FOR MORE INFORMATION

PAINE HAMBLEN LLP
Spokane, Washington
www.painehamblen.com

Scott C. Cifrese
scott.cifrese@painehamblen.com

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IDAHO

SPOLIATION

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

Idaho law recognizes the "tort of intentional interference with a prospective civil action by spoliation of evidence by a third party." *Raymond v. Idaho State Police*, 165 Idaho 682, 690, 451 P.3d 17 (2019). To bring a third-party spoliation claim the plaintiff must prove six elements:

(1) a pending or probable lawsuit involving the plaintiff;

(2) the defendant's knowledge of the potential or probable lawsuit;

(3) the wrongful destruction, mutilation, alteration, or concealment of evidence by the defendant 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 disruption to the lawsuit; and

(6) damages proximately caused by defendant's acts.

Raymond, 165 Idaho at 687.

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

Idaho law does not recognize first-party spoliation as a separate cause of action. *Raymond*, 165 Idaho at 686. A first-party spoliation allegation within existing litigation requires "a showing of intentional destruction of evidence by an opposing party." *Raymond*, 165 Idaho at 686. Upon this showing of proof a court will apply an inference that "the missing evidence was adverse to the party's position." *Raymond*, 165 Idaho at 686.

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

A third-party spoliation claim exists as a cause of action separate from other prospective claims. *Raymond*, 165 Idaho at 686 (spoliation claim "provides an aggrieved plaintiff a cause of action against a third party for intentional, egregious conduct that adversely impacts the plaintiff's cause of action against another").

A first-party spoliation claim is not a separate cause of action. *Raymond*, 165 Idaho at 686.

4. Remedies when spoliation occurs:

In a third-party spoliation claim, a plaintiff may recover monetary damages that may be "proven with reasonable certainty" that result from the spoliation. *See Raymond*, 165 Idaho at 687-88.

The Idaho Supreme Court adopted the tort of intentional interference with a prospective civil action by spoliation of evidence against a third party in *Raymond*, *supra*. In formally adopting the tort, the Court reversed the district court's dismissal of the plaintiff's third-party spoliation claim. *Raymond*, 165 Idaho at 690. The *Raymond* Court allowed the plaintiff on remand to pursue damages for: (1) the increased cost of pursuing liability, (2) the decrease in value of a potential award, (3) interest accrued from the delay of the claim's resolution, and (4) general damages. *Raymond*, 165 Idaho at 684. In its reasoning, the *Raymond* Court, citing the Utah Supreme Court, called "nontort remedies such as evidentiary inferences, discovery sanctions, and attorney disciplinary measures… unavailable or largely ineffectual." *Raymond*, 165 Idaho at 687 (quoting *Hills v. United Parcel Serv., Inc.*, 2010 UT 39, 232 P.3d 1049 (Utah 2010)).

In the case of first-party spoliation a court will apply a negative inference presumption and instruct the jury that the jury may "reasonably infer that the evidence deliberately or negligently destroyed by a party was unfavorable to that party's position." *Raymond*, 165 Idaho at 686 (alteration and quotes removed).

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

Idaho law does not recognize a specific duty to preserve electronic information or specific types of evidence. Instead, a spoliation implication arises when a "party with a duty to preserve evidence" destroys the evidence. *Courtney v. Big O Tires, Inc.*, 139 Idaho 821, 824, 87 P.3d 930 (2003) (first-party spoliation analysis). Idaho courts have not clearly set forth when the "duty to preserve evidence" arises. However, courts generally find a duty to preserve evidence attaches when the defendant knows of a potential or probable lawsuit. *See Raymond*, 165 Idaho at 687. There is no duty to preserve evidence in the possession of a third party. *Courtney*, 139 Idaho at 824 (analyzing first-party spoliation allegation stating, "the spoliation doctrine only applies to the party connected to the loss or destruction of the evidence").

6. Retention of surveillance video.

See response to Question 5, *supra*.

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 may submit to the jury the total amount of medical expenses even if a portion of expenses were reimbursed by an insurer. I.C. § 6-1606; *Eldridge v. West*, 166 Idaho 303, 314, 458 P.3d 172 (2020) ("The jury should be provided with the providers' bills that are subject to the write-offs, absent any write-offs.").

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?

By statute, "Evidence of payment by collateral sources is admissible to the court *after the finder of fact has rendered an award*." I.C. § 6-1606 (emphasis added). The trial court should reduce the award rendered by the verdict in a post-trial hearing. *See Eldridge v. West*, 166 Idaho at 314.

