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NORTH CAROLINA

SPOLIATION

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

Spoliation is defined as the "intentional destruction, mutilation, alteration, or concealment of evidence, usu. a document." See Black's Law Dictionary (11th ed. 2019); Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) ("Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."). Spoliation arises when a party destroys evidence within its control that it knew, or should have known, would be relevant to litigation, before that evidence can be made available to other parties in the case for inspection. See, e.g., Holloway v. Tyson Foods, Inc., 193 N.C. App. 542, 547, 668 S.E.2d 72, 75 (2008) (citations omitted).

The spoliation doctrine recognizes that where a party fails to produce certain evidence relevant to the litigation, the finder of fact may infer that the party destroyed the evidence because the evidence was harmful to its case. See Panos v. Timco Engine Center, Inc., 197 N.C. App. 510, 677 S.E.2d 868 (2009). The inference is permitted even in the absence of evidence that the spoliator acted intentionally, negligently or in bad faith. See, e.g., McLain v. Taco Bell Corp., 137 N.C. App. 179, 184, 527 S.E.2d 712, 716 (2000).

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

North Carolina law does not distinguish between first party and third party spoliation.

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

North Carolina law does not recognize an independent, general tort claim for spoliation of evidence. See, e.g., Holloway v. Tyson Foods, Inc., 193 N.C. App. 542, 547, 668 S.E.2d 72, 75 (2008) (citations omitted). However, there is some older North Carolina authority stating that where a party deliberately destroys, alters or creates a false document to subvert an adverse party's investigation of his right to seek a legal remedy, and injuries are pleaded and proved, a claim for resulting increased costs of the investigation will lie. Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326 (1984) (underlying action for civil conspiracy, not spoliation).

4. Remedies when spoliation occurs:

Court-ordered sanctions can vary significantly and are highly dependent on the facts and circumstances of each case. See Teague v. Target Corp., 2007 WL 1041191 (W.D.N.C. Apr. 4, 2007) ("While courts have broad discretion to sanction a party for spoliation, the applicable sanction should be molded to

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serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine.") (internal quotations omitted). Additionally, courts consider the prejudice cased to the moving party when fashioning sanctions for spoliation. SCR-Tech LLC v. Evonik Energy Servs. LLC, No. 08 CVS 16632, 2014 WL 7640129, at *7 (N.C. Super. Dec. 31, 2014).

- Negative inference instruction

"The principle of 'spoliation of evidence' means that 'a party's intentional destruction of evidence in its control before it is made available to the adverse party can give rise to an inference that the evidence destroyed would injure its (the party who destroyed the evidence) case.'" See, e.g., Holloway v. Tyson Foods, Inc., 193 N.C. App. 542, 547, 668 S.E.2d 72, 75 (2008) (citations omitted). North Carolina courts have determined that spoliation of evidence merely gives rise to an adverse inference, as opposed to an adverse presumption. Id. "Although destruction of evidence in bad faith 'or in anticipation of trial may strengthen the spoliation inference, such a showing is not essential to permitting the [adverse] inference.'" SCR-Tech LLC v. Evonik Energy Servs. LLC, No. 08 CVS 16632, 2014 WL 7640129, at *5 (N.C. Super. Dec. 31, 2014) (citations omitted). "If, however, the evidence withheld or destroyed was equally accessible to both parties or there was a fair, frank, and satisfactory explanation for the nonproduction of the evidence, 'the principle is inapplicable and no inference arises.'" Holloway, 193 N.C. App. at 547, 668 S.E.2d at 75 (citations omitted).

"Furthermore, the adverse inference "'is permissive, not mandatory'. ... 'For this reason, it is improper to base the grant or denial of a motion for summary judgment on evidence of spoliation. It is not an issue to be decided as a matter of law, and cannot, by its mere existence, be determinative of a claim.'" See, e.g., Panos v. Timco Engine Center, Inc., 197 N.C. App. 510, 521, 677 S.E.2d 868, 876-77 (2009) (citation omitted).

Another result of the inference being permissive and not mandatory is that, if the factfinder believes the documents were destroyed accidentally or for an innocent reason, "'then the factfinder is free to reject the inference.'" Holloway, 193 N.C. App. at 547, 668 S.E.2d at 75.

