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INDIANA

SPOLIATION

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

Under Indiana law, spoliation is defined as the intentional destruction, mutilation, alteration, or concealment of evidence. If proven, spoliation may be used to establish that the evidence was unfavorable to the party responsible.[1] Indiana's Supreme Court has found that the spoliation rule applies to altered as well as destroyed documents.[2]

In 2014, the Indiana Court of Appeals in *Miller v. Federal Express Corporation*,[3] while deciding an issue of spoliation of a defendant's computer, cited to the "seminal case in electronic discovery" *Zubulake v. UBS Warburg LLC*[4] which case stands for the proposition that anyone who anticipates being a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary. While a litigant is under no duty to keep or retain every document in its possession…it is under a duty to preserve what it knows, or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request. The court in the *Miller* case, using this reasoning, found that defendant should have preserved the contents of his computer. *Miller*, at 1013.

Indiana also recognizes negligent spoliation of evidence. *Northern Indiana Public Service Company v. Aqua Environmental Container Corp*., 102 N.E.3d 290, 302 (Ind. Ct. App. 2018) citing *Gribben*, at 354.

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. Howard Regional Health System v. Gordon, 952 N.E.2d 182, 188 (Ind. 2011) citing Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 348, 350 (Ind. 2005). Third-party spoliation refers to spoliation by a non-party. Howard, at 188.

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

Indiana law does not recognize a claim for first-party negligent or intentional spoliation of evidence.[5] Indiana courts recognize spoliation of evidence as an independent tort only in narrow circumstances where a relationship exists between the claimant and the third party sought to be held responsible for a failure to

[1] Loomis v. Ameritech Corp., 764 N.E.2d 658, 662 (Ind. Ct. App. 2002)
[2] *Id.* at 662
[3] 6 N.E.3d 1006, 1013 (Ind. Ct. App. 2014)
[4] 220 F.R.D. 212, 217 (S.D.N.Y 2003).
[5] *Gribben v. Wal-Mart Stores, Inc. 824 N.E.2d 349, 355 (Ind. 2005)*

preserve evidence.[6] A cause of action for third-party spoliation has been recognized in Indiana against a defendant's liability insurance carrier. *Thompson v. Owensby,* 704 N.E.2d 134 (Ind. Ct. App. 1998). In the *Thompson* case, a claim was permitted against defendant's liability insurer for failing to preserve evidence that the insurer had collected after litigation had commenced. The Court noted the relationship between the carrier and a third-party claimant could warrant recognition of a duty to preserve evidence.

4. Remedies when spoliation occurs:

There are sanctions available under Indiana law to provide remedy to those aggrieved by acts of spoliation, but also to serve as a deterrent. A trial court has broad discretion to redress spoliation of evidence; its power to sanction spoliation is derived from its broad and inherent discretionary powers to issue evidentiary rulings and to manage the orderly and expeditious disposition of cases. *Northern Indiana Public Service Company*, at 302. Potential sanctions for spoliation include further discovery, cost-shifting, fines, special jury instructions, preclusions, and the entry of default or dismissal. *Howard*, at 189.

Trial Rule 37 (B) authorizes trial courts to respond to discovery violations with such sanctions "as are just", such as ordering designated facts to be taken as established, prohibiting the introduction of evidence, dismissal of all or any part of an action, rendering a judgment by default against a disobedient party, and payment of reasonable expenses including attorney fees.[7] Attorneys can also be sanctioned under the Indiana Rules of Professional Conduct if they participate in acts of spoliation.

Intentional first-party spoliation of evidence may be used to establish an inference that the spoliated evidence was unfavorable to the party responsible. *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 351 (Ind. 2005). Indiana provides a model jury instruction which instructs the jury that if a party fails to testify about facts, produce a witness, or produce documents under the party's exclusive knowledge or control, the jury may conclude that the testimony the witness could have given or the documents the witness could have produced would have been unfavorable to the party's case. *Indiana Model Civil Jury Instruction* 535.

