IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

KATHLEEN SILKWORTH and NOAH SILKWORTH, by and through KATHLEEN SILKWORTH as his Parent and Natural Guardian,

Plaintiffs,

v.

CITY OF BOCA RATON; TERRY B. COHEN, M.D.; TERRY B. COHEN, M.D., P.A.; E-MED, LLP; and BOCA RATON REGIONAL HOSPITAL, INC..;

Defendants.
_____/

Case No. 2013CA013276
Civil Division: AI

ORDER GRANTING PLAINTIFFS' MOTION FOR SANCTIONS IN THE FORM OF ADVERSE INFERENCES AGAINST DEFENDANT BOCA RATON REGIONAL HOSPITAL FOR ITS DESTRUCTION OF EVIDENCE AS TO CCTV EVIDENCE

THIS MATTER came before the Court on Plaintiffs' Motion for Sanctions in the Form of Adverse Inferences Against Defendant Boca Raton Regional Hospital for its Destruction of Evidence filed on March 31, 2016 ("Motion"). The Court has carefully considered the Motion; Defendant, Boca Raton Hospital, Inc.'s Response; Plaintiffs' Reply; Plaintiffs' Supplemental Brief; Boca Raton Hospital, Inc.'s Supplemental Memorandum of Law in Opposition; Plaintiffs' Response to Defendant's Supplemental Memorandum; the arguments presented at the Court's August 11, 2016 hearing; and is otherwise fully advised in the premises.

STATEMENT OF THE CASE AND FACTS

The instant lawsuit arises out of an automobile accident in which Plaintiff Kathleen Silkworth ("Kathleen") suffered injuries that, ultimately, resulted in her developing paraplegia. At issue in the suit is whether and to what extent Kathleen's injuries were a result of the

negligent care of Defendants City of Boca Raton; Terry B. Cohen, M.D.; Terry B. Cohen, M.D., P.A.; E-Med, LLP, and Boca Raton Regional Hospital, Inc. ("BRRH"). Plaintiffs Kathleen and Noah Silkworth argue Defendants' actions subsequent to the automobile accident are the cause of Kathleen's paraplegia. Relevant to this Motion, Plaintiffs allege that upon Kathleen's arrival at BRRH, she was in full possession of movement in her legs. Plaintiffs allege that Defendants' negligence after her arrival resulted in her paraplegia, as shown by her inability to move her lower extremities upon leaving BRRH for transfer to a trauma center.

Plaintiffs' Motion presents the question of whether BRRH should be sanctioned via an adverse inference for failure to preserve certain CCTV surveillance footage of BRRH's common areas through which Kathleen was transported upon her arrival.[1] The CCTV footage in question had been deleted thirty days after its recordation pursuant to BRRH policy. Plaintiffs argue the footage would show whether Kathleen was able to move her legs at the time of arrival—a fact BRRH disputes—thereby providing evidence of Defendants' negligence. As a result of the failure to preserve the footage, Plaintiffs request an adverse inference that "[t]he CCTV surveillance footage of [BRRH]'s common areas on June 22 would have shown events or conditions which were unfavorable to [BRRH]."

The Court held a hearing on Plaintiffs' Motion on August 11, 2016. At the hearing, the Court denied part of Plaintiffs' Motion, but requested supplemental briefing regarding the question of whether BRRH had a duty to preserve the CCTV surveillance footage. The instant Order resolves the question of whether such a duty existed and whether Plaintiffs are entitled to an adverse inference as to the now-missing CCTV footage.

[1] Plaintiffs' Motion original also sought an adverse inference sanction for failure to preserve certain electronic medical records. The Court denied this portion of the Motion at the August 11, 2016 hearing.

LEGAL ANALYSIS AND RULING

The Fourth District Court of Appeal set forth the test for when an adverse inference is appropriate in *Golden Yachts, Inc. v. Hall*:

> Prior to a court exercising any leveling mechanism due to spoliation of evidence, the court must answer three threshold questions: 1) whether the evidence existed at one time, 2) whether the spoliator had a duty to preserve the evidence, and 3) whether the evidence was critical to an opposing party being able to prove its prima facie case or defense.

