there was no evidence to confirm whether the AIP was at Nitro that night and whether he was under the influence of alcohol. The investigation remains open.

¶ 13 Tiana Winters, a witness who had also been struck by the AIP's car, testified that the night in question was a very violent night at Nitro and police officers were stationed outside the club. Sometime after midnight, Tiana and Galissa left the club together. They were walking towards their car parked a few blocks away, when a car coming from the direction of Nitro swerved onto the curb and struck both women. Tiana's sister, Sironda Edwards, had been walking with them when the incident occurred. Tiana testified that Sironda observed the accident and mentioned that the car was of a dark color, possibly green or blue. Tiana did not know the

identity of the driver, if he was at the club or if he drank alcohol at the club that night. According to Tiana, the detective mentioned to her that the police intended to get the surveillance camera footage from the scene of the accident.

¶ 14 Donnie Moore worked as a security guard at Nitro from 1999-2004. He was not at the club on November 27, 2008. However, he received a phone call that night from another guard named Will, now deceased, who informed Moore that the club was "out of control" and that "a young lady was killed." In reference to Galissa's accident, Will told Moore that he recognized the car and it had been at Nitro's parking lot before. According to Moore, the car was a "fully decked out" dark colored Impala and its picture had been posted on myspace.com. Moore mentioned that decedent's cousin, Erica Johnson, knew the "street name" of the AIP but Moore could not recall the name.

¶ 15 Moore testified that Nitro's surveillance system was replaced in 2000. According to Moore, the new system took footage of the outside of the club and parking lot. He believed that 15 or 16 cameras were employed to film the inside and outside of the club. Although he testified that he is "computer illiterate," he believed the cameras were computerized and not reliant on video tapes. According to Moore, Will and another guard named Kevin told Moore there was some footage on the club's cameras of "the whole incident at hand[,] not so much of the incident concerning the young lady getting hit[,] [but] basically where it all started as far as the fight."

¶ 16 Plaintiff testified that when he arrived to the hospital, his daughter had already died. At the hospital, a police officer told him that there had been four or five stabbings in the club that night and the police would try to get video footage from the club's cameras. The officer also told plaintiff that the offending vehicle was a "Chevy with Wisconsin plates" and the driver was "an

African American guy." Plaintiff believed that the AIP was a member of a local street gang and because of that affiliation, no witnesses were willing to come forward to identify the AIP.

Plaintiff 's niece told him the AIP was at the nightclub that night, but does not have proof the AIP consumed alcohol there. Plaintiff visited Nitro a few days after the accident to gather more information about his daughter's death. According to plaintiff, he "just went there to look around and hope they would talk to me but they wouldn't."

¶ 17 Perry Orr, an agent of Nitro, was also deposed, however, a transcript of his testimony is not part of the record on appeal. The parties agree that his testimony was consistent with a sworn affidavit that appears in the record. Orr's affidavit states only that Nitro has no information identifying the AIP who struck and killed Galissa.

¶ 18 Joseph Napoli, commander of the Stone Park police department testified by affidavit that he was the lead detective in Galissa's case. The investigation uncovered several leads regarding the description of the car and nicknames of the AIP. According to Napoli, all leads reached a dead end and did not lead to the identity of the AIP. The police department reviewed surveillance footage of the area of the accident, but it did not help the police identify the AIP. The department never requested Nitro's surveillance footage "because there was no direct evidence that the alleged driver came from Nitro Nightclub and the hit and run accident occurred .2 miles away from the club." Napoli dismissed as hearsay a witness statement suggesting the AIP was a Nitro patron right before the accident.

¶ 19 After considering the aforementioned evidence, on March 15, 2013, the circuit court granted defendant's motion for summary judgment on all counts. Plaintiff timely filed this appeal.

¶ 20

ANALYSIS

¶ 21 Plaintiff appeals the entry of summary judgment in defendant's favor. Summary judgment is appropriate when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2008). In considering summary judgment, the court must view the record in light most favorable to the nonmoving party. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). We review the circuit court’s ruling on a motion for summary judgment *de novo*. *Id.* If a plaintiff fails to establish any element of a claim, summary judgment for the defendant is proper. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 335 (2004).