When deciding whether to sanction a party for the spoliation of evidence, courts consider two primary factors: (1) the degree of culpability of the party who lost or destroyed the evidence; and (2) the degree of actual prejudice to the other party. *Northern Indiana Public Service Company*, at 303.

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

Indiana applies the same laws for preservation and spoliation to electronic evidence as any other type of evidence. Anyone who anticipates being a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary. *Miller v. Federal Express Corporation*, 6 N.E.3d 1006, 1013 (Ind. Ct. App. 2014). While a litigant is under no duty to keep or retain every document in its possession…it is under a duty to preserve what it knows, or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request. *Id.* The court in the *Miller* case, using this reasoning, found that defendant should have preserved the contents of his computer. *Miller v. Federal Express Corporation*, 6 N.E.3d 1006, 1013 (Ind. Ct. App. 2014); *Carmichael v. Separators, Inc.*, 148 N.E.3d 1048 (Ind. Ct. App. 2020).

6. Retention of surveillance video.

Indiana applies the same laws for preservation and spoliation to any type of evidence. Anyone who anticipates being a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary.

[6] Kelley v. Patel, 953 N.E.2d 505, 510 (Ind. Ct. App. 2011)

[7] *Gribben,* at 351

Miller v. Federal Express Corporation, 6 N.E.3d 1006, 1013 (Ind. Ct. App. 2014).

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?

Statements of charges for medical, hospital, or other health care expenses for diagnosis or treatment occasioned by an injury are admissible into evidence. Such statements are prima facie evidence that the charges are reasonable. Ind. R. Evid. 413. However, hearsay is a hurdle that must be overcome to admit medical bills. Indiana's Supreme Court has held that medical bills already charged can usually be admitted over any hearsay objection through the testimony of the supplier of medical treatment as business records under Rule of Evidence 803(6) or through the testimony of the patient to refresh memory under Rule of Evidence 803(5). *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 278 (Ind. 2003) cited by *Barrix v. Jackson*, 973 N.E.2d 22, 28 (Ind. Ct. App. 2012). To admit medical bills under the business records exception to the hearsay rule, the medical bills must also be authenticated under Rule of Evidence 901.

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?

Indiana's Collateral Source Rule indicates that in a personal injury or wrongful death action, the court shall allow the admission into evidence of:

(1) proof of collateral source payments other than:

(A) payments of life insurance or other death benefits;

(B) insurance benefits the plaintiff or members of the plaintiff's family have paid for directly; or

(C) payments made by the state or United States or any agency, instrumentality, or subdivision of the state of the United States.

(2) proof of the amount of money the plaintiff is required to repay, including worker's compensation benefits, as a result of the collateral benefits received; and

(3) proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff of plaintiff's family.

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Indiana's Supreme Court has held that the collateral source statute does not bar evidence of discounted amounts in order to determine the reasonable value of medical services. To the extent the adjustments or accepted charges for medical services may be introduced into evidence without referencing insurance, they are allowed. *Stanley v. Walker*, 906 N.E.2d 852, 858 (Ind. 2009).

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).

A defendant may introduce discounted amounts of medical bills into evidence (without referencing insurance) to rebut the reasonableness of charges introduced by the plaintiff. *Stanley v. Walker*, 906 N.E.2d 852, 858 (Ind. 2009); *Patchett v. Lee*, 60 N.E.3d 1025 (Ind. 2016). This evidence has been held to be of value to determine the reasonable value of medical services. *Id*. The collateral source statute does not bar evidence of discounted amounts of medical bills to determine reasonable value of medical services, and such evidence is admissible without reference to insurance. *Id*.

An injured plaintiff is entitled to recover damages for medical expenses that were both necessary and reasonable. *Stanley v. Walker*, 906 N.E.2d 852, 855 (Ind. 2009) citing *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 277 (Ind. 2003). Medical bills may be introduced to prove the amount of medical expenses when there is no substantial issue that the medical expenses are reasonable. *Stanley*, at 856. In cases where the reasonable value of medical services is disputed, the opposing party may produce contradictory evidence to challenge the reasonableness of the proffered medical bills. Id. The focus is on the reasonable value, not the actual charge.

