

The Interplay of Spoliation of Evidence and Subsequent Remedial Measures

MICHAEL P. MURPHY

*Hepler, Broom, MacDonald, Hebrank,
True & Noce, LLC*
Edwardsville, IL
mpm@heplerbroom.com

An employee of an independent contractor is performing work on the premises of your client when he falls down a flight of metal stairs, sustaining severe injuries. A few days later, after investigating the incident, your client decides that, in an abundance of caution, it will replace the treads of the stairs upon which the incident occurred. It removes the old stair treads, throws them in the dumpster, and installs new stairs. Almost two years later when the plaintiff sues your client in federal court based on diversity claiming that the stairs were in poor condition and caused him to fall, they are long gone and unavailable for inspection.

Defense counsel will immediately recognize that, upon counsel for plaintiff's discovery of the destruction of the stair treads, their client will soon be defending against not only a premises liability cause of action, but also a cause of action for spoliation of evidence. Defense counsel will also recognize, however, that evidence that its client repaired the stairs in question after the incident should be inadmissible with respect to the premises liability claim pursuant to evidentiary rules regarding subsequent remedial measures. This article discusses the interrelationship between these two seemingly inconsistent doctrines in such a situation.

As the above hypothetical is a diver-

sity case, the federal court will apply state substantive law while applying federal procedural law. See, e.g., *Flamingo v. Honda Motor Co., Ltd.*, 733 F.2d 463, 471 (7th Cir. 1984). Since the plaintiff will have stated a claim for spoliation under state law, the federal court will apply state substantive law on the issue of spoliation, but will apply federal procedural law at trial, including the Federal Rules of Evidence. See *Smith v. Shipping Utilities, Inc.*, 2005 WL 3133494, 2005 U.S. Dist. LEXIS 30396 (S.D. Ill.) (applying Illinois spoliation law); *Williams v. General Motors Corp.*, 1996 WL 42-273, 1996 U.S. Dist. LEXIS 19524 (N.D. Ill.) (applying Illinois spoliation law); *State Farm Fire & Cas. Co. v. Frigidaire*, 146 F.R.D. 160, 162 (N.D. Ill. 1992) (concluding that the pre-suit duty to preserve material evidence is substantive and Illinois law governs); *Barron v. Ford Motor Co. of Canada Ltd.*, 965 F.2d 195, 198-99 (7th Cir. 1992) (federal rules of evidence, rather than state rules, apply in diversity cases, except for matters of presumptions, privilege, and competency of witnesses).

The Spoliation of Evidence Cause of Action

Destruction of material evidence in the course of discovery has long been the subject of sanctions against defendants pursuant to court rules regulating discovery. See, e.g., FED. R. CIV. P. 37; ILL. S. CT. RULE 219. A developing area of the law, however, is the ability of a plaintiff to bring a separate cause of action seeking damages due to the destruction

of evidence. For example, in *Boyd v. Travelers Insurance Company*, 166 Ill.2d 188, 652 N.E.2d 267, 209 Ill. Dec. 727 (Ill. 1995), the Supreme Court of Illinois officially recognized a cause of action for negligent spoliation of evidence for the first time. Illinois law allows spoliation of evidence to be pleaded as an independent cause of action under the principles of general negligence law. *Boyd*, 166 Ill.2d at 194, 652 N.E.2d at 270, 209 Ill. Dec. at 730. Thus, the elements for negligent spoliation are the well-known negligence elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) an injury proximately caused by that breach; and (4) damages. *Id.* at 195, 652 N.E.2d at 270, 209 Ill. Dec. at 730.

