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MICHIGAN

SPOLIATION

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

A party has "a duty to preserve evidence" even if an action has not commenced and there is merely a potential for litigation. *Brenner v Kolk*, 226 Mich App 149, 162 (1997). This duty to preserve evidence includes all evidence "that [a party] knows or reasonably should know is relevant to the [anticipated] action." *Id. Wood v Cook*, No. 334901, 2018 WL 341437, at *4–*5 (Mich. Ct. App. Jan. 9, 2018). Further, a party must reasonably preserve the documents and data within its "possession, custody, or control." MCR 2.310(B).

Spoliation is the failure of a party to properly preserve or produce evidence that was in a party's control and could have been produced. See *MASB-SEB Prop/Cas Pool, Inc v Metalux*, 231 Mich App 393, 400 (1998)

In Michigan, spoliation need not be intentional. See *Brenner*, 226 Mich App at 157 (citing *Hamann v Ridge Tool Co*, 213 Mich App 252, 258 (1995)). Rather, the opposing party must demonstrate that it suffered unfair prejudice where "it was unable to challenge or respond to the evidence." *Id.*

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

First-party spoliation constitutes the destruction of evidence by a party to the underlying litigation, while third-party spoliation is carried out by a third-party that had the duty to preserve evidence. *Teel v Meredith*, 284 Mich App 660, 667 (2009). Not all litigation-related remedies for spoliation are applicable third-party spoliation. *Id*. However, Michigan courts have acknowledged that some discovery sanctions may be available to punish third-party spoliation, including monetary and contempt sanctions against persons who suppress or destroy evidence in contempt of the discovery process. *Id.* Further, a party that is adversely affected by third-party spoliation may deflect the impact of the spoliation by demonstrating why the spoliated evidence is missing. *Id*. To the extent that third parties had a contractual obligation to preserve evidence, contract remedies may also be available. *Id*. at 668.

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

Michigan does not yet recognize a valid cause of action for the spoliation of evidence that interferes with a civil action against a third-party. *Teel*, 284 Mich App at 661. However, a trial court maintains the authority "to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation is commenced." *MASB-SEB*, 231 Mich App at 400.

4. Remedies when spoliation occurs:

- Negative inference instruction

A jury may be directed to draw an adverse inference against a party that failed to produce evidence one when: "(1) the evidence was under the party's control and could have been produced; (2) the party lacks a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the other party." *Ward v Consolidated Rail Corp*, 472 Mich 77, 85-86 (2005). In other words, where the loss of evidence does not appear to have been intentional, the court should instruct the jury that it may make an adverse inference against the offending party. *Brenner*, 226 Mich App at 164.

- Dismissal

Dismissal is generally a last resort, and trial courts must first consider lesser sanctions. *MASB-SEG*, 231 Mich App at 401. However, courts have the discretion to dismiss the case after its evidentiary rulings, and summary disposition is appropriate where the exclusion of the evidence results in a party's inability to prove an element of its case or defense. *Brenner,* Mich App at 161, 164.

- Criminal

Criminal sanctions, as well as disciplinary sanctions, may be available against attorneys who are involved in spoliation. *Teel,* 284 Mich App at 667.

- Adverse presumption

This sanction may be imposed if the destruction of evidence was intentional. More specifically, the Michigan Supreme Court has determined that a trial court should only grant adverse presumption "when the complaining party can establish 'intentional conduct indicating fraud and a desire to destroy [evidence] and thereby suppress the truth." *Ward*, 427 Mich at 84. To this point, adverse presumption serves to put the burden of producing rebuttal evidence on the party that destroyed the evidence. *Widmayer v Leonard*, 422 Mich 280, 289 (1985).

- Other sanctions

Ultimately, a trial court may properly use its discretion to impose a sanction that denies the party the fruits of its misconduct but does not interfere with the party's right to produce other relevant evidence. Introducing Evidence at Trial. *Brenner*, 226 Mich App at 161).

