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COLORADO

SPOLIATION

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

Spoliation of evidence is defined as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." Cache La Poudre, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 620 (D. Colo. 2007).

In Colorado, courts have inherent powers and broad discretion to impose appropriate sanctions or provide the jury with an adverse inference instruction for spoliation of evidence. Pena v. District Court, 681 P.2d 953, 656 (Colo. 1984); Aloi v. Union Pacific Railroad Corp., 129 P.3d 999, 1004 (Colo. 2006); Cache La Poudre Feeds, LLC, 244 F.R.D. at 621. Courts may impose appropriate sanctions or an adverse inference instruction for either bad faith, willful or even negligent spoliation of evidence. Pfantz v. Kmart Corp., 85 P.3d 564, 569 (Colo. App. 2003).

To draw an adverse inference from the absence, loss or destruction of evidence (or failure to preserve), it would have to appear that the evidence would have been relevant to an issue at trial and would naturally have been introduced as evidence. Aloi, 129 P.3d at 1004. The plaintiff must first prove that the evidence was relevant, and the spoliator knew or should have known of pending, imminent, or reasonably foreseeable litigation. Castillo v. The Chief Alternative, LLC, 140 P.3d 234, 236 (Colo. App. 2006); Turner v. Pub. Serv. Col. of Colo., 563 F.3d 1136, 1149 (10th Cir 2009). Courts look at a variety of factors, primarily giving most weight to (1) the degree of culpability of the party who lost or destroyed evidence; and (2) the degree of actual prejudice to the other party. Blangsted v. Snowmass-Wildcat Fire Prot. Dist., 642 F. Supp.2d 1250, 1259-60 (D. Colo. 2009).

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

Colorado courts have not made any distinctions between first party and third-party spoliation.

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

Colorado does not recognize an independent cause of action for spoliation of evidence. Moore v. U.S., 864 F. Supp. 163 (D. Colo. 1994). In some cases, Plaintiffs have attempted to couch a claim for spoliation as "intentional interference with prospective litigation through spoliation" (similar to "intentional interference with prospective economic advantage") but to date, such attempts have been rejected. Moore, 864 F. Supp. At 163; Johnson v. Liberty Mutual Fire Ins. Co., 653 F. Supp.2d 1133, 1137-39 (D. Colo. 2009). Rather, spoliation is a rebuttable presumption of evidence.

4. Remedies when spoliation occurs:

- Negative inference instruction

Colorado Courts may provide the jury with an "adverse inference instruction" when spoliation of relevant evidence occurs. Aloi, 129 P.3d at 1002 (Colo.2006). This serves a punitive and remedial function. Rodriguez v. Schutt, 896 P.2d 881, 884 (Colo. App. 1994); The Lauren Corp. v. Century Geophysical Corp., 953 P.2d 200 (Colo. App. 1998); Pfantz, 85 P.3d at 568.

- Default Judgement or Dismissal

In the most extreme of cases only, courts may impose the ultimate penalties of a default judgement (or dismissal, if it is the plaintiff that destroys evidence) where a party has; willfully or deliberately disobeyed a discovery rule; engaged in bad faith conduct that is a flagrant disregard or dereliction of discovery obligations; or engaged in culpable conduct which is more than mere inadvertence or simple negligence, but is gross negligence. "Bad faith" includes conduct which, although not necessarily deliberate or intentional, nonetheless amounts to a flagrant disregard of dereliction of one's discovery obligations. Pfantz, 85 P.3d at 568; Energy W. Mining Co. v. Oliver, 555 F.3d 1211, 1220 n. 2 (10th Cir. 2009).

- Criminal sanctions

There are no known cases in which criminal sanctions have been imposed.

