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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.

To establish spoliation under Florida law, a party must first establish to the satisfaction of the trial court that the absence of certain documents or materials hinders his ability to establish a prima facie case. *Pub. Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 599 (Fla. 1987). If the court finds that the destruction of certain evidence hinders the ability of a party to establish his prima facie case, the court is authorized to impose sanctions against his/her opponent to remedy the destruction of the evidence. See *Valcin*, 507 So. 2d at 599; *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 346-47 (Fla. 1995). The damage that flows from such a breach is the resulting inability to prove a cause of action. *Id*. Negligent spoliation of evidence is a tort claim based on a defendant's breach of a duty to preserve evidence. *Humana Worker's Comp. Servs. v. Home Emergency Servs., Inc.*, 842 So. 2d 778, 781 (Fla. 2003)(underline added). If a non-party to the injury or loss event knowingly or negligently destroys evidence, that non-party may be liable for the losses that could have been proved by the party suffering the loss on the basis of spoliation of evidence. Larry R. Lelby, § 16:22.Spoliation of evidence, 8 Fla. Prac., Constr. Law Manual § 16:22 (2020-2021 ed.)

The essential elements of a claim for spoliation are: (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve the evidence which is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages. *Greenleaf v. E.I. Dupont De Nemours and Co.*, 341 F.3d 1292, 1308 (11th Cir. 2003)(citing *Continental Ins. Co. v. Herman*, 576 So.2d 313, 315 (Fla. 3d DCA 1990); *see also Gayer v. Fine Line Constr. & Electric, Inc.*, 970 So.2d 424, 426 (Fla. 4th DCA 2007); *Royal & Sunalliance v. Lauderdale Marine Ctr.*, 877 So.2d 843, 845 (Fla. 4th DCA 2004); *Hagopian v. Publix Supermarkets, Inc.*, 786 So.2d 1088, 1091 (Fla. 4th DCA 2001).

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

Third Party Spoliation:

Florida recognizes a third party cause of action for negligent spoliation. *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342 (Fla. 2005). See also *Valcin v. Public Health Trust*, 507 So.2d 596 (Fla. 1987). *Martino* remains authoritative in Florida. In *James v. U.S. Airways, Inc.*, 375 F. Supp. 2nd 1352 (USDC, M.D. Fla. 2005) the Federal District Court held, applying Florida law, that a first party claim for intentional spoliation of evidence did not exist under Florida law. In so holding the Court relied upon *Silhan v. Allstate Ins. Co.*, 236 F. Supp. 2nd 1303, (N.D. Fla.

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2005).

It should be noted that the *Silhan* opinion that was relied upon by the Middle District for the proposition that Florida does not recognize the tort of intentional third party bad faith actually states "although a cause of action for intentional spoliation has been recognized by Florida Courts no Florida Court has defined its elements in a case". *Silhan* at 1308. The *James* Court's holding notwithstanding the just quoted *Silhan* language and the fact that the Florida Supreme Court's *Martino* decision reaffirming intentional spoliation as a basis for sanctions in a first party case was decided after James the existence or non existence of an intentional third party spoliation tort remains uncertain in Florida.

First Party Spoliation:

First party spoliation occurs when the person or entity that lost, misplaced or destroyed evidence is a party to the cause of action to which the allegedly spoiled evidence was relevant. Third party spoliation occurs when evidence is spoiled by a third party that is not a party to the lawsuit to which the spoiled evidence is relevant. *See Martino, Valcin* and *Silhan*, supra. Florida does not recognize a cause of action for "first party" spoliation. *Martino*, supra. The *Martino* Court held that when the absence of evidence is due to a Defendant's negligence an adverse inference would arise against the spoiler in the first party context resulting in a rebuttable presumption that the Defendant was negligent in the underlying action. In so holding the Court reaffirmed its ruling in Public Health Trust of Dade County v. Valcin, 507 So.2d 596 (Fla. 1987) that when evidence is intentionally lost, misplaced or destroyed by one party in the first party context the trial courts should rely on the sanctions found in Fla.R.Civ. P. 1.380(b)(2) and the application of a rebuttable presumption of negligence against the intentional spoiler to deal with such improper conduct.