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

Information should be preserved the moment that a party knows or should reasonably know there is a potential for litigation, and the duty to preserve extends to electronically stored information (ESI). *Brenner*, 226 Mich App at 162; MCR 2.302(B)(5).

MCR 2.310(A)(2) defines ESI as electronically stored information, regardless of the format, system, or properties. MCR 2.310 authorize the discovery of ESI that is within the "possession, custody, or control" of the responding party. ESI has its discovery rules civil litigation, and the January 1, 2020 amendments to the Michigan Court Rules include new ESI provisions and other changes regarding the scope of discovery.

Generally, parties have "the same obligation to preserve" ESI as they do for all other types of information and must take reasonable steps to secure and protect potentially relevant ESI within their possession, custody, or control from alteration, loss, and destruction. See MCR 2.302(B)(5)

When a case is reasonably likely to include discover of ESI, under MCR 2.401(J)(1), parties may have an ESI conference by stipulation, order, or motion to consider any ESI issues. Subsequently, following an ESI conference, parties shall file an ESI discovery plan and a statement considering any issues on which the

parties cannot agree to the court. MCR 2.401(J)(2). Notably, there is also an ESI competence requirement and attorneys who participate in an ESI conference must be sufficiently versed in matters relating to their clients' technological systems and may bring a client representative or outside expert to assist in discussions. MCR 2.401(J)(3). In cases involving complex ESI issues, a court may appoint an expert under MRE 706 to aid in the mediation of discovery disputes. MCR 2.411(H)(4).

Under MCR 2.506(A)(2), a subpoena may satisfy the form or forms in which ESI is to be produced, subject to objection. However, parties are not required to provide discovery of ESI from sources that are not reasonably accessible or because of undue burden or cost. MCR 2.306(B)(6); MCR 2.506(A)(3). Additionally, courts may allocate the expense of discovery of ESI and limit the frequency or extent of discovery of ESI, whether or not it is from a reasonably accessible source. MCR 2.306(B)(6).

Nonetheless, under MCR 2.313(D) courts have the power to impose a variety of sanctions for the spoliation of ESI. The rule limits the courts sanctions to measures no greater than necessary to cure the prejudice. MCR 2.313(D)(1). However, courts may order appropriate remedies, including: a presumption that the lost information was unfavorable to the party, a jury instruction either allowing or requiring the jury to presume the lost information was unfavorable to the party, or dismissal of the action or entry of a default judgment. See MCR 2.313(D)(2)(a), (b), and (c).

6. Retention of surveillance video.

The duty to preserve evidence when there is a potential for litigation applies to all evidence that a party knows or reasonably should know is relevant to the anticipated action, including surveillance video. *Brenner*, 226 Mich App at 162. This duty to preserve may also extend to backup tapes used for information retrieval. *Forest Labs*, 2009 WL 998402, at *4. For instance, the *Forest Labs* Court found that even though parties are not typically obligated to produce data from inaccessible backup tapes, even inaccessible backup tapes must be preserved if they contain key information that is not otherwise accessible. *Id.*

However, in *Wood v Cook*, 2018 WL 343437 at *4–*5, the Michigan Court of Appeals determined that the defendant sufficiently rebutted any adverse presumption by presenting evidence that the surveillance footage was merely destroy as a matter of course and not in an attempt to destroy relevant evidence and suppress the truth. In *Wood*, the record indicated that the defendant's employees did not deliberately erase or record over the surveillance video records, but that the defendant's security DVR system automatically re-recorded over its stored media after 64 days. *Id.* at *4 Thus, the evidence was no longer under the defendants' control and was not capable of being produced. *Id.* at *5. Ultimately, the court opted against both adverse presumption and adverse inference where the defendant's failure to preserve the entire record of the plaintiff's record appeared to be the result of a reasonable assumption that the accident itself was the only relevant footage rather than a deliberate decision to hide away damaging evidence, and the plaintiff presented no evidence of spoliation. *Id.*

Further, where a party had no control over purported surveillance video, and there was no evidence showing otherwise, the Michigan Court of Appeals determined that the trial court did not abuse its discretion in holding there was no spoliation of evidence. *Estate of Jones by Jones v VHS Sinai-Grace Hospital Inc*, No. 340634, 2019 WL 1644921, at *3 (Mich App 2019) (citing *Brenner*, 226 Mich App at 160).

