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ALASKA

SPOLIATION

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

Alaska recognizes a cause of action for intentional spoliation of evidence. *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986) (recognizing a new tort for intentional spoliation of evidence). When the spoliation is unintentional (as is the usual case), the court will likely provide a curative jury instruction that the evidence would have benefited the adverse party had it not been destroyed., 895 P.2d 484, 493 (Alaska 1995). Generally, a showing that the destruction of the evidence was negligent is required. See *Id.*; *Doubleday v. State*, 238 P.3d 100, 106 (Alaska 2010).

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

In *Hazen v. Anchorage*, 71 P.2d 456 (Alaska 1986), the plaintiff was permitted to allege spoliation against a municipal prosecutor, who was not a party to the underlying civil suit, but was an agent of the municipality (Anchorage). Furthermore, in *Nichols v. State Farm & Cas. Co.*, 6 P.3d 300 (Alaska 2000), the Court implied that spoliation of evidence by a party's agent creates a claim for first party spoliation. Additionally, the *Hazen* court permitted the plaintiff to bring a claim against the individual police officers involved in her arrest (third party spoliation).

In, *Nichols* the Alaska Supreme Court explicitly recognized intentional third-party spoliation of evidence as a tort. These previous holdings were relied on by the Alaska Supreme Court in *Hibbits v. Sides*, 34 P.3d 327 (Alaska 2001). In *Hibbits*, the Court held that when alleging third party spoliation, a plaintiff must plead and prove that the defendant intended to interfere in his civil suit.

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

If evidence is destroyed or is concealed until all remedies have expired, the affected party may recover in tort if the spoliating party intentionally interfered with the other party's ability to bring a civil cause of action and if the affected party had a valid underlying cause of action which was prejudiced by the destruction. Punitive damages are available in such a claim. *Allstate Ins. Co. v. Dooley*, 243 P.3d 197 (Alaska 2010).

Alaska also recognizes the tort of fraudulent concealment, the elements of which are: (1) the defendant concealed evidence material to plaintiff's cause of action; (2) plaintiff's underlying cause of action was viable; (3) the evidence could not reasonably have been procured from another source; (4) the evidence was withheld with the intent to disrupt or prevent litigation; (5) the withholding caused damage to the plaintiff from having to rely on an incomplete evidentiary record; and, (6) the withheld evidence was discovered at a time when the plaintiff lacked another available remedy. *Allstate v. Dooley*. When a defendant negligently spoliates evidence, the burden shifts to it to prove the non-existence of the fact presumed.

Sweet v. Sisters of Providence in Washington, 895 P.2d 484 (Alaska 1995).

4. Remedies when spoliation occurs:

- Negative inference instruction

In *Sweet v. Sisters of Providence*, 895 P.2d 484 (Alaska 1995), the Alaska Supreme Court held that it was proper to shift the burden of disproving negligence and causation to the hospital which failed to preserve its treatment records in violation of its record keeping duties. The Court has considered, but not yet approved, an adverse inference instruction as an alternate remedy for negligent spoliation, or announced the standard trial courts should use when deciding whether to give such an instruction. *Lindbo v. Colaska*, *Inc.,* 414 P.3d 646 (Alaska 2018); See *Todeschi v. Sumitomo Metal Mining Pogo, LLC*, 394 P.3d 562, 568, 577-78 (Alaska 2017). The Alaska Court has rejected a first party claim for damages for negligent spoliation, holding that the burden-shifting remedy provided by Sweet provides an adequate remedy. Nichols, supra, 6 P.3d at 304. The Court has not formally decided whether to allow a cause of action for negligent third-party spoliation. See Sweet, 895 P.2d at 493. The Court in dicta appears to suggest that it would likely disallow a separate third-party action for negligent spoliation, however. See *Hibbits*, 34 P.3d at 329.

- Dismissal

Alaska courts may impose sanctions for withholding, destroying or altering relevant documents or evidence under Alaska rule of Civil Procedure 37(b). The test for validity of a discovery sanctions, such as dismissal of a claim or an order that certain facts are issues be taken as established, is whether claims or issues are "elements of the dispute that cannot be determined on the merits without disclosure of the evidence the court has ordered the party to produce." *Bachner v. Pearson,* 479 P.2d 324 (Alaska 1970).

- Criminal sanctions

Alaska law prohibits tampering with evidence. A person may be charged with this crime for destroying or removing physical evidence with the intent to impair its use in an official proceeding. *See* Alaska Stat, §11.56.610 (2004). Generally, the charge is brought in connection with other criminal charges or to prevent another from being charged with a crime.

- Other sanctions

See above.

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

The Alaska Supreme Court amended the Civil Rules to specifically address production of E-Discovery- ln particular, Civil Rule 26(a)(1)(D) requires parties to produce a copy, or at least a description and location, of all "electronically stored information" (hereinafter, ESI) at the time they exchange lnitial Disclosures. Therefore, parties must be prepared to produce, or at least locate and identify, any relevant ESI in their possession early in the litigation process.

Alaska Civil Rule 26(b)(2)(B) also addresses E-Discovery, it reads:

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. lf that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

This provision will allow parties to raise the undue burden or cost argument with regard to the production of ESI. However, by the very language of the Rule, the court may still require production of the ESI regardless of the undue burden on the producing party. The revisions to the Alaska Civil Rules mirror the ESI provisions of the Federal Rules of Civil Procedure. Therefore, until guidance is provided by the Alaska Supreme Court, we can expect the trial courts to look to cases interpreting the Federal Rules for guidance in addressing ESI issues

6. Retention of surveillance video.

See above.

