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MINNESOTA

SPOLIATION

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

In Minnesota, the spoliation of evidence need not be intentional to warrant sanctions. *Wajda v. Kingsbury*, 652 N.W.2d 856, 862 (Minn. Ct. App. 2002) (citing *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995)). Indeed, sanctions may be warranted where the destruction of evidence is due to negligence or unintentional. *Id*. The standard for sanctions for spoilation of evidence is whether the evidence destroyed prejudices the opposing party. The court examines the "nature of the item lost in the context of the claims asserted and the potential for remediation of the prejudice." *Patton*, 538 N.W.2d at 119.

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

Minnesota recognizes spoliation by a third-party. Spoliation of evidence by a third party or non-party requires physical control over the evidence. *Willis v. Indiana Harbor S.S. Co.*, 790 N.W.2d 177, 184 (Minn. Ct. App. 2010). In *Himes v. Woodings-Verona Tool Works, Inc.*, an injured railroad employee sued the manufacturer of the bolt wrench after settling a claim against the employer who determined that the wrench was made out of faulty materials. 565 N.W.2d 469, 470 (Minn. Ct. App. 1997). However, because the manufacturer did not have an opportunity to inspect the wrench, the court granted summary judgment in favor of the manufacturer, recognizing that the plaintiff "should have to bear the consequences for the loss of the tool." *Id.* at 471.

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

Minnesota does not recognize a separate cause of action for a spoliation claim. *Federated Mut. Ins. Co.*, 456 N.W.2d at 437.

4. Remedies when spoliation occurs:

In Minnesota "when evidence critical to a party's claim is under the exclusive control of an adverse party and the evidence is destroyed, whether accidentally or otherwise, the district court has discretion to permit the jury to make an unfavorable inference from that fact." *Wajda*, 652 N.W.2d at 864. Also see *Kmetz v. Johnson*, 261 Minn. 395, 400, 113 N.W.2d 96 (1962).

Minnesota district courts have discretion in ordering discovery-related sanctions, including dismissal for spoliation of evidence. The Minnesota Court of Appeals has recognized that dismissal with prejudice is the most punitive sanction, reserving it for exceptional circumstances only. The primary factor to be considered in determining whether to grant a dismissal with or without prejudice is the prejudicial effect of the order upon the parties to the action, although under extraordinary circumstances a dismissal with prejudice might be justified even

though no prejudice to defendant is shown. *Firoved v. Gen. Motors Corp.*, 277 Minn. 278, 283, 152 N.W.2d 364, 368 (1967). Generally, dismissal is imposed only as a last resort if no alternate remedy by way of a lesser, but equally efficient remedy, is available. *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 552 (D. Minn. 1989).

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

Courts may implement measures as necessary to impose sanctions when a party fails to take reasonable steps to preserve ESI in anticipation or conduct of litigation, and the information cannot be restored or replaced through additional discovery. Minn. R. Civ. P. 37.05. Rule 37.05 prevents sanctions for spoliation of evidence when the ESI is lost due to routine operation of a computer system. Minn. R. Civ. P. 37.05, advisory committee's comment. In addition to establishing a duty to preserve ESI, this rule also requires a finding of prejudice to a party or intent to deprive another party of the lost information.

6. Retention of surveillance video.

The duty to preserve evidence is subject to surveillance video. *Owens v. Linn Co.*, No. 16-cv-776, 2017 WL 2304260, at *7 (D. Minn. April 17, 2017). The duty arises when the party knows or should have known that the video evidence is relevant to future or current litigation. *Id.* (finding that defendant was not aware of duty to preserve video surveillance and, therefore, sanctions for spoliation was not warranted); *see Laughlin v. Stuart*, 2020 WL 5798487, at *4 (D. Minn. Sept. 29, 2020) (the preservation of video requires a duty to preserve under current or future litigation).

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?

A jury "shall not be informed of the existence of collateral sources or any future benefits which may or may not be payable to the plaintiff." Minn. Stat. § 548.251, subd. 5. Minnesota defines "collateral sources" as "payments related to the injury or disability in question made to the plaintiff, or on the plaintiff's behalf up to the date of the verdict.

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?

The plaintiff's medical expenses are not admissible at trial. If the court finds liability and resulting damages, a party may file a motion within ten days of the verdict to request determination of the collateral sources. Pursuant to the motion, parties shall submit written evidence of (i) amounts of collateral sources that have been paid or are available to the plaintiff, and (ii) amounts that have been paid, contributed, or forfeited by the plaintiff for the two-year period immediately before the accrual of the action to secure rights to collateral source benefits the plaintiff is receiving. Minn. Stat. § 548.251, subd. 2. The court will reduce the verdict accordingly.

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 negotiated price discount between the insurer and medical provider is considered a collateral source when such discount is secured in relation to the injury in question. Minn. Stat. 548.251, subd. 1. In *Swanson v. Brewster*, the Minnesota Supreme Court clarified Minn. Stat. 548.251 by concluding that "the negotiated discount is unambiguously a collateral source for purposes of the collateral-source statute." 784 N.W.2d 264,

276 (Minn. 2010).

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?