Notwithstanding, a party may present evidence of collateral source payments during trial if relevant to some other material issue. *Mulford v. Union Pac. R.R.*, 156 Idaho 134, 141, 321 P.3d 684 (2014) ("Payments received from collateral sources are generally inadmissible unless the evidence of payment from a collateral source is relevant to some other material issue."). For example, a party may properly admit evidence of collateral source payments for impeachment purposes if the plaintiff asserts he "is destitute or in financial straits." *Mulford*, 156

Idaho at 141.

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).**

Yes. *See Eldridge*, 166 Idaho at 314. In *Eldridge*, the Supreme Court explained that "Medicare write-offs are not technically collateral sources under [I.C.] section 6-1606." *Eldridge*, 166 Idaho at 314. Nevertheless, the Court, relying on prior case law, recognized recovery for write-offs "is the type of windfall that I.C. section 6-1606 was designed to prevent." *Eldridge*, 166 Idaho at 314. The Court went on to explain the procedure for presentation of medical costs and write-offs:

> The jury should be provided with the providers' bills that are subject to the write-offs, absent any write-offs. If a verdict is rendered that includes those amounts, "[s]uch award shall be reduced by the court." [I.C. § 6-1606]. However, it is only possible to give effect to the statute by submitting the bills as they exist, prior to the write-offs, to the factfinder.

Eldridge, 166 Idaho at 314.

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?**

Yes; accident/incident reports may be protected as work product if the trial court finds the purpose of the report was to prepare for litigation. I.R.C.P. 26(b)(3); *see also Anstine v. Dbh Props.*, 2012 Ida. Dist. LEXIS 16 (conclusory statement and checked box that incident report was prepared in anticipation of litigation insufficient to invoke privilege). The party resisting discovery must show the report contains privileged information including mental impressions, opinions, legal theories or trial strategy. *Anstine v. Dbh Props*., 2012 Ida. Dist. LEXIS 16, *14. A report that contains facts observed or facts reported will not satisfy the work product standard. *Anstine v. Dbh Props*., 2012 Ida. Dist. LEXIS 16, *14.

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?**

Though the Idaho Rules of Civil Procedure contain specific provisions for electronically stored information the Rules do not provide special rules for social media. Under the general rules for electronically stored information:

(1) a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost; I.R.C.P. 26(b)(1)(B);

(2) if a request does not specify the form for producing electronically stored information, the party must provide the information in a form or forms which it is ordinarily maintained or in a reasonably usable form or forms; I.R.C.P. 34(b)(2)(E)(ii); and

(3) a party need not produce the same electronically stored information in more than one form; I.R.C.P. 34(b)(2)(E)(iii).

A party may request discovery of social media through the ordinary means of discovery: requests for production, I.R.C.P. 34, deposition, I.R.C.P. 30, subpoena, I.R.C.P. 45, and requests for admissions, I.R.C.P. 36.

See also, e.g., *Patton v. Ackerman*, 2015 Ida. Dist. LEXIS 3 (analyzing potential means for discovery requests for plaintiff's social media that defendants failed to pursue and denying request to apply spoliation inference).

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.**

Idaho Rules of Civil Procedure do not recognize specific limitations for obtaining social media evidence from an opposing party. Instead, the general limitations on discovery set forth in I.R.C.P. 26(b) apply. Relevant to electronically stored information specifically, I.R.C.P. 26(b)(1)(B) expressly allows a party to "not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." The party resisting discovery "must show that the information is not reasonably accessible because of undue burden or cost." I.R.C.P. 26(b)(1)(B). "If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause" and "[t]he court may specify conditions for the discovery." I.R.C.P. 26(b)(1)(B).

A lawyer may not communicate with a represented party through social media. RPC 4.2; *see also Patton v. Ackerman*, 2015 Ida. Dist. LEXIS 3, *2 (defendant hired third party to "investigate" plaintiff's social media without issue).

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

Idaho courts have not set forth any specific spoliation standards applicable to social media. *See e.g.*, *Patton v. Ackerman*, 2015 Ida. Dist. LEXIS 3, *11 (district court denying request to apply spoliation presumption when defendant failed to diligently pursue discovery of plaintiff's social media).

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).**

Idaho's "Best Evidence Rule," I.R.E. 1001 *et seq*., provides that the original of electronic stored information "means any printout – or other output readable by sight – if it accurately reflects the information." I.R.E. 1001(d). The printout of the electronically stored information "is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity, or the circumstances make it unfair to admit the duplicate." I.R.E. 1003.

