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ALABAMA

SPOLIATION

1. Elements/definition of spoliation: Is it an "intentional or fraudulent" threshold or can it be negligent destruction of evidence.

Spoliation of evidence occurs when one party hides or harms material evidence that might be favorable to an adverse party. *Goins v. Advanced Disposal Servs. Gulf Coast*, No. 1190393, 2021 Ala. LEXIS 13, at *9 (Ala. Feb. 19, 2021). One can prove spoliation by showing that "a party purposefully or wrongfully destroy[ed] a document which he knew was supportive of the interest of his opponent, whether or not an action involving such interest was pending at the time of the destruction." *May v. Moore*, 424 So.2d 596, 603 (Ala. 1982).

Alabama courts have also held that a products-liability claim relating to a defective product is properly disposed of on a motion for summary judgment if the product in question is not available and the plaintiff has no other means of proving the alleged defect. *See Smith v. Atkinson,* 771 So.2d 429, 434 (Ala. 2000) (citing *Capital Chevrolet, Inc. v. Smedley*, 614 So.2d 439 (Ala. 1993)); *see also Story v. RAJ Props.*, 909 So.2d 797 (Ala. 2005); *Cincinnati Ins. Co. v. Synergy Gas, Inc.*, 585 So.2d 822 (Ala. 1991).

2. Distinction between first party and third-party spoliation.

Third-party spoliation arises when "evidence [is] lost or destroyed through the acts of a third-party (i.e., a party not alleged to have committed the underlying tort as to which the lost or destroyed evidence is related)." *Smith v. Atkinson*, 771 So.2d 429, 438 (Ala. 2000). First-party spoliation occurs "where the alleged spoliator was a party to the action." *Christian v. Kenneth Chandler Const. Co.*, Inc., 658 So. 2d 408, 413 (Ala. 1995).

3. Whether there is a separate cause of action for a spoliation claim.

While Alabama does not recognize an independent cause of action for first-party spoliation, *Christian v. Kenneth Chandler Const. Co., Inc.*, 658 So. 2d 408, 413 (Ala. 1995), Alabama does recognize a claim for third-party spoliation of evidence under the traditional negligence framework. *See Smith*, 771 So. 2d at 438.

As in all negligence actions, the plaintiff in a third-party spoliation case must show (1) a duty to a foreseeable plaintiff, (2) breach of that duty, (3) proximate cause, and (4) damages. *Crowne Invs., Inc. v. Bryant*, 638 So.2d 873, 878 (Ala. 1994).

Further, Alabama courts employ a three-part test for determining when a third party can be held liable for negligent spoliation of evidence. *Smith*, 771 So. 2d at 432-33. In addition to proving duty, breach, causation, and damages, the plaintiff in a third-party spoliation case must also show: (1) that the defendant spoliator had actual knowledge of pending or potential litigation; (2) that a duty was imposed upon the defendant through a voluntary undertaking, an agreement, or a specific request;

and (3) that the missing evidence was vital to the plaintiff's pending or potential action. *Id*. Once all three of these elements are established, there arises a rebuttable presumption that, but for the fact of the spoliation of evidence, the plaintiff would have recovered in the pending or potential litigation. The defendant must overcome that rebuttable presumption or else be liable for damages.

4. Remedies when spoliation occurs:

- Negative inference instruction

When a party is guilty of spoliation of evidence, an adverse inference jury instruction is one option available to the trial court. *See, e.g.*, *Campbell v. Williams*, 638 So. 2d 804 (Ala. 1994). Spoliation "is sufficient foundation for an inference of [the spoliator's] guilt or negligence." *May v. Moore*, 424 So.2d 596, 603 (Ala. 1982).

- Dismissal

The sanction of dismissal of the claim may be warranted when a party frustrates a discovery request by willfully discarding critical evidence subject to a production request. *Iverson v. Xpert Tune, Inc.*, 553 So.2d 82 (Ala. 1989). Dismissal for failure to comply with a request for production may be warranted even when there was no discovery pending or even litigation underway at the time the evidence in question was discarded or destroyed. *Vesta Fire Ins. Corp. v. Milam & Co. Const., Inc.*, 901 So.2d 84, 93-94 (Ala. 2004).

- Criminal sanctions

Criminal contempt sanctions based upon spoliation are available in civil proceedings pursuant to Rule 70A, ALA. R. CIV. P. *Kaiser v. Kaiser*, 868 So. 2d 1095 (Ala. Civ. App. 2003). Rule 70A defines "criminal contempt" as: (i) Misconduct of any person that obstructs the administration of justice and that is committed either in the court's presence or so near thereto as to interrupt, disturb, or hinder its proceedings; or (ii) Willful disobedience or resistance of any person to a court's lawful writ, subpoena, process, order, rule, or command, where the dominant purpose of the finding of contempt is to punish the contemnor.

