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KANSAS

SPOLIATION

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

Spoliation has not been specifically defined in Kansas. Additionally, Kansas courts have not discussed whether spoliation must meet an intentional or fraudulent threshold. But Kansas' negative-inference jury instruction sheds light on the issue. The instruction permits the jury to infer that evidence not produced would have been adverse to the non-producing party provided that certain elements are satisfied. These elements include the following: (1) the evidence "could have been produced by the exercise of reasonable diligence," (2) "[a] reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed it would be favorable to him," and (3) "no reasonable excuse for the failure has been shown." K.P.J.I. § 102.73. Accordingly, a reasonableness standard has been built into the spoliation instruction, and thus alleged instances of spoliation must be judged by this reasonableness standard.

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

Kansas courts recognize a distinction between first-party and third-party spoliation. Kansas courts define first-party spoliation as "spoliation committed by a party to a principal or underlying lawsuit," while third-party spoliation is "spoliation committed by a nonparty to the principal or underlying lawsuit." *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 893, 259 P.3d 676, 682 (2011). The distinction between first-party and third-party spoliation is particularly important because, in *Koplin v. Rosel Well Perforators, Inc.*, 241 Kan. 206, 734 P.2d 1177 (1987), the Kansas Supreme Court refused to recognize the tort of intentional third-party spoliation absent "some independent tort, contract, agreement, voluntary assumption of duty, or some special relationship of the parties." *Koplin*, 734 P.2d at 1183. The question whether Kansas courts would recognize the tort of intentional first-party spoliation - i.e., spoliation by a defendant or potential defendant in an underlying case - has not yet been decided. *Id.* at 1182. In *Koplin*, the court distinguished the case factually from two cases from other jurisdictions. These cases recognized an independent tort for spoliation in cases "wherein the defendants or potential defendants in the underlying case destroyed the evidence to their own advantage." *Id.* The Kansas Supreme Court declined to decide whether it would likewise recognize an independent tort in similar circumstances, noting that "whether we would recognize a cause of action under similar facts is not before this court for determination and we leave that decision for another day." *Id.*

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

Kansas does not recognize a separate cause of action for spoliation. *See, e.g., Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 259 P.3d 676 (2011); *Aramburu v. The Boeing Co.*, 112 F.3d 1398 (10th Cir. 1997). In *Koplin*, the Kansas Supreme Court considered whether to recognize a common law tort action for intentional

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interference with a civil action by spoliation of evidence under the facts presented. The Court concluded that "absent some independent tort, contract, agreement, voluntary assumption of duty, or some special relationship of the parties, the new tort of spoliation of evidence should not be recognized in Kansas under the facts presented." *Koplin*, 734 P.2d at 1183. However, the holding in *Koplin* was limited to the facts of the case. The court left open the possibility that it may recognize a cause of action for intentional first-party spoliation wherein defendants or potential defendants in the underlying case destroy evidence to their own advantage. *Id.* at 1882.

Kansas courts have acknowledged that if a spoliation claim were recognized in Kansas, the elements for intentional spoliation of evidence are: (1) existence of a potential civil action, (2) defendant's knowledge of a potential civil action, (3) destruction of evidence; (4) intent; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages. *See, e.g.*, *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 259 P.3d 676 (2011) citing *Foster v. Lawrence Memorial Hosp.*, 809 F. Supp. 831 (D. Kan. 1992).

4. Remedies when spoliation occurs:

- Negative inference instruction

Kansas courts may give a spoliation instruction to the jury if it is established that a party had evidence in its possession which the party destroyed or otherwise concealed from the opposing party. *See Armstrong v. City of Salina*, 211 Kan. 333, 339, 508 P.3d 323 (1973). Failure to produce records and documents within a party's control raises a presumption that the evidence which would be disclosed by those records is unfavorable to that party." *Home Life Ins. Co. v. Clay*, 13 Kan. App. 2d 435, Syl. ¶ 2, 773 P.2d 666, *rev. denied* 245 Kan. 783 (1989) ("Failure to produce records and documents within a party's control raises a presumption that the evidence which would be disclosed by those records is unfavorable to that party.").

Kansas utilizes a pattern jury instruction, K.P.J.I. § 102.73 for "Inferences Arising from Failure to Produce Evidence." K.P.J.I. § 102.73, provides: If a party to [the] case has failed to offer evidence within his power to produce, you may infer that the evidence would have been adverse to that party, if you believe each of the following elements: (1) The evidence was under the control of the party and could have been produced by the exercise of reasonable diligence, (2) the evidence was not equally available to an adverse party, (3) A reasonably prudent person under the same or similar circumstances would have offered if they believed it to be favorable, (4) No reasonable excuse for the failure has been shown.

- Dismissal

K.S.A. 60-237(e) specifically addresses the remedies available for a party's failure to preserve electronically stored information. The statute authorizes dismissal of an action, or entry of default against a party, though precludes the court from taking any action beyond what is necessary to cure the prejudice.