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

Florida recognizes independent causes of action for third-party spoliation claims. As previously noted, *Martino* left it clear that Florida does not allow separate, first party spoliation claims. Due to the nature of spoliation claims, the damage is the inability to use the evidence in the underlying proceedings. *Jimenez v. Community Asphalt Corp.*, 968 So.2d 668, 672 (Fla. 4th DCA 2007). Therefore, a spoliation claim may only be brought when the underlying claim is decided. *United Rentals v. Kimmis Const. Corp.*, 2008 U.S. Dist. LEXIS 105221 (M.D. Fla. 2001); *see also Lincoln Ins. Co. v. Home Emergency Servs., Inc.*, 812 So.2d 433, 435 (Fla. 3d DCA 2001). Otherwise, a party would not be able to show how it was damaged by the alleged lost evidence.

4. Remedies when spoliation occurs:

Prior to a court exercising any levelling mechanism due to spoliation of evidence, the court must answer three threshold questions: (1) whether the evidence existed at one time; (2) whether the spoliator had a duty to preserve the evidence; and (3) whether the evidence was critical to an opposing party being able to prove its prima facie case or a defense. *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777 (Fla. 4th DCA 2006). Florida courts may impose sanctions, including striking pleadings, against a party that intentionally lost, misplaced, or destroyed evidence, and a jury could infer under such circumstances that the evidence would have contained indications of liability. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 391 (Fla. 2015).

- Negative inference instruction

A negative inference instruction is a jury instruction on spoliation of evidence which raises a presumption against the spoliator. *Flury v. Daimler Chrysler Corp*., 427 F.3d 939, 945 (11th Cir. 2005). In order to have an adverse inference drawn from a party's failure to preserve evidence, the absence of the evidence must be predicated on bad faith. *Bashir v. AMTRAK*, 119 F.3d 929, 931 (11th Cir. 1997). Mere negligence in losing or destroying evidence is not enough for an adverse inference, as "it does not sustain an inference of consciousness of a weak case." *Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir.1975) (quoting

McCormick, Evidence § 273 at 660-61 (1972), 31A C.J.S. Evidence § 156(2) (1964)).

In cases involving negligent spoliation, courts are more likely to use negative inference jury instructions to address the lack of evidence, rather than striking pleadings or entering default judgments which are more likely in bad faith cases. *Martino v. Wal-Mart Stores, Inc*., 908 So. 2d 342, 346-7 (Fla. 2005). *See also St. Cyr v. Flying J Inc.*, 2007 U.S. Dist. LEXIS 42502 (M.D. Fla. 2007). There are three types of adverse inferences, ranging in differing and ever increasing levels of harshness. *Point Blank Solutions, Inc. v. Toyobo Am., Inc*., 2011 U.S. Dist. LEXIS 42239, 28 (S.D. Fla. 2011). One type results in a jury being instructed that certain facts are deemed admitted and must be accepted as true. *Id*. Another type results in the imposition of a mandatory, albeit rebuttable, presumption. *Id*. A third type permits a jury to presume that the lost evidence is relevant and favorable to the innocent party. *Id*. With this third type of adverse inference, the jury also considers the spoliating party's rebuttal evidence and then decides whether to draw an adverse inference. *Id*. The adverse inference instruction does not relieve a party from its burden of proof at trial. *Anesthesiology Critical Care & Pain Mgmt. Consultants, P.A. v. Kretze*r, 802 So. 2d 346, 351 (Fla. 4th DCA 2001).

- Dismissal

Dismissal is the most severe sanction that a federal court can impose. *Flury v. Daimler Chrysler Corp*., 427 F.3d 939, 944 (11th Cir. 2005). It is appropriate when a party demonstrates its inability to completely set forth its defense without having had the opportunity to examine and test lost evidence. *DeLong v. A-Top Air Conditioning Co*., 710 So.2d 706 (Fla. 3d DCA 1998). However, outright dismissal of a lawsuit is within the court's discretion. *St. Cyr v. Flying J Inc*., 2007 U.S. Dist. LEXIS 42502 (M.D. Fla. 2007). Dismissal is appropriate only where alternative lesser sanctions will not suffice or there is a showing of bad faith. *Flury*, 427 F.3d at 944 ; see also *Harrell v. Mayberry*, 754 So. 2d 742, 744 (Fla. 2d DCA 2000)) (dismissal is the ultimate sanction and should always be viewed as a remedy of last resort). Dismissal "represents, in effect, an infringement upon a party's right to trial by jury under the Seventh Amendment; it runs counter to a sound public policy of deciding cases on their merits; and finally it works against the goal of providing each party its fair day in court." *Telectron, Inc. v. Overhead Door Corp*., 116 F.R.D. 107, 129 (S.D. Fla. 1987) (citing *Wilson v. Volkswagen of Am*., 561 F.2d 494, 503-04 (4th Cir. 1977)).

