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NEVADA

SPOLIATION

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

   Under Nevada law, spoliation of evidence occurs when a party fails to preserve material it knows or reasonably should know is relevant to actual or anticipated litigation. *MDB Trucking, LLC v. Versa Prod. Co., Inc.*, 136 Nev. Adv. Op. 72, 475 P.3d 397 (2020). Spoliation of evidence can be intentional or negligent and the available remedy will depend on the intent behind the suppression.

   To prove the spoliation of evidence was intentional and not accidental or reckless, the party claiming spoliation has the burden to prove the destruction of evidence was done with the intent to harm. *Bass–Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 106 (2006). The intent to harm must be present; the intent to destroy the evidence is not enough. *Nguyen v. Boynes*, 133 Nev. 229, 237, 396 P.3d 774, 781 (2017).

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

   First-party spoliation is the destruction of evidence by a party to the underlying litigation. *Timber Tech Engineered Bldg. Prod. v. The Home Ins. Co.*, 118 Nev. 630, 633, 55 P.3d 952, 954 (2002). Third-party spoliation occurs when an individual or entity not named in the underlying litigation destroys evidence, such as a warehouse storing the evidence. *Id.*

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

   The Supreme Court of Nevada has continuously declined to recognize a separate cause of action for spoliation of evidence for either first or third-party spoliation. *Timber Tech Engineered Bldg. Prods. v. Home Ins. Co.* (2002). The court held that the benefit in recognizing a tort cause of action for spoliation far outweighs the burden it would cause to those involved because of the probability for a potentially endless litigation over a speculative loss. *Id*. Although there is no legal cause of action, there are other court sanctioned remedies available.

   In *Timber Tech*, the insurance companies for the parties signed a Preservation of Evidence Agreement to store the evidence in a warehouse; the court held that the agreement did not create a duty in tort but rather created a contractual relationship. *Id*. Because Timber Tech never raised a breach of contract claim, the court refrained from addressing whether a spoliation of evidence claim would succeed under a breach of contract theory. *Id*.

   Although parties to litigation are not under a legal duty to preserve evidence, the

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attorneys of record are under an ethical duty to ensure the preservation of material evidence. *See* Nevada Rules of Professional Conduct Rule 3.4.

4. Remedies when spoliation occurs:

When spoliation of evidence occurs, the available remedy depends on the intent behind the suppression. Willful or intentional spoliation invokes the remedy provided in NRS 47.250(3) whereas negligent spoliation invokes the benefit of an adverse court instruction. *Thomas v. Hardwick*, 126 Nev. 142, 151, 231 P.3d 1111, 1117 (2010).

NRS 47.250(3) provides a rebuttable presumption that evidence willfully suppressed would be adverse if produced. For a party to obtain the benefit of this presumption they must prove the evidence was willfully destroyed with the intent to cause harm. *Bass-Davis v. Davis* (2006). When that burden is met, the presumption that the evidence was adverse applies and if not rebutted, the factfinder is instructed to presume the evidence was adverse. *Id*.

If evidence is negligently lost or destroyed, an adverse inference will be permitted. An inference has been defined as a conclusion of fact that is not presented by direct evidence, but through logic and reason may be concluded to be an existing fact. *Bass-Davis v. Davis (2006).* When evidence is negligently suppressed, an instruction may, but is not required to, be given to the trier of fact permitting them to draw a negative inference from the missing evidence. *Id*. The trial court has complete discretion in deciding whether to provide a negative inference instruction. *Thomas v. Hardwick,* (2010).

Nevada courts have generally adopted the Second Circuit's three-part test for establishing whether a negative inference instruction is applicable. The factors the court considers are: (1) whether the party who had control over the evidence had an obligation to preserve it; (2) whether the records were destroyed with a culpable state of mind or in anticipation of litigation; and (3) whether a reasonable trier of fact would find the destroyed evidence to be relevant to a claim or defense. *Hernandez v. Vanveen*, 2016 WL 1248702 (D. Nev. Mar. 28, 2016), citing *Apple Inc. v. Samsung Elecs. Co*., 888 F. Supp. 2d 976, 989 (N.D. Cal. 2012).

To move for dismissal based on the spoliation of evidence, pursuant to NRCP 12(b), requires proof that the party has failed to state a claim because they have no evidence. *Id*. In reviewing the motion to dismiss, the court is obligated to read the evidence in the light most favorable to the non-moving party. *Id*. Because case-terminating sanctions are so harsh, the court applies a heightened standard of review to orders imposing them. *GNLV Corp. v. Serv. Control Corp*., 111 Nev. 866, 870, 900 P.2d 323, 325 (1995). Factors a court considers before imposing case-terminating sanctions include the degree of willfulness of the offending party, the extent the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of less severe sanctions, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses. *Id*; see also *MDB Trucking, LLC v. Versa Prod. Co*., (2020).