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?

Work product includes the mental impressions, conclusions, opinions, and legal theories prepared on that party's behalf. Indiana Trial Rule 26(B)(3) governs discovery of materials that fall into these categories. Documents assembled in the ordinary course of business, pursuant to public requirements unrelated to litigation or for any other non-litigation purpose, are not work produce and are not immune from discovery. *Brandenburg Indus. Service Co. v. Indiana Dept. of State Revenue*, 26 N.E.3d 147 (Ind. Tax Ct. 2015).

A party may obtain discovery of documents and tangible things otherwise discoverable and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative including his insurer only upon a showing that the party seeking discovery: 1) has a substantial need for the materials in the preparation of his case; and 2) is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In no event, however, is a party seeking discovery entitled to the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation. *Pioneer Lumber v. Bartels*, 673 N.E.2d 12 (Ind. App. 1996).

The rule provides that a party may obtain discovery of documents and tangible items prepared by another party's attorney in anticipation of litigation or for trial but only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Although a party may obtain discovery of ordinary work product materials by making a special showing, a party's mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation are entitled to heightened protection. Such material, often called opinion work product, is entitled to almost absolute protection from discovery. *Purdue University v. Wartell*, 5 N.E.3d 797 (Ind. Ct. App. 2014); 10 INPRAC §58.5.

Where an insurance company undertakes to represent an insured in third-party litigation, statements provided by insured to the insurer are privileged and not subject to discovery by a third-party litigant. *Richey v. Chappell*, 594 N.E.2d 443 (Ind. 1992); *Steinrock Roofing & Sheet Metal, Inc. v. McCullough*, 965 N.E.2d 744 (Ind. Ct. App. 2012); accord *Strack and Van Til, Inc. v. Carter,* 803 N.E.2d 666 (Ind. Ct. App. 2004); *Madison v. Hawkins*, 644 N.E.2d 184 (Ind. Ct. App. 1994).

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?

First, submitting a demand/request to preserve social media evidence should be considered to both the social media account holder/party as well as the social media entity. As previously stated, while a litigant is under no duty to keep or retain every document in its possession…it is under a duty to preserve what it knows, or

reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request. *Miller v. Federal Express Corporation* 6 N.E.3d 1006, 1013 (Ind. Ct. App. 2014) The court in the Miller case, using this reasoning, found that defendant should have preserved the contents of his computer.

Standard requests to produce governed by Indiana Rule of Civil Procedure 34 will allow a party to obtain copies of social media evidence from the social media account owner. Under Rule 34, any party may serve on any other party a request to produce and permit the party making the request, or someone acting on the requester's behalf, to inspect and copy, any designated documents or electronically stored information (including, without limitation, writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations from which information can be obtained or translated, if necessary, by the respondent into reasonably usable form) or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(B) and which are in the possession, custody or control of the party upon whom the request is served.

Of note, when social media posts are open to the public, any party can simply perform a search for public social media content. To be admissible in a court proceeding, the posts must be authenticated. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. *Wilson v. State*, 30 N.E.3d 1264, 1268 (Ind. Ct. App. 2015). Once this reasonable probability is shown, any inconclusiveness regarding the exhibit's connection with the events at issue goes to the exhibit's weight, not its admissibility. Additionally, authentication of an exhibit can be established by either direct or circumstantial evidence." *Pavlovich v. State,* 6 N.E.3d 969 (Ind.Ct.App.2014) *trans. denied,* (citing *Fry v. State,* 885 N.E.2d 742, 748 (Ind.Ct.App.2008), *trans. denied*). Letters and words set down by electronic recording and other forms of data compilation are included within Rule 901(a). *Hape v. State,* 903 N.E.2d 977, 989 (Ind.Ct.App.2009). "Absolute proof of authenticity is not required." *Fry,* 885 N.E.2d at 748.

