

ARKANSAS

SPOILIATION

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

“Spoliation is defined as ‘the intentional destruction of evidence’” *Goff v. Harold Ives Trucking Co., Inc.*, 342 Ark. 143, 27 S.W.3d 387 (2000). This definitional requirement of intentional destruction has been upheld by the Arkansas Supreme Court. *Rodgers v. CWR Construction, Inc.*, 343 Ark. 126, 133, 33 S.W.3d 506, 511 (2000) (“In the absence of any intentional misconduct, we cannot say that the trial court abused its discretion by failing to give the jury an instruction on spoliation of evidence.”).

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

There are notable distinctions in the remedies available for victims of third party spoliation. In the case of first party spoliation, the victim may request the negative inference instruction and/or other discovery sanctions available under the Arkansas Rules of Civil Procedure. These remedies are not available to a victim of third party spoliation. However, a party to a lawsuit can seek an order directing the preservation of the information or property. In addition, under Arkansas Rule of Civil Procedure 45(b), a lawyer may subpoena a non-party to produce “tangible things” for inspection. Production may be compelled by a court using its contempt power. ARK. R. CIV. P. 45(f). Also, Rule 34(c) of the Arkansas Rules of Civil Procedure allows for an independent action against a non-party for the production of evidence. Finally, criminal sanctions are available in cases of both first and third party spoliation. Ark. Code Ann. § 5-53-111.

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

The Arkansas Supreme Court has declined to recognize an independent tort of spoliation in both first and third party contexts. *Goff*, supra (first party); *Downen v. Redd*, 367 Ark. 551, 242 S.W.3d 273 (2006) (third party).

4. Remedies when spoliation occurs:

- Negative inference instruction

A party damaged by the spoliation of evidence may request that a jury be instructed to draw a negative inference against the spoliator. *Goff*, supra. The Arkansas Model Instruction commonly given on this issue instructs the jury that it may draw an inference that the lost, destroyed, or otherwise suppressed evidence would have been unfavorable to the spoliator’s claim or defense. ARK. MODEL JURY INSTRUCTIONS - CIVIL 106.

- Dismissal

Pursuant to Arkansas Rule of Civil Procedure 37(b), the failure to obey an order to

provide or permit discovery, may result in an order from the court striking pleadings, dismissing the action, or rendering a judgment by default against the disobedient party.

- Criminal sanctions

Pursuant to Arkansas statute, a person commits a Class B misdemeanor if he or she “alters, destroys, suppresses, removes, or conceals any record, document, or thing with the purpose of impairing its verity, legibility, or availability in any official proceeding or investigation.” ARK. CODE ANN. § 5- 53-111 (Repl. 1997); *see also Goff, supra*.

- Other sanctions

In addition to those sanctions discussed above, actions constituting the spoliation of evidence may result in the following: discovery sanctions, *see* Ark. R. Civ. P. 37(b)(2); punitive damages, *see Union Pacific R. Co. v. Barber*, 356 Ark. 268, 149 S.W.3d 325 (2004); and referral to the Arkansas Office of the Committee on Professional Conduct, *see* Model Rules of Professional Conduct 8.4(c),(d).

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

The Arkansas Supreme Court has enacted a specific rule of civil procedure related to the discovery of electronic information. Ark. R. Civ. P. 26.1. It is an optional rule and only applies by agreement of the parties or by order of the circuit court. Pursuant to Rule 26.1, absent exceptional circumstances, the court may not impose sanctions for the failure to preserve electronically stored information destroyed “as the result of the routine, good-faith operation of an electronic information system.” Ark. R. Civ. P. 26.1.

6. Retention of surveillance video.

Arkansas courts have decided few cases regarding the retention of surveillance videos following an incident. However, the case law on point appears to stand for the proposition that spoliation is not established when a party destroys or erases video in a routine manner in accordance with company policy, rather than intentionally following an incident. *See, e.g., Tomlin v. Wal-Mart Stores, Inc.*, 81 Ark. App. 198, 100 S.W.3d 57 (Ark. Ct. App. 2003). In *Tomlin*, the surveillance tape purportedly showing the incident was destroyed in accordance with company policy, which directed that video be kept for two weeks to a month. *Id.* The court determined that the elements entitling Tomlin to a jury instruction on spoliation were not met because there was no evidence that Wal-Mart knew whether or not the incident was recorded or that they intentionally destroyed a specific tape depicting the accident. *Id.*

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?