Duty

In general, there is no duty to preserve evidence. Such a duty may arise, however, through an agreement, a contract, a statute, or another special circumstance. A defendant may also voluntarily assume a duty by affirmative conduct. *Id.* at 195, 652 N.E.2d at 270-71, 209 Ill. Dec. at 730-31. "In any of the foregoing instances, 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." *Id.* at 195, 652 N.E.2d at 271, 209 Ill. Dec. at 731. Illinois follows a two-prong approach to the duty analysis. First, the court must decide whether "such a duty arises by agreement, contract, statute, special circumstance,

or voluntary undertaking.” *Dardeen v. Kuehling*, 213 Ill.2d 329, 336, 821 N.E.2d 227, 231, 290 Ill. Dec. 176, 180 (Ill. 2004). If so, the court must decide “whether that duty extends to the evidence at issue – i.e., whether a reasonable person should have foreseen that the evidence was material to a potential civil action. . . . If the plaintiff does not satisfy both prongs, there is no duty to preserve the evidence at issue.” *Id.*

In the above scenario, the plaintiff would argue that the defendant voluntarily assumed a duty to preserve evidence when, after the incident, it removed the stair treads upon which the incident occurred. The defendant had the stair treads in issue in its possession shortly after the incident. Instead of disposing of the treads, the defendant should have retained them for future inspection and testing by experts retained by the plaintiff. Moreover, the plaintiff will argue, based on the serious injuries sustained by the plaintiff, a reasonable person would have foreseen that the stair treads would be material evidence in potential litigation.

Breach

Naturally, a plaintiff can prove the breach of the duty to preserve evidence by demonstrating that the defendant destroyed or lost the material evidence. See *Boyd*, 166 Ill.2d at 197, 652 N.E.2d at 272, 209 Ill. Dec. at 732. In the above fact pattern, the defendant disposed of the stair treads, so the plaintiff can easily allege this element.

Causation

The plaintiff must demonstrate that an injury proximately resulted from a breach of the duty. *Boyd*, 166 Ill.2d at 196, 652 N.E.2d at 271, 209 Ill. Dec. at

731. “Therefore, in a negligence action involving the loss or destruction of evidence, a plaintiff must allege sufficient facts to support a claim that the loss or destruction of the evidence *caused the plaintiff to be unable to prove an underlying lawsuit.*” *Id.* (emphasis in original). The Supreme Court of Illinois refused to impose upon a plaintiff the burden to prove that he or she *would have prevailed* in the underlying action, stating that “[t]his is too difficult a burden.” *Id.* at n. 2. “A plaintiff must demonstrate, however, that but for the defendant’s loss or destruction of the evidence, the plaintiff had a reasonable probability of succeeding in the underlying suit.” *Id.* “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.*

In our example, the plaintiff would allege that the destruction of the stairs caused him to be unable to prove his premises liability cause of action, i.e., that he is now unable to prove that the stair treads were defective and caused him to fall. He will argue that if the stair treads were available for inspection, he could prove, through expert testimony or otherwise, that the treads were in poor condition, failed to meet certain standards or regulations, and/or should have been replaced years ago. Essentially, the plaintiff will allege that if he loses his premises liability claim, his loss was directly caused by the defendant’s destruction of the key piece of evidence he needed to win.

Damages

Finally, actual damages must be demonstrated by the plaintiff. *Boyd*, 166 Ill.2d at 197, 652 N.E.2d at 272, 209 Ill. Dec.

at 732. With respect to a spoliation claim, the plaintiff must demonstrate “that a defendant’s loss or destruction of the evidence caused the plaintiff to be unable to prove an otherwise valid, underlying cause of action. A plaintiff must prove this before the harm has been realized.” *Id.* The measure of damages is a topic with little discussion in Illinois jurisprudence. In *Boyd*, the Supreme Court of Illinois expressed “no opinion on the appropriate measure of damages,” stating that “[t]he amount of damages should be determined by the trial court and the trier of fact after a full trial on the merits.” *Boyd*, 166 Ill.2d at 197, 652 N.E.2d at 272, 209 Ill. Dec. at 732. As some courts have suggested, the measure of damages logically is the amount which the plaintiff would have recovered in the underlying lawsuit which was lost due to the lack of evidence. *Fremont Cas. Ins. Co. v. Ace-Chicago Great Dane Corp.*, 317 Ill. App. 3d 67, 75, 739 N.E.2d 85, 91, 250 Ill. Dec. 624, 630 (Ill. App. Ct. 2000) (“[w]e acknowledge that, if [plaintiff] is successful, the measure of damages in his negligent spoliation of evidence claim against [defendant] will be the amount of money which he could have recovered against [another defendant] for his personal injury”); *Petrik v. Monarch Printing Corp.*, 150 Ill. App. 3d 248, 261, 501 N.E.2d 1312, 1320, 103 Ill. Dec. 774, 782 (Ill. App. Ct. 1986) (“perhaps the plaintiff should be awarded the full measure of damages that he would have obtained had he won the underlying lawsuit.”)

