FOR MORE INFORMATION

DANIEL COKER
Oxford, Mississippi
www.danielcoker.com

Timothy Peeples
TPeeples@danielcoker.com

Julia B. Jimenez
JJimenez@danielcoker.com

ALFA International
The Global Legal Network
Local Relationships Worldwide

MISSISSIPPI

SPOLIATION

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

Spoliation may arise in both instances of negligence and intentional or fraudulent conduct. *Bolden v. Murray*, 97 So.3d 710, 717-18 (Miss.Ct.App. 2012). Spoliation occurs "when evidence is lost or destroyed by one party . . . thus hindering the other party's ability to prove his case." *Id.* at 718. When spoliation occurs, "a presumption is raised that the missing evidence would have been unfavorable to the party responsible for its loss." *Id.*

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

Mississippi recognizes the distinction between spoliation by a first party and a third party. *Dowdle Butane Gas Co., Inc. v. Moore*, 831 So.2d 1124, 1127-30 (Miss. 2002).

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

There is no separate cause of action for a spoliation claim. *Bolden*, 97 So.3d at 717.

4. **Remedies when spoliation occurs:**

- Negative inference instruction

A party's spoliation of evidence entitles the opposing party to a jury instruction that directs the finder of fact to presume that the lost or destroyed evidence would have been unfavorable to the spoliator. *Thomas v. Isle of Capri Casino*, 781 So.2d 125, 134 (Miss. 2001).

- Dismissal

Courts have discretion to assess sanctions, including dismissal of a party's claims, under Rule 37 of the Mississippi Rules of Civil Procedure. *M.R.C.P. 37; see also Moore*, 831 So.2d at 1133.

- Criminal sanctions

An individual may be imprisoned for not less than one month in the County jail nor more than two years in the State penitentiary, fined up to $500.00, or both for destroying evidence. Miss. Code Ann. §97-9-55.

- Other sanctions

Courts have wide latitude under Rule 37 to sanction litigants and counsel for spoliation and related conduct. *Moore*, 831 So.2d at 1127.

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

Spoliation applies to all forms of evidence, including electronically stored information. *Murphy v. William Carey Univ.*, 314 So.3d 112, 125 (Miss.Ct.App. 2020). Mississippi's federal courts have noted a key exception to this general rule

of thumb: Courts may not impose sanctions under Rule 37 of the Federal Rules of Civil Procedure when the loss of electronically stored information results from "routine, good-faith operation of an electronic information system." *Kermode v. University of Miss. Med. Ctr.*, 2011 WL 2619096, *3 (S.D. Miss. 2011).

6. Retention of surveillance video.

There is no *per se* requirement that a business retain surveillance video footage, but some Courts have used a business' failure to preserve video footage as the basis for finding in favor of the business' invitee in certain circumstances. *See, e.g., Grand Casino Biloxi v. Hallmark*, 823 So.2d 1185, 1195 (Miss. 2002) (finding in favor of a gambling patron where the defendant casino failed to preserve video evidence regarding the results of the patron's slot machine play). The Mississippi Court of Appeals, however, ruled in a personal injury case arising out of a customer's fall from a chair in a cell phone store, that there was no basis for a spoliation instruction where a store employee completed an incident report after the accident, reviewed the videotape before preparing the report, and the store's cameras automatically recorded over the footage three weeks after the accident. *Walker v. Cellular South, Inc.*, 309 So.3d 16, 28-29 (Miss.Ct.App. 2020). The Court deemed the missing evidence to not be an "integral component" of the injured customer's case. *Id.* at 29.

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. Mississippi recognizes the collateral source rule under which a "wrongdoer is not entitled to have the damages to which he is liable reduced by proving that plaintiff has received or will receive compensation or indemnity for the loss from a collateral source, wholly independent of him." *Coker v. Five-Two Taxi Service, Inc.*, 211 Miss. 820, 52 So.2d 356, 357 (Miss. 1951). In other words, a "tortfeasor cannot use the moneys of others (insurance companies, gratuitous gifts, etc.) to reduce the cost of its own wrongdoing." *Brandon HMA, Inc. v. Bradshaw*, 809 So.2d 611 (Miss. 2001). A defendant is not allowed to put on evidence of payments or compensation from third parties like health insurance payments or disability benefits as a way to reduce the plaintiff's recoverable damages. *See Encyclopedia of Miss. Law* at § 25:51. The admission of such evidence is reversible error. *Easton v. Gilliland*, 537 So. 2d 406, 408 (Miss. 1989).

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. Evidence of insurance payments for medical expenses is not admissible at trial. Likewise, the trial judge may not reduce a verdict in a post-trial hearing based on the fact that all or part of the plaintiff's medical expenses were paid by the plaintiff's insurance carrier.