In the *Wilson v. State* case, the Court of Appeals found that testimony of a witness indicating she communicated with the defendant on Twitter, that the defendant posted pictures of the two online, the witness' testimony identifying the Twitter account as that belonging to defendant, as well as pictures posted on the account depicting defendant holding guns used in the crime at issue, as well as other personal identifiers in the posts were sufficient to authenticate the Twitter posts as being authored by defendant. *Wilson*, 30 N.E.3d 1264, 69 (Ind. Ct. App. 2015).

If posts are deleted after a preservation request has been made, the issue of spoliation comes into play.

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.

Indiana does not specifically impose limitations on obtaining social media evidence from an opposing party. A party can attempt to obtain social media posts through a party's own search of social media or can request posts through standard discovery requests (interrogatories pursuant to Rule 33 and requests to produce pursuant to Rule 34). If you suspect discoverable information may be contained in a party's social media posts, you should send a formal preservation request to the opposing party as soon as possible.

Pursuant to Indiana Trial Rule 26(F) discovery is permitted regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information

sought will be inadmissible at trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence.

The basic limits of discovery apply to social media. *Appler v. Mead Johnson & Co., LLC*, 2015 WL 5793236 (S.D. Ind. 2015). Indiana limits discovery, generally, if the court determines 1) the discovery sought is unreasonably cumulative, duplicative, or is obtainable from some other source that is more convenient; 2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought or; 3) the burden or expense of the discovery outweighs any likely benefit.

Regarding privacy concerns: Federal District Courts in Indiana have held that viewing a party's public social media profiles does not violate his or her privacy rights-'the very nature of social medial limits parties' privacy expectations.' *In re Cook Medical, Inc., IVC Filters Marketing, Sales and Products Liability Litigation*, 2017 WL 4099209 (S.D. Ind. 2017) citing *Higgins v. Koch Dev. Corp*, WL 3366278 (S.D. Ind. 2013). Private social media data may be compelled when the party seeking the data shows the media is relevant and proportional to the needs of the case. *In re Cook Medical, Inc. citing Crabtree v. Angie's List, Inc*., WL 413242 (S.D. Ind. 2017). However, the requesting party does not have an unfettered right to rummage through the responding party's social media and must limit the time period and content of the request. *In re Cook Medical*, citing *Ye v. Cliff Viessman, Inc.*, No. 14-cv-01531-JTG, 2016 WL 950948, at 3 (N.D. Ill. Mar. 7, 2016); *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D. Cal. 2012). The court in *In re Cook Medical* discussed the need to tailor social media requests to case issues rather than broad requests for every social media post of a party (e.g. posts showing the ability to travel more than two hours or participate in social engagements after the claimed incident rather).

Further, Federal District Courts in Indiana have identified the "unique challenge" courts face due to the relative novelty of social media content and their ability to be shared by someone besides the original poster. *Appler v. Mead Johnson & Co., LLC*, 2015 WL 5793236 (S.D. Ind. 2015). However, a court may compel production of a party's (Facebook) social medial information if the party seeking disclosure makes a threshold relevance showing. Id; *See Equal Emp't Opportunity Comm'n v. Simply Storage Mgmt., LLC,* 270 F.R.D. 430, 434–35 (S.D. Ind.2010).

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

Indiana's spoliation laws apply to social media posts. Intentional spoliation of evidence (such as deleting social media posts that are relevant to a legal action) may be used to establish an inference that the spoliated evidence was unfavorable to the party responsible. *Gribben v. Wal-Mart Stores*, 824 N.E.2d 349 (Ind. 2005). A trial court may impose sanctions, including "payment of reasonable expenses" upon a party that destroys evidence. *Id*. at 351. (*See* also unpublished memorandum decision *Jent v. Cave*, 152 N.E.3d 1097 (Ind. Ct. App. 2020) which case concerned deleted Facebook posts depicting destruction of husband's personal property in divorce action. The Jent court held there was insufficient evidence beyond conjecture indicating what the deleted (social media) posts may have depicted. The Jent court held that in the absence of proof that the party deleted (Facebook) posts that were relevant to the action, there was not an abuse of discretion by the trial court in failing to conclude the party intentionally destroyed the evidence).

