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SPOLIATION

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

The District of Columbia recognizes the spoliation doctrine in two sub-categories: the deliberate destruction of evidence, and the simple failure to preserve evidence. Battocchi v. Washington Hosp. Center, 581 A.2d 759 (D.C. 1990). The former is intentional spoliation of evidence, and the latter is negligent or reckless spoliation of evidence. Although the District of Columbia recognizes both sub-categories, in Battocchi, the D.C. Court of Appeals articulated that where destruction of the evidence is not intentional or deliberate, there is not strictly "spoliation" of evidence but rather a "failure to preserve evidence." Id. at 765–67. When a party has failed to preserve evidence, the trial court "'has discretion to withhold the issue from the jury after considering factors such as the degree of negligence or bad faith involved, the importance of the evidence lost to the issues at hand, and the availability of other proof enabling the party deprived of the evidence to make the same point.'" Freeman v. District of Columbia, 60 A.3d 1131, 1148 (D.C. 2012) (quoting Battocchi, 581 A.2d at 766–67).

The elements of negligent or reckless spoliation are: "(1) existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to that action; (3) destruction of that evidence by the duty-bound defendant; (4) significant impairment in the ability to prove the potential civil action; (5) a proximate relationship between the impairment of the underlying suit and the unavailability of the destroyed evidence; (6) a significant possibility of success of the potential civil action if the evidence were available; and (7) damages adjusted for the estimated likelihood of success in the potential civil action." Holmes v. Amerex Rent-A-Car, 710 A.2d 846, 854 (D.C. 1998).

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

First-party spoliation "refers to the spoliation of evidence by a party to the principal litigation". Cook v. Children's Nat. Medical Center, 810 F.Supp.2d 151, n.3 (D.D.C. 2011). A first-party spoliator "is a party to the underlying action who has destroyed or suppressed evidence relevant to the plaintiff's claims against [that] party." Id. (citing Mendez v. Hovensa, LLC, 2008 WL 803115, at *7 (D.Vi. Mar. 24, 2008)). In contrast, third-party spoliation "refers to spoliation by a non-party". Id. A third-party spoliator is alleged to have destroyed evidence relevant to the plaintiff's claims against another, but the third-party is "not alleged to have committed the underlying tort as to which the lost or destroyed evidence related." Id. (internal quotation and citation omitted).

In the District of Columbia, there is no general common law duty to preserve evidence in a third-party spoliation situation. "Absent some special relationship or duty rising by reason of an agreement, contract, statute, or other special

circumstance", the general rule is that there is no duty to preserve possible evidence for another party to pursue a future legal action against a third party. Holmes, 710 A.2d at 849 (citing Koplin v. Rosel Well Perforators, 241 Kan. 206, 208 (Kan. 1987)). For a plaintiff to succeed on a claim of negligent spoliation, the plaintiff must establish the existence of such a "special relationship", that a duty is created to preserve the evidence for use in future litigation. Holmes, 710 A.2d at 849.

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

The District of Columbia Court of Appeals has held that negligent or reckless spoliation of evidence is an independent and actionable tort, which allows a plaintiff to recover against a defendant who has negligently or recklessly destroyed, or allowed to be destroyed evidence that would have assisted the plaintiff in pursuing a claim against a third party. Holmes, 710 A.2d at 849 (stating that the court is "willing to provide independent legal protection against negligent or reckless spoliation of evidence").

4. Remedies when spoliation occurs:

- Negative inference instruction

In Battocchi, the D.C. Court of Appeals stated that where the spoliation was not intentional or reckless, the trial court is accorded discretion in determining whether to provide an adverse inference instruction, and the appellate court will not disturb its decision absent an abuse of that discretion. 581 A.2d at 767. By contrast, "upon a finding of gross indifference to or reckless disregard for the relevance of the evidence to a possible claim, the trial court must submit the issue of lost evidence to the trier of fact with corresponding instructions allowing an adverse inference." Id.

