FOR MORE INFORMATION

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SPOLIATION

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

Spoliation of evidence occurs where a party culpably destroys relevant evidence in her possession while under a duty to preserve it. Bartlett v. Mut. Pharm. Co., 731 F. Supp. 2d 135, 156 (D.N.H. 2010). To impose sanctions for spoliation, "bad faith is not essential"; it is enough that "evidence is mishandled through carelessness, and the other side is prejudiced." Sacramona, 106 F.3d at 447, cited in Rockwood v. SKF USA, Inc., 2010 DNH 171, 2010 U.S. Dist. LEXIS 108792, 15, 2010 WL 3860414 (D.N.H. 2010). A suitable foundation must exist before an adverse inference can materialize. Thus, the sponsor of the inference must proffer evidence sufficient to permit the trier to find that the target knew of (a) the claim (that is, the litigation or the potential for litigation), and (b) the document's potential relevance to that claim. See Blinzler v. Marriott International, 81 F.3d 1148,1159 (1st Cir. 1996). Even if these foundational requirements have been met, the trier nonetheless may refuse to draw the negative inference. The inference is permissive, not mandatory. Testa v. Wal-Mart Stores, 144 F.3d 173, 177 (1st Cir. N.H. 1998).

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

New Hampshire State Courts have not drawn a clear distinction between first party and third party spoliation. The First Circuit touched on this issue in Testa v. Wal-Mart Stores and declined to draw a distinction, noting that while whether the particular person who spoils evidence has notice of the relationship between that evidence and the underlying claim is relevant to the factfinder's inquiry, it does not necessarily dictate the resolution of that inquiry. Testa v. Wal-Mart Stores, 144 F.3d 173, 177-178 (1st Cir. N.H. 1998) The critical part of the foundation that must be laid depends, rather, on institutional notice -- the aggregate knowledge possessed by a party and its agents, servants, and employees. Testa, 144 F.3d at 177-178.

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

The New Hampshire Courts have not yet recognized a separate cause of action for the tort of spoliation of evidence. See Cavadi v. Bank of Am., 2008 DNH 66, 2008 U.S. Dist. LEXIS 26389, 8 (D.N.H. 2008); see also Morales v. Foster, 2019 WL 441967, at *7 (D.N.H. Jan. 3, 2019).

4. Remedies when spoliation occurs:

- Negative inference instruction

In Mayes v. Black & Decker (U.S.), Inc., 931 F.Supp. 80 (D.N.H. 1996), the court ruled that upon the establishment of an adequate foundation, the trier of fact

could infer that plaintiffs destroyed relevant evidence out of a realization that the evidence was unfavorable., Id. at 85 (citing Blinzler v.Marriot Inter'l,Inc., 81 F.3d 1148, 1158 (1st Cir. 1996)). The court instructed that before such an inference could be drawn by a jury, there must be a sufficient foundational showing that the party who destroyed the evidence had notice both of the potential claim and of the item's potential relevance. Id. (citing Nation-Wide Check Corp. v. Forest Hill Distribs., Inc., 692 F.2d 214, 218 (1st Cir. 1982)). The court further instructed that an adverse inference about spoliation could not be drawn from merely a negligent loss or destruction of evidence, rather, the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in loss or destruction. Id. Even under such circumstances, the adverse inference is permissive, not mandatory, and a factfinder is free to reject the inference. Mayes v. Black & Decker (U.S.), Inc., 931 F. Supp. 80, 85(D.N.H. 1996).

- Dismissal

To date, no New Hampshire courts have dismissed a claim for spoliation. The Federal District Court for the District of New Hampshire addressed the issue in Rockwood v. SKF USA, Inc., 2010 U.S. Dist. LEXIS 108792; 2010 DNH 171; 2010 WL 3860414 (D.N.H. 2010), but they declined dismissal in favor of an adverse inference because while the plaintiff deleted files from his laptop after the court had ordered production of the files in discovery, his actions did not prejudice the defendant. In Rockwood, the defendant brought a motion to dismiss the plaintiffs' claim that the defendants had promised to buy the plaintiffs' company, alleging that the plaintiffs failed to ensure that their company's business records would not be destroyed following its lender's foreclosure, repossession of the company's assets, and the sale of those assets to a third party, and that the plaintiffs replaced the hard drives on the laptop computers they used in connection with the company business, then deleted files from those computers after the court ordered their production in discovery. Rockwood, 2010 U.S. Dist. LEXIS 108792 at 4. Because the record assembled on the motion did not support the defendant's charges that the plaintiffs negligently or intentionally destroyed relevant documents, its request for dismissal was denied. The court found that the plaintiffs took steps that were reasonable under the circumstances to preserve the business records in question and the files stored on their laptops' hard drives. And, though one of the plaintiffs admitting to having deleted the electronic versions of a handful of documents that were responsive to the defendant's document requests, he swore that he did so without realizing that fact, and he later produced paper copies of them, and so failed to prejudice the defendant. The Court found that, while there was no prejudice and therefore no cause for dismissal, the deletion of files, combined with plaintiffs' use of file cleaning software on two laptops after the defendant filed a motion to compel the laptops' production supported drawing an adverse inference against the plaintiff's credibility as a witness at any trial on the merits. Rockwood v. SKF USA, Inc., 2010 DNH 171, 2010 U.S. Dist. LEXIS 108792, 2-3, 2010 WL 3860414 (D.N.H. 2010).