- Other sanctions

Discovery sanctions pursuant to Rule 37(d), ALA. R. CIV. P., are a proper vehicle through which the court may, without prior order or the need of a motion to compel, deal with a party's failure to produce or spoliation of evidence. *Iverson*, 553 So. 2d at 88-89.

The Alabama Supreme Court has applied the following five factors in analyzing a request for spoliation sanctions: "(1) the importance of the evidence destroyed; (2) the culpability of the offending party; (3) fundamental fairness; (4) alternative sources of the information obtainable from the evidence destroyed; and (5) the possible effectiveness of other sanctions less severe than dismissal." *Story v. RAJ Props.*, 909 So. 2d 797, 802-803 (Ala.2005).

5. Spoliation of electronic evidence and duty to preserve electronic information.

Effective December 21, 2018, Rule 37(g) of the Alabama Rules of Civil Procedure was amended to address ever-evolving electronic discovery issues. The current version of the Rule is as follows:

> *Failure to preserve electronically stored information*. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and if it cannot be restored or replaced through additional discovery, the court:
>
> > (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

> (2) only upon finding that the party acted with the intent to deprive another party of use of the information in the litigation, may:
>
> (A) presume that the lost information was unfavorable to the party responsible for its loss;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party responsible for its loss; or
>
> (C) dismiss the action or enter a default judgment.

As explained by the Committee Comments to Rule 37(g), the new amendments "focus on the reasonableness of the steps taken to preserve electronically stored information, as well as whether the information can be replaced or restored." The prior version of Rule 37(g) utilized a "good faith" standard. *See* Committee Comments to Rule 37(g).

6. Retention of surveillance video.

See discussion of Rule 37(g), Ala. R. Civ. P., above. The prior version of Rule 37(g) stated that "a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." The new version of Rule 37(g) omits this language. Nevertheless, the Committee Comments to the 2018 amendments note that "[c]ertainly, discovery should not prevent continued routine operation of computer systems necessary for business or other endeavors in this world increasingly connected by computer systems." However, "it is important for a party aware of the existence of relevant electronically stored information to take reasonable steps to preserve such information." *See* Committee Comments to Amendment to Rule 37(g) Effective December 21, 2018.

COLLATERAL SOURCE

7. Can plaintiff submit to a jury the total amount of his/her medical expenses, even if a portion of the expenses were reimbursed or paid for by his/her insurance carrier?

Yes, but the defendant may likewise introduce evidence that a collateral source has paid or will pay or reimburse the plaintiff for his medical or hospital expenses. Ala. Code § 12-21-45. *See also Melvin v. Loats*, 23 So.3d 666, 669 (Ala. Civ. App. 2009).

8. Is the fact that all or a portion of the plaintiff's medical expenses were reimbursed or paid for by his/her insurance carrier admissible at trial or does the judge reduce the verdict in a post-trial hearing?

Such evidence is admissible at trial. Ala. Code § 12-21-45 states as follows:

> "In all civil actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed shall be admissible as competent evidence. In such actions upon admission of evidence respecting reimbursement of payment of medical or hospital expenses, the plaintiff shall be entitled to introduce evidence of the cost of obtaining reimbursement or payment of medical or hospital expenses."

Ala. Code § 12-21-45(a). Further, "[u]pon proof by the plaintiff to the court that the plaintiff is obligated to repay the medical or hospital expenses which have been or will be paid or reimbursed, evidence relating to such reimbursement or payment shall be admissible." § 12-21-45(c).

However, as to subsection (c) of Ala. Code § 12-21-45, Alabama courts have held that a plaintiff's personal knowledge or understanding of his or her duty to repay an insurer is inadmissible hearsay and does not qualify

as competent evidence. *See Daniels v. Kapoor*, 64 So.3d 62, 66 (Ala. Civ. App. 2010) (holding that plaintiff's personal understanding of a subrogation lien is inadmissible hearsay); *Bruno's Supermarkets, Inc. v. Massey*, 914 So.2d 862, 864 (Ala. Civ. App. 2005) (holding that the plaintiff may not rely on inadmissible hearsay evidence in establishing a third-party subrogation interest).

9. **Can defendants reduce the amount plaintiff claims as medical expenses by the amount that was actually paid by an insurer? (i.e. where plaintiff's medical expenses were $50,000 but the insurer only paid $25,000 and the medical provider accepted the reduced payment as payment in full).**

While the defendant cannot reduce the amount plaintiff claims as medical expenses by the amount that was actually paid by the insurer, the defendant can present evidence of collateral source payments. "[U]nder § 12-21-45, a plaintiff is not entitled, necessarily, to fully recover medical or hospital expenses . . . . Instead, in such cases a jury must consider all of the evidence introduced at trial regarding payments from collateral sources and determine to what extent the plaintiff is entitled to recover his medical or hospital expenses." *Melvin v. Loats*, 23 So. 3d 666, 669-70 (Ala. Civ. App. 2009) (quoting *Senn v. Alabama Gas Corp.*, 619 So. 2d 1320, 1326 (Ala. 1993) (Hornsby, C.J., concurring specially).

