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KENTUCKY

SPOLIATION

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

   In Kentucky, the trial court is within its discretion to give a missing-evidence instruction when: (1) the evidence is material or relevant to an issue in the case; (2) the opponent had "absolute care, custody, and control over the evidence;" (3) the opponent was on notice that the evidence was relevant at the time he failed to produce or destroyed it; and (4) the opponent, "utterly without explanation," in fact failed to produce the disputed evidence when so requested or ordered. *Norton Healthcare, Inc. v. Disselkamp*, 600 S.W.3d 696, 731 (Ky. 2020). Courts will not find spoliation for loss of evidence because of (1) mere negligence, (2) fire, weather, natural disaster, or other calamities, or (3) normal course of business in line with industry or regulatory standards. *Id.* at 730-731.

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

   Kentucky does not recognize separate torts for either first-party or third-party spoliation of evidence. *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997).

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

   See response to Answer 2. Kentucky does not recognize spoliation of evidence as cause of action or tort. Instead, it is treated as an evidentiary and jury instruction issue.

4. **Remedies when spoliation occurs:**

   The court counteracts a party's deliberate destruction of evidence through evidentiary rules, civil sanction, and missing evidence instructions. *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997).

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

   No Kentucky cases thus far have reported on electronic evidence spoliation, but a court would apply the standard that a spoliation instruction is appropriate "where the issue of destroyed or missing evidence has arisen." *Id.*

6. **Retention of surveillance video.**

   See Answer to 1. and 5. The court would likely look to the retention of video in line with industry standards and whether the person or entity in possession of the video was on notice regarding that the evidence was relevant and destroyed it.

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 allows the plaintiff to (1) seek recovery for the reasonable value of medical services for an injury, and (2) seek recovery for the reasonable value of medical services without consideration of insurance payments made to the injured party. *Baptist Healthcare Systems, Inc v. Miller*, 177 S.W.3d 676, 682 (Ky. 2005)

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 collateral source payments or contractual allowances are properly withheld by the trial court from the jury. *Id.* at 682-683. The healthcare insurance can assert a subrogation lien against the judgment. Evidence of payments to the plaintiff from medical or disability insurers would be excluded as irrelevant, recognizing that such payments have no bearing on the issue to be judicially decided, the amount of damages the plaintiff has incurred and is entitled to recover from the wrongdoer in the civil action, nor does it matter that the source of the collateral source benefits may be entitled to reimbursement from the recovery because of contractual or statutory subrogation rights. See, e.g., *Davidson v. Vogler*, 507 S.W.2d 160, 164 (Ky. 1974) and *Burke Enterprises, Inc. v. Mitchell*, 700 S.W.2d 789, 796 (Ky. 1985).

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. It is improper to reduce a plaintiff's damages by payments for medical treatment under a health insurance policy if the premiums were paid by the plaintiff or a third party other than the tortfeasor. *Baptist Healthcare Systems, Inc v. Miller*, 177 S.W.3d 676, 682 (Ky. 2005). The Kentucky Supreme Court was clearly unconcerned about windfalls for plaintiffs in *Baptist Healthcare Systems, Inc.* At least four times in that opinion the Court noted how the collateral-source rule could create windfalls, but it expressed no concern over that possibility.

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?**

Incident reports can be protected in Kentucky under certain circumstances. In *Asbury v. Beerbower,* 589 S.W.2d 21 (Ky. 1979), the Kentucky Supreme Court endorsed the principle set out in 81 Am.Jur.2d, *Witnesses*, Sec. 193 that "a report or other communication made by an insured to his liability insurance company, concerning an event which may be made a basis of a claim against him and which is covered by the party, is a privileged communication, as being between an attorney and client ..." Asbury 589 S.W.2d at 217.

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?**

Written discovery requests including interrogatories and document requests. Civil Rule 26.02 provides "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ... It is not ground for objection that the information sought will be inadmissible at trial if the discovery sought appears to be reasonably calculated to lead to the discovery of admissible evidence."

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.

See Answer to 11 regarding Civil Rule 26.02. *See also*, *Thompson v. Coleman*, 544 S.W.3d 635 (Ky. 2018) regarding approval of trial court's permitting inspection of computer and social media accounts.

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

Spoliation and destruction of evidence standard discussed *supra* in *Norton Healthcare, Inc. v. Disselkamp*, 600 S.W.3d 696, 731 (Ky. 2020).

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).

All evidence must meet the requirements of relevancy set for in KRE 401 and KRE 402. But evidence from social media accounts must also meet the standard set forth in KRE 901 which requires that evidence must be authenticated as a condition precedent to its admissibility; there must be sufficient evidence that it is what it purports to be. The role of the judge, as a gatekeeper, is only to determine if an offering party has produced enough evidence for a reasonable jury to find authenticity. Robert G. Lawson, *The Kentucky Evidence Law Handbook,* 7.00 at 495 (4th ed.2003) (*citing Bell v. Commonwealth,* 875 S.W.2d 882, 886–87 (Ky. 1994).

The judge decides if the evidence is admissible, but "the trier of fact determines the authenticity of the evidence and its probative force." *Id.* (*quoting E.W. French & Sons, Inc. v. General Portland Inc.,* 885 F.2d 1392, 1398 (9th Cir.1989)). Social media posts will need to be authenticated by witnesses who observed or maintained the posts.

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

There are few if any reported Kentucky state court cases on this issue. There are also more protections for governmental employees as opposed to private employees. Social media outside of work is difficult to control or monitor but could be subject to employer control if it creeps into the conduct of the work or workplace setting. For employers, especially private employers, they can develop social media policies in their handbook.

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

There are few if any reported state court cases on this issue. The Sixth Circuit has addressed these issues. First the employee must show it is protected speech—government action is involved regarding a matter of public concern. But the employee must also show causation between the protected speech, if it exists, and the termination. To show causation, the employee "must demonstrate 'that the speech at issue represented a *substantial or motivating* factor in the adverse employment action.'" *Vereecke v. Huron Valley Sch. Dist.*, 609 F.3d 392, 400 (6th Cir. 2010) (quoting *Rodgers v. Banks*, 344 F.3d 587, 602 (6th Cir. 2003)). "A 'motivating factor' is essentially but-for cause ...." *Leonard v. Robinson*, 477 F.3d 347, 355 (6th Cir. 2007).