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MISSOURI

SPOLIATION

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

Spoliation is the intentional destruction or significant alteration of evidence. *State ex rel. Zobel v. Burrell,* 167 S.W.3d 688, 691 (Mo. Banc 2005). The destructive act must be intentional; mere negligent destruction of evidence does not constitute spoliation. *Schneider v. G. Guilliams, Inc.,* 976 S.W.2d 522, 527 (Mo. App. E.D. 1998). The spoliator must destroy or alter the evidence under circumstances indicating fraud, deceit, or bad faith. *Id.* However, under certain circumstances, the spoliator's failure to adequately explain the evidence's destruction may give rise to an adverse inference. *Id.* at 527. The party seeking to invoke the doctrine bears the burden of making a prima facie showing of the spoliator's fraudulent intent. *DeGraffenreid v. R.L. Hannah Trucking,* 80 S.W.3d at 873.

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

First-party spoliation claims are those claims for destruction or alteration of evidence brought against parties to the underlying litigation. Conversely, third-party spoliation claims are those destruction or alteration of evidence claims against non-parties to the underlying litigation.

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

Missouri has not recognized intentional or negligent spoliation as a tort. As such, there is no separate cause of action for a spoliation claim in Missouri.

4. Remedies when spoliation occurs:

- Negative inference instruction

In Missouri, the victim of spoliation is entitled to an adverse inference which holds the spoliator to admit that the missing evidence would have been unfavorable to its position. *Marmaduke v. CBL & Associates Management Inc.,* 521 S.W.3d 257, at 269. The party asserting the doctrine is not entitled to any further inferences as a matter of law regarding that evidence and is not entitled to an adverse inference jury instruction. *Id.* The adverse inference does not prove the opposing party's case. *Id.*

Missouri does not offer any other remedies when spoliation of evidence occurs. However, Rule 61.01 of the Missouri Rules of Civil Procedure provides courts with wide discretion in issuing sanctions for failure to make discovery. As such, spoliators are at risk of an adverse inference regarding the evidence as well as any other sanctions permissible under Rule 61.01 the court deems proper under the circumstances.

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

   A party's duty to preserve evidence/information extends to electronic information as well. Courts in Missouri have a wide range of discretion when issuing sanctions for spoliation of evidence, both physical and electronic. As we streamline towards a paperless society, the duty to preserve electronic information is more readily apparent now than it has ever been.

6. **Retention of surveillance video.**

   The duty to preserve electronic information, as one would expect, applies to the retention of surveillance videos as well. In 2018, the Missouri Court of Appeals, Eastern District held that a defendant violated the spoliation doctrine by failing to preserve a surveillance video that was alleged to have shown the accident as issue in the underlying litigation. For this spoliation violation, the defendant had to admit that the surveillance video would have been unfavorable to its position. *Hill v. SSM Health Care St. Louis,* 563 S.W.3d 757.

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 Plaintiff can submit to the jury the total amount of his/her medical expenses. However, a defendant can submit to the jury evidence of payments made by the defendant, defendant's insurer, or authorized representative towards the plaintiff's total amount of medical expenses as well as the outstanding amount which is almost always less than the charged amount.

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?**

   In 2017, the Missouri Legislature amended the collateral source rule and limited the "actual cost" of the plaintiff's medical care or treatment to "no more than the dollar amounts paid by or on behalf of the plaintiff plus any remaining amount necessary to satisfy the financial obligation for the medical care after adjustment for any contractual discount or price reduction." MO Rev. Stat. § 490.715 (2017). As such, if all or a portion of plaintiff's medical expenses were reimbursed or paid for by his/her insurance carrier, evidence of said payments are admissible to limit the plaintiff's overall recovery for its medical expenses. However, the Court of Appeals in Missouri has ruled that this does not bar the plaintiff from admitting the charged amount.

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).**

   Yes, defendants can introduce evidence to reduce the plaintiff's medical expenses by the amount that was actually paid by an insurer and any amount that is still outstanding. The Missouri Court of Appeals, Eastern District held that Section 490.715, as amended in 2017, allows for *both* the admittance of evidence of the "actual cost" of a plaintiff's medical expenses as well as evidence of any payments made by an insurer. *Brancati v. Bi-State Development Agency,* 571 S.W.3d 625, at 635. This renders the statute essentially meaningless as this was the accepted practice before the attempt by the legislature to prohibit the submission of the charged amount.

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 can be protected when they are made at the direction of an insurer and/or result from an investigation conducted by the insurer. Missouri recognizes insurer-insured privilege as part of the attorney-client privilege. *State ex rel. Cain v. Barker*, 540 S.W.2d 50, 58 (Mo. 1976). The privilege requires an existing insured-insurer relationship where the insurer is obligated to defend the insured. *May Dep't Stores Co. v. Ryan*, S.W.2d 134, 136 (Mo. App. 1985). The privilege exists even if no attorney has been employed regarding the occurrence. *State ex. rel. Cain*, 540 S.W.2d 50, 58. The privilege precludes from discovery investigation and claims documents created by an insurer for possible litigation. *Id.*

The privilege includes protecting incident reports made by an employee for the purposes or reporting an incident to the employer's insurance company. *Ratcliff v. Sprint Mo., Inc.*, 261 S.W.3d 534, 548 (Mo. App. 2008). A statement concerning an accident obtained by an employer from his servant relating to the employer's duty to report incidents and the insurer's duty to defend and indemnify falls within the attorney-client privilege and is excluded from discovery. *Id*.