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 Mississippi Supreme Court has held that medical bills which are "written off" after payment of a portion of the total bill by an insurer, Medicare, or Medicaid fall under the collateral source rule, and the entire, unreduced amount is admissible. *Wal-mart Stores, Inc. v. Frierson*, 818 So.2d 1135, 1139 (Miss. 2002).

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?

Generally speaking, accident/incident reports are probably not protected from discovery. Mississippi law does not shield documents prepared in the ordinary course of business from disclosure in a lawsuit. *Haynes v. Anderson*, 597 So.2d 615, 618 (Miss. 1992). For example, if a business prepares an accident report after every reported incident, Courts are less likely to find them to be protected from discovery. To be covered by the work product privilege, the document must truly be prepared "in anticipation of litigation." *Id.* at 619. The factors to be considered in what the Courts have described as a "case by case approach," are "the nature of the documents, the nature of the litigation [and investigation], the relationship between the parties, and any other fact peculiar to the case." *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?**

Parties may request social media evidence under Rule 26 of the Mississippi Rules of Civil Procedure. Rule 26(b)(5) sets out a balancing test governing the production of large and/or costly-to-produce amounts of electronically stored information. Similarly, Rule 45 allows parties to subpoena social media evidence from non-parties (with a similar cost-shifting mechanism set out in Rule 45(e)).

An example of social media discovery requests are, as follows:

> INTERROGATORY: Identify the username, email address, and password for all of plaintiff's social media accounts, including, but not limited to, Facebook, Twitter, Instagram, Snapchat, LinkedIn, Marco Polo, Youtube, Tumbler, Pinterest, Google+, Blog Spot, and all over virtual or online communities or networks in which personal information, comments, and/or images are exchanged with members of those communities or networks and/or the public.
>
> REQUEST FOR PRODUCTION: Make available for inspection and reproduction the following: your cell phone(s), tablet(s), smart phone(s), PDA(s), computer(s), and other device(s) on which ESI may be stored or used by the plaintiff from (insert date) to present.
>
> REQUEST FOR PRODUCTION: If you are a member of or belong to any social networking website(s) or have utilized a blog or website related to your individual activities, provide a copy of all information contained on those sites as the information existed on the date of service of the foregoing Request. This Request includes, but is not limited to, a copy of any screen names, news feeds, profile pictures and/or information, contacts (i.e., friends and followers), suggested contacts, messages sent and/or received, contents of inbox, status or mood updates, activity streams, tweets, blurbs, comments, notifications, notes, personal information (i.e., information including, but not limited to, hobbies, interests, entertainment, education, and/or work), photographs, videos, music, groups, networks, memberships, and/or advertising.

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.**

The only limitation is that set out in Rule 26(b)(1). The Rule allows parties to "obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party." The Rule further provides that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence."

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

While there are no cases directly dealing with this issue, it is very likely Mississippi's Courts would take the same approach with regard to social media evidence as it would with any other evidence. Negligently and/or intentional/fraudulent destruction of social media evidence could be deemed spoliation, entitling the opposing party to an adverse jury instruction against the spoliator.

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).

Mississippi Courts have primarily concerned themselves with the question of authenticity when it comes to the introduction of social media evidence. Courts here have been somewhat reluctant to allow this type of evidence in at trial when the authorship and/or ownership of social media posts and materials is in dispute. In the first decision issued by the Mississippi Supreme Court related to the admission of social media evidence (which has since been followed by other Mississippi Courts), the Court explained that due to "special concerns regarding fabrication, the fact that an electronic communication on its face purports to originate from a certain person's social media networking account is generally insufficient standing alone to authenticate that person as the author of the communications." *Smith v. State*, 136 So.3d 424, 433 (Miss. 2014). Mississippi Courts want "something more," which may include the following: (1) the purported sender admits authorship, (2) the purported sender is seen composing the communication, (3) business records of an internet or cell service provider show that the communication originated from the purported sender's personal computer or phone under circumstances in which it is reasonable to believe that the purported sender would have access to the computer or phone, (4) the communication contains information only the purported sender would know, (5) the purported sender responds to an exchange in such a way as to indicate circumstantially that he or she was the author of the communication, or (6) other circumstances peculiar to the particular case.

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

No. While employers in the State should be cognizant of rulings by the National Labor Relations Board, Courts in this State have no addressed this issue.

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

This issue has been not been addressed in any depth by Mississippi's state or federal courts, but the United States Court of Appeals for the Fifth Circuit upheld an employee's termination that resulted from her violation of her employer's social media policy. *See Rodriguez v. Wal-Mart Stores, Inc.*, 540 F.Appx 322, 328 (5th Cir. 2013). Since Mississippi has a longstanding history as an employer-friendly at-will employment State, Mississippi's Courts would likely follow the general rule that employees may be terminated for any reason, including their usage of social media (particularly in violation of a company policy), so long as the reason given for termination is not a pretext for discrimination under federal law.