- Dismissal

The sanction of dismissal should be granted only upon a showing of severe circumstances. The D.C. Court of Appeals has upheld orders of dismissal only when there was a disregard of discovery rules, and a flagrant disregard of court orders pertaining to discovery. See Koonce v. District of Columbia, 111 A.3d 1009 (D.C. 2015) (affirming the decision by the trial court to not dismiss driving under the influence charges brought by the government, as the government, which received the defendant's discovery request for video evidence, did not demonstrate bad faith, or a "willful refusal" to preserve that evidence). Although a court is not required to state its reasons for dismissing an action instead of a lesser sanction for failing to comply with discovery processes, the trial court must indicate that other sanctions were considered before ordering dismissal. Braxton v. Howard University, 472 A.2d 1363, 1366 (D.C. 1984). Thus, dismissal is a permissible sanction for spoliation of evidence provided that the trial court has "evaluate[d] the prejudice to the moving party" for failing to obtain the requested materials, and has also "consider[ed] alternative, less harmful sanctions than dismissal, which is the most draconian sanction that may be imposed." Synanon Foundation, Inc. v. Bernstein, 503 A.2d 1254, 1265–66 (D.C. 1986) (internal quotations and citation omitted).

- Criminal sanctions

There is no case or statutory law suggesting that criminal sanctions are available for spoliation of evidence in the District of Columbia.

- Other sanctions

The District of Columbia Court of Appeals has made clear that "[a]bsent an abuse of discretion, the decision of what sanctions, if any, to impose [for loss of evidence] is committed to the trial court". Cotton v. United States, 388 A.2d 865, 869 (D.C. 1978). When the failure to preserve evidence is merely negligent, "nothing in the decisions of this jurisdiction requires that sanctions be automatically imposed." Id. at 870. See also Gibson v. United States, 536 A.2d 78, 84 (D.C. 1987); Bartley v. United States, 530 A.2d 692, 697 (D.C. 1987);

and Wiggins v. United States, 521 A.2d 1146, 1148 (D.C. 1987).

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

For purposes of electronic evidence, the District of Columbia Court of Appeals determined in its D'Onofrio opinion that when email and other electronically stored information was not produced in response to a valid discovery request, the party suspected of spoliation was obliged to permit the opposing expert to conduct a diligent search of all potential repositories of electronically stored information that was likely to yield responsive information to the discovering party's demands. 254 F.R.D. 129, 132 (D.C. 2008).

In Philip Morris, the United States District Court for the District of Columbia found that emails had been destroyed on a monthly, system-wide basis for a period of two years after an order had issued regarding the preservation of documents and records potentially relevant to the litigation. 327 F.Supp.2d 21, 25 (D.D.C. 2004). As a sanction, the court excluded expert testimony and fact witness testimony from anyone who had failed to comply with the document retention program instituted at Philip Morris. Id. at 26. The court concluded that it was impossible to fashion a proportional evidentiary sanction that would accurately target the discovery violation (because the contents of the destroyed emails were unknown), and imposed a monetary sanction of $250,000 upon each of the eleven Philip Morris corporate managers who failed to comply with Phillip Morris' print and retain policy; and an additional sanction of $5,000 was issued for the costs associated with a deposition on the topic of email destruction issues. Id. at 26.

The D'Onofrio and Philip Morris opinions illustrate that there is a general duty to preserve electronic information that might be relevant to litigation.

6. Retention of surveillance video.

In a 2015 opinion, the District of Columbia Court of Appeals criticized the government's failure to follow the Metropolitan Police Department's own policy of preserving surveillance video evidence until the investigation folder was disposed of, or if no criminal proceedings are initiated from an incident, "the material shall be preserved for a period of three years from the date such material was first obtained." Koonce, 111 A.3d at 1018 (additional quotations omitted). This criticism was issued in the context of a driving under the influence case in which the defendant requested the judge to submit a spoliation instruction to the jury, as the government did not respond to defendant's request to preserve video of the traffic stop that may have been depicted from the police station's surveillance video system, even though that preservation request was submitted after the 30 day period during which the video would have recorded over itself as part of the government's "practice of recording over the video every thirty days." Id. at 1016. "[A] reasonable amount of time has to be allowed for the defense to make a discovery request, and for the government to respond to those requests." Id. at 1018.

