TEXAS

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I. SPOLIATION

A. What is the rule regarding spoliation of evidence in your state?

First, the court must determine whether the party spoliated evidence, and second, the court must assess an appropriate remedy if spoliation occurred. See Brookshire Bros., Ltd. v. Aldridge, 438 S.W.3d 9 (Tex. 2014). To complete step one, there must be a duty to preserve evidence (discussed in B below), and the general rule is that a party must intentionally breach the duty to preserve evidence for a spoliation finding. Brookshire Bros., Ltd. v. Aldridge, 438 S.W.3d 9, 20 (Tex. 2014). Brookshire Bros., Ltd. v. Aldridge, 438 S.W.3d 9, 23 (Tex. 2014).

“[T]he harsh remedy… is warranted only when…the spoliating party acted with the specific intent of concealing discoverable evidence. . . To allow such a severe sanction as a matter of course when a party has only negligently destroyed evidence is neither just nor proportionate.”

A failure to preserve evidence with a negligent mental state may only underlie a spoliation instruction in the rare situation in which a nonspoilating party has been deprived of any meaningful ability to present a claim or defense.”

It is important to note that spoliation is not an independent cause of action recognized in Texas and does not give rise to independent damages. Trevino v. Ortega, 969 S.W.2d 950, 953 (Tex. 1998). “Spoliation is an evidentiary concept, not a separate cause of action.” Brookshire Bros., Ltd. v. Aldridge, 438 S.W.3d 9, 20 (Tex. 2014).

B. Is there a duty to preserve evidence absent a specific demand?

The Texas Supreme Court held that for a spoliation finding, there must be proof that the spoliating party had a duty to preserve evidence. Brookshire Bros., Ltd. v. Aldridge, 438 S.W.3d 9, 20 (Tex. 2014). This duty “arises only when a party knows or reasonably should know that there is a substantial chance” that a lawsuit will be filed. Id. citing Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 722. The non-spoliating party bears the burden to prove that the spoliating party anticipated litigation.” Trevino v. Ortega, 969 S.W.2d 950, 956 (Tex. 1998). Furthermore, in spoliation cases “a party should be found to be on notice of potential litigation when, after viewing the totality of the circumstances, the party either actually anticipated litigation or a reasonable person in the party’s position would have anticipated litigation.” Id.

C. What is the rule of spoliation of evidence specifically relating to electronic data?

The rules and analysis discussed above from Alridge are applicable to electronic data and non-electronic data. This is the leading case in Texas regarding spoliation, and the case concerned the preservation of video surveillance. The Alridge court noted the high cost and difficulty of retaining electronic data and discussed the heavy weight that level of culpability has in a spoliation cases.
D. What has been your experience with its application to onboard equipment like DriveCam?

Best practice to avoid a spoliation finding is to preserve all DriveCam footage in the event of a vehicle collision. If there is an injured party—other than an employee when various worker’s compensations issues could arise—or if there is property damage, it is easy to argue that one can reasonably anticipate that a lawsuit will be filed, thus triggering the duty to preserve the DriveCam footage.

E. Does your state allow direct actions against responsible parties for spoliation?

No, Texas is not a “direct action” state, so a Plaintiff would have to file a lawsuit against the tortfeasor or driver instead of directly suing the tortfeasor’s or driver’s insurance company. Moreover, spoliation is not an independent cause of action in Texas, so to sue a defendant for spoliation, there must be another existing cause of action alongside the spoliation claim.

F. Is there any limitation on upstream liability for spoliation?

The court’s discretion on the amount of liability for spoliation is broad but not limitless Petro. Sols., Inc. v. Head, 454 S.W.3d 482, 489 (Tex. 2014). The remedy must be “just” meaning that “a direct relationship must exist between offensive conduct, the offender, and the sanction imposed” and the sanction must not be excessive. Id. See also Brookshire Bros., Ltd. v. Aldridge, 438 S.W.3d 9, 24 (Tex. 2014).

II. CITATIONS OR CRIMINAL CONVICTIONS RESULTING FROM AN ACCIDENT

A. Are citations admissible in civil litigation?

Evidence concerning whether a traffic ticket or citation was given is not admissible in a civil case. However, depending on how the citation is handled, the traffic citation may eventually become admissible. See 2(B) below for more information.

B. How does a guilty plea or verdict impact civil litigation? Plea of no contest?

A guilty plea and a guilty verdict to a citation are admissible so long as the citation arose from the same event as the subject of the civil litigation. On the other hand, a plea of no contest is not admissible without a subsequent finding of guilt.