¶ 22 Plaintiff alleged the defendant sold alcoholic liquor to an allegedly intoxicated person who later drove from the defendant nightclub, hitting and killing plaintiff’s daughter with his car. Plaintiff did not identify the car or its driver contending he could not do so because defendant taped over its video surveillance footage from that night and the video would have identified the driver as a patron of the club and further identify the car responsible for the death. The circuit court granted defendant's motion for summary judgment on the basis that plaintiff could not identify the driver, he could not establish that the driver was at the defendant club or that he was intoxicated and plaintiff could not establish that defendant had a duty to preserve the video evidence.

¶ 23 Plaintiff's notice of appeal seeks a reversal of the circuit court's order that granted defendant's motion for summary judgment and dismissed the "matter with prejudice." Plaintiff's second amended complaint, the subject of the summary judgment dismissal, contained a

dramshop claim and a claim for negligent spoliation of evidence. On appeal, however, plaintiff does not argue that his claim under the Dramshop Act should survive and admits not knowing the identity of the driver. Plaintiff does not assert any argument to support a reversal of the circuit court's entry of summary judgment in favor of defendant on his dramshop claim. An issue raised in the notice of appeal will not be considered where an appellant's brief does not contain "the contentions of the appellant and the reasons therefore, with citation of the authorities and the pages of the record relied on." *Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d 713, 720 (2010); See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Therefore, given that plaintiff fails to advance or develop any argument against the summary dismissal of his dramshop claim, it is forfeited.

¶ 24 The entirety of plaintiff's appellate brief argues that the circuit court erred in granting defendant's motion for summary judgment as to the claim of negligent spoliation of evidence. A review of plaintiff's arguments in this regard are unpersuasive.

¶ 25 Spoliation of evidence is not an independent tort but rather a form of negligence. *Martin v. Kelley & Sons, Inc.*, 2012 IL 113270, ¶ 26. To prevail in a negligence action, a plaintiff must prove that defendant owed a duty to the plaintiff, defendant breached that duty, and the breach proximately caused plaintiff's injury. *Dardeen v. Keuhling*, 213 Ill. 2d at 335-36; *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 194, 196 (1995). To prove negligent spoliation of evidence, a plaintiff must also establish that the "loss or destruction of the evidence caused the plaintiff to be unable to prove an underlying lawsuit." *Boyd*, 166 Ill. 2d at 196. Plaintiff argues that Nitro had a duty to preserve the surveillance video, defendant breached that duty by taping over the video and this breach proximately caused plaintiff's inability to recover on his dramshop

claim. The parties agree that Nitro's video cameras recorded surveillance footage on November 27, 2008 and that the footage is no longer available. Thus, we are first asked to decide whether defendant had a duty to preserve the video surveillance footage for use in this civil action.

¶ 26 "The general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute [citation] or another special circumstance. Moreover, a defendant may voluntarily assume a duty by affirmative conduct. [Citation.]" *Id.* at 195. If a duty is established, the plaintiff must then show that the duty encompasses the evidence at issue and that "a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Id.* This has been referred to as a two prong "relationship" and "foreseeability" test and if a plaintiff fails to satisfy both parts of the test then the defendant has no duty to preserve the evidence at issue. *Dardeen*, 213 Ill. 2d at 336; *Martin*, 2012 IL 113270, ¶27.

¶ 27 No agreement or contract or voluntary undertaking is advanced by plaintiff to establish defendant's duty. Plaintiff, instead argues that defendant had a statutory duty to collect and preserve its surveillance video taken on November 27, 2008 pursuant to the City of Chicago Liquor License Ordinance (Ordinance) (Chicago Municipal Code § 4-60-130) and Nitro breached that duty when it failed to turn the tapes over to the police. One would immediately pause upon reading this argument because the events and defendant's location are in Stone Park, Illinois, a non-contiguous municipality to the city of Chicago. Plaintiff did not reference the Ordinance or any duty pursuant to the Ordinance in his complaint or in response to the motion for summary judgment. The use of valuable appellate time and resources reveals that a footnote in the defendant's summary judgment reply brief referenced the Ordinance for no logical reason