Ultimately, in Koonce, the D.C. Court of Appeals affirmed the trial court's decision to not submit a spoliation instruction to the jury, as the government did not demonstrate a "willful act" to deny the requested video evidence. 111 A.3d at 1020. The opinion also only specifically addressed video evidence in the possession of a government entity as opposed to video evidence in the possession of a private business. However, the opinion makes clear that D.C. courts take seriously that when a party receives a prompt request for preservation of surveillance video, that party should have in place procedures to preserve such evidence. Id. at 1015–18. Otherwise, the party receiving a discovery request for surveillance video may be at risk of being subject to the negative inference associated with a spoliation jury instruction.

In Myers v. United States, the District of Columbia Court of Appeals held that a digital video recording of an assault on a Washington Metropolitan Area Transit Authority (WMATA) bus, which led to criminal assault charges, was not required to have been preserved and submitted into evidence by the WMATA. 15 A.3d 688

(D.C. 2011). Because the video was not in the possession of an investigative agency, WMATA had no discovery obligation to preserve and disclose the video, as the WMATA police were never involved in the investigation of the crime, and local police and the United States Attorney's Office handled the investigation and prosecution of the case.

In Myers, the defendant filed a motion to compel the government to produce any video or audio recording that might have been made on the bus during the incident. When the prosecutor informed the court at the beginning of the trial that there was a digital video recorder on the bus, but that the video was erased after eighty (80) hours pursuant to established WMATA policy, defense counsel moved for the case to be dismissed. 15 A.3d at 689.

Defense counsel argued that the government violated Rule 16 of the D.C. Superior Court Rules of Criminal Procedure by failing to preserve the video which was made on the bus during the incident. Rule 16 requires the government, when requested, "to permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control". (Emphasis added). The trial court ultimately denied the motion, and found that while the recording was material to defendant's defense, the recording was not in the government's possession, and therefore the recording's production was not required pursuant to Rule 16. Id. at 690. In other words even though the government did not dispute that the video recording was material to the defendant's defense, the video was never within the government's possession, and did not violate the District of Columbia discovery rules.

Similarly, in Mazloum v. District of Columbia Metropolitan Police Dept., the United States District Court for the District of Columbia held that a nightclub did not have a duty to preserve a surveillance video of an altercation between a nightclub patron and off-duty police officers because the nightclub owner was not capable of destroying a tape that was not under his control, and the plaintiff failed to prove the requisite causal connection to establish the spoliation claim. 522 F.Supp.2d 24 (D.D.C. 2007).

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?

The collateral source rule is well established in the District of Columbia, and provides that "payments to the injured party from a collateral source are not allowed to diminish damages recoverable from the tortfeasor." Godfrey v. Iverson, 503 F.Supp.2d 363 (D.D.C. 2007) (citing Hardi v .Mezzanotte, 818 A.2d 974, 984 (D.C. 2003)). A plaintiff is entitled to recover all of their medical costs, regardless of any amounts written off by plaintiff's medical care providers. Calva-Cerqueira v. United States, 281 F.Supp.2d 279 (2003).

The District of Columbia Court of Appeals has asserted that "[a]s a general proposition, the collateral source rule provides 'that when a tort plaintiff's items of damage are reimbursed by a third-party who is independent of the wrongdoer, the plaintiff may still seek full compensation from the tortfeasor even though the effect may be a double recovery.'" Caglioti v. District Hosp. Partners, LP, 933 A.2d 800, 815 (D.C. 2007) (quoting Jacobs v. H.L. Rust Co., 353 A.2d 6, 7 (D.C. 1976)). In support of the collateral source rule, the court noted that in the context of a medical malpractice matter, if a plaintiff is not allowed to pursue his or her full compensation regardless of whether any expenses were reimbursed by a third party, "it is the medical providers who could potentially be the recipients of any windfall as they could evade liability and not have to pay any amount, even if they were negligent as alleged." Caglioti, 933 A.2d at 815.

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?

"The receipt of payment from a collateral source may not be injected into a trial to mitigate damages." Jacobs v. H.L. Rust Co., 353 A.2d 6, 7 (D.C. 1976) (internal citations omitted). However, medical expenses paid for by Medicaid are not considered a collateral source when the wrongdoer is the District of Columbia. Rice v. District of Columbia, 774 F.Supp.2d 25 (D.D.C. 2011). As a result, medical bills paid by Medicaid will be inadmissible against the District or its employees. Id. (holding that an arrestee who was shot by arresting officers brought a tort and civil rights action against the District, but could not invoke the collateral source doctrine to recover his medical expenses that were paid by Medicaid because Medicaid is not wholly independent of the District).