- Criminal sanctions

Florida Statutes §918.13 prohibits the alteration, destruction, concealment or removal of physical evidence "knowing that a criminal trial or proceeding or an investigation by a duly constituted prosecuting authority, law enforcement agency, grand jury, or legislative committee of this State is pending or is about to be instituted." However, it appears there is no criminal penalty in Florida for tampering with evidence in a civil case.

- Other sanctions

Other sanctions include the exclusion of expert testimony. *Flury v. Daimler Chrysler Corp*., 427 F.3d 939, 943 (11th Cir. 2005); *Vanliner Ins. Co. v. ABF Freight Sys*., 2012 U.S. Dist. LEXIS 30676 (March 2012). See also *QBE Ins. Corp. v. Jorda Enters*., 280 F.R.D. 694, 696 (S.D. Fla. 2012)(where crucial evidence could not be examined by opposing party's experts due to spoliation, exclusion of spoliating party's expert testimony was appropriate) (citing from *Kraft Reinsurance Ir., Ltd. v. Pallets Acquisitions, LLC*, 843 F. Sup. 2d 1318, 1324-26, 2011 U.S. Dist. LEXIS 153241, (N.D. Ga. Dec. 5, 2011).

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

- Spoliation of electronic evidence

Florida has since addressed the issue of spoliation/failure to preserve "electronically stored information" to

reach consistency with Federal Rule of Civil Procedure 37(e). 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 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 the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

Fla. R. Civ. P. 1.380(e).

- Duty to preserve electronic information

As noted by one scholar, the aforementioned *Detzner* case clarified the premise that if litigation can be "reasonably anticipated", a duty to preserve evidence exists. *See* Ralph Artigliere et. al*.,* League of Women Voters of Fla. v. Detzner: The Florida Supreme Court's Hidden Pre-Litigation E-Discovery Preservation Mandate, Fla. B.J., November 2016, at 8, 14. The Florida Supreme Court effectively extended the duty to preserve evidence beyond affirmative prescriptions for litigants. This point has since been supported in the courts. *See e.g. Adamsonv. R.J. Reynolds Tobacco Co.*, No. 4D19-3242, 2021 WL 3073670, at *1 (Fla. 4th DCA July 21, 2021). However, this extended duty does not apply to third-parties. *See Shamrock-Shamrock, Inc. v. Remark*, 271 So. 3d 1200 (Fla. 5th DCA 2019). As such, if a litigant believes a non-party may be in possession of electronically-stored information he/she needs, it is prudent to put this non-party on notice.

6. Retention of surveillance video.

In *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342 (Fla. 2005) the Florida Supreme Court affirmed the lower Court's decision to allow the Plaintiff's allegation that Wal-Mart negligently maintained surveillance films of the Plaintiff's accident to be presented to the jury in the first party context so the jury could give proper consideration of the "adverse inferences which may arise when a party fails to produce pertinent evidence within its control". In *Martino*, the Plaintiff alleged that she specifically asked the Wal-Mart store to maintain the video surveillance of her fall. However, in *Osmulski v. Oldsmar Fine Wine, Inc*., 2012 WL 2470126 (Fla. 2d DCA 2012) the Court held that the store where the Plaintiff fell had no duty to preserve video surveillance recordings because the injured patron never asked the store to preserve the recordings and the store did not otherwise have a duty to preserve video surveillance which was automatically deleted every 60 days. When "the video recordings were discarded or taped over no lawsuit had been filed, no demand for preservation of the evidence had been made" and even though the store manager was aware that Osmulski had made a claim with the insurance carrier he had been told that Osmulski was only seeking payment for her medical expenses. Because the Defendant store did not have a duty to preserve the video recordings even under a "reasonably foreseeable standard" the Plaintiff was not entitled to a rebuttable presumption of negligence jury instruction.