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

Pursuant to Nevada Rule of Civil Procedure 37(e), if electronically stored information is lost due to a party failing to take reasonable steps to preserve it, it cannot be restored or replaced, and it should have been preserved in anticipation of litigation, the court may order no greater measure than necessary to cure the prejudice. If the court finds that the party who failed to preserve the evidence acted with the intent to harm, then a rebuttable presumption may apply.

6. Retention of surveillance video.

Under Nevada law, surveillance videos that contain material information relevant to litigation or prosecution are generally discoverable and admissible in court. *See* NRCP 26(b)1. To be admissible, the surveillance video will have to be relevant, meaning it tends to prove or disprove a material fact. NRS 48.015. Additionally, the video must be authentic. NRS 52.015.

Once the preliminary threshold of relevance and authenticity is met, a surveillance video can be admitted. In 2010, a Clark County District Court ruled that any type of surveillance material taken in the ordinary course of business must be disclosed in a party's initial disclosures, pursuant to NRCP 16.1; see also *Angela J. Mendez v. New Albertsons, Inc.,* Discovery Commissioner's Report and Recommendations, December 8, 2010.

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?

In Nevada, a plaintiff is permitted to submit the total amount of medical expenses even if a portion was paid by the plaintiff's insurance company. The defendant can be liable for the entire amount because it does not enjoy the benefit of the plaintiff's insurance. The Nevada collateral source rule provides that if a plaintiff obtains compensation for his injuries from a source wholly independent from that of the tortfeasor, such as their insurance carrier, that compensation cannot be deducted from the damages the plaintiff would have otherwise collected from the tortfeasor. *Khoury v. Seastrand*, 132 Nev. 520, 377 P.3d 81 (2016). This is intended to prevent the jury from misunderstanding the issues and diminishing the award the plaintiff would receive because of compensation that a third-party has paid. *Id*. The prejudicial impact of collateral source payment greatly outweighs the probative value of such evidence. *Id*.

The collateral source rule does not protect against the admission of medical liens. Generally, the existence of a lien is inadmissible because of its potential for jury prejudice unless it is being offered to show potential bias at trial. *Khoury v. Seastrand*, (2016)(stating the admissibility of a medical lien did not invoke the collateral source rule because it was offered to show the testifying medical provider was a biased witness because he had a stake in the outcome of the case.)

NRS 42.021 provides an exception to the collateral source rule in medical malpractice actions and the defendants are permitted to use evidence of collateral payments to prevent plaintiffs from receiving compensation from both the medical provider and collateral sources. *McCrosky v. Carson Tahoe Reg'l Med. Ctr*., 133 Nev. 930, 936, 408 P.3d 149, 155 (2017). If, however, the defendant chooses to introduce collateral evidence, the plaintiff can provide evidence substantiating the amount he paid to secure his insurance benefits. *See* NRS 42.021.

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?

Information indicating that a plaintiff's medical expenses have been reimbursed or paid for by his insurance carrier is inadmissible at trial. *Khoury v. Seastrand*, (2016). The collateral source rule applies in both trial and post-trial hearings. *Id*. A tortfeasor is potentially liable for the full extent of the damages caused, and it does not matter how much the victim, or his insurance, has paid. *McConnell v. Wal-Mart Stores, Inc.,* 995 F. Supp. 2d 1164, 1169 (D. Nev. 2014).

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).

Generally, the collateral source rule prohibits any evidence of a wholly independent third-party compensating a plaintiff for damages and such payment should not be deducted from the damages a plaintiff would otherwise receive from the tortfeasor. *Winchell v. Schiff*, 124 Nev. 938, 193 P.3d 946 (2008). The fact that a medical provider ultimately accepted less than the billed amount, whether from an insurance company or the victim directly, is not relevant to whether the tortfeasor is liable for the full value of the harm he has caused. *McConnell v. Wal-Mart Stores, Inc.* (D. Nev. 2014). Because any write-down of the cost by a medical provider or insurance carrier is considered a third-party payment, the collateral source rule will govern, and the injured party can recover for the full amount billed. *Id*.