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).**

Defendants cannot reduce the amount a plaintiff claims in medical expenses by the amount that was actually paid by an insurer, i.e. a collateral source. Mezzanotte, 818 A.2d at 984. This rule applies when the source of the benefit is independent of the tortfeasor or when the plaintiff contracted for the possibility of double recovery. Calva-Cerqueira, 281 F.Supp.2d at 295. Because collateral source evidence will not be admissible at trial or in post-verdict proceedings, so long as the collateral source is independent to the tortfeasor, defendants are unlikely to reduce the amount of damages claimed by plaintiffs during settlement negotiations based on collateral source evidence.

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 District of Columbia Superior Court Rules closely track the Federal Rules, including Superior Court Rule 26(b)(3) regarding attorney work product. Under Rule 26(b)(3), a party may obtain documents prepared by the opposition in anticipation of litigation, or for trial, but only upon showing a substantial need of the materials, when the party cannot obtain the substantial equivalent of the requested materials without undue hardship. D.C. Super. Ct. Civ. R. 26. Federal courts in the District of Columbia have suggested that an incident report would not be protected as work product, as described below.

To determine whether an accident or incident report qualifies under the business record exception to the hearsay rule, two inquiries must be made: (1) whether the record itself falls under the exception, and (2) whether any statement within that record is hearsay which is not covered by a hearsay exception. Evans-Reid v. District of Columbia, 930 A.2d 930 (D.C. 2007). Within this framework, police reports created by the internal affairs division ("IAD reports") are usually not admissible under the business records exception because they contain hearsay in the form of statements from interviewees and conversations between other people that were reported by the interviewees. Id. at 944 ("a police report of [an] accident is not to be admitted [under the business record exception to the hearsay rule] if it contains hearsay or conjecture or conclusions"). Because of the multiple levels of hearsay that are often contained within these reports, the business records exception alone does not make an accident report or incident report admissible.

If an incident report does not contain inadmissible hearsay, the report will generally be admissible under the business records exception unless the party in possession of the report can demonstrate that the report was prepared in anticipation of litigation. See Brooks v. District of Columbia, 999 A.2d 134, 143 (2010). In Brooks, the plaintiff requested during discovery any incident reports regarding the allegations complained of, and the District of Columbia Housing Authority ("DCHA") responded that they were not aware of any of the requested

reports. Id. After trial, plaintiff obtained the requested reports through a Freedom of Information Act request, and following an in-camera review of the requested reports, the Superior Court found that the reports were not privileged "because DCHA failed to demonstrate that the documents were prepared in anticipation of litigation." Brooks, 999 A.2d at 143. Ultimately, because DCHA failed to assert privilege at the outset of plaintiff's discovery request, the court remanded the case for a determination of whether the newly discovered evidence would have changed the verdict. Id. at 147.

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?

D.C. courts allow parties to issue interrogatories, subpoenas, and requests for admissions when attempting to obtain social media evidence. Super. Ct. Civ. R. 34; Super. Ct. Civ. R. 45; and Super Ct. Civ. R. 36.

An example of a discovery request for information concerning another party's social media activity is as follows:

> Identify each social media website or service with which you have an account, including but not limited to Facebook, Instagram, Twitter, Reddit, TikTok, MySpace, YouTube, and/or Vine, identify the username of each account, and provide the login information for each account, the date each account was first used, and identify any modifications or deletions to any posts, videos, photographs, or other submissions made since the occurrence.

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.

D.C. courts have still not expressly addressed discovery issues that arise from discovery requests for information on social media. Nevertheless, the general discovery rules that apply to all requests for the production of documents, tangible things, electronic information and otherwise still apply to a party's discovery requests for social media evidence. For example, the District of Columbia discovery rules only permit the discovery of relevant evidence. Superior Court Rule of Civil Procedure 26(b)(1).