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, a plaintiff can submit to the jury his/her gross medical expenses rather than the lesser amount paid on his/her behalf by an insurance carrier. An exception exists when plaintiff did not incur "[an] expense, obligation, or liability" to obtain the insurance coverage. The collateral source rule functions as a rule of damages and a rule of evidence. *Gormley v. GTE Prods. Corp*., 587 So.2d 455, 457 (Fla. 1991).

Florida Statute section 768.76 governs the damages function of the collateral source rule. Fla. Stat. § 768.76 (2006), In its evidentiary function, the collateral source rule prohibits the admission of evidence which may mislead the jury as to a defendant's liability. *Gormley*, 587 So. 2d 455 at 457-58;(holding upon proper objection, the collateral source rule is invoked to prohibit the introduction of evidence). In *Nationwide Mut. Fire Ins. Co. v. Harrell*, the First District affirmed the trial court's determination that appellee, Harrell (a personal injury plaintiff), was permitted to introduce evidence of the gross amount of her medical bills, and not the amount her health insurance provider paid in settlement. 53 So.3d 1084, 1087 (Fla. 1st DCA 2010).The court held that it was not reversible error to permit such evidence under these facts. *Id*. at 1085-86. The Court rejected the appellee's argument that plaintiff would receive a windfall because plaintiff had paid the insurance premiums. *Id*. at 1087.

It is a well-settled rule of damages, that the defendant should not be indemnified by proceeds to which it did not contribute. *Joerg v. State Farm Mut. Auto Ins. Co.*, 176 So. 3d 1247, 1256 (Fla. 2015). From an evidentiary perspective, there is no exception to the collateral source rule allowing for the introduction of social legislation benefits. *Id.* The *Joerg* case prevented the admission of the injured plaintiff's eligibility for future social benefits. Similarly in *Benton v. CSX Transp., Inc.*, the Fourth District reversed and remanded the trial court with instructions to exclude the introduction of collateral source evidence in new trial due to its prejudicial effect. 898 So.2d 243, 245 (Fla. 4th DCA 2005). The plaintiff who was injured in a train accident was questioned as to the benefits he received from the railroad defendants during trial. *Id*. The court noted the potential prejudicial effect in that during deliberations, the jury specifically asked about the plaintiff's receipt of railroad benefits. *Id*. The jury's award, though in favor of the plaintiff, found no negligence against those railroad defendants. *Id*.

"W]hile payments from an insurance company are setoff from a verdict, Medicare benefits are not setoff and are not considered a collateral source." *Gulfstream Park Racing Ass'n, Inc. v. Volin*, No. 4D19-3471, 2021 WL 1997278, at *2 (Fla. 4th DCA May 19, 2021). As stated by the Fourth District Court of Appeal, "[t]he gross amount the provider billed is inadmissible as evidence when Medicare satisfies the plaintiff's medical expenses for a lesser amount." *Id*., at *3. The *Volin* court certified a question of great public importance for the Florida Supreme Court:

> DOES THE HOLDING IN *JOERG V. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.*, 176 SO. 3D 1247 (FLA. 2015), PROHIBITING THE INTRODUCTION OF EVIDENCE OF MEDICARE BENEFITS IN A PERSONAL INJURY CASE FOR PURPOSES OF A JURY'S CONSIDERATION OF FUTURE MEDICAL EXPENSES ALSO APPLY TO PAST MEDICAL EXPENSES?

Id. This question had already been certified as a matter of great public importance in the Second District Court of Appeal. *Dial v. Calusa Palms Master Ass'n, Inc.*, 308 So. 3d 690 (Fla. 2d DCA 2020). Hence, the permissibility as evidence in considering Medicare benefits for incurred medical expenses is likely to be reviewed.