In evaluating a spoliation of evidence claim, it can safely be presumed that if the jury finds for the defendant and against the plaintiff on the underlying claim, but also decides that the defendant prevailed on that claim due to its

spoliation of evidence, the jury would award the same amount of damages on the spoliation claim as it would have awarded for the underlying claim.

Based on the above hypothetical, the plaintiff can allege sufficient facts to properly plead a spoliation of evidence claim against the defendant. The case would proceed through discovery with evidence being gathered with respect to both the premises liability claim and the spoliation of evidence claim. When the pre-trial motion stage is reached, the parties must begin to ponder the effect of evidentiary rules governing subsequent remedial measures.

Subsequent Remedial Measures

Federal Rule of Evidence 407 provides, in pertinent part:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, ... or a need for a warning or instruction. This rule does not require the exclusion of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Fed. R. Evid. 407. Although this rule has substantive underpinnings, it nonetheless applies in diversity actions in federal court. See *Flamingo v. Honda Motor Co., Ltd.*, 733 F.2d 463, 470-71 (7th Cir. 1984). In state court litigation, state law will likely provide a similar rule (check your state's law). See, e.g., *Herzog v. Lexington Township*, 167 Ill.2d 288, 300, 657 N.E.2d 926, 932, 212 Ill.

Dec. 581, 587 (Ill. 1995). The rationale for this rule is that a strong public policy favors encouraging improvements to enhance safety, subsequent remedial measures are not considered sufficiently probative of prior negligence, as later carelessness may merely be an attempt to exercise the highest standard of care, and a general concern that the jury may perceive such conduct as an admission of negligence. *Id.*

In the sample fact pattern above, the defendant, after the plaintiff's injury, replaced the stairs upon which he fell. If the defendant had done this prior to the injury, it is less likely that the plaintiff would have fallen. Thus, Rule 407 militates that evidence of the removal of the old stairs and installation of new stairs is not admissible as part of an attempt to show that the defendant was negligent or that the defendant should have warned the plaintiff about the alleged dangers on the stairs. It is likely that none of the exceptions provided in the rule would apply. The ownership and control of the stairs on the defendant's premises would not be contested and, moreover, the defendant would not contest the feasibility of precautionary measures (*i.e.*, replacing the stairs), since it took such measures shortly after the incident. The defendant, however, may need to stipulate to this feasibility or include it as an uncontested fact in pre-trial pleadings in order to ensure that the exception is inapplicable. See *Ross v. Black & Decker, Inc.*, 977 F.2d 1178, 1185 (7th Cir. 1992).

The defendant may file a motion *in limine* arguing that evidence of the defendant's subsequent remedial measures as to the stairs is not admissible pursuant to Rule 407. It is obvious, however, that the plaintiff must present evidence of the repair and disposal of the stairs

in order to present her spoliation claim, while Rule 407 precludes her from using such evidence to establish the underlying negligence claim. The defendant can further argue that to allow such evidence to be admitted in a concurrent trial of the negligence claim and spoliation claim would be too prejudicial as to the negligence claim, as the jury may view the defendant's conduct as an admission of liability and find for the plaintiff on the underlying claim. Thus, a concurrent trial of the plaintiff's claims under these circumstances may be too prejudicial for the defendant. The defendant could therefore opt to move for a bifurcated trial: one proceeding on the negligence claim and another separate proceeding as to the spoliation claim. Determining how to proceed presents the unique issue of the interrelationship between spoliation of evidence and subsequent remedial measures.