920 So. 2d 777, 781 (Fla. 4th DCA 2006). The parties do not dispute the first prong of this test; plainly the CCTV footage was in existence at one time. At issue, then, are the second and third prongs of the test—and of particular concern is the second prong, which the parties have presented argument on in their supplemental briefings. As the parties dispute when a duty to preserve evidence arises, the Court first sets forth the law resolving this issue before ruling on the instant Motion.

A. A duty to preserve evidence arises when litigation is reasonably foreseeable.

The parties vigorously dispute when a duty to preserve evidence arises. Plaintiffs assert under *League of Women Voters v. Detzner*, 172 So. 3d 363 (Fla. 2015), the duty to preserve evidence starts when litigation is reasonably foreseeable. BRRH counters by arguing under *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987), the duty to preserve evidence only exists when it is reasonably foreseeable that the evidence would itself be relevant in the specific type of litigation at issue. That is, BRRH argues it is not reasonably foreseeable that CCTV footage of common areas in a hospital would be relevant in a medical negligence action and that therefore no duty to preserve the footage existed. BRRH also argues *Detzner* is an extraordinary case that should be limited to its facts.

1. *Detzner* controls when a duty to preserve evidence arises and holds that a duty to preserve evidence is triggered when litigation is reasonably foreseeable.

Detzner involved a challenge to the Florida House of Representatives' redistricting plan as an unconstitutional attempt at gerrymandering. *See generally* 1720 So. 3d 363. While the bulk of the Court's opinion addresses the constitutional issues surrounding legislative redistricting, relevant to *Detzner*'s conclusion was the fact that "the Legislature systematically deleted almost all of [its] emails and other documentation relating to redistricting" and "did so despite knowledge that litigation over the constitutionality of its redistricting plan was inevitable." *Id.* at 390 (internal quotation omitted). In analyzing whether an adverse inference was appropriate as a result, the Florida Supreme Court determined that a duty to preserve evidence can arise "when a party should reasonably foresee litigation." *Id.* (citing *Am. Hospitality Mgmt. Co. of Minn. v. Hettiger*, 904 So. 2d 547, 549 (Fla. 4th DCA 2005)). *Detzner* continued:

> Even in the absence of a legal duty, though, the spoliation of evidence results in an adverse inference against the party that discarded or destroyed the evidence. . . . In other words, as recognized by the Fourth District Court of Appeal, 'an adverse inference may arise in any situation where potentially self-damaging evidence is in possession of a party and that party either loses or destroys the evidence.'

Id. (quoting *Golden Yachts*, 920 So. 2d at 781).

The Court finds *Detzner*'s holding clear—a duty to preserve evidence arises when it is reasonably foreseeable that litigation could occur. Contrary to BRRH's assertions, there is no threshold requirement that there be a request to preserve evidence or that a complaint be filed in a case before any duty arises. Further, destruction of evidence even in the absence of a duty is grounds for an adverse inference. As this standard governs this Court and is consistent with relevant legal authorities, it is the standard the Court applies to the case at bar.

2. BRRH's counterarguments against use of the *Detzner* test are rejected.

The Court rejects BRRH's counterarguments against *Detzner*'s application. BRRH first argues that *Detzner* should be limited to its facts because it "took liberties with the 'reasonably foreseeable' standard" and was a "means to obtain[ ] a political end." Even if the Court were inclined to agree with BRRH—which it is not—it is bound by the Florida Supreme Court's ruling and is not entitled to find the case limited to its facts until that Court itself does the same. *See, e.g.*, *State v. Lott*, 286 So. 2d 565, 566 (Fla. 1973) ("The trial court is bound by the decisions of this Court just as the District Courts of Appeal follow controlling precedents set by the Florida Supreme Court."). This first argument is rejected.

Next, BRRH argues that the Court should apply the Second District Court of Appeal's decision in *Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389 (Fla. 2d DCA 2012) instead of *Detzmer*, as *Osmulski* deals with the question of video evidence specifically. In *Osmulski*, a plaintiff filed a slip-and-fall case against a defendant who failed to preserve security camera footage of the fall. 93 So. 3d at 391-92. The Second District held that no duty to preserve this footage existed because no written request to do so had been made. *Id.* at 393. The *Osmulski* court held:

> [I]f a defendant has knowledge that an accident or incident has occurred on its property and that same defendant has a video camera that may have recorded the accident or incident, that defendant has a duty to obtain and preserve a copy of any relevant information recorded by that camera if a written request to do so has been made by the injured party or their representative prior to the point at which the information is lost or destroyed in the normal course of the defendant's video operations.