other than to ostensibly analogize the present factual situation to the provisions of the Ordinance to establish the absence of a duty. In the reply brief defendant summarized the affidavit of commander Napoli to the effect that the Stone Park police department did not ask Nitro for the security video or to retain the video. Defendant then argued that the Ordinance requires security cameras to be maintained for not less than 72 hours and "shall be made available to the police department" and, therefore, the duty under the Ordinance ran to the police and not to the plaintiff. As one would expect, plaintiff now contends this amounts to an admission that a statutory duty existed. In an attempt to clarify the argument raised in its reply brief in the circuit court, on appeal defendant argues that the "duty" to maintain surveillance video recordings is not imposed under the Chicago ordinance but rather under section 4-60-130 of the Illinois Municipal Code. There is no such statutory provision. Accordingly, we will address plaintiff's argument that defendant had a duty to preserve the surveillance footage pursuant to the Chicago ordinance.

¶ 28 It is undisputed that Nitro is located in the Village of Stone Park, Illinois, a home rule municipality. Stone Park has its own Code of Ordinances with its own enactments regulating the issuance of liquor licenses. See Code of Stone Park, Title XI, Ch.111 *et seq.* (eff. April 20, 1992). The City of Chicago, a home rule municipality, cannot legislate outside its geographical borders. *County of Cook v. Village of Bridgeview*, 2014 IL App (1st) 122164, ¶ 17. Therefore, because Nitro is domiciled outside of Chicago, it cannot be subject to any duty to preserve video surveillance footage imposed by section 4-60-130 of the Chicago Municipal Code. Our review of the trial court proceedings and the submissions of the parties do not compel a conclusion that defendant admitted it had a duty to preserve the video as required under the Chicago ordinance or that the Chicago ordinance applied to this defendant or that the plaintiff pled or the circuit

court considered the ordinance in any regard in resolving the question of whether a duty to preserve the video existed. Therefore, any analysis or commentary from this court on the scope of the Ordinance would be advisory and beyond the function of our review. *Barth v. Reagan*, 139 Ill. 2d 399, 419 (1990). Under the facts presented, the Chicago ordinance did not impose a duty on defendant to preserve the video in question.

¶ 29 Alternatively, plaintiff argues that a special circumstance existed to require defendant to preserve the video footage at issue. Although "special circumstance" has not been defined "in the context of recognizing a duty in a spoliation of evidence claim" our supreme court in *Miller v. Gupta*, 174 Ill. 2d 120 (2004) has "hinted at what special circumstances might give rise to a duty to preserve evidence." *Martin v. Kelley & Sons, Inc.*, 2012 IL 113270, ¶ 39. In *Miller*, the plaintiff alleged claims for medical malpractice and negligent spoliation of evidence. *Miller*, 174 Ill. 2d at 122-23. To support the malpractice claim, Miller requested copies of her X rays from Gupta, the defendant doctor. *Id.* Gupta obtained the X rays and placed them on his desk, near a wastebasket. *Id.* The cleaning staff emptied the wastebasket and also discarded the X rays. *Id.* The trial court found that Gupta did not have a duty to preserve the X rays and dismissed Miller's complaint with prejudice. *Id.* Our supreme court disagreed and remanded the case for Miller to amend the pleadings because the facts indicated a duty to preserve the X rays might have arisen under these circumstances presented but not sufficiently pled. *Id.*

¶ 30 *Miller* can be distinguished from other decisions that held that a special circumstance does not create a duty to preserve evidence where the plaintiff never requested the defendant to maintain or turn over the evidence. *Dardeen v. Kuehling*, 213 Ill. 2d 329 (2004). In *Dardeen*, the plaintiff alleged that he fell in a hole on the brick sidewalk outside the defendant's home causing