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. Under Michigan's collateral source rule, MCL 600.6303(1) in a personal injury action where the plaintiff

seeks to recover medical expenses, "evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the verdict." However, benefits from a collateral source shall not be considered payable or receivable unless the court determines there is a previously existing contractual or statutory obligation on the part of the collateral source to pay the benefits. MCL 600.303(5).

Nonetheless, if the court finds "that a portion of the past economic damages was paid by a collateral source," the court must reduce the jury verdict by that amount. *State Auto Mut Ins Co v Fieger*, 477 Mich 1068, 1072 (2007); MCL 600.6303(1). In *Heinz v Chicago Rd Investment Co,* 216 Mich App 289, 300 (1996), the court noted that the statute requiring that a jury damage award be reduced by the amount a plaintiff receives from a collateral source does not violate the right to a jury trial. Additionally, the *Heinz* court determined that the application of the collateral source rule was not precluded by the defendant's failure to insist on the use of the statutory jury verdict form because the verdict form that the court used was sufficient to allow it to make proper reductions pursuant to the collateral source statute. *Id.* at 302.

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 to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court before a judgement is entered. MCL 600.6303(1). However, Michigan courts reduce the judgment by the amount paid by a collateral source. MCL 600.6303(1). See *Wessels v Garden Way, Inc*, 263 Mich App 642, 644–645 (2004) (noting that where the amount of fault attributable to the plaintiff was 45%, all amounts awarded by the jury verdict are to be reduced by 45% pursuant to MCL 600.6303(3)); see also *Anderson v State Farm Mut Auto Ins Co*, 488 Mich 865 (2010) (questioning why the jury verdict was not reduced under MCL 600.6303(1), the collateral source rule).

Except for premiums on insurance required by law, the judgment amount shall "be reduced by a sum equal to the premiums, or that portion of the premiums paid for the particular benefit by the plaintiff or plaintiff's family or incurred by the plaintiff's employer on behalf of the plaintiff" in obtaining benefits from the collateral source. MCL 600.6303(2). Notably, the court's reduction must not exceed the amount of the judgment for economic loss or the portion of the verdict that represents the damages paid or payable by a collateral source. *Id.*

Notably, in *Shivers v Schmiege*, 285 Mich App 636, 654 (2009), the court found that the collateral source payment statute did not apply to reduce amounts awarded to a patient where the only evidence regarding present economic damages to the patient concerned the in-home care the patient's family provided him. The alleged collateral sources on the other hand, including the social security and disability insurance, did not cover such expenses. *Id.* Thus, the court found that parsing out collateral-covered versus noncollateral-covered expenses "would be pure speculation." *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).**

The Michigan Court of Appeals has addressed this question in *Detary v. Advantage Healthy Physicians, PC*, No. 308179, 2012 WL 6035024 (Mich. Ct. App. Nov. 29, 2012). The *Detary* defendant reasserted on appeal that payment of the medical bills in full by the plaintiff's health care insurer required setting off the judgment pursuant to the collateral source payment statute to the amount that was actually paid by the insurer, adjusted for comparative negligence. *Id.* at *6. Nonetheless, the Court disagreed and noted that where statutory language is clear and unambiguous, the statute must be applied as written. *Id.* at *7 (citing *Rose Hill*

Ctr, Inc v Holly Twp, 224 Mich App 28, 32 (1997).