Idaho's authentication rule, I.R.E. 901, is based on FRE 901. *State v. Koch*, 157 Idaho 89, 96, 334 P.3d 280 (2014). As such, the proponent of electronic evidence may authenticate the evidence via circumstantial proof. *Koch*, 157 Idaho at 96. Circumstantial proof may include the "the email address, cell phone number, or screen name connected with the message; the content of the messages, facts included within the text, or style of writing; and metadata such as the document's size, last modification date, or the computer IP address." *Koch*, 157 Idaho at 96.

When the adverse party objects to the authenticity of an electronic record, the proponent must furnish sufficient authentication or identification to confirm the author's identity beyond mere phone number or self-identification. *See, e.g.*, *Koch*, 157 Idaho at 98 (cell phone number and self-identification in message alone insufficient to authenticate alleged sender's identity but phone number, identification and content of message sufficient).

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

Idaho courts have not specifically addressed an employer's right to monitor an employee's social media use. *But see Talbot v. Desert View Care Ctr.*, 156 Idaho 500, 522, 156 Idaho 517, 522, 328 P.3d 497 (2014) (affirming denial of unemployment benefits when employer terminated nurse for disparaging social media post regarding patients that violated employer's social media policy).

Notwithstanding, Idaho recognizes the tort of invasion of privacy. *See Alderson v. Bonner*, 142 Idaho 733, 739, 132 P.3d 1261 (Ct. App. 2006). In order to bring a claim for invasion of privacy, the plaintiff must show: (1) an intentional intrusion, (2) into a matter which the plaintiff has a right to keep private, (3) by the use of a method which is objectionable to a reasonable person. *Alderson*, 142 Idaho at 739 (affirming invasion of privacy award when the uninvited defendant lurked with camera in hand and peered in the window of the young, female, plaintiff).

The Idaho Supreme Court previously held a public employee that signed a disclaimer of her right to personal privacy for the public e-mail system did not have not right to privacy to prevent disclosure of personal e-mails sent via the public e-mail system. *Cowles Publ'g Co. v. Kootenai Cty. Bd. of Cty. Comm'rs*, 144 Idaho 259, 265, 159 P.3d 896 (2007); *see also Alamar Ranch, LLC v. Cty. of Boise*, No. CV-09-004-S-BLW, 2009 U.S. Dist. LEXIS 101866, at *9 (D. Idaho Nov. 2, 2009) (applying four-part test for expectation of privacy for e-mails sent from company computer: (1) Is there a company policy banning personal use of e-mails?; (2) Does the company monitor the use of its e-mail?; (3) Does the company have access to all e-mails?; and (4) Did the company notify the employee about these policies?").

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

Idaho courts have not defined case law regarding limitations on employment terminations specific to social media. Protections or limitations on employment terminations arise from general employment laws like the Whistleblower Act. *See, e.g.*, *Berrett v. Clark Cty. Sch. Dist. No. 161*, 165 Idaho 913, 929, 454 P.3d 555 (2019) (remanding Whistleblower Act claim for further proceedings because issues of fact surrounded whether employer terminated employee for social media post or protected activity of reporting building code violations).

Notwithstanding, Idaho courts will permit termination of an employee that violates an objectively reasonable social media policy. *See Talbot*, 156 Idaho 500.

In *Talbot*, *supra*, the Supreme Court affirmed the Idaho Industrial Commission's denial of benefits to an aggrieved former employee. *Talbot*, 156 Idaho at 522. There, the employer hospital terminated the employee nurse after the employee posted a disparaging Facebook post contrary to the employer's social media policy. *Talbot*, 156 Idaho at 519. On appeal, the Court considered whether the employer discharged the employee for misconduct in connection with his employment for unemployment security purposes. *Talbot*, 156 Idaho at 520. The applicable test required the employer prove that (1) the employee's conduct fell below the employer's expected standard of behavior; and (2) the employer's expectations were objectively reasonable under the circumstances. *Talbot*, 156 Idaho at 521. The Court found the first prong satisfied because the employer "had an expectation that its nurses would not make threatening statements about a patient on Facebook, which is supported by its Social Media Policy." *Talbot*, 156 Idaho at 521. The Court then found the second prong satisfied because the employee provided a signed acknowledgement that he received and agreed to the employer's social media policy that he violated. *Talbot*, 156 Idaho at 521.