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?**

Evidence of benefits to the plaintiff is not admissible during a liability trial but must be set-off during a post-trial hearing. In *Goble v. Frohman*, the Florida Supreme Court held that collateral sources must be set-off

against an award of compensatory damages following trial, unless a right of reimbursement or subrogation exists. 901 So.2d 830, 833 (Fla.2005)(citing Fla. Stat. § 768.76(1)(2006)). The defendant is entitled to a set-off of "payments made to the claimant, or made on the claimant's behalf." *Id*. However, there is no requirement that evidence of a collateral source be admitted into evidence at the liability trial. *Gormley*, 587 So.2d 455 at 459. In *Scott*, Allstate appealed the trial court's refusal to allow a set-off for PIP benefits paid to the claimant. *Allstate Insurance Co. v. Scott*, 773 So.2d 1290, 1291 (Fla. 5th DCA 2001).The Fifth District held that denial of the affirmative defense of collateral source because of defendant's failure to submit evidence during trial was reversible error. Id.(citing Fla. Stat. § 768.76(1)(2006). The court noted that Allstate was not required to submit evidence of paid benefits during the trial, but was entitled to a posttrial hearing. Id. at 1291.

In Personal Injury Protection (PIP) cases, the collateral source rule differs from tort and contract law because it must be pled as an affirmative defense. Florida Statute section 627.736(3) governs the collateral source rule in personal injury causes. Fla. Stat. § 627.736(3)(2006). The Florida Supreme Court noted that Florida Statute section 768.71(3) provides that any conflicting statute governs over section 768.76.*Caruso v. Baumle*, 880 So. 2d 540, 544 (Fla. 2004).Therefore, in lawsuits concerning motor vehicle accidents, section 627.736(3), not section 768.76(1), applies. *Id*. Applying section 627.736(3),the Florida Supreme Court held that evidence of PIP benefits must be presented to the trier of fact for purposes of a set-off defense. *Caruso*, 880 So.2d at 543. The judge is required to instruct the jury during jury instructions that the plaintiff cannot recover any special damages for which PIP benefits can be paid or are payable. *Id*. at 545.Florida Statute section 627.7372 governed the collateral source rule for motor vehicle liability cases prior to 2003. Fla. Stat. §627.7372 (repealed 1993).Section 627.7372 was similar to section 627.736(3)(1) as it requires collateral source evidence to be presented to the jury during trial. *Kirkland v. Allstate Ins. Co.*, 655 So. 2d 106, 109 (Fla. 1st DCA 1995). Since section 627.7372 was repealed, motor vehicle liability cases now fall under section 768.76(1)(2006).

As noted above, Medicare benefits are treated differently. "[W]hile payments from an insurance company are setoff from a verdict, Medicare benefits are not setoff and are not considered a collateral source." *Gulfstream Park Racing Ass'n, Inc. v. Volin*, No. 4D19-3471, 2021 WL 1997278, at *2 (Fla. 4th DCA May 19, 2021). As stated by the Fourth District Court of Appeal, "[t]he gross amount the provider billed is inadmissible as evidence when Medicare satisfies the plaintiff's medical expenses for a lesser amount." *Id.*, at *3. This is likely to be reviewed in upcoming Florida Supreme Court sessions.

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).**

As a damages rule, "[t]he collateral source rule permits an injured party to recover full compensatory damages from a tortfeasor irrespective of the payment of any element of those damages by" an independent source. *Gulfstream Park Racing Ass'n, Inc. v. Volin*, No. 4D19-3471, 2021 WL 1997278, at *2 (Fla. 4th DCA May 19, 2021). But A trial court cannot setoff the difference between the amount billed and the amount Medicare paid. *Id.*, at *3.

Note that evidence which may otherwise mislead the jury as to a defendant's liability is inadmissible. Upon proper objection, any evidence of payments from collateral sources is inadmissible. *Nationwide Mut. Fire Ins. Co. v. Harrell*, 53 So. 3d 1084, 1086 (Fla. 1st DCA 2010). "[D]iscounts" negotiated by a plaintiff's private health insurer with health-care providers constitute a collateral source which must be set off against an award of compensatory damages following trial pursuant to section 768.76(1), Florida Statutes, unless a right of reimbursement or subrogation exists. *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?