There is little discussion of this relationship in existing authority. While some courts have made reference to the potential interaction of spoliation of evidence and subsequent remedial measures, *Hickman v. Carnival Corp.*, 2005 WL 3675961, 2005 U.S. Dist. LEXIS 26219 (S.D. Fla.) (noting that if the court granted a motion to strike an answer based upon subsequent remedial measures which resulted in spoliation of evidence, Federal Rule of Evidence 407 would be "eviscerated," and liability would be created "where a staircase was repaired after someone tripped and fell"); *Hays v. Alta*, 2007 WL 3036871, 2007 Ky. App. LEXIS 404 (Ky. Ct. App.) (disposal of trampoline upon which injury occurred was a subsequent remedial measure and thus inadmissible under Kentucky law, which does not recognize a cause of action for spoliation); *Szalontai v. Yazbo's Sports*

Café, 183 N.J. 386, 402, 874 A.2d 507, 518 (N.J. Sup. Ct. 2005) (noting that plaintiff declined to pursue a spoliation claim, “perhaps because of the tension between a spoliation claim under the circumstances present here and our State’s long-standing public policy favoring subsequent remedial measures”); *Rodriguez v. Webb*, 141 N.H. 177, 179, 680 A.2d 604, 606 (N.H. 1996) (in holding that testimony regarding destruction of evidence was admissible, the court noted that “the defendant does not argue that this testimony was inadmissible under New Hampshire Rule of Evidence 407 (subsequent remedial measures), and we therefore do not consider the application of Rule 407”); *Molski v. Mandarin Touch Restaurant*, 385 F. Supp. 2d 1042, 1047 (C.D. Cal. 2005) (in commenting on an attorney’s letter stating that if modifications to facilities are made, the defendant would be liable for spoliation, the court stated “the rather obvious points that such remedial measures are by no means spoliation of evidence, and that, in fact, the law recognizes a strong policy in favor of such repairs, see FED. R. EVID. 407”), there is no definitive precedent on how the two doctrines interact. Thus, defense counsel presently has little guidance in determining trial strategy.

Trial Procedure and Strategy

In the scenario where a spoliation of evidence cause of action and subsequent remedial measures evidentiary rules interact, one critical trial strategy issue is whether the defendant should try the underlying cause of action and the spoliation claim concurrently or move for a bifurcated trial. The Supreme Court of Illinois has 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.” *Boyd*, 166 Ill.2d at 198, 652 N.E.2d at 272, 209 Ill. Dec. at 732. The court’s rationale was that “[a] single trier of fact would be in the best position to resolve all the claims fairly and consistently. If a plaintiff loses the underlying suit, only the trier of fact who heard the case would know the real reason why.” *Id.* At least one federal court has noted the Supreme Court of Illinois’ comments regarding the concurrent trial of a spoliation claim and the underlying claim. *Smith v. Shipping Utilities, Inc.*, 2005 WL 3133494 at * 3, 2005 U.S. Dist. LEXIS 30396 at * 11 (S.D. Ill.) (noting that spoliation claims and underlying products liability suit should be joined together under the rationale of *Boyd*).

The Supreme Court of Illinois in *Boyd*, however, did not mandate the concurrent trial of all spoliation claims with the underlying claim. Rather, the court “encourage[d] plaintiffs and the trial court to employ joinder” under the circumstances of that case. *Boyd*, 166 Ill.2d at 199, 652 N.E.2d at 272, 209 Ill. Dec. at 732. The court only held that “[o]n remand and upon a proper request by plaintiffs, the trial court should fully consider whether joinder and concurrent trials are appropriate here,” and that “[t]he parties should be allowed to present arguments and evidence that is relevant to this subject.” *Id.* at 200, 652 N.E.2d at 273, 209 Ill. Dec. at 733. The circumstances of *Boyd* are distinguishable from the circumstances of the above hypothetical.

In *Boyd*, the plaintiff brought a products liability action against one defendant, Coleman, for injuries due to an allegedly defective heater, and brought a spoliation action against an insurance

company, Travelers, for allegedly taking the heater into custody following the accident but subsequently losing the heater. *Id.* at 199 n.3, 652 N.E.2d at 272 n.3, 209 Ill. Dec. at 732 n.3. The court noted that “as a practical matter, in a concurrent trial the trier of fact would resolve the products liability action against Coleman before its consideration of the negligence action against Travelers.” *Id.* Further, the court stated that all issues beyond the issue common to both claims (whether the loss of the heater caused the plaintiffs to be unable to prove the underlying claim) “could be readily handled in a single action, without prejudice or inconvenience to the parties.” *Id.* at 200, 652 N.E.2d at 273, 209 Ill. Dec. at 733.