Thus, the court emphasized that the collateral source rule prevents a plaintiff from recovering the same expenses from both a defendant and a collateral source. *Id.* at *8 (citing *Haberkorn v Chrysler Corp (Two Cases*), 210 Mich App 354, 374 (1995). In *Detary*, the court mentioned that the plaintiff's health care insurer made payments to the hospital and its staff for plaintiff's medical care that would initially qualify as collateral source under MCL 600.6303(4). *Id.* However, where the insurer properly exercised its lien rights, the benefits actually paid or payable by the insurer are not a collateral source pursuant to MCL 600.6303(4). *Id.* (citing *Zdrojewski v Murphy*, 254 Mich App 50, 70 (2002).

The defendant also argued that because those amounts were "written off" by the plaintiff's health care providers, they were not subject to any lien by the insurer and any amount awarded to the plaintiff for medical expenses above and beyond the amount actually paid by the insurer is a "collateral source" and the verdict should be set off by the same. *Id.* However, the court noted that under MCL 600.6303(1), the trial court may reduce the plaintiff's judgment only by the amount that the plaintiff's loss has been paid or is payable, and an amount that has been written off is not a collateral source where it has not been paid and is not payable. *Id.* at *9. Further, the court determined that where the write off is not a benefit received or receivable from an insurance policy and is not a benefit payable pursuant to a contract with a health corporation, any benefit plaintiff receive from write offs did not fall within the statutory definition of collateral source. *Id*. Additionally, if the insurer negotiated a reduced medical payment, the court acknowledged that arguably the plaintiff was still entitled to the full value of the medical services rendered on her behalf. *Id.* Thus, where a jury found that the defendant was negligent and caused the plaintiff's damages, the fact that the plaintiff was insured and that her medical care providers elected to absorb some of the cost of her care did not make the defendant any less negligent. *Id.*

However, in *Greer v Advantage Health*, 305 Mich App 192, 212 (2014), the court held that payments insurers made to parents' healthcare providers and insurance discounts were excluded from the statutory collateral benefits rule. Therein, the defendants moved to reduce the award of future damages to present value to setoff the entire amount the hospital paid to settle the parents' claims and to reduce the award for past medical expenses to the amounts the insurance actually paid rather than bills, for which there was a lien for reimbursement. *Id.* at 197. However, the *Greer* court noted that the statute does not specify that this exclusion from the statutory collateral source rule is limited to the amount of the lien exercised or the amount actually paid. *Id.* at 207. Rather, the exclusion applies to all benefits "paid or payable" by a legal entity that timely asserted a contractual lien pursuant to MCL 600.6303(3). *Id.* However, the court did consider an insurance discount to be a "collateral source" by which the plaintiffs' medical expenses were "paid or payable" and that the discount was a benefit "received or receivable from an insurance policy." *Id.* at 206.

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?

Accident/incident reports are protected as privileged attorney work product when the reports are prepared in anticipation of litigation and the materials subject to the privilege pertain to more than just "objective facts." *D'Alessandro Contracting Grp., LLC v Wright*, 308 Mich App 71, 78 (2014) (quoting *Great Lakes Concrete Pole Corp v Eash*, 148 Mich App 649, 657 (1986)). Notably, a party does not necessarily waive work product protection by providing the report to a third party. Rather, work product protection is waived only if disclosure to a third party "substantially increases the risk that it will be obtained by an adversary." *Id.*

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?

Social media is an example of potentially relevant ESI that is subject to discovery. Thus, discovery of social media is governed by the same rules of evidence pertaining to ESI. *Id.* Namely, social media content can be obtained through discovery requests and subpoenas, so long as the request is reasonable and relevant.

Content often sought include photographs, messages, native copy of the social media account, data printouts involving the IP address, device, date and time the social media platform was accessed, and the steps taken to identify and preserve the ESI.

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.

Courts recognize that social media is neither privileged nor protected by any right of privacy. law *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012). However, requests must be (1) relevant to the subject matter of the action and (2) reasonably calculated to lead to the discovery of admissible evidence. MCR 2.302(B)(1). Namely, social media evidence is relevant where the content has "probative value." *People v Robinson*, No. 331680, 2017 WL 2989044, at *2 (Mich. Ct. App. July 13, 2017).