III. CAN A PLAINTIFF MAINTAIN A NEGLIGENT HIRING/SUPERVISION/TRAINING CLAIM WHERE THE EMPLOYER ADMITS SCOPE AND COURSE OF EMPLOYMENT?

A direct liability claim, such as negligent hiring/supervision/training or entrustment and a claim resulting from vicarious liability under respondeat superior are normally mutually exclusive modes of recovery. See Rutherford v. Joe Rud Trucking, No. SA-13-CA-856-FB (HJB), 2015 U.S.
IV. ADMISSIBLE EVIDENCE REGARDING MEDICAL DAMAGES – CAN PLAINTIFF SEEK TO RECOVER THE AMOUNT CHARGED BY THE MEDICAL PROVIDERS OR THE AMOUNT ACTUALLY PAID, AND IS THERE A BASIS FOR POST-VERDICT REDUCTIONS OR OFFSETS?

No, plaintiff cannot seek to recover the amount charged by the medical providers. Instead, pursuant to the Texas Civil Practice & Remedies Code § 41.0105, “...recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.” By its plain language, Section 41.0105 created a measure of damages with respect to medical care expense damages and prohibits the recovery of medical expenses which have been written off, discounted, or adjusted. Haygood v. De Escabelo, 356 S.W.3d 390 (Tex. 2011). A plaintiff is precluded from presenting evidence or recovery of expenses that “neither the claimant nor anyone acting on his behalf will ultimately be liable for paying.” Id.

In Mills v. Fletcher, the jury awarded $1,551.00 in past medical expenses. On appeal, the defendant argued that, pursuant to Section 41.0105, the amount of the plaintiff’s award for past medical expenses should have been reduced because his medical providers accepted lesser amounts for their services from his health insurance company, thereby “writing off” the balance due from the plaintiff. The case was reversed and remanded. 229 S.W.3d 765 (Tex. App.—San Antonio 2007, no pet.).

V. WHAT WERE THE SIGNIFICANT TRUCKING VERDICTS OR RULINGS IN YOUR STATE LAST YEAR?

Significant trucking verdicts in Texas include (1) Greenwood Motor Lines, Inc. v. Bush, a case in which the plaintiff was rear-ended by a tractor-trailer with a verdict of over four million dollars and (2) Puga v. About Tyme Transport, Inc., a case involving a head-on collision and talking on a cell phone, resulting in an $11.27 million verdict.
VI. WHAT IS THE DISCOVERABILITY OF INSURANCE ADJUSTER FILE MATERIALS IN YOUR STATE WHEN OUTSIDE COUNSEL HAS NOT BEEN RETAINED?

Texas courts routinely hold that the entire insurance file is not discoverable although parts of an insurance file are likely discoverable and very fact dependent. Under Texas Rule of Procedure 192.5, the work product privilege often protects parts on insurance file before counsel is retained:

192.5 Work Product. (a) Work product defined. Work product comprises:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

Other common objections affecting the discoverability of the file include relevance and that the discovery request is overly broad, burdensome, and vague. Nonetheless, parts of the insurance file are discoverable.

VII. DOES YOUR JURISDICTION FOLLOW CARMACK OR ARE THERE JURISDICTIONAL SPECIFIC RULES REGARDING CARGO LIABILITY?

Texas follows the Carmack Amendment for claims related to interstate cargo liability. Texas courts have explicitly held that state law claims of breach of contract, breach of implied and express warranty, violation of the Texas Deceptive Trade Practices Act Sections 17.46 and 17.50, misrepresentation, fraud, negligence, gross negligence, and violation of statutory duties of common carriers under Texas law are pre-empted by the Carmack Amendment. See Moffit v. Bekins Van Lines Co., 6 F.3d 305 (5th Cir. 1993.)

VIII. DOES YOUR JURISDICTION REQUIRE PRE-TRIAL DISCLOSURE OF SURVEILLANCE/SOCIAL MEDIA INVESTIGATIONS? IF SO, WHEN ARE YOU REQUIRED TO MAKE DISCLOSURES?

No, Texas does not require disclosure of surveillance or social media investigations before trial. If surveillance is done in the anticipation of litigation, it is protected from discovery in Texas under the work product privilege. See In re Weeks Marine, Inc., 31 SW3d 389. Nonetheless, if a party intends to introduce surveillance or social media evidence in trial, it must timely disclose this in response to applicable discovery requests unless (1) there was good cause or (2) the failure to make, amend, or supplement the discovery response will not unfairly surprise of unfairly prejudice the other parties pursuant to Texas Rule of Civil Procedure 193.6(a). If the party intends
to introduce the surveillance or social media evidence, the disclosures must abide by the timelines in Texas Rule of Civil Procedure 193.5.