Missouri recognizes the exception to the attorney-client/insured-insurer privilege that allows discovery of materials when the party seeking discovery shows substantial need without the ability to obtain the substantial equivalent though other means of discovery.

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?

There is no Missouri appellate court authority with respect to discovery of social media evidence. As such, discovery disputes arising from request for social media evidence are decided on ad hoc basis, and the ability of a defendant to procure social media evidence depends very heavily on the inclination of the circuit court judge. The standard discovery tools of Interrogatories, Requests for Production of Documents, Requests for Admission, and subpoenas are available to solicit social media the same as with other types of evidence.

In response to a Requests for Production, a party must produce responsive documents that are within the party's control. In Missouri State Courts, "Control" does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability, to obtain the documents from a non-party to the action." *Hancock v. Shook*, 100 S.W.3d 786, 797 (Mo. 2003) (internal citations omitted). Missouri Federal Courts have similarly defined "control" as the ability to obtain upon demand documents in the possession of another. *Huggins v. Fed. Express Corp.*, 250 F.R.D. 404, 408 (E.D. Mo. 2008). Thus, the party to whom discovery is directed need not have legal ownership or actual physical possession, but rather a "practical ability" to obtain the documents. *Orthoarm, Inc. v. Forestadent USA, Inc.*, No. 4:06–CV–730, 2007 WL 1796214, at *2 (E.D. Mo. June 19, 2007).

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.

Missouri law does not impose any special limitations on the discovery of social medical evidence. As such, a party's social media content is discoverable so long as the request for same falls within the scope of discovery as defined under Missouri law. Rule 56.01(b) of the Missouri Rules of Civil Procedure establishes the general scope of discovery: "Parties may obtain discovery of any matter, not privileged, that 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 information sought appears reasonable calculated to lead to the discovery of

admissible evidence. The party seeking discovery shall bear the burden of establishing relevance." Determining the appropriate scope of discovery involves "the pragmatic task of weighing the conflicting interests of interrogator and the respondent." *State ex rel. LaBarge v. Clifford*, 979 S.W.2d 206, 208 (Mo. App. E.D. 1998) (quoting *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 328 (Mo. App. E.D. 1985)). The party from whom discovery is sought may seek a court order protecting that party from "annoyance, embarrassment, oppression, or undue burden or expense." *Edwards v. Missouri State Bd. of Chiropractic Examiners*, 85 S.W.3d 10, 22 (Mo. Ct. App. 2002) (citing Mo. S. Ct. Rule 56.01(c)). Even if the information sought is properly discoverable, upon objection the trial court should consider whether the information runs against an interest in privacy. *State ex rel. Creighton v. Jackson*, 879 S.W.2d 639, 642 (Mo. Ct. App. 1994).

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

Neither the Missouri Bar nor Missouri Courts have set forth any spoliation standards for litigants' social media accounts. As such, the traditional spoliation analysis applies to resolve a claim that a party has spoliated social media evidence. There are no reported Missouri decisions that address a spoliation claim in the context of destruction of social media evidence. Missouri Courts define spoliation as the destruction or significant alteration of evidence. *Schneider v. G. Guilliams, Inc.*, 976 S.W.2d 522, 526 (Mo. Ct. App. 1998) (quoting *Baugher v. Gates Rubber Co.*, 863 S.W.2d 905, 907 (Mo. Ct. App. 1993)). In Missouri, if a party has intentionally spoliated evidence, indicating fraud and a desire to suppress the truth, that party is subject to an adverse evidentiary inference. *Brown v. Hamid*, 856 S.W.2d 51, 56–57 (Mo. banc 1993).

For spoliation to give rise to an adverse inference, there must be evidence indicating fraud, deceit, or bad faith. *Id.* In such cases, it may be shown by the proponent that the alleged spoliator had a duty, or should have recognized a duty, to preserve the evidence. *Wilmes v. Consumers Oil Co. of Maryville,* 473 S.W.3d 705, 718 (Mo. App. W.D. 2015). This is largely a fact-based, case by case determination, and preservation letters can be used to show the requisite "fraud, deceit, or bad faith" so as to lead to an adverse inference. *See Carroll v. Kelsey*, 234 S.W. 3d 559, 566 (Mo. App. W.D. 2015). Accordingly, in the appropriate case, it is advisable to send preservation letters requesting the preservation of social medial or seek an entry of a Protective Order prohibiting a plaintiff from deleting defined social media content. If the plaintiff then proceeds to delete or alter such information, a spoliation argument would be much stronger.

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).

No published Missouri opinion specifically addresses standards for the admissibility of social media evidence. As such, traditional relevance and foundation analyses govern. To lay a proper foundation, a party must establish authenticity, relevance, best evidence, and must defeat any hearsay objections. *Hadlock v. Director of Revenue*, 860 S.W.2d 335, 337 (Mo. banc 1993).