Generally, social media evidence must be properly authenticated. MRE 901. Additionally, any electronically stored information must be reasonably accessible. MCR 2.302(B)(6). The discovery request must also be narrowly tailored and not for the purpose of harassing a person not involved in the matter. *Alberto v Toyota Motor Corp*, 289 Mich App 328, 336, 796 N.W.2d 490, 494 (2010). See also *People v Smith*, No. 346044, 2021 WL 641725, at *13 (Mich. Ct. App. Feb. 18, 2021), *appeal denied*, No. 162841, 2021 WL 3378620 (Mich. Aug. 3, 2021) (restricting as hearsay the admission of social media comments written by individuals who did not testify and were not parties to the case).

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

Michigan defines ESI as "electronically stored information regardless of format, system, or properties." ESI includes the contents of social media platforms. Therefore, because the contents of social media platforms are ESI, the general rules of spoliation apply.

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).

Relevance: The evidence sought must provide a "probative value" to the case. *People v. Overstreet*, No. 323646, 2016 WL 1126237, at *2 (Mich. Ct. App. Mar. 22, 2016). However, relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice." *Id*. To weigh the probative value against its prejudicial effect, courts look to the following factors:

- the time required to present the evidence and the possibility of delay;
- whether the evidence is needlessly cumulative;
- how directly the evidence tends to prove the fact for which it is offered;
- how essential the fact sought to be proved is to the case;
- the potential for confusing or misleading the jury; and
- whether the fact can be proved in another manner without as many harmful collateral effects.

See *People v. Blackston*, 481 Mich. 451, 462 (2008).

Authenticity: Authentication requires proof that the evidence is "what the proponent claims it to be." *People v. Allison*, No. 328523, 2016 WL 7427653, at *1 (Mich. Ct. App. Dec. 22, 2016); MRE 901(a). Courts have held that social media evidence is properly excluded where the party fails to provide evidence to establish the authenticity of the content. *People v. Al-Shimary*, No. 293096, 2010 WL 5373826, at *2 (Mich. Ct. App. Dec. 28, 2010).

Hearsay: Hearsay is generally inadmissible unless it is subject to a hearsay exception. MRE 802. In the social media context, courts have held that introducing comments to "show its effect on a listener, as opposed to proving the truth of the matter asserted does not constitute hearsay under MRE 801(c)." *People v Algra*, No. 321374, 2015 WL 5247277, at *4 (Mich. Ct. App. Sept. 8, 2015) (quoting *People v Gaines*, 306 Mich. App. 289, 306–07 (2014)). Namely, this occurs when the statement's value does not depend on the truth of the statement. *Id.*

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

Public Act 478 prohibits Michigan employers and prospective employers from requiring employees and applicants to "grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal internet account." The Act applies to Michigan public and private sector employers and public and private educational institutions.

Importantly, the Act does not prohibit an employer from gaining access to devices or equipment "paid for in whole or in part by the employer." As such, an employer could likely monitor an employee's social media use on employer-owned devices. Michigan has no case law that restricts this exception under Public Act 478.

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

Most employment relationships in Michigan are "at will." Therefore, employers can generally terminate employees for their social media posts. However, limitations may arise where the social media involved protected activity or where the termination took place outside of the company's policy. See *Williams v. Oakwood Healthcare, Inc.*, No. 2:17-CV-11381, 2018 WL 4206975, at *3 (E.D. Mich. Sept. 4, 2018), *aff'd*, 769 F. App'x 341 (6th Cir. 2019).

In the case of public employees, the question usually centers on whether the speech was constitutionally protected as a matter of public concern. See *Hayse v. City of Melvindale*, No. CV 17-13294, 2020 WL 999015, at *5 (E.D. Mich. Mar. 2, 2020).