If a party believes that a discovery request infringes on his or her privacy, D.C. law provides a tool for that party to limit the subject discovery request by requesting the Court to issue a Protective Order. Superior Court Rule of Civil Procedure 26(c), governing protective orders states in order for a party to move for a protective order, the moving party "must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including:

> "(A) forbidding the disclosure or discovery; … (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; … (F) requiring that a deposition be sealed and opened only by court order; … and (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs."

Superior Court Rule of Civil Procedure 26(c). While the rule does not specifically reference social media activity, a party who does not wish to disclose certain social media evidence has recourse through a protective order, if that party can articulate good cause to the Court.

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

D.C. courts are yet to issue a court opinion on the application of spoliation standards within the context of discovery requests for social media evidence. However, D.C. recognizes an independent cause of action for spoliation, and parties generally have a duty to preserve evidence. See Holmes, 710 A.2d at 848; and Williams v. Washington Hosp. Ctr., 601 A.2d 28, 31 (D.C. 1991). Recognizing spoliation as an independent cause of action allows a party to hold third parties liable for spoliation when the third party has a "special relationship" with the party that creates a duty to preserve evidence for use in future litigation. Holmes, 710 A.2d at 849–50. An independent cause of action for spoliation concerning social media evidence could arguably apply when an adverse party deletes social media evidence that is material to a given lawsuit or claim.

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).

D.C. courts do not require the same authentication procedures as those used in many other jurisdictions, including the Federal Rules of Evidence. Instead, D.C. courts require a "reasonable possibility" that a document is what it purports to be as a condition precedent to admissibility. Stewart v. United States, 881 A.2d 1100, 1111 (D.C. 2005). However, the District of Columbia Court of Appeals has not issued case law that clearly identifies any authenticity requirements that are specific to social media evidence. As a result, the same "reasonable possibility" standard appears to apply to a party's attempt to offer social media activity into evidence at trial.

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

Recently, more than 20 states adopted legislation that precluded employers from taking disciplinary action against employees who refuse to provide their username and password for a social media account, when requested by their employer. However, there are no federal laws that prohibit an employer from demanding this information.

Furthermore, D.C. employers are not expressly precluded from monitoring an employee's social media activity, especially if certain activity is brought to the attention to the employer as being a poor representation of the employer and/or job. When an employee accesses their social media accounts when using an employer-provided computer or telephone, an employer obviously has greater access to the employee's social media accounts, and an increased capability to monitor same.

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

To date, District of Columbia courts have not identified existence of any limitations to employment terminations that occur as a consequence of an employee's social media activity. However, the United States District Court for the District of Columbia has recognized that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Jangjoo v. Broadcasting Board of Governors, 244 F.Supp.3d 160, 173, n.6 (D.D.C. 2017) (quoting Garcetti v. Ceballos, 547 U.S. 410, 421 (2006)).

In Jangjoo, one plaintiff filed a retaliation action against a former employer for reducing the plaintiff's workload in response to plaintiff signing a "Change.org" petition demanding that the employer reinstate another employee who was previously replaced. 244 F.Supp.3d at 163. When the plaintiff complained to the employer about the reduced workload, which resulted in reduced pay, the employer rebuffed her complaints, and she was ultimately terminated from her position. Id. at 164–66. The signing of a "Change.org" petition is a form of online speech that is analogous to speech made over social media. The court stated that for a

public employee to move forward with a First Amendment retaliation claim, "the employee must demonstrate at the outset that the statements that allegedly prompted the retaliation were made in the employee's capacity as a private citizen, and that the speech touched on a matter of 'public concern'". Id. at 172.

Of course, employees who work for private employers do not receive the same First Amendment protections regarding their social media use that employees in the public sector receive. Those private employees typically can only seek recourse against the employer for wrongful termination if that termination breached the employer's contract with the employee, or otherwise discriminated or retaliated against the employee due to the employee belonging to a protected class. But typically private employees can be terminated for social media activity.

It is worth noting that employees who work in policymaking decisions are subject to dismissal based upon their political affiliation, which indicates that a policymaking public employee's social media activity on political issues can justifiably result in the employee's dismissal. See Elrod v. Burns, 427 U.S. 347 (1976).