In the above example, unlike in *Boyd*, the underlying action and the spoliation claim are against the same party, not two different parties. The same party that is alleged to have negligently maintained the stairs is also alleged to have negligently destroyed those very stairs after the injury, which destruction was actually also a subsequent remedial measure. In *Boyd*, the subsequent remedial measures doctrine was not an issue, because the evidence of spoliation would not have been used to show negligence of the *same party* in the underlying suit, but rather to show negligence of *another party* in spoliation of the evidence. Thus, the prejudice resulting to the defendant from violation of the subsequent remedial measures doctrine as to the underlying claim (or any prejudice from concurrent presentation of spoliation evidence in a case with a single defendant) was not considered by the Supreme Court of Illinois as it would be considered by the federal court in this hypothetical case. As discussed below, it cannot be said in this scenario that

a concurrent trial can be had “without prejudice” to the defendant.

The proper application of a spoliation of evidence cause of action is that a plaintiff may recover under a spoliation theory *only* if he or she is unsuccessful in the underlying suit. “[A] spoliator may be held liable in a negligence action *only* if its loss or destruction of the evidence caused a plaintiff to be unable to prove the underlying suit.” *Boyd*, 166 Ill.2d at 198, 652 N.E.2d at 272, 209 Ill. Dec. at 732 (emphasis in original). Thus, the plaintiff can recover in the underlying action, or he can recover under the spoliation theory; however, he cannot recover under both. If the jury returns a verdict for the plaintiff under the plaintiff’s original premises liability theory, the case is over: the plaintiff cannot possibly prove that he was unable to prove the underlying lawsuit due to spoliation, as he has won that lawsuit. The existence of the spoliation count, therefore, can be viewed as a “second chance” for the plaintiff to recover against the defendant. In the event the jury finds in favor of the defendant as to the premises liability count, it will then consider whether the plaintiff failed to prove her case on that count *because of* missing evidence which the defendant should have preserved.

The federal court would have discretion to try the claims together or order separate trials. Although the plaintiff has the right to plead both causes of action against the defendant, “a claim properly joined as a matter of pleading need not be proceeded together with the other claims if fairness or convenience justifies separate treatment.” Fed. R. Civ. P. 18(a) and Advisory Committee Notes to 1966 Amendment. Under Federal Rule of Civil Procedure 42, “[t]he court, in furtherance of conve-

nience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim.” Fed. R. Civ. P. 42(b). Thus, the trial court may order separate trials of the underlying premises liability claim and the spoliation claim “to avoid prejudice.”

At trial, the strategy is obviously to first attempt to defeat the underlying premises liability claim. In a concurrent trial, however, it must be argued to the jury that the *reasons* the defendant is not liable for the underlying claim have nothing to do with any alleged missing evidence, but rather have to do with other reasons, such as the plaintiff’s contributory negligence and/or lack of notice of any defect in the stairs. The argument is that the defendant is not liable, but it is not because the plaintiff was unable to prove her case due to missing evidence; rather, it is because the defendant is not liable to the plaintiff in this case with or without that evidence. Thus, the defendant should not be held liable on either count.

In a concurrent trial, however, since the plaintiff would be able to present evidence regarding the spoliation claim, the plaintiff will be presenting evidence that may make it appear that the defendant recognized its fault or had something to hide. In other words, in order to allow the plaintiff to present the spoliation claim, the subsequent remedial measures rule must give way. As a consequence, the damages awarded by the jury as to the underlying claim could be increased, and the jury would not reach the spoliation count. If the jury hears that the defendant immediately disposed of the stairs in issue, it may conclude that the stairs were defective due to improper maintenance, find for the plaintiff on the underlying claim,

and possibly increase its verdict due to the appearance of impropriety in the defendant’s post-occurrence conduct.