ACCIDENT AND INCIDENT REPORTS

10. **Can accident/incident reports be protected as privileged attorney work product prepared in anticipation of litigation or are they deemed to be business records prepared in the ordinary course of business and discoverable?**

If the accident report is made in the ordinary course of business after each accident or incident, regardless of the prospect of potential litigation, it likely discoverable. *See Ex parte Schnitzer Steel Indus.*, 142 So.3d 488 (Ala. 2013). However, if the report is prepared by an attorney, or by the client specifically for or because of potential litigation, it may be privileged work product. *See Ewing v. Biggs*, 135 So.3d 247, 251-52 (Ala. 2013) (granting a writ of mandamus vacating a trial court discovery ruling ordering the production of an accident report when the evidence established that the report was prepared because of the prospect of litigation and similar reports were not prepared in the ordinary course of business).

SOCIAL MEDIA

11. **What means are available in your state to obtain social media evidence, including but not limited to, discovery requests and subpoenas? Can you give some examples of your typical discovery requests for social media?**

In Alabama, all of the traditional discovery tools are available to obtain social media evidence, including interrogatories, requests for production, and subpoenas. Examples of routine requests include:

Interrogatories:

- Identify all social media for which you have had an account or to which you have posted information in the two years prior to the incident, up to the present, including but not limited to:
    - Facebook
    - Twitter
    - Google Plus
    - Instagram
    - LinkedIn
    - Pinterest
    - MySpace, and/or
    - YouTube, etc.

- For each social media account, profile, or site identified in response to Interrogatory No. 11 above, state the date your profile was created and closed, if applicable; and any and all usernames, aliases, and/or email addresses employed for such purposes.

Request for Production:

- Produce documents reflecting Plaintiff's social media activity from two years prior to the incident, up to and including the present, including but not limited to all profile updates, wall posts, photographs, videos, comments, messages, events, and "likes," for any social media account Plaintiff has maintained at any time from two years prior to the incident, up to and including the present. Include activity relating to any pages Plaintiff administers or groups of which Plaintiff is a member.
- Produce documents reflecting Plaintiff's social media activity from two years prior to the incident, up to and including the present, which social media refers or relates to Plaintiff's daily activities and/or the ability to engage in same.
- Produce documents reflecting Plaintiff's social media activity from two years prior to the incident, up to and including the present, which social media refers or relates to any accidents and/or injuries Plaintiff has been involved in.

12. **Which, if any, limitations do your state's laws impose on a party on obtaining social media evidence from an opposing party? Possible limitations include a privacy defense, relevance, etc.**

While no Alabama laws specifically impose limitations on obtaining social media evidence in discovery, the general rules governing discovery would still apply. "Parties may obtain discovery regarding any matter, not privileged, which is (i) relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party; and (ii) proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expenses of the proposed discovery outweighs its likely benefit." Ala. R. Civ. P. 26(b)(1). Furthermore, it is not a proper basis for objection that "the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

13. **What, if any, spoliation standards has your state's Bar or courts set forth on social media for party litigants?**

No Alabama authority has identified any specific spoliation standards for party litigants as it pertains to social media.

14. **What standards have your state's courts set for getting various types of social media into evidence? Please address relevance, authenticity, and whether any exclusionary rule might apply (e.g., Rules 404(a) or 802).**

Alabama evidentiary rules concerning authentication and relevance apply equally to social media evidence. While there are not yet any civil state court decisions in civil cases bearing on this issue, s*ee Knight v. State*, 300 So.3d 76 (Ala. Crim. App. 2018), which held that a trial court properly admitted screen shots of the defendant's social media profile after testimony from the detective who made the screen shots as to their authenticity. In so holding, the court noted that "Rule 901 requires only a showing sufficient to indicate that the evidence is what it is purported to be" and that the defendant's arguments were better addressed to the weight of the evidence, not its admissibility. *Id.* at 110. *See also Stout by Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 1008 (11th Cir. 2018) ("Of course, the Gardendale Board was free to challenge the weight given to the Facebook posts, but they were plainly admissible.") (emphasis in original).

15. **How have your State's courts addressed an employer's right to monitor employees' social media use?**

To date, no Alabama authority has addressed an employer's right to monitor its employees' social media use.

16. How have your State's state or federal courts addressed limitations on employment terminations relating to social media?

Although no Alabama state or federal court has specifically addressed this issue, Alabama is an at-will employment state. Thus, an employer may generally terminate an employee at any time for any reason. *See Ex parte Michelin N. Am., Inc.*, 795 So.2d 674, 677.