Pursuant to Minn. Stat. 169.09, subd. 13(b), "accident reports and data contained in the reports are not discoverable under any provision of law or rule of court. No report shall be used as evidence in any trial, civil or criminal, or any action for damages or criminal proceedings arising out of an accident. However, the commissioner of public safety shall furnish, upon the demand of any person who has or claims to have made a report or upon demand of any court, a certificate showing that a specified accident report has or has not been made to the commissioner solely to prove compliance or failure to comply with the requirements that the report be made to the commissioner." Disclosing of information in any accident report is a misdemeanor unless the disclosure is made to authorized parties, such as the commissioner of public safety or legal counsel. Minn. Stat. 169.09, subd. 13(d). Accident reports may be considered privileged attorney work product in limited circumstances.

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?

Any party may request production or inspection of ESI, which includes "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained." Minn. R. Civ. P. 34.01(a)(1)(A). Generally, the procedure to obtain social media evidence follows the same discovery process as ESI. Minn. R. Civ. P. 26.06. However, there are challenges that are unique to ESI, such as increased risk of destruction or spoliation, identification of search terms and custodians, and deciding on a production format.

Discovery of ESI is limited to burden or cost of production. Minn. R. Civ. P. 26.02(b)(2). On a motion to compel discovery or for a protective order, the responding party must "show that the information is not reasonably accessible because of undue burden or cost." To overcome the responding party's objection, the requesting party must show good cause and proportionality, whereby the court may limit the "frequency or extent of use of the discovery methods otherwise permitted under these rules." Minn. R. Civ. P. 26.02(b)(3).

A party producing ESI "must produce documents as they are kept in the usual course of business at the time of the request and may organize them to correspond to the categories in the request." Minn. R. Civ. P. 34.02(c)(5)(A).

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.

Like other ESI, social media information must be authentic and relevant for admission as evidence. The court may deny evidence when data is fragmented, discoverable by other means (i.e. available online), or legacy data. Minn. R. Evid. 901.

To protect parties from unnecessary production requests, responding party may object to discovery requests for burden and expense of production when the burden outweighs benefit to the requesting party. Minn. R. Civ. P. 26.02. The court conducts a proportionality analysis to determine whether the burden or expense of the proposed discovery outweighs its likely benefit, which includes factors such as: amount in controversy, parties'

relative access to relevant information, available resources, and necessity of the material requested in addressing issues. *Id.*

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

Minnesota does not have spoliation standards specifically for social media. Social media evidence is governed under ESI evidence and the general evidentiary spoliation standards apply.

On appeal, sanctions for spoliation of evidence are reviewed for abuse of discretion by the district court. The party challenging the sanction has the burden of proof that the district court abused its discretion when it based its conclusions on erroneous interpretation of the law. *Miller,* 801 N.W.2d at 127. That burden is met "only when it is clear that no reasonable person would agree with the [district] court's assessment of what sanctions are appropriate." *Patton*, 538 N.W.2d at 119.

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 evidence, like other ESI evidence, must be authentic and relevant.

First, the court reviews evidence for relevancy to the case. Relevant evidence is defined as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Civ. P. 401. The evaluation of whether evidence is relevant to the case is fact-dependent. The proposed evidence should justify a finding of fact by proving or disproving a material fact of the case. *Boland v. Morrill*, 270 Minn. 86, 98, 99, 132 N.W.2d 711, 719 (1965). However, evidence with probative value that is substantially outweighed by prejudice, confusion of issues or misleading to the jury, or cause undue delay, will be excluded. Minn. R. Civ. P. 403.

In a wrongful termination case between an employer, defendant, and plaintiff, former-employee, the district court permitted the defendant to obtain plaintiff's social media content within a limited time period relating to a question of material fact. However, the court noted that social media communications must have substantive relevance to be admissible as evidence. *Holter v. Wells Fargo & Co.*, 281 F.R.D. 340, 344 (D. Minn. 2011), quoting *EEOC v. Simply Storage Management*, 270 F.R.D. 430 (S.D. Ind. 2010) (social media evidence was probative to show plaintiff's mental state, which was material to the plaintiff's disability discrimination claim).

The Minnesota Supreme Court and Legislature have the authority to identify methods of authentication of various types of evidence. Minnesota Rule 901 provides examples of different methods of authentication. Minn. R. Civ. P. 901(a). For example, identification of voice in an electronic audio transmission may be authenticated by a properly qualified witness. *State ex rel. Trimble v. Hedman*, 291 Minn. 442, 450, 192 N.W.2d 432, 437 (1971). There is no single procedure for authenticating evidence.

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

A bill to protect applicants and employees from employer's access to their social media account was introduced in the House and the Senate on February 14, 2019. H.F. No. 1196, 91st Session 2019. However, the proposed language of the bill narrowly defines "personal social media account" as "an account with an electronic medium or school's behest, or provided by a school, and intended to be used solely on behalf of the school," indicating that the bill is intended for employees of schools only. *Id.*

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

Minnesota courts have addressed limitations of employment termination in cases relating to personal social media accounts of public service employees. Minnesota courts invoke the Pickering balance, which considers

"six interrelated factors: (1) the need for harmony in the work place; (2) whether the government's responsibilities require a close working relationship; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties." *Palmer v. Cty. of Anoka*, 200 F. Supp. 3d 842, 848 (D. Minn. 2016) (quoting *Anzaldua v. Ne. Ambulance & Fire Prot. Dist.*, 793 F.3d 822, 832-33 (8th Cir. 2015)).