

NEW JERSEY

SPOILIATION

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

Spoilation occurs when evidence pertinent to an action is destroyed, interfering with the action’s proper administration and disposition. See, Hirsch v. General Motors Corp., 266 N.J. Super. 222 (Law Div. 1993).

A duty to preserve evidence arises when there is: (1) pending or probable litigation; (2) knowledge by the party of the existence or likelihood of litigation; (3) foreseeability of harm to the other party, or in other words, discarding the evidence would be prejudicial; and (4) the evidence is relevant to the litigation. If such duty arises and evidence is destroyed, spoliation occurs.

There is no intent threshold and negligent spoliation can result in sanctions. The level of intent is a factor in the penalty to be assessed.

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

With regard to liability, none,, as there is a cause of action that can be brought against a third-party spoliator. Additional remedies may be available against a first-party spoliator who is a party to the litigation.

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

There is a separate cause of action for “fraudulent concealment of evidence.” The elements of that cause of action are:

- (1) That defendant in the fraudulent concealment action had a legal obligation to disclose evidence in connection with an existing or pending litigation;
- (2) That the evidence was material to the litigation;
- (3) That plaintiff could not reasonably have obtained access to the evidence from another source;
- (4) That defendant intentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation;
- (5) That plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed. Rosenblit v. Zimmerman, 166 N.J. 391 (2001).

Such a claim must be proven by clear and convincing evidence. Fox v. Mercedes-Benz Credit Corp., 281 N.J. Super. 476 (App.Div. 1995).

4. Remedies when spoliation occurs:

- Negative inference instruction

Available. A party may request an adverse inference instruction when spoliation by

a party is discovered at trial. Such a remedy may be in addition to a fraudulent concealment of evidence claim.

- Dismissal

Available. Specific facts of a case may allow dismissal of a claim or an answer.

- Criminal sanctions

Destruction, altering or falsification of evidence in an official proceeding or investigation is a 4th degree crime. NJ Stat § 2C:28-6.

- Other sanctions

Courts have wide latitude to fashion appropriate sanctions for spoliation. In addition to an adverse inference instruction, dismissal of a claim or suit for damages, spoliators can be subject to rulings barring evidence, striking defenses, imposition of counsel fees, and default judgment.

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

Same as for any other evidence. Notice to the custodian of the claim is key. Destruction or deletion of records in accordance with established document retention policy, absent notice of a claim or demand to preserve, is not sanctionable spoliation.

6. Retention of surveillance video.

Same as for any other evidence. Video destroyed in the normal course of business in accordance with established policy for retention, and without knowledge of a claim, is not spoliation. If there is notice of a claim or potential claim, the video should be retained.

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. Any party can introduce collateral source evidence and the plaintiff must disclose such payments to the court.

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?

Both. While the collateral source payments can be admitted as evidence at trial, the collateral source payments are subtracted from the verdict post-trial by the court.

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. Plaintiff's incurred expenses are only those he/she is liable to pay. If the insurer makes a reduced payment and the provider accepts the reduced payment as payment in full, a plaintiff, not being liable for the balance, cannot include that amount as incurred medical expenses.

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?

Yes, the reports can be protected and are not discoverable absent a showing of substantial need and the necessity of getting them from the defendant. R.4:10-2(c). Note that pre-litigation investigations can be considered work-product and protected under R. 4:10-2(c). Paladino v. Auletto Enter., Inc., 459 N.J.Super. 359 (App.Div. 2019).

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 are no special rules for social media. Social media is discoverable pursuant to Rule 4:10-2 in the same way as other writings and evidence are discoverable.

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.

Case law on the of social media is sparse in New Jersey and decisions will likely turn on the scope of the demanded disclosure and other case-specific factors. While there are no specific rules, social media, being discoverable by normal means, is also limited by standard defenses in discovery practice. Such evidence must be relevant and authenticated to be admissible. Courts have the power to limit the scope of a disclosure or conduct an in camera review. Neighboring states and New Jersey's Federal Courts have noted that public-facing social media do not incur the same privacy concerns as private postings. Some New Jersey state trial courts have barred disclosure of private-facing social media.

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

Generally none. However, in a case in the Federal District of New Jersey, a plaintiff was penalized for spoliation for deleting his entire Facebook account after being ordered to disclose its contents. That plaintiff was subjected to an adverse-inference jury charge. Grotto v. United Air Lines, Inc., 2013 U.S. Dist. LEXIS 41909 (D.N.J. 2013).

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).

There are few appellate cases on such standards from New Jersey Courts. Such evidence does have to be authenticated as any other writing. State v. Hannah, 448 N.J.Super. 78 (App.Div. 2016).

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

New Jersey does have an employer access law that bars employers from requiring their employees to provide access to an electronic account. NJ Stat § 34:6B-6. However, there is an exception for legitimate investigations of employee conduct or disclosures of employer information. The Third Circuit ruled that an employer who accessed employee social media accounts via passwords saved on devices owned by the employer could introduce evidence gathered from such snooping. Scherer Design Grp., LLC v. Ahead Eng'g LLC, 764 Fed.Appx. 147 (3d Cir. 2019).

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

Not specifically. New Jersey is an "at-will" state, and employees can be terminated at any time, for any reason, as long as that reason is not otherwise prohibited by law. New Jersey does have a statute prohibiting employers from demanding access to social media, N.J. Stat. § 34:6B-6. There are no reported cases regarding application of New Jersey's Social Media Privacy Law *vis a vis* wrongful termination.