Consequently, the defendant must determine whether a bifurcated proceeding is in its best interests. If the court orders separate trials and the plaintiff is successful in the underlying claim, the spoliation trial will be unnecessary, which would save some time and resources for all involved. A bifurcated proceeding would eliminate the possible damaging evidence of the remedial measures taken by the defendant after the incident, along with the conclusions the jury may draw from hearing such evidence, *i.e.*, that the defendant’s conduct after the accident was an admission of fault or wrongdoing, by operation of the subsequent remedial measures rule. Moreover, since the spoliation trial would naturally be second and will only occur if the defendant prevails in the first trial, the jury will know why it decided for the defendant in the first trial, and if the presence of the alleged missing evidence would have had no effect on their decision, they will render a verdict for the defendant on the spoliation count. In this light, a bifurcated trial may be favorable. The defendant excluded possibly prejudicial evidence in the first trial which, if presented, may have led to a verdict in favor of the plaintiff on the underlying claim, and also received a verdict in the second trial because the excluded evidence was of no consequence in the jury’s eyes.

The concurrent presentation of the cases, however, would almost certainly be more time-efficient for the parties, the court, and the jury. If, after deliberating, the jury found in favor of the defendant on the underlying claim, it would then have to listen to the presentation of additional evidence and

argument on the spoliation claim and later deliberate and decide that issue. It is reasonable to assume that the jury would not be pleased to have to pull such “double-duty.” Further, while the effect of the spoliation claim is that it gives the plaintiff a “second chance” to recover, a bifurcated trial might give the plaintiff a higher probability to recover on the “second chance” spoliation claim. The jury will have already found for the defendant if there is to be a separate spoliation trial. If the jury found for the defendant on the underlying claim, it may have also found for it on the spoliation claim in a concurrent trial with the arguments discussed above, i.e., that the defendant did not prevail because of missing evidence, it prevailed for other reasons. If the jury has to return and hear testimony and argument from the plaintiff solely regarding how the defendants “covered up” the evidence that would have proven the underlying claim, the jury may be more inclined to find for the plaintiff than if such evidence is merely combined with all other evidence. The jury may even be irritated that it did not hear such evidence in the first trial, regret not finding for the plaintiff, and enter a verdict for the plaintiff on the spoliation count.

Moreover, the only reason to bifurcate the trial is to avoid introduction of the subsequent remedial measures evidence in the underlying claim. While the jury could draw the conclusion discussed above (that the defendant essentially admitted liability by replacing the stairs), and such evidence is prejudicial, the defendant could opt to simply allow introduction of this evidence and present its own witnesses and argument explaining the measures taken. It can then be argued that the defendant’s conduct was completely reasonable

under the circumstances and was not an admission of any kind: someone fell down a set of stairs, and the defendant immediately replaced them in order to be overly cautious. It can further be brought out on cross-examination that the alleged missing evidence really had no effect on the opinion of plaintiff’s expert witness, since he or she will still testify favorably for the plaintiff and will still come to a conclusion critical of the defendant. In addition, the defendant could request a jury instruction providing that the jury is not to consider the spoliation of evidence claim in deciding the underlying cause of action. See *Rodriguez v. Webb*, 141 N.H. 177, 181, 680 A.2d 604, 607 (N.H. 1996). Thus, the defendant could choose to try the claims concurrently but attempt to minimize the effect of the introduction of evidence which would otherwise be barred by Rule 407 but is relevant to the spoliation claim.

Ultimately, the decision of whether to ask the court try the underlying claim and the spoliation claim concurrently or in bifurcated proceedings will depend on the facts and circumstances of the individual case at hand. Defense counsel must consider the advantages and disadvantages of each approach, as well as the particular circumstances of the alleged spoliation of evidence and how such evidence will be perceived by the jury.

Conclusion

Plaintiffs will take advantage of the developing area of the law regarding spoliation of evidence whenever there is evidence that someone lost or destroyed evidence material to the plaintiff’s cause of action. Where the same party is alleged to be negligent or otherwise liable in the underlying cause of action

and alleged to have lost or destroyed the evidence, the evidentiary rules regarding subsequent remedial measures may be implicated. In such a case, the defendant must consider whether a concurrent or bifurcated trial is the proper strategy based upon the facts and circumstances of the underlying cause of action, the subsequent remedial measures taken, and the loss or destruction of the material evidence in issue.