- Other sanctions

Courts may award sanctions such as costs and reasonable attorneys' fees for any and all of the proceedings related to spoliation motions. Colo. R. Civ. P. 37. Courts may impose lesser sanctions if (1) litigation was imminent when the evidence was destroyed; (2) the party was prejudiced by the destruction of evidence. Turner v. Pub. Serv. Co. of Colo., 563 P.3d 1136, 1149 (10th Cir. 2009). Examples of "lesser" sanctions include (1) allowing the party to question witness about the missing evidence (see Dalcour v. City of Lakewood, No. 11-1117, 2012 U.S. App. LEXIS 16303, *35 (10th Cir. 2021)); (2) excluding evidence (see OTO Software, Inc. v. Highwall Techs., LLC, 2010 U.S. Dist. LEXIS 101516 (D. Colo. 2010)); and (3) striking a party's proof (Energy W. Mining Co., 555 F.3d at 1220). In order to determine the appropriateness of certain sanctions, whether dispositive or otherwise, judges need to balance the degree of misconduct by a party's mental state against the degree of harm which flows from the misconduct. Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90, 104 (D. Colo. 1996).

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

Parties to litigation have a duty to preserve evidence. In most cases, the duty to preserve evidence is triggered by the filing of a lawsuit. Grabenstein v. Arrow Elecs., Inc., 2012 U.S. Dist. LEXIS 56204 (D. Colo. 2012). However, the obligation to preserve evidence may arise even earlier if a party has notice that future litigation is likely." Id.; Cache La Poudre Feeds, LLC, 244 F.R.D. at 621. That is, "[w]hile a party should not be permitted to destroy potential evidence after receiving unequivocal notice of impending litigation, the duty to preserve relevant documents should require more than a mere possibility of litigation." Id.

The duty to preserve evidence applies to the duty to preserve electronic information. In Grabenstein, the issue was whether the defendants had a duty to preserve e-mail correspondence between the parties. The courts held that spoliation applies to e-mails if **"**(1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence." See also Partminer Worldwide, Inc. v. Siliconexpert Techs. Inc., No. 09-cv-00586-MSK-MJW, 2010 U.S. Dist. LEXIS 111647, at *5 (D. Colo. September 23, 2010) (where court held defendants "had an obligation to preserve non-privileged materials concerning potential trade secrets, whether such

materials were in hard copy or in electronically stored information ("ESI") format.").

The Colorado Rules of Civil Procedure are not specifically patterned after the Federal Rules of Civil Procedure pertaining to "ESI".

6. Retention of surveillance video.

There is a dearth of Colorado law pertaining to preservation of surveillance video. The principles and analysis adopted in Aoli, Pfantz and Castillo probably apply. However, the Tenth Circuit has addressed the issue and held that the evidentiary doctrine of spoliation does not apply with respect to a store videotape. Rowe v. Albertsons, Inc., 116 Fed. Appx. 171, 176 (10th Cir. 2004).

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. Colorado codified the common-law pre-trial evidentiary component of the collateral source rule preserving the notion that collateral source benefits may never be considered by a trial or jury where a plaintiff's insurer covers some or all the medical expenses incurred by the plaintiff. Wal-Mart Stores, Inc. v. Crossgrove, 2012 CO 31, ¶ 10, 276 P.3d 562, 565; Volunteers of Am. Colo. Branch v. Gardenswartz, 242 P.3d 1080, 1082-83 (Colo. 2010). Moreover, evidence of collateral source benefits may not be used tangentially for any other reason, including to show the reasonable value of the medical expenses. Crossgrove, 276 P.3d at 566. Courts have barred evidence of collateral source benefits because "such evidence could lead the fact-finder to improperly reduce the plaintiff's damages award on the grounds that plaintiff already recovered his loss from the collateral source." Crossgrove, 276 P.3d at 565.

"Under this rule, the benefits received by an injured plaintiff due to the plaintiff's third-party-health insurance coverage are from a collateral source, and therefore not to be considered in determining the amount of plaintiff's recovery." Gardenswartz, 242 P.3d at 1083. "A plaintiff's insurer is a collateral source because it is a third party wholly independent of the tortfeasor to which the tortfeasor has not contributed." Crossgrove, 276 P.3d at 568. The purpose of this rule is to "prevent a tortfeasor from benefitting, in the form of reduced liability, from compensation in the form of money or services that the victim may receive from a third-party source." Gardenswartz, 242 P.3d at 1083. A tortfeasor is solely responsible for making the injured plaintiff whole. Id. Therefore, all medical expenses that were either reimbursed or paid by the plaintiff's insurance company are "collateral" and irrelevant in calculating the tortfeasors liability. Id.

