FOR MORE INFORMATION

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HAWAII

SPOLIATION

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

Hawaii Courts have not resolved whether it would recognize a tort of spoliation of evidence. However, in *Matsuura v. E.I. du Pont de Nemours and Co.*, 102 Hawaii 149, 168, 73 P.3d 687, 706 (2003), the Hawaii Supreme Court offered the following guidance:

"The few jurisdictions that recognize a cause of action for intentional spoliation . . . of evidence require a showing of the following elements: (1) the existence of a potential lawsuit; (2) the defendant's knowledge of the potential lawsuit; (3) the intentional destruction of evidence designed to disrupt or defeat the potential lawsuit; (4) disruption of the potential lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (6) damages.

For a claim of negligent spoliation of evidence, jurisdictions generally require that the plaintiff prove: (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence that 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 destruction of evidence and the inability to prove the lawsuit, and (6) damages." *Id*. at 166–67, 73 P.3d at 704–05 (citations omitted). *Lee v. Doe*, 130 Hawai'i 346, 310 P.3d 1047 (Haw. App. 2010).

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

First party spoliation is the intentional spoliation of evidence against a party to the underlying litigation. *See generally Matsuura*, 102 Haw.149 at 166; 73 P.3d at 704. There are no reported decisions discussing the parameters or impact of third-party spoliation.

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

Hawaii courts have yet to resolve whether Hawaii law would recognize a separate cause of action for a spoliation claim. *See Matsuura*, 102 Haw.149, 167; 73 P.3d at 705.

4. Remedies when spoliation occurs:

- Negative inference instruction

Hawaii recognizes the negative inference instruction as a remedy when spoliation occurs. *See Stender v. Vincent*, 92 Haw. 355, 362; 992 P.2d 50, 57 (Haw. 2000) (the trial court has the authority to give an instruction "if it deemed such a measure appropriate"). The Court "has the inherent power . . . to fashion a remedy to cure prejudice suffered by one party as

a result of another party's loss or destruction of evidence." *Id*. See also HRS § 603-21.9(6) (1993).

- Dismissal

The Hawaii Supreme Court has also recognized that the circuit court has wide-ranging authority to impose sanctions for the spoliation of evidence. Hawaii Rules of Civil Procedure Rule 37(b)(2) allows the court to "make such orders . . . as are just," including the dismissal of claims, in response to discovery violations. *See Wong v. City and County of Honolulu*, 66 Haw. 389, 392-94 (Haw. 1983); 665 P.2d 157, 160-62.

- Criminal sanctions

There are no reported decisions providing for criminal sanctions as a remedy when spoliation occurs.

- Other sanctions

The Court under its inherent power has available to it a number of sanctions such as excluding evidence or admitting evidence of the circumstances of the spoliation. *Durham v. County of Maui*, 2010 WL 3528991, *5 (citation omitted) (D. Haw. Sept. 10, 2010). Other applicable sanctions would be governed under HRCP Rule 37(b)(2). *See, e.g., Wong v. City and County of Honolulu,* 66 Haw. 389, 392-94, 665 P.2d 157, 160-62 (1993).

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

There are no reported decisions with respect to a duty to preserve electronic information as it relates to the spoliation of electronic evidence.

6. Retention of surveillance video.

There are no reported decisions with respect to retaining surveillance video as it relates to the spoliation of evidence.

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,' in general, provides that benefits or payments received on behalf of a plaintiff, from an independent source, will not diminish recovery from the wrongdoer." *Bynum v. Magno* 106 Haw. 81, 86; 101 P.3d 1149, 1154 (Haw. 2004). "Under the collateral source rule, a 'tortfeasor is not entitled to have its liability reduced by benefits received by the plaintiff from a source wholly independent of and collateral to the tortfeasor[.]'" *Sam Teague, Ltd. v. Hawai'i Civil Rights Comm'n*, 89 Hawai'i 269, 281, 971 P.2d 1104, 1116 (1999) (quoting *Sato v. Tawata*, 79 Hawai'i 14, 18, 897 P.2d 941, 945 (1995)).

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?

No. "[A]lthough double compensation may result to the plaintiff, such a benefit should redound to the injury party rather than 'become a windfall' to the party causing injury." *Bynum v. Magno* 106 Haw. 81, 86; 101 P.3d

1149, 1154 (Haw. 2004).

"The injured party's net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff's injury. But it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor. Restatement § 920A cmt. b (emphases added). Ultimately, comment b explains that "it is the tortfeasor's responsibility to compensate for all harm that he causes, not confined to the net loss that the injured party receives." *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).**

No. "The collateral source rule prohibits reducing a plaintiff's award of damages to reflect the discounted amount paid by Medicare/Medicaid." *Bynum v. Magno,* 106 Haw. 81, 89 ;101 P.3d 1149, 1157 (Haw. 2004). The same would apply to private insurance and even gratuitous services provided by health care providers. *Bynum,* 106 Haw. 81, 87-95; 101 P.3d 1149, 11555-1163.

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?**

It depends on the intent of the report. If the report was made with the intention to communicate it to counsel in intention of litigation, then it can be protected. "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." Hawaii Rules of Evidence Rule 503; see also Hawaii Revised Statutes § 626-1.

However, statements given to an insurer in the course of an initial investigation before commencement of litigation and not requested by or taken under guidance of counsel are not protected by the attorney-client privilege and may be discovered. *DiCenzo v. Izawa,* 723 P.2d 171, 176-177 (Haw. 1986).

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 same means available for traditional discovery sources are available for social media evidence including interrogatories, document production requests, and subpoenas.

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.**

The same objections available for traditional sources of discovery are available for social media evidence including privacy and relevance.

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

Spoliation standards for social media have not specifically addressed by the State Bar or courts. Generally, evidence of spoliation may be addressed by a trial court in a number of ways including appropriate instructions at trial, striking of defenses, limitation of testimony, etc. Hawaii court have not resolved whether state law would recognize spoliation of evidence as a separate tort. S*ee Matsuura v. E.I. du Pont De Memours and Co.*, 102 Hawai'i 149, 168; 73 P.3d 686, 706 (Hawai'i 2003).

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 same standards for traditional evidence types apply to social medial evidence including relevance, prejudice, foundation, and authentication. In *State of Hawaii v. Patrick K.K. Ho*, No. 29131, CR No. 05-01-0282(3) (Haw. App. Nov. 14, 2011), an unpublished 2011 decision, the state's Intermediate Court of Appeals ruled that the lower court did not err in refusing to admit undated photographs from a party's MySpace page because the party seeking their admission was unable to establish the date the photographs were taken or posted and could not demonstrate that they reflected the opposing on a certain date.

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

The State courts have not addressed the issue yet. A number of bills are making their way through the Hawai'i legislature that will have significant impacts if passed. House Bill 713 and Senate Bill 207 would prohibit employers from requiring employees and applicants for employment from disclosing social media usernames and passwords. House Bills 1023 and 1104 would prohibit educational institutions and employers from requesting a student, prospective student employee, or prospective employee to grant access to, allow observation of, or disclose information that allows access to or observation of personal internet accounts; provides penalties. House Bill 2415 prohibits employers and schools from requiring or requesting employees, potential employees, students, and potential students to grant access to social networking site account usernames and passwords.

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

There are no reported cases on point.