The work-product privilege protects documents and papers of an attorney or a party prepared in anticipation of litigation. Incident reports, internal investigative reports, and information gathered by employees to be used to defend against potential litigation are generally protected by the work-product privilege. *Marshalls of M.A., Inc. v. Witter*, 186 So. 3d 570, 573 (Fla. 3d DCA. 2016). "A lawsuit need not be filed for information gathered in an accident investigation to qualify for work-product protection. *Id.* An often cited, early case regarding this protection is *Winn-Dixie Stores, Inc. v. Nakutis*, which stated:

> [R]eports certainly are not prepared because of some morbid curiosity about how people fall at the market. Experience has shown all retail stores that people who fall in their stores try to be compensated for their injuries. Experience has also shown those stores that bogus or frivolous or exaggerated claims might be made. A potential defendant's right to fully investigate and memorialize the results of the investigation should not be restricted any more than should a potential plaintiff's. Our system of advocacy and dispute settlement by trial mandates that each side should be able to use its sources of investigation without fear of having to disclose it all to its opponents. This allows for free discussion and communication during preparation for litigation. If all reports and other communications of the litigants were available to the opposition then those communications would certainly be stilted, unrevealing and thus self-defeating in their purpose.

435 So. 2d 307, 308 (Fla. 5th DCA 1986).

Note, when a party asserts the work-product privilege, Florida law requires that the trial court "hold an in-camera inspection of the discovery material at issue in order to rule on the applicability of the privilege." *See e.g. Snyder v. Value Rent–A–Car,* 736 So.2d 780, 782 (Fla. 4th DCA 1999).

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 is discoverable in *Florida. Root v. Balfour Beatty Constr. LLC.*, 132 So.2d 867 (Fla. 2d DCA 2014). When a plaintiff seeks intangible damages in a personal injury case, the fact-finder is required to examine the quality of the plaintiff's life before and after the accident to determining the extent of the loss. *Nucci v. Target Corp.,* 162 So. 3d 146, 152, (Fla. 4th DCA 2015); *see also Beswick v. NW Medical Center, Inc.*, No. 07-020592 CACE (03), 2011 WL 70005038 (Fla. 17th Cir. Ct. Nov. 3, 2011).

The primary means used in Florida to obtain this information is through discovery requests such as interrogatories and requests for production. Notably, efforts to obtain a plaintiff's electronic devices to access the social media sites directly on the device have been unsuccessful. *See Davenport v. State Farm Mut. Auto Ins. Co.*, 2012 U.S. Dist. LEXIS 20944 (M.D. Fla. February 21, 2012)("defendant does not have a generalized right to rummage at will through information that plaintiff has limited from public view").

Exemplar interrogatories and requests for production which have been successfully applied in Florida include:

> Interrogatory: Please identify any internet social media websites which Plaintiff has used and/or maintained an account in the last five (5) years. "Internet social media websites includes, but is not limited to, Facebook,

Twitter, Instagram, TikTok, Linkedin, XboxLive, Foursquare, Gowalla, MySpace, and Windows Live Spaces. If the Plaintiff has internet social media accounts, please provide his/her username and password, or, alternatively, under Florida Rules of Civil Procedure 1.340(c), please provide a copy of all non-privileged content/data shared on the account in the last five (5) years." See "Discovery of Facebook Content in Florida Cases," Trial Advocate Quarterly, Spring 2012.

Request for Production: "All photographs posted, uploaded, or otherwise added to any social networking sites or blogs, including but not limited to Facebook.com, Instgram.com, Myspace.com, Twitter.com, or any similar websites posted since the date of the accident alleged in the Complaint. This includes photographs posted by others in which [plaintiff] has been tagged or otherwise identified therein. *See Davenport*, 2012 U.S. Dist. LEXIS at 20944.

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.

Generally, the photographs posted on a social networking site are neither privileged nor protected by any right of privacy, regardless of any privacy settings that the user may have established. *Nucci v. Target Corp.,* 162 So. 3d 146, 153 (Fla. 4th DCA 2015). Indeed the Florida's 17th Circuit Court has stated that an argument of privacy for social media posts "lack[s] merit" because "information that an individual shares through social networking websites like Facebook may be copied and disseminated by another, rendering any expectation of privacy meaningless." *Beswick v. NW Medical Center, Inc.*, No. 07-020592 CACE (03), 2011 WL 70005038 (Fla. 17th Cir. Ct. Nov. 3, 2011) (citing *Romano v. Steelcase, Inc.,* 907 N.Y.S.2d 650 [N.Y. Sup. Ct. 2010][which states "to permit a party claiming very substantial damages. . .to hide behind self-set privacy controls on a web-site, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial."]).