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?

Under C.R.S. § 13-21-111.6, the court may reduce the verdict in a post-trial hearing, however, courts are prohibited from reducing such amount where the plaintiff contracted for the benefit. C.R.S. § 13-21-111.6. The general goal of Section 13-21-111.6 is to avoid a plaintiff's double recovery. Gardenswartz, 242 P.3d at 1084. Under C.R.S. § 13-21-111.6, post-verdict awards are adjusted "by deducting compensation or benefits that the plaintiff received from collateral sources (i.e., sources other than the tortfeasor)", however, a "contract exception" exists for certain collateral source benefits. Id. The contract exception "clearly denies the setoff of benefits that result from private insurance contracts for which someone pays monetary premiums." Id.

Under the contract exception, "no offset is permitted if the benefits arise out of a contract entered into on the plaintiff's behalf." Id. at 1084. Although the general goal of the statute is to limit double-recoveries, "[i]t also shows, [] an intent not to deny a plaintiff compensation to which he is entitled by virtue of a contract that

either he, or someone on his behalf, entered into and paid for with the expectation of receiving the consequent benefits at some point in the future." Id. A plaintiff's double recovery is mitigated by the fact that the collateral source benefits were already paid for by the plaintiff, or someone on their behalf. Id. at 1085. Whereas the tortfeasor would receive a windfall by virtue of the benefits of the contract "for which [he] paid no compensation." Id. at 1082-83.

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).**

No. The amount the health care provider charged is the amount presented to the jury. Even if health care provider accepted $40,000 as payment in full for a $250,000 bill, the amount presented to the jury will be $250,000. Crossgroves, 276 P.3d at 566. Where a health care provider "writes off" a portion of the plaintiff's medical expenses, those deductions may not be used to adjust the post-verdict award. Gardenswartz, 242 P.3d at 1085-86. Healthcare provider discounts, in the form of write offs, are considered collateral source benefits because the write offs require a contractual agreement between the plaintiff and her insurance carrier, i.e., the company negotiating such discounts. Id. at 1085. Thus, write offs "are as much of a benefit for which [a plaintiff] paid consideration as are the actual cash payments by his health insurance carrier to the health care providers." Id. The Colorado General Assembly intended the contract exception to preserve the common law collateral source rule and prevent the tortfeasor from receiving a windfall by virtue of the benefits the plaintiff receives through her contract. Id.

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?**

No, the Colorado Supreme Court has held that "because a substantial part of an insurance company's business is to investigate claims made by an insured against the company or by some other party against the insured, it must be presumed that such investigations are part of the normal business activity of the company and that reports and witness' statements compiled by or on behalf of the insurer in the course of such investigations are ordinary business records as distinguished from trial preparation materials." Hawkins v. Dist. Ct., 638 P.2d 1372, 1378 (Colo. 1982); See Lazar v. Riggs, 79 P.3d 105 (Colo. 2003).

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?**

Social media evidence may be obtained by discovery requests and subpoenas in Colorado. However, there is little Colorado-specific case law or other State-specific guidelines that an attorney may rely on to guarantee success in obtaining such evidence. Therefore, discoverability of social media evidence is generally determined on a case by case and a judge by judge basis. Additionally, if a party chooses to subpoena social media information directly from the source, a consent or release may be necessary. See, Ledbetter v. Wal-Mart Stores, Inc., 2009 WL 1067018, 06-cv-01958-WYD-MJW, Minute Order (D. Colo. June 8, 2009) (compelling execution of "consents allowing the Social Networking Sites to produce the information sought in defendant's subpoena").

During discovery, we typically issue a demand for preservation of social media evidence (i.e. a request not delete or change photographs and posts on Facebook, MySpace, Blogspot, and Twitter) and make document

requests for printouts and/or usernames and passwords of all networking sites and blogs for which the opposing party is a user or contributor, the dates that the party joined the sites and updated or deleted content, and the dates in which profiles or pages were made "private."