Id.

The Court declines to apply *Osmulski* to this case. Though dealing with the precise subject matter as here, the Second District did not have the benefit of the *Detzner* decision when

determining the question of whether a duty to preserve camera footage arose. *Detzner* itself is clear that there is no threshold requirement for a duty to preserve evidence to arise—the only relevant question is whether litigation is foreseeable. *See* Ralph Artigliere et al., League of Women Voters of Fla. v. Detzner: *The Florida Supreme Court's Hidden Pre-Litigation E-Discovery Preservation Mandate*, Fla. B.J., Nov. 2016 at 9, 14 (noting after *Detzmer*, "[n]ow Florida, as in federal court and most states, requires preservation of relevant evidence, electronic or otherwise, when litigation is reasonably anticipated"). Accordingly the Court declines to apply the *Osmulski* analysis to the extent it requires a written request to preserve video evidence for a duty to preserve the evidence to arise. The Court agrees, though, with *Osmulski*'s observation that a plaintiff's failure to request preservation of video evidence is "considered as a factor in determining whether a plaintiff's claim was reasonably foreseeable." 93 So. 3d at 393 n.3.

Finally, BRRH argues that Plaintiffs' articulation of the duty to preserve evidence test is misstated and that such a duty arises only when it is reasonably foreseeable that the evidence in question would be foreseeably relevant in the litigation in question. In essence, BRRH claims while the CCTV footage would be relevant in a slip-and-fall case, it would not be foreseeably relevant in a medical negligence action and so a duty to preserve is inappropriate. In support of this position, BRRH relies on *Valcin*, 507 So. 2d 596. Initially, the Court notes that this articulation of the test is inconsistent with that of *Detzner* which, as discussed above, applies here. More critically, the Court finds *Valcin* unhelpful for the question of when a duty to preserve evidence arises. In *Valcin*, a surgeon's "operative report" had gone missing prior to the litigation thereby hindering the plaintiff's ability to prove whether a surgical procedure had been performed with due care. *Id.* at 597. In *Valcin*, though, there was no question of whether there

was a duty to preserve evidence—a statute mandated the operative report's preservation. *Id.* at 598. *Vancin*, then, dealt with the procedures that follow the failure to preserve evidence that a litigant is duty-bound to preserve. Contrary to BRRH's assertions, the case is not relevant to determine *when* that duty arises. BRRH's argument is rejected.

For the reasons set forth above, the applicable test in this case is whether litigation could arise from Kathleen's care at BRRH. If so, a duty to preserve the CCTV footage existed and an adverse inference would be appropriate if it was critical to Plaintiffs' ability to prove their prima facie case.

B. An adverse inference is appropriate because litigation was foreseeable and the CCTV footage was crucial to Plaintiffs' proving a prima facie case.

The Court finds a duty to preserve the CCTV footage existed in this case because litigation over Kathleen's paraplegia was reasonably foreseeable. Because the footage would be critical to proving a prima facie case of medical negligence, an adverse inference instruction is appropriate. At the outset, it is critical to note that the question of reasonable foreseeability is fact-intensive by its nature and so analysis of the circumstances surrounding Kathleen's injuries and the CCTV footage is appropriate.

BRRH's CCTV system preserves footage for thirty days before it is looped over. (Crawford Dep. 19:9-13.) Cameras record the areas through which Kathleen was brought into the hospital after her injuries. (Pls.' Br. App. 17.) After Kathleen had been admitted to the hospital, Defendant Cohen met with the paramedics who had transported her to the hospital because her injuries were "significant . . . not picked up at the time of the paramedic intervention" and "something that might need some further follow-up." (Pls.' Br. App. 19.) Upon discovery of the severity of Kathleen's injuries, she was transferred to a separate hospital

for trauma care. (*Id.*) BRRH also completed an adverse-incident report on the day of Kathleen's treatment reflecting "delayed treatment." (Pls.' Br. App. 28.) The report indicates both that fire rescue indicated Kathleen was moving all extremities upon arrival. (*Id.*) A "follow-up" to the report made three days later, though, indicates that "EMS later stated they did not remember if [Kathleen] was moving . . . ." (Pls.' Br. App. 29.)