Arkansas plaintiffs may submit to a jury the entire amount of their medical expenses, even though an insurance carrier contributed a portion of the expenses. *Douglas V. Adams Trucking Co.*, 345 Ark. 203, 46 S.W.3d 512 (2001).

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?

Arkansas defendants cannot reduce a plaintiff’s damages by introducing evidence that an insurance carrier paid all or part of the claimed medical bills. *Ebbing v. State Farm Fire & Cas. Co.*, 67 Ark. App. 381, 1 S.W.3d 381 (Ark. Ct. App. 1999). Defendants may, however, use collateral-source evidence for non-mitigation or non-reduction purposes, such as impeaching a plaintiff. *Id.* Moreover, Arkansas limits insurers’ right to subrogation to situations where a settlement or jury verdict fully redressed the plaintiff’s injury (a.k.a. the made-whole

doctrine). *Ryder v. State Farm Mut. Auto Ins. Co.*, 371 Ark. 508 (2007). A plaintiff can settle a claim or receive a judgment without necessarily being made whole. *Id.*

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).**

Arkansas defendants cannot reduce a plaintiff's medical expense claims by the amount the insurer actually paid. *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231 (Ark. Ct. App. 2004).

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?**

Arkansas's attorney-client privilege protects accident reports prepared in anticipation of litigation. *Holt v. McCastlain*, 357 Ark. 455, 182 S.W.3d 112 (2004).

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?**

The means available to obtain social media evidence are the same as the general methods for obtaining discovery in Arkansas. Ark. R. Civ. P. 26(a) provides that parties may obtain discovery through depositions, written interrogatories, production of documents or things, and requests for admission.

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.**

Arkansas has imposed no limitations to a party's ability to obtain social media evidence from an opposing party distinct from those set forth in the Arkansas Rules of Civil Procedure. Pursuant to Ark. R. Civ. P. 26(b), parties may obtain discovery regarding any unprivileged matter relevant to the issues in the pending action.

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

Neither the Arkansas Bar Association, nor Arkansas state courts have set forth any spoliation standards pertaining specifically to social media for party litigants. See Arkansas Model Jury Instruction (Civil) 106 for a general overview of spoliation in Arkansas.

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).**

Arkansas state courts impose no standards specific to admitting social media evidence. Social media evidence is subject to the same standards set forth by the Arkansas Rules of Evidence. See, e.g., *Clement v. Johnson's Warehouse Showroom, Inc.*, 2012 Ark. App. 17, (Ark. Ct. App. 2012) (deciding that photographs taken from Facebook and Myspace depicting Plaintiff "drinking and partying" were relevant to Plaintiff's credibility and claim of excruciating pain as a result of a work-related injury).

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

Arkansas state courts have not addressed an employer's right to monitor social media use. However, the Arkansas Social Media Statute (Acts of Arkansas 1480) prohibits an employer from requiring, requesting or suggesting that an employee or prospective employee "friend" (i.e. connect with) a supervisor, or another

employee. The prohibition does not apply to company email accounts or to social media accounts an employer creates for business use. It also allows for employers to request an employee's username and password when it is "reasonably believed to be relevant to a formal investigation or related proceeding" of possible violations of federal and state laws, or of the employer's written policies.

If an employer inadvertently obtains an employee's username, password or other login information to his or her social media account through the use of an employer-provided electronic device or a program monitoring an employer's network, the employer is not liable under the Act. Nonetheless, the employer may not use that information to gain access to the employee's social media account.

Arkansas law does not prohibit an employer from viewing information about a current or prospective employee publicly available on the Internet, nor does it prevent an employer from complying with the requirements of federal, state or local laws, rules, or regulations (or the rules or regulations of self-regulatory organizations).

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

No state or federal court in Arkansas has addressed any limitations on employment terminations relating to social media.