In Florida, the Second District Court of Appeal has determined that normal discovery principles apply to social media, and that information sought to be discovered from social media must be "(1) relevant to the case's subject matter, and (2) admissible in court or reasonably calculated to lead to evidence that is admissible in court." *Root v. Balfour Beatty Construction, Inc.*,132 So.3d 867, 869-70 (Fla. 2nd DCA 2014).

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

There is no heightened or particularized standard for the spoliation of Social Media evidence. The essential elements of a claim for spoliation are: (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve the evidence which is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages. *Greenleaf v. E.I. Dupont De Nemours and Co.*, 341 F.3d 1292, 1308 (11th Cir. 2003)(citing *Continental Ins. Co. v. Herman*, 576 So.2d 313, 315 (Fla. 3d DCA 1990); see also *Gayer v. Fine Line Constr. & Electric, Inc*., 970 So.2d 424, 426 (Fla. 4th DCA 2007); *Royal & Sunalliance v. Lauderdale Marine Ctr.*, 877 So.2d 843, 845 (Fla. 4th DCA 2004); *Hagopian v. Publix Supermarkets*, Inc., 786 So.2d 1088, 1091 (Fla. 4th DCA 2001).

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).

Few decisions discuss social media evidence being admitted into evidence. However, *Lamb v. State*, 246 So. 3d 400 (Fla. 4th DCA 2018) (and the cases cited therein) is instructive on having social media evidence authenticated prior to its admission. The mere fact that an item appears online does not make it self-authenticating. *Lamb v. State*, 246 So. 3d at 408. Predicate testimony to establish its authenticity or to prove

the truth of its content may be required. *Id*., (citing *Dolan v. State*, 187 So.3d 262, 266 (Fla. 2d DCA 2016)). However, "authentication for the purpose of admission is a relatively low threshold that only requires a prima facie showing that the proffered evidence is authentic; the ultimate determination of the authenticity of the evidence is a question for the fact-finder." *Mullens v. State*, 197 So.3d 16, 25 (Fla. 2016). "Evidence may be authenticated by appearance, content, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances. In addition, the evidence may be authenticated either by using extrinsic evidence, or by showing that it meets the requirements for self-authentication." *Symonette v. State*, 100 So.3d 180, 183 (Fla. 4th DCA 2012)(underline added).

Hence there are several avenues to authenticating social media evidence, and the burden of authentication is not high. Granted, a practitioner must remain mindful that relevance and hearsay challenges may still remain. Charles W. Ehrhardt, § 901.1a Digital and electronic evidence, 1 Fla. Prac., Evidence § 901.1a (2021 ed.). When introducing social media evidence, a practitioner must be ready for substantive challenges to both the video and audio portions of the proffered evidence.

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

There are no reported decisions in Florida on this subject. However, the Florida legislature has been working on a bill that would bar employers from requiring access to an employee's social media accounts if they aren't available to the general public. Recent attempts have failed, including SB 126 Social Media Privacy Bill (2015), and HB 493 Social Media Accounts Privacy (2019). Nevertheless, employers must remain vigilant of federal law, including the Stored Communications Act, 18 U.S.C. Sec. 2701, *et seq*.

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

This broad concept has not been addressed by the Florida legislature. Private employees can be terminated for their social media postings. In *Morse v. J.P. Morgan Chase & Co*., 2010 U.S. Dist. LEXIS 143520 (M.D. Fla. June 23, 2010), plaintiff commenced an action under the Fair Labor Standards Act, alleging that her former employer failed to pay her overtime wages, and when she complained on her Facebook page, retaliated by terminating her employment. The defendant moved to dismiss the retaliation claim, arguing that a Facebook post did not amount to a "formal complaint." The Court agreed, holding that "letting off steam" on Facebook "falls far short" of the activity protected by the Fair Labor Standards Act. *Id*., at *4. In sum, protections here are do not extend past those prescribed by federal law.