The proponent of evidence authenticates a piece of evidence by showing that the document is, in fact, what it purports to be. *Estate of W. v. Moffatt*, 32 S.W.3d 648, 653 (Mo. Ct. App. 2000). Typically, a party can serve as the foundation witness for that party's own social media content. If there is concern with respect to whether a party will admit that social media content is in fact, his or her own content, thought should be devoted to developing an alternative foundation, including the presentation of a third party witness to testify who is experienced in completing social media research and who can testify with respect to the subject social media evidence. Also, if a party denies authorship of the social media content at issue, the evidence can still be used to impeach the party, even if a Court determines that it is not admissible as substantive evidence.

Once evidence has been authenticated, the proponent must establish that the evidence is relevant. Evidence

is relevant if it tends to prove or disprove a fact in issue or corroborate other evidence. Also, the probative value must outweigh any prejudicial effect. *Whelan v. Missouri Pub. Serv., Energy One*, 163 S.W.3d 459, 462 (Mo. Ct. App. 2005) (citing *Guess v. Escobar*, 26 S.W.3d 235, 242 (Mo. Ct. App. 2000)).

Lastly, the statements of a party opponent made on social media satisfy an exception to the hearsay rule and are admissible as an admission of a party opponent. *See e.g.*, *Nettie's Flower Garden, Inc. v. SIS, Inc.*, 869 S.W.2d 226, 229 (Mo. Ct. App. 1993).

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

There are no published Missouri opinions addressing an employer's right to monitor an employee's social media usage. However, it has been well settled that employers have a right to impose restrictions on the use of their equipment, e-mail, and internet access. Violation of reasonable rules regarding computer usage can result in proper termination and disqualification from unemployment compensation. See e.g. *Jackson v. Walgreen Co.*, 516 S.W.3d 391 (Mo. App. E.D. 2017); Mo. Rev. Stat. § 288.050. For example, employers may have policies related to social media and unauthorized use of company e-mail, internet, and computer equipment. *See e.g. Jackson,* 516 S.W.3d at 393; *Ernst v. Sumner Group, Inc.*, 264 S.W.3d 669, 671-72 (Mo. Ct. App. 2008).

In *Ernst v. Sumner Group, Inc.*, 264 S.W.3d 669, 672 (Mo. Ct. App. 2008), the Court of Appeals held that a former employee had been terminated for misconduct, and therefore properly denied unemployment benefits, where he had used the company computer system to circulate sexually explicit photos. Company policy manuals clearly stated that such conduct was unauthorized and that company computers and e-mails "may be monitored 24 hours a day, 7 days a week to ensure appropriate business use. The employee has no expectation of privacy at any time when using Company property." *Id.* at 670 (Emphasis in original).

The Missouri Supreme Court has not yet specifically addressed the issue of employee privacy rights in e-mail and internet communications. However, a Missouri federal court concluded that a plaintiff could bring a claim for trespass to chattel against his employer for interfering with his private email. *Porters Bldg. Ctrs., Inc. v. Sprint Lumber*, No. 16-06055-CV-SJ-ODS, 2017 U.S. Dist. LEXIS 162139, *32 (Mo. App. W.D. 2017). In *Porter*, an employer accessed the personal email account of his employee and read some of the emails, even printing a few. *Id.* at *24. The court held that because the email communication was connected to a tangible object, a server, the employee could maintain an action against his employer who "intermeddled" with his possessory interest in his private email account. *Id.* at 32-33.

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

Missouri is an "at will" employment state, and an employer can generally terminate employees for any reason, including the contents of the employee's social media postings. In *Jackson v. Walgreen Co.*, 516 S.W.3d 391 (Mo. App. E.D. 2017), the Court of Appeals affirmed a determination that an employee was not entitled to receive unemployment benefits after being terminated for violating the employer's "Social Media Policy." The Court found that Walgreens satisfied its burden in proving the employee was terminated for misconduct connected with work for a post to a coworker's page that violated the "Social Media Policy." *Id.* at 393. However, an employer's right to terminate an employee for social medial posts is not unfettered.

State courts as well as the Eighth Circuit and Missouri federal courts have ruled consistently in matters related to an employee's concerted activities. When an employee posts something negative on their social media account about their company, employees, or supervisors, an employer must consider whether the post is

protected by the NLRA. The test is whether the employee is engaging in this activity solely for himself or on behalf of other employees. A social media gripe that is the "logical outgrowth of concerns expressed by the employees collectively" is a protected concerted activity where the employee is seeking to initiate, induce, or prepare a group for action and where an individual employee brings "truly group complaints" to management's attention. *See Meyers Industries*, 281 NLRB 882, 885 (1996). The 8th Circuit has consistently applied *Meyers* to analyze concerted activity involving "a speaker and a listener" or individual employee. *N.L.R.B. v. RELCO Locomotives, Inc.*, 734 F.3d 764, 786 (8th Cir. 2013) (citing *Meyers* at 887; *Williams v. Watkins Motor Lines*, Inc., 310 F.3d 1070, 1072 (8th Cir. 2002) (citing *Meyers* at 882)).