An exception to the general collateral source rules applies in cases involving workers' compensation. Nevada law provides that the amount of workers' compensation an injured employee received must be deducted from the amount the employer is to pay. NRS 616c215 is a narrow exception to the collateral source rule and is generally coupled with a jury instruction advising the jury to not deduct the damages they intend to award because that will be done post-trial. *Cramer v. Peavy*, 116 Nev. 575, 580, 3 P.3d 665, 668 (2000).

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?

The discoverability and admissibility of an incident report will often turn on who authored the report. Generally, if a party to litigation prepared a written report regarding the subject incident, that report will be discoverable and admissible. If the report was created by an insurer in response to an investigation or claim by its insured, the work-product privilege will *only* apply if that report was prepared at the express direction of counsel for the insured; otherwise, the incident report is discoverable. *Ballard v. Eighth Jud. Dist. Ct.*, 106 Nev. 83, 85 (1990).

The Nevada work-product privilege may protect an incident report prepared by a party or insurer if it was prepared solely in anticipation of litigation, rather than in the normal course of business. The report may, however, be discoverable if the party seeking the disclosure of the report can prove that he has a substantial need for it and is unable to obtain it himself without undue hardship. *See* NRS 49.095.

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?

When the social media accounts are private, or the sought-after information is contained in the private messaging of the social media platform, a discovery request must be made. The social media information requested must be substantially related to the litigation.

The U.S. District Court for the District of Nevada held that when private email communications are being requested, the request must be narrowly tailored so as not to allow a "fishing expedition." *Mackelprang v. Fidelity Nat. Title Agency of Nevada, Inc.*, 2007 WL 119149 (D. Nev. Jan. 9, 2007) (stating where a party's emotional distress and state of health are put at issue because of alleged sexual assault by co-worker, private email communications on the myspace.com platform would be discoverable if defendant had put forth a

limited request including only the messages that pertained to the alleged sexual assault and employer.)

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.**

A party cannot deny a request to produce social media because of privacy. *Hinostroza v. Denny's Inc.*, 2018 WL 3212014 (D. Nev. June 29, 2018). Nevada does require that any discovery request be narrowed tailored based on the website or platform, time-period, and content related to the case. *Id*. A period of one year is considered narrowly tailored because it allows the party to requesting the information to establish a pattern, because one instance of happiness is not enough to undermine a party's claim of emotional or physical anguish. *Id*.

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

The Nevada Rules of Professional Conduct prohibit an attorney from encouraging a party to destroy their social media accounts, posts, or messages when relevant to the litigation *See* Rule 3.4. The issue of spoliation of social media in a civil action has not been specifically addressed; however, the general spoliation standard would likely apply if a discovery request had been properly and timely made.

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).**

To admit social media content into evidence the social media must be relevant. NRS 48.015. The social media must also be authenticated by the party intending to introduce it into evidence by proving that the social media account is operated by the individual they claim operates it. *See* NRS 52.015(1). Methods of authentication include, but are not limited to, testimony of witnesses with knowledge or a process or system used that is accurate, such as an IP address. *See* NRS 52.025 and NRS 52.105.

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

Pursuant to Nevada Revised Statute 613.135 it is unlawful for any employer to require an employee or prospective employee to disclose his username and/or password for his personal social media accounts. The statute further prohibits an employer from discriminating against or denying employment to the individual if he refuses to disclose the username and password. NRS 613.135(4) defines social media as any electronic account or content including, but not limited to, videos, photos, blogs, podcasts, instant messages, emails, or any internet website profile. NRS 613.135 does not prohibit an employer from searching for an employee or potential employee's public social media presence.

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

Nevada is an at-will employment state and employers are generally permitted to terminate an employee at any time and for any reason unless it offends some notion of public policy. *Martin v. Sears, Roebuck & Co.*, 111 Nev. 923, 899 P.2d 551 (1995). Nevada Revised Statute 613.330 specifically prohibits an employer from terminating an employee based on race, color, religion, sex, sexual orientation, gender identity or expression, age, disability, or national origin. See also *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984) (stating a retaliatory termination by the employer in response to the employee filing a worker's compensation claim was a public policy exception).

Private employers can terminate an employee for posts made on his social media account. Public government employees may be subject to the same restraint. *Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900 (9th Cir. 2021). When a public employee is terminated based on a social media post, the employee's First Amendment rights may be implicated. The court has adopted the *Pickering* balancing test to address whether

the termination is constitutional. *Id*.; see also *Pickering v. Bd. of Ed. of Twp. High Sch.*, 88 S. Ct. 1731 (1968). If an employer's disciplinary interest in promoting efficiency in the public services it provides substantially outweighs an employee's free-speech interest, then the termination is constitutional. *Id*.