The Mayes court adopted a five-factor inquiry to determine whether and what evidentiary sanctions would be appropriate in a given situation. 91 F.Supp. at 83 (citing Northern Assurance Co. v. Ware, 145 F.R.D. 281, 283 (D. Me. 1993)). The factors considered are: (1) whether the defendant was prejudiced as a result of the destruction of evidence; (2) whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether the plaintiff was acting in good faith or bad faith; and (5) the potential for abuse if the evidence is not excluded. 931 F.Supp. at 83. The Court indicated that, although a harsh sanction, dismissal of the opposing party's case could be appropriate where a party maliciously destroyed relevant evidence with the sole purpose of precluding an adversary from examining that evidence. Id. (citing Ware, 145 F.R.D. at 282, n.2). However, the court ruled that the level of prejudice suffered by Black & Decker as a result of the Mayes' destruction of evidence did not warrant dismissal of the case or preclusion of plaintiffs' expert's testimony as to the cause of the fire. Id. at 84. Rather, only an adverse inference instruction was warranted.

- Criminal sanctions

New Hampshire law does not impose criminal sanctions for spoliation of evidence.

- Other sanctions

There are no decisions in New Hampshire imposing sanctions for spoliation other than a negative inference.

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

There are to-date no reported decisions from New Hampshire State Courts on the issue of duty to preserve electronic evidence. The United States District Court for the District of New Hampshire in the Rockwood case did not distinguish between electronic and other types of evidence.

6. Retention of surveillance video.

There are to-date no reported decisions from New Hampshire state courts on this issue, and there are no First Circuit cases dealing with retention of surveillance video in particular. One recent United States District Court for the District of New Hampshire has dealt briefly with a § 1983 claim based on the intentional or negligent failure to retain surveillance video. Morales v. Foster, 2019 WL 441967 (D.N.H. Jan. 3, 2019) (recommendation adopted, see 2019 WL 440564). The court noted the general law on spoliation of evidence, but dismissed the § 1983 claim because of the claim's "unsettled status in state law." Id. Other First Circuit courts have held that where an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action. Allstate Ins. Co. v. Creative Env't Corp., 1994 U.S. Dist. LEXIS 13307, 14-15, 28 Fed. R. Serv. 3d (Callaghan) 1352 (D.R.I. Apr. 1, 1994). That standard seems to apply to retention of surveillance video to the same extent as it does to other types of evidence.

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?

New Hampshire law has long allowed plaintiffs to receive, as damages, compensation for all injuries, past and prospective, in consequence of the defendants' wrongful or negligent acts. Holyoke v. Grand Trunk Ry., 48 N.H. 541 (1869). Plaintiffs are allowed to introduce evidence of the reasonable value of these past and future medical expenses, even if a portion of the expenses were reimbursed or paid for by his/her insurance carrier. Cyr v. J.I. Case Co., 652 A.2d 685, 688 (N.H. 1994).

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 of the fact that all or a portion of the plaintiff's medical expenses were reimbursed or paid for by an insurance carrier is evaluated and deemed admissible on a case-by-case basis. If introduced for the purpose of determining damages, it is inadmissible. However, if introduced for other purposes, it could be admissible.

In Cyr v. J.I. Case Co., 652 A.2d 685, 688 (N.H. 1994), evidence of the plaintiff's receipt of workers' compensation benefits was ruled admissible by the trial court despite the collateral source rule because it was admissible for another permissible purpose under Rule 105. The defendants entered the benefits into evidence to show a motive for exaggerating injuries - the desire not to return to work and collect workers compensation. The New Hampshire Supreme Court ruled later, however, that although the workers' compensation evidence was admissible under Rule 105, it failed the balancing test of Rule 403. The probative value of the evidence was substantially outweighed by the likelihood the jury would use the information for improper purposes. The case was vacated and remanded for a new trial on this basis alone.