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).

Social media may be admissible (or not admissible) under the same standards required for all evidence. As with any evidence, social media evidence must be relevant to the action. Relevant evidence is defined as evidence having "any tendency to make a fact more or less probable than it would be without the evidence; and … the fact is of consequence in determining the action." Ind. Evid. R. 401. Relevant evidence is admissible, unless

any of the following provides otherwise: (a) the United States Constitution; (b) the Indiana constitution; (c) a statute not in conflict with these rules; (d) these rules; or (e) other rules applicable in the courts of this state. Irrelevant evidence is not admissible. Ind. Evid. R. 402. This rule applies to social media evidence. *See* also *Clark v. State*, 915 N.E.2d 126, 130 (Ind. 2009) (holding trial court did not abuse its discretion in admission of defendant's social media (MySpace) page, in which defendant's postings consisted on various prideful declarations concerning his apparent reputation as an outlaw and criminal; defendant's statements about and references to himself are not evidence of prior bad acts, so Rule 404 does not apply and evidence was relevant after defendant made his character a central issue).

Authentication: Next, social media evidence must be authenticated pursuant to Indiana Rule of Evidence 901(a) which states that the proponent of such evidence must produce evidence sufficient to support a finding that the item is what the proponent claims it is. *See M.T.V. v. State*, 66 N.E.3d 960 (Ind. Ct. App. 2016), transfer denied, 83 N.E. 3d 1220 (Ind. 2017) (in juvenile adjudication of delinquency for Conspiracy to Commit Aggravated Battery in connection with plot to bring guns to school, records of Facebook conversations between juvenile and co-conspirator were authenticated with testimony that the records contained information that juvenile admitted they would and an affidavit from Facebook's authorized records custodian that records were made and kept by automated systems and were made at or near time the Facebook user transmitted the information; Facebook records were authenticated with requisite reasonable probability that the records corresponded to co-conspirators' accounts and that conversations were authored by them); *Strunk v. State*, 44 N.E.3d 1, 5 (Ind. Ct. App. 2015) (state properly authenticated screen shots of defendant's Facebook profile containing message sent to minor molestation victim with testimony that victim had communicated with defendant through same page previously, that she knew it was his page because of his profile picture, and because they had mutual friends, including victim's mother, who also identified the page).

Hearsay: Statements are not hearsay and are not excluded as such when they are an admission by a party opponent. Evid. R.801(d)(2). *See Pavlovich v. State*, 6 N.E.3d 969 (Ind. Ct. App. 2014) (text messages and e-mail communications between "pimp" and police officer and defendant's alleged phone number and e-mail address that had been authenticated by testimony by prostitute were admissible as non-hearsay, as statements by party-opponent).

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

Indiana state courts have not addressed or restricted an employer from monitoring an employee's social media use.

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

Indiana is an at-will state,[8] meaning an employer can terminate someone at any time for any legal reason (not legal reason would be discrimination-based firing such as age, race, sex, etc.). *Harris v. Brewer*, 49 N.E.3d 632, 639 (Ind. Ct. 2015).

An employer can set forth standards of expected conduct that may include social media posts in a written employee rule book. Having such written rules in place can assist with justifying denial of unemployment compensation benefits upon termination as long as the employee (1) knows the rule(s) and (2) knows the conduct that violated the rule. *Reed v. Review Bd. Of Workforce Development*, 32 N.E.2d 814 (Ind. Ct. App.

[8] An employer and employee may enter into an employment contract that includes a job security provision, in which case an employer generally may not terminate the employment relationship before the end of the term except for just cause or by mutual agreement. *Harris*, at 639, citing *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712, 717 (Ind. 1997).

2015); *Doughty v. Review Bd. Of Dept. of Workforce Development,* 784 N.E.2d 524 (Ind. Ct. App. 2003).