We also typically assign a paralegal to search the sites and to download or print the pages or posts that are made available to the public generally. However, when performing or assigning someone to perform social media research on a party or witness, an attorney should be careful to conform to and to instruct others on their State Bar rules and ethical cannons. There are several state bars and bar organizations which have issued opinions or rules regarding the use of social media as an investigative research tool. See, NYSBA Ethics Opinion 843 (2010) (allowing access to "public" social media which doesn't require a lawyer to "friend" the other party or to direct a third person to do so); N.Y. City Bar Formal Ethics Opinion 2010-2 (finding attorneys are ethically permitted to use "truthful friending" as long as the attorney or agent uses their real name and profile to do so.

Although we are aware of no Colorado Ethics or State Bar opinions on the subject, the Colorado Supreme Court has published an article on its website which suggests that the Court endorses the review of public information and "friending" an unrepresented party if the attorney identifies themselves and their purpose. See, "New Tools, Same Rules," James Carlson and Amy Devan, Esq., located at http:coloradosupremecourt.com/Newsletters/Summer_2013/Social Media.htm. However, the Court discourages "friending" represented parties (regardless of disclosure of your true identity), and the use of third parties, aliases, and other pretextual means of gaining access to nonpublic social media information. Id.

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.**

Again, while social media evidence may be obtained in Colorado, there is little Colorado-specific case law and State-specific guidelines that an attorney may rely on to guarantee success in obtaining such evidence. Limitations such as privacy, relevance, undue burden, cost and expense have been asserted with success. Generally, we have found the State Court judges will decide these issues on a case-by-case basis in deciding a motion to compel, motion to quash, or protective order.

In some cases, parties have been successful in obtaining Facebook discovery by showing that the request was relevant to the claims asserted (i.e. relevant to the physical and mental condition of plaintiff) or directly relevant to the facts or circumstances underlying the alleged incident. See, Ledbetter, supra; Moore v. Miller, 10-cv-651-JLK, Order Granting Motion to Compel, (D. Colo. June 6, 2013). In those cases, the courts have held the request to be reasonably calculated to lead to the discoverability of relevant evidence. In granting social media discovery requests, the Court may order an *in camera* review or a protective order to ensure the content is relevant and that "private" information is not shared outside of litigation. However, we have also found that under Martinelli v. District Court, 199 Colo. 163, 174, 612 P.2d 1083, 1091 (1980), Colorado Courts may limit social media discovery to only those postings or disseminations that were intended by the user to be placed in the public realm. When disclosure is challenged under Martinelli, the court is directed to consider: (1) whether the individual has a legitimate expectation of non-disclosure; (2) whether disclosure is nonetheless required to serve a compelling state interest; and (3) where a compelling state interest necessitates disclosure of otherwise protected information, how disclosure may occur in a manner which is least intrusive with respect to the right to confidentiality. Id.

In a personal injury case handled by our firm, the defense sought Facebook message and postings, both prior to and post-accident, which we argued was relevant to prior injuries and conditions. See, Irwin v. Kahrs, 10 cv 180, Order Denying Motion to Compel (Logan Co. Dist. Ct., Colo. Nov. 1, 2011). In denying a motion to compel, the Court applied the test set forth in Martinelli v. District Court, 199 Colo. 163, 174, 612 P.2d 1083,

1091 (1980) and held that information that was posted for a limited group of individuals or "friends," should remain "private" despite relevant similar issues in litigation. Id. In so holding, the Court reasoned that where a the Plaintiff chose not to disseminate information to the public and instead made their accounts "private," the Plaintiff had made a conscious decision about the level of disclosure and has expressed an expectation of privacy. Id. The court further reasoned there was no compelling state interest which would override the expectation of privacy because other means were available to obtain evidence of pre-existing conditions or impeachment evidence through medical records and depositions. Id.

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

None that we are aware of which have been formally published or promulgated at this time.

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).