- Criminal sanctions

There are no Kansas cases or statutes authorizing criminal sanctions for spoliation of evidence.

- Other sanctions

Kansas courts have not addressed alternative sanctions as a remedy for spoliation of evidence

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

K.S.A. 60-237(e) specifically addresses the remedies available for a party's failure to preserve electronically stored information. The statute provides:

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 for 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.

6. **Retention of surveillance video.**

There are no Kansas cases specifically addressing the retention of surveillance video. As discussed above, K.S.A. 60-237(e) specifically addresses the remedies available for a party's failure to preserve electronically stored information, which includes surveillance video.

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, the plaintiff may 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. Kansas has adopted the majority position employing the "reasonable value of services" approach when it comes to submitting medical expenses to a jury. *Martinez v. Milburn Enters., Inc.*, 290 Kan. 572, 233 P.3d 205 (2010). Under this approach, evidence of the "original amount billed" ***and*** the "amount accepted … in full satisfaction of the amount billed" may ***both*** be admitted in evidence for the jury to consider as relevant to determining the reasonable value of the medical services provided to plaintiff, and the collateral source rule does not bar such evidence. *Id.* at 611-12.

In *Martinez,* the Kansas Supreme Court considered the issue of "whether in a case involving private health insurance the collateral source rule applies to bar evidence of (1) the amount originally billed for medical treatment or (2) the reduced amount accepted by the medical provider in full satisfaction of the amount billed, regardless of the source of payment." *Id.* at 208. The court held that evidence of (1) the original amount billed and (2) the amount accepted by the hospital in full satisfaction of the amount billed were both admissible *Id.* at 229. The finder of fact is permitted to determine the reasonable value of the medical services provided from these and other facts. *Id.*

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, the fact that all or a portion of the plaintiff's medical expenses were reimbursed or paid for by his/her insurance carrier is not admissible at trial. "[E]vidence of the source of any collateral payment is inadmissible under the collateral source rule." *Martinez*, 233 P.3d at 229. As the Kansas Supreme court explained in *Martinez*:

> When medical treatment expenses are paid from a collateral source at a discounted rate, determining the reasonable value of the medical services becomes an issue for the finder of fact. Stated more completely, when a finder of fact is determining the reasonable value of medical services, the collateral source rule bars admission of evidence stating that the expenses were paid by a collateral source. However, the rule does not address, much less bar, the admission of

> evidence indicating that something less than the charged amount has satisfied, or will satisfy, the amount billed. *Martinez*, 233 P.2d at 222-23.

The judge is not authorized to reduce the verdict by the amount paid by the plaintiff's insurer, nor by the discount on services pursuant to the health insurer's agreement with the medical providers. *Id.* In short, the identity of the collateral source payer is not admissible but the jury can receive evidence that the medical provider accepted a lesser amount in full satisfaction of the obligation.

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 defendants cannot reduce the amount plaintiff claims as medical expenses by the amount that was actually paid. However, evidence of both the original amount billed and the amount accepted by the hospital in full satisfaction of the amount billed is admissible and may be considered by the finder of fact in determining the reasonable value of the medical services provided. *Martinez*, 233 P.2d at 229.

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?

In Kansas, it is unlikely that an accident/incident report will be afforded protection by the attorney work product privilege. Kansas's work-product rule, as codified at K.S.A. 60-226(b)(4), does afford some protection for documents and tangible things prepared in anticipation of litigation or for trial. This protection extends to documents and tangible things prepared by or for a party's representative, including not only lawyers but also insurers, agents and others. *Wichita Eagle & Beacon Pub. Co., Inc., v. Simmons*, 274, Kan. 194, 218, 50 P.3d 66, 84 (2002).

In order for a document to be deemed prepared in anticipation of litigation, however, there must be a "substantial probability that litigation will ensue." *Wichita Eagle*, 50 P.3d at 85 (citing *In re Grand Jury Investigation*, 599 F.2d 1224, 1229 (3d Cir. 1979)). Accordingly, Kansas courts have refused to extend work product protection to insurance companies' initial investigations of potential claims that are made by the insurer prior to the commencement of litigation, and which were not requested by or undertaken pursuant to the guidance of counsel. *Henry Enterprises, Inc., v. Smith*, 225 Kan. 623, 625, 592 P.2d 915, 921 (1979; *Independent Mfg. Co., v. McGraw-Edison Co.*, 6 Kan. App.2d 982, 986, 637 P.2d 431, 434 (1981). The courts have determined that such reports are made in the ordinary course of the insurer's business, and not "in anticipation of litigation or for trial" as those terms are used in K.S.A. 60-226. *Henry Enterprises*, 592 P.2d at 921; *McGraw-Edison Co.*, 637 P.2d at 434. In declining to extend work product protection to investigations of pretrial claims, the court in *Henry Enterprises* specifically recognized that insofar as insurance companies are concerned, "litigation is a very real potential, but the fact remains that the investigation of potential claims is an integral part of the insuror's business," and "investigations are made regularly and in the ordinary course of business." *Henry Enterprises*, 592 P.2d at 915.