him to fracture his elbow. *Id.* at 331. That same day, plaintiff's daughter contacted defendant to inform her of the accident and request the name of defendant's insurance agent. *Id.* Defendant asked that plaintiff come to defendant's home that evening to discuss the incident. *Id.* Defendant then contacted her insurance agent who told her she could remove the bricks which created the hole. *Id.* at 331-332. Later that day, defendant removed the bricks. *Id.* In the interim, Dardeen went back to the accident site, but did not take a photo of the hole or damaged bricks before they were removed. *Id.* Dardeen did not have a photo or proof of the damaged bricks and sidewalk and he was unable to prove his premises liability claim. *Id.* at 332. The trial court allowed him to amend his complaint to allege negligent spoliation against defendant and her insurer for the removal of the bricks. *Id.* at 332. Our supreme court affirmed summary judgment for the insurer finding that Dardeen failed to establish that the insurer owed a duty to preserve the sidewalk because Dardeen never contacted carrier about preserving the bricks. *Id.* at 339.

¶ 31 Here, plaintiff suggests that the only reason the insurance carrier in *Dardeen* did not have a duty to preserve the evidence was because the agent did not possess the bricks. This argument was rejected in *Martin* where our supreme court stated, "we did not hold in *Dardeen* that a defendant's possession and control of the evidence, standing alone, is sufficient to establish a duty to preserve the evidence." *Martin* at ¶ 45. "[S]omething more than possession and control are required, such as a request by the plaintiff to preserve the evidence and/or the defendant's segregation of the evidence for the plaintiff's benefit." *Id.* at ¶ 45.

¶ 32 Here, plaintiff's special circumstance argument attempts to fit within the holding in *Miller* because plaintiff personally visited Nitro to talk to someone about his daughter's death. His argument fails because the plaintiff bears the burden to establish all elements of a spoliation

claim. *Martin*, 2012 IL 113270 at ¶ 46. The record is devoid of any request by plaintiff for Nitro to preserve its November 27, 2008 surveillance video. In his deposition, plaintiff was asked "[h]ave you ever gone back to Nitro after the accident to see the curb or to see anything?" Plaintiff answered that he "just went there to look around and hope they would talk to me but they wouldn't" and does not indicate when that was. Nothing in the record establishes that anyone, either the plaintiff or the investigating police officers, ever requested the video footage. Because plaintiff failed to request the preservation of the surveillance video, a special circumstance was not established to show that defendant had a duty to preserve the video evidence. *Dardeen*, 213 Ill.2d at 336; *Martin*, 2012 IL 113270 ¶53.

¶ 33 Plaintiff also suggests that the Stone Park police detectives intended to review Nitro's surveillance footage and this intention created a duty for Nitro to preserve the footage. However, both detective Pavini and commander Napoli testified that the police department never requested such information and only reviewed the traffic camera footage from the area near the accident. In addition, plaintiff suggests that footage of the accident or of the AIP was captured by Nitro's tapes. Plaintiff relies on the testimony of Moore, a former security guard who was not working at Nitro at the time in question. However, Moore testified that the video footage he referenced allegedly capturing the accident and events leading up to it could not have been recorded by the club's video cameras because the accident was several blocks away from Nitro. Lastly, plaintiff suggests that because it was a violent night at Nitro, the club should have known that the video footage would be material of a civil action. Plaintiff does not explain how a violent night at Nitro would impose a duty to preserve video for litigation stemming from an accident which occurred .2 miles from the club. We find no merit to defendant's arguments.

¶ 34 To prevail on a claim for negligent spoliation of evidence, the plaintiff must satisfy both the "relationship" and "foreseeability" prongs to establish an exception to the general no-duty rule to preserve evidence. *Martin*, 2012 IL 113270, ¶27. Summary judgment is appropriate against a plaintiff where he fails to establish any element of his negligent spoliation claim. *Dardeen*, 213 Ill.2d at 336. We find plaintiff failed to establish that the defendant had a duty to preserve the surveillance footage based on any agreement, contract, statute, other special circumstance or voluntary undertaking. Therefore, we need not address the "foreseeability" prong as set forth in *Boyd* because plaintiff has not established that defendant had a duty to preserve the video footage in the first instance. *Martin*, 2012 IL 113270 at ¶ 53. On this basis, we affirm the circuit court's judgment granting defendant's motion for summary judgment on plaintiff's claim for negligent spoliation.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 37 Affirmed.