1. Litigation under these circumstances was reasonably foreseeable.

The Court finds litigation under these circumstances was reasonably foreseeable. Kathleen suffered significant injuries. The time of her suffering these injuries is critical to the question of liability, as the evidence makes clear that whether and when Kathleen was able to move her lower extremities was cast into doubt. If it is true that she was able to move her legs upon arrival at BRRH but not after her transfer, litigation regarding whether BRRH is at fault for her subsequent paraplegia could reasonably be foreseen. This conclusion is bolstered by the fact that an adverse-incident report indicates "delayed treatment." In such a situation, a duty to preserve evidence exists in light of the reasonable foreseeability of litigation.

BRRH counters this conclusion by levying the policy argument that requiring preservation of hours of CCTV footage of common areas on the "remote chance" a part of that footage could be relevant to a claim is overly burdensome. This Order should not be construed so broadly. On the contrary, this is a case with unique facts—an extremely significant injury whose effects could be discerned by the naked eye and the timing of which is in dispute. In such a situation, the preservation of footage that could prove or disprove the existence or timing of these injuries is wholly appropriate. In other situations where, for example, an injury is not discernible by the naked eye or in which the timing of the injury is not dispute, preservation would not be required at all. In such a situation, the CCTV footage would not need to be

preserved because the footage would not be "evidence" at all, as it would be of no help in proving an alleged fact. In the typical medical negligence action, then, preservation of this footage would likely be inappropriate. Where, as here, there is a question of liability that could potentially be resolved by camera footage, a duty to preserve is appropriate.

2. The CCTV footage was critical to Plaintiffs' ability to prove a prima facie case.

The Court also finds that the CCTV footage is critical to Plaintiffs' ability to prove their prima facie case. The *Golden Yachts* court articulated the standard for this prong as whether the missing evidence "hampered the plaintiffs in proving their claims." 920 So. 2d at 781. Video footage of Kathleen moving her extremities would be critical in proving whether BRRH is at fault for her paraplegia. If the CCTV cameras captured images of her moving her extremities or the precautions taken when she was brought into BRRH, it would illuminate the question of which Defendant—if any—is liable for the injuries that became apparent when Kathleen was transferred for trauma care. The third prong of the *Golden Yachts* test is satisfied here.

BRRH argues it is wholly speculative that the evidence in question would be relevant in the instant lawsuit at all. The Court notes that this precisely part of the problem with the failure to preserve the footage—whether or not the cameras captured Kathleen moving her extremities will be forever unknown because the footage has been deleted. To the extent BRRH argues the camera footage could not possibly show Kathleen moving her legs or that other evidence suggests Kathleen had no movement in her legs upon her arrival at the hospital, BRRH remains free to present these arguments to the jury at trial. An adverse inference is just that—an *inference* based on the evidence or, in this case, the lack thereof. While the jury will be permitted to conclude that the missing footage may have shown Kathleen moving her legs, there

is no presumption of this fact and so Defendants remain free to challenge the veracity of this conclusion.

For the reasons set forth above, BRRH had a duty to preserve the CCTV footage. As the lack of this footage hindered Plaintiffs' ability to present its case, an adverse inference is appropriate. While the Court is mindful of the policy considerations at play in this case, it must be stressed that this is a unique set of facts in which footage of a common area is relevant to a claim of medical negligent that may or may not have occurred in a patient room. While it may be doubtful that such footage will be helpful in other cases, the circumstances of this particular case make an adverse inference appropriate. Accordingly, it is hereby,

ORDERED that Motion for Sanctions in the Form of Adverse Inferences Against Defendant Boca Raton Regional Hospital for its Destruction of Evidence is **GRANTED**.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, this 7th day of November, 2016.

MEENU SASSER, CIRCUIT JUDGE

Cc:

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