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 standard discovery tools of Interrogatories, Requests for Production of Documents and Requests for

Admission are available to obtain social media from a party the same as with other types of information. A party may also issue a subpoena to third-parties under K.S.A. § 60-245 for electronically stored information.

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.**

Kansas has not enacted limitations on discovering social media materials. Kansas Courts apply the same analysis to the discovery of social media as to other forms of information, and multiple courts have noted that information on social networking sites is not entitled to special consideration. Discovery requests seeking social media information should be tailored so as not to constitute "the proverbial fishing expedition in the hope that there might be something of relevance." No. 13-2605-CM, 2014 U.S. Dist. LEXIS 83953, 2014 WL 2804188, at *4-5 (D. Kan. June 20, 2014).

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

Neither Kansas's state courts nor its state Bar Association have set forth specific rules or standards regarding spoliation of social media evidence, but Kansas caselaw has addressed the issue of spoliation of e-mails and treated those emails in the same manner in which the court treated other types of evidence. In S*mith v. Hillshire Brands*, 2014 U.S. Dist. LEXIS 83953, 2014 WL 2804188(D. Kan. 2014), defendant requested all "communications by and between you and any third party." Plaintiff informed defense counsel that he did not save the e-mails and responded to the request by stating, "I have submitted everything I have." Defendant asserted, and the court agreed, that "plaintiff had an obligation to preserve e-mails related to his claim once litigation was reasonably foreseeable. Such preservation may not be selective." The court held that, "Failing to preserve evidence—including electronic material—that another party might use in pending or reasonably foreseeable litigation is deemed 'spoliation'." If it is found that plaintiff engaged in spoliation, there are a variety of sanctions that the court may impose against plaintiff, including, if the spoliation is found to be particularly egregious, dismissal of this case." *Id.* The court ordered plaintiff to contact his e-mail service provider and inform defendant of the "specific steps that he has taken to recover responsive e-mails and the progress that he has made toward that end. Defendant may then decide whether to pursue spoliation sanctions against plaintiff." Under K.S.A. § 60-237, the court may not impose sanctions on a party "for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This exception has not been tested by a Kansas court.

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).**

In weighing whether to admit an online profile and page (in this case FaceBook), the Kansas Court of Appeals set forth the following two part test for authentication under K.S.A. § 60-464:

> Printouts of web pages must first be authenticated as accurately reflecting the content of the page and the image of the page on the computer at which the printout was made before they can be introduced into evidence. Then, to be relevant and material to the case at hand, the printouts often will need to be further authenticated as having been posted by a particular source." *State v. Jones*, 2014 Kan. App. Unpub. LEXIS 118, 11, 318 P.3d 1020 (Kan. Ct. App. 2014).

The court in Jones recognized three nonexclusive methods to authenticate the website postings. First, the proponent could present the testimony of a witness with knowledge; or, in other words, "ask the purported creator if she indeed created the profile and also if she added the posting in question." *Jones*, 318 P.3d at 1022. Second, the proponent could offer the results of an examination of the internet history or hard drive of the

person who is claimed to have created the profile in question to determine whether that person's personal computer was used to originate the evidence at issue. *Id.* Third, the proponent could produce information that would link the profile to the alleged person from the appropriate employee of the social networking website corporation. *Id.* (internal quotations omitted).

Once properly authenticated, a statement made by an opposing party on social media is admissible in Kansas as a statement by an opposing party. *State v. Walker*, 452 P.3d 889 at * 6 (Kan. App. 2019).

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

There are no specific statutory provisions or reported Kansas cases regarding social media information for employees, including employer monitoring, in Kansas. Employers in this State should be mindful of recent decisions of the National Labor Relations Board related to social media and using social media posts as a basis for employment decisions.

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

Kansas is an "at will" employment state, and an employer can generally terminate employees for any reason, likely including the contents of the employee's social media postings. Kansas courts have declined to read a duty of good faith and fair dealing into at-will employment. *Goldman v. Univ. of Kan.*, No. 122,060, at *28 (Kan. App. 2020). *See also Ed DeWitte Ins. Agency, Inc. v. Fin. Assocs. Midwest, Inc.*, 388 P.3d 156, 169-70, 53 Kan. App. 2d 238, 256-57 (Kan. App. 2016)(rev'd on other grounds in 427 P.3d 25); *Waste Connections of Kan., Inc. v. Ritchie Corp.*, 298 P.3d 250, 265, 296 Kan. 943, 965 (2013). Neither the United States District Court for the District of Kansas nor any state appellate court have addressed limitations on employment terminations relating to social media.