So although evidence of a collateral source of compensation may be allowed under Rule 105, courts are wary to allow it in after a Rule 403 analysis.

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 New Hampshire Supreme Court has not yet considered whether the amount billed for medical treatment and services, as opposed to the amounts paid to and received by the medical provider as full compensation and reimbursement, is the appropriate measure of the "reasonable value" of medical expenses. However, once a plaintiff has interjected medical expenses into the case, the law permits "in appropriate circumstances as determined on a case-by-case basis, consideration of write offs by a plaintiff's health care provider" in order to determine "reasonable value" of medical expenses. Veilleux v. Noonan, 2008 WL 6016234 (N.H. Super. Ct. Apr. 7, 2008). The fact that the plaintiff's medical professionals agreed with a third-party payor or payors to forgo collection of the difference between what the third-party payors paid and the reasonable value of medical care provided or to be provided does not, without more, raise any issues such as might render relevant the amount the third parties paid. Id.

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?**

New Hampshire courts will look at the totality of the circumstances to determine if these documents are work or ordinary business product. When presented with the issue, the court will look to the overall purpose of making the report and whether it was made with a view of anticipated litigation. Riddle Spring Realty Co. v. State, 107 N.H. 271, 274, 220 A.2d 751, 755 (1966). Work-product may consist of correspondence, memoranda, reports, such as those of real estate appraisers, exhibits, trial briefs, drafts of proposed pleadings, plans for presentation of proof, statements, and other matters, obtained in the preparation of a pending or reasonably anticipated case on behalf of a client. Id.

New Hampshire Revised Statute Annotated 151:13-a, however, protects from discovery certain documents made in the ordinary course of business. Hospital quality assurance committee documents, such as incident/accident reports, although made in the ordinary course of business are still protected. N.H. Rev. Stat. Ann. § 151:13-a. Reports must be prepared by quality assurance committees or on committee's behalf; forays into quality assurance by individual members of hospital staff are not privileged. In re "K",132 N.H. 4 (N.H. 1989). This privilege also extends to home health care provider quality assurance committees. N.H. Rev. Stat. Ann. §151:13-B.

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?**

Attorneys in New Hampshire may seek social media discovery through all normal methods, including interrogatories, depositions, and requests to admit. In fact, according to New Hampshire's Ethics Committee, lawyers have "a general duty to be aware of social media as a source of potentially useful information in litigation." This duty is limited by the ethical duties of truthfulness and fairness when dealing with other parties. The general rule is that a lawyer may obtain social media discovery so long as he does not mislead, whether directly or by omission, the party from whom he seeks discovery.

A sample interrogatory is as follows:
Have you opened, used, or maintained any other social networking accounts (including, but not limited

to Google+, MySpace, FourSquare, and Twitter) since [date]? If so, identify the username and email address for all such accounts. Please preserve all such accounts so that they may be captured forensically if appropriate.

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.**

No published New Hampshire Supreme Court decision has addressed the limitations, if any, on social media discovery. It appears that only one trial court has briefly addressed this issue. See Pearson v. Wally's Pub, LLC, 2017 WL 10702650, at *2 (N.H. Super. Ct. Aug. 21, 2017). The request broadly asked for social media posts and related data. The court denied the motion to compel an answer to this request, reasoning: "Social media posts and related data present unique discovery problems. The court would never approve a request for 'all paper documents in your possession' or 'all letters you have written to anybody' or 'all post-it notes from your refrigerator.' Rather, the court would approve a tailored request for specific subsets of these things. A Facebook page is like a correspondence file, it contains relevant stuff and irrelevant stuff. The document request is overbroad." Id. Given the Ethics Committee's opinion, it appears that this analysis (*i.e.*, normal limitations, such as scope of discovery and relevance) would represent the only limitations on social media discovery.

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

No authorities in New Hampshire have addressed this issue.

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 New Hampshire decision has yet addressed this subject.

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

No published New Hampshire decision has addressed this subject. However, the General Court recently passed HB 1407, 2014 N.H. Laws Chapter 305, which forbids employers from requesting that any employee or prospective employee disclose login information for any social media service. The bill also prevents employers from requiring employees to alter their privacy settings on personal social media accounts and from requiring that any employee add anyone to a list of social media contacts. The bill has been codified as RSA 275:74.

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

No published decision in the state or federal courts of this state has addressed this subject.