"The admissibility of a computer printout is governed by the rules of relevancy, authentication, and hearsay." People v. Glover, 2015 COA 16, 363 P.3d 736; People v. Huehn, 53 P.3d 733, 736 (Colo. App. 2002). Colorado Rules of Evidence 901 through 903 "govern authentication and identification of objects whose admission into evidence is sought by a party." Glover, 363 P.3d at 739. "Authentication is a condition precedent to admissibility of physical evidence sufficient to support a finding that the evidence in question is what the proponent claims." Id.; CRE 901(a); People v. Crespi, 155 P.3d 570, 574 (Colo. App. 2006) (trial court should admit physical evidence if a reasonable jury could decide that it is what the proponent claims to be).

Authentication requires only a prima facie showing, constituting a low bar to admit social media evidence. Glover, 363 P.3d at 739. Social media evidence can be authenticated in numerous ways. Glover, 363 P.3d at 740. In some circumstances, social media evidence can be self-authenticating. CRE 902; Glover, 363 P.3d at 740 (extrinsic evidence not required for authenticity of Facebook business record "if the record is accompanied by an affidavit of its custodian or other qualified person certifying the record", i.e., a custodian of Facebook.) Otherwise, printouts containing information from social networking websites can be authenticated by factors including "how the records were obtained, the substance of the records themselves, and affidavits or testimony from employees of the social networking site." Glover, 363 P.3d at 741.

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

Colorado employees are protected by State and Federal Statutes which prohibit employers from compelling access to their private social media. For example, the Federal Stored Communications Act prohibits unauthorized or "coerced" access to personal sites, even when the access is found on employer-owed devices. Colorado Statutes also prohibit employers from suggesting, requesting or requiring an employee or applicant to disclose usernames, passwords or other access to their social media accounts or electronic devices. C.R.S. § 8-2-127. The statute also prohibits employers from requiring its employees to provide their contact or "friend" lists or to add the employer to their contact lists. Id.

While employers are not allowed to "intercept" employee usernames and passwords, we are aware of no laws which prohibit an employer from monitoring employee activity on social networking sites while at work. In fact, employers regularly enforce social media and internet policies in the workplace and monitor or hire third-party companies to monitor online employee internet activity to protect employer interests.

The National Labor Relations Board (NLRB) has issued a number of rulings involving questions about the legality of employer social media policies. Although the NLRB has indicated that these cases are extremely fact-specific, it has provided the following general guidance:

- Employer policies should not be so sweeping that they prohibit the kinds of activity protected by

federal labor law, such as the discussion of wages or working conditions among employees;

- An employee's comments on social media are generally not protected if they are mere gripes and are not made in relation to group activity among employees.

Thus, it appears that as long as the company policies are enforced for a legitimate purpose such as ensuring that employees don't leak sensitive information on social networks or engage in behavior that could damage a company's reputation, social media monitoring policies are accepted. Social media policies may not prohibit the rights of employees to act together to address work-related conditions.

The United States District Court, District of Colorado has also held that employers' social media accounts can constitute trade secrets and that an ex-employee's continued use, access or theft of them can constitute misappropriation. See Christou v. Beatport, LLC, 2011 U.S. Dist. LEXIS 19055 (D. Colo. Feb. 10, 2011).

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

The Colorado Lawful Activities Act, prohibits termination of employees who "engage in activities that are personally distasteful to their employer, but which activities are legal and unrelated to an employee's job duties." See, C.R.S. § 24-34-402.5. However, Colorado courts have also held that the Colorado Lawful Activities Act imposes a duty of loyalty on employees that limits their right to make negative public comments about the employer. See, Patterson-Eachus v. United Airlines, Inc., Civil Action No. 19-cv-01375-MEH, 2020 U.S. Dist. LEXIS 231865 (D. Colo. Dec. 9, 2020); Marsh v. Delta Airlines, 52 F. Supp. 1458; 1997 U.S. Dist. LEXIS 1438 (D. Colo. 1997). Therefore, work-related posts that are publicly posted on blogs, social media sites and websites may not be protected.

Although we are aware of no published Colorado decision applying the tort in a social media context, an employee may also have a cause of action for invasion of privacy with respect to social media postings. In such cases, the employee would be required to show a reasonable expectation of privacy in their postings, which we believe would vary depending upon the level of "privacy" offered by the particular website.