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?

Alaska recognizes the Collateral Source Rule. *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967). Plaintiff's damages not reduced by "collateral source." No evidence of collateral source allowed because it would affect jury's judgment unfavorably to plaintiff on both liability and damages. *Tolan v. ERA Helicopters, Inc*., 699 P.2d 1265 (Alaska 1985); *Loncar v. Gray*, 28 P.3d 928 (Alaska 2001) (involved evidence of Medicaid coverage).

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?

An Alaska statute modifies the Collateral Source Rule. After jury has rendered verdict and court has awarded costs and attorney's fees, Alaska statute allows defendant to introduce collateral source payments that are not subject to subrogation. Defendant may not introduce evidence of federal benefits, life insurance, and gratuitous benefits. If defendant introduces evidence of collateral sources, plaintiff may show that his attorneys' fees exceeded those awarded by court and the amounts he paid to secure the insurance benefits. If amount of collateral benefits exceeds plaintiff's attorneys' fees and cost of insurance, the court deducts the excess from the jury award. This statute does not apply to medical malpractice actions. Alaska Stat. § 9.17.070.

The amount to which a medical bill is lowered ("negotiated rate") is part of the value of that collateral benefit and should not accrue to the defendant. Alaska follows "reasonable value" approach in which the plaintiff is allowed to introduce the full, undiscounted medical bills into evidence at trial. However, both the actual amounts paid and any amounts the provider wrote off are relevant to the medical services' reasonable value. Defendants must adhere to the Collateral Source Rule but are free to cross-examine any witnesses that a plaintiff might call to establish reasonableness, and the defense is also free to call its own witnesses to testify that the billed amounts do not reflect the reasonable value of the services." Such evidence may include, for example, testimony about the range of charges the provider has for the same services or what other providers in the relevant area charge for the same services. Lastly, to the extent the negotiated rate differential represents a collateral benefit for which the collateral source has no "right of subrogation by law or contract," it is subject to the post-verdict procedure set out in § 09.17.070. *Weston v. AKHappytime, LLC,* 445 P.3d 1015 (Alaska 2019) (case involving Medicare payments but applied to all "negotiated rates.").

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).

See above.

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?

The Alaska Supreme Court has held that insurance files pertaining to claims, including the insurer's investigative materials, are ordinary business records that are subject to discovery in a civil action relating to that claim. The Alaska Supreme Court has required the production of statements made by an insured to an insurance company's claim adjuster concerning an accident and held that such records were not protected by the attorney-client privilege unless it can be established that the adjuster, in receiving such statements, was acting under the express direction of counsel for the insured. The court also held that materials in an insurer's file are conclusively presumed to have been compiled in the ordinary course of business, absent a showing they were prepared at the request of the insured's attorney. Consequently, prior to attorney involvement on behalf of the insured, materials held by insurers are subject to discovery without regard to any work product restrictions.)

However, under Rule 26(b)(1) of the Alaska Rules of Civil Procedure, the trial court is still required to protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation. Presumably this would protect such things as memoranda containing opinions as to liability and settlement value.

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?

There does not appear to be any restrictions under Alaska law for seeking social media information through standard discovery requests.

Of interest, Alaska's Rule of Civil Procedure 4(e) permits a litigant to pursue alternative methods of service, such as posting to the court's legal notice website or posting to a social media account, once the litigant has made a diligent inquiry by attempting to serve process by certified mail/restricted delivery/return receipt and/or via a process server. The litigant must complete a Request to Serve Defendant by Posting or Alternative Service and an Affidavit of Diligent Inquiry for the court's review.

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.

Social media records in Alaska are governed by the Alaska Statutes Title 40: Public Records and Recorders, which defines records as any evidence of the organization, function, policies, decisions, procedures, operations, or other activities. The law defines records not by their physical form or characteristic, but by the informational value in them. In other words, it is the content that defines social media records in Alaska, not the medium.)

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

Standard spoliation principles generally apply.

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).

Alaska appellate courts have not yet ruled on these issues.

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

Alaska has no statutes, nor instructive case law, regarding the use of social media in the workplace. Employers and employees alike are using social media for business and personal reasons. Consequently, it is critical that

both employers and individuals take steps to protect their reputation and to the extent possible ensure that unflattering postings and images are kept off or "wiped off" the web. Companies need to understand that there are risks to viewing employees' or potential employees' online activities. Looking up an applicant's profile could be grounds for a lawsuit if the job seeker claims they were snubbed because of information garnered from the web regarding their race, religion or sexual orientation.

In *Cowles v. State*, 23 P.3d 1168 (Alaska 2001), after receiving information that University of Alaska box office manager Lindalee Cowles was stealing cash from ticket sales, the University police, without obtaining a warrant, installed a hidden video camera which recorded her in the act of theft. Cowles contended that the videotape should be suppressed because it was the product of an unlawful search. The court held that the fact that hidden surveillance videotaping of Cowles was conducted for the purpose of recording illicit conduct, namely Cowles' theft, did not violate her reasonable expectation of privacy. *Cowles*, 23 P.3d at 1172-3. Cowles' activities were observable by the public through an open ticket window and by co-workers circulating through the office. *Id*. at 1173.

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

Alaska appellate courts have not yet ruled on these issues.