"'[T]o qualify for the adverse inference, the party requesting it must ordinarily show that the 'spoliator was on notice of the claim or potential claim at the time of the destruction.'" Arndt v. First Union National Bank, 170 N.C. App. 518, 527-28, 613 S.E.2d 274, 281 (2005). But, the "obligation to preserve evidence may arise prior to the filing of a complaint where the opposing party is on notice that litigation is likely to be commenced." Id. Additionally, the evidence lost must be relevant to the issues of the case. Id.

- Dismissal

The principle of spoliation of evidence has evidentiary consequences and may not be relied upon as a basis for sanctions in the absence of other statutory or rule violations authorizing the imposition of sanctions. Holloway v. Tyson Foods, Inc., 668 S.E.2d 72 (2008). Moreover, it is improper to base the grant or denial of a motion for summary judgment on evidence of spoliation, as the inference that the spoliated evidence was detrimental to a party's case is not mandatory but lies within the province of the trier of fact, it is not an issue to be decided as a matter of law, and cannot, by its mere existence, be determinative of a claim. Sunset Beach Development, LLC v. AMEC, Inc., 196 N.C. App. 202, 675 S.E.2d 46 (2009).

- Criminal sanctions

There are no cases in North Carolina where spoliation of evidence results in criminal sanctions.

- Other sanctions

There are no other special sanctions for spoliation of evidence in North Carolina.

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

The duty to preserve evidence is a common law duty owed to the court by all litigants. It is triggered when a "reasonable person" anticipates litigation. North Carolina courts acknowledge that the "reasonable anticipation of litigation" standard is not a bright-line test, but neither the legislature nor the courts have provided a more specific test or framework for North Carolina litigants to follow in order to avoid spoliation of evidence.

The North Carolina Rules of Civil Procedure were amended in 2011 to address electronic discovery. See 2011 North Carolina Laws S.L. 2011-199 (HB 380). The 2011 NCRCP amendments largely parallel the 2006 FRCP amendments. However, North Carolina courts have given little guidance on how to deal with electronically-stored information ("ESI") thus far.

One important provision now provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of routine, good-faith operation of an electronic information system." N.C. R. Civ. P. 37(b1).

Several North Carolina courts have required litigants to physically produce hard drives for forensic examination. See Orrell v. Motorcarparts of Am., Inc., 2007 WL 4287750 (W.D.N.C. Dec. 5, 2007) (ordering plaintiff to produce hard drive for forensic examination by defendant after finding that plaintiff did not fully comply with discovery obligations, stating that the plaintiff's burden to preserve evidence was not eliminated due to the alleged crashing of the plaintiff's computer); Warner Bros. Records, Inc. v. Souther, 2006 WL 1549689 (W.D.N.C. June 1, 2006) (ordering defendant to produce computer hard drive at evidentiary hearing and authorizing plaintiff's forensic technician to make mirror image of the hard drive in the court's chambers because defendant failed to provide electronic copies of the computer's desktop and registry files in response to a discovery request).

In Teague, the court found sufficient evidence to direct an adverse inference instruction to the jury at trial because the plaintiff "discarded the computer well after she had retained counsel and filed her EEOC charge" and "because the computer contained evidence directly related to her lawsuit against Target." 2007 WL 1041191 at *2.

Finally, in Arndt, a pre-suit letter from plaintiff's counsel of intent to sue was found sufficient to trigger the duty to preserve electronic evidence. 170 N.C. App. 518, 613 S.E.2d 274.

6. **Retention of surveillance video.**

There is no specific authority in North Carolina regarding retention periods for surveillance video.

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?**

For actions arising on or after October 1, 2011, the answer to this question in North Carolina is **no**. On that date, N.C. Rule of Evidence 414 took effect. It provides that:

> Evidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. This rule does not impose upon any party an affirmative duty to seek a reduction in billed charges to which the party is not contractually entitled.

Under the plain language of Rule 414, a plaintiff can only submit evidence of the amounts actually paid or

that will be necessary to pay in order to satisfy his or her medical bills. A plaintiff cannot submit evidence of the total amount of medical bills if that total amount was not paid or has been reduced.

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?**

Generally speaking, any evidence of a plaintiff's receipt of benefits for his or her injury or disability from sources collateral to the defendant, such as reimbursement for or payment of medical expenses by an insurance carrier, is not admissible in North Carolina under its application of the collateral source rule. See, e.g., Cates v. Wilson, 361 S.E.2d 734, 737 (N.C. 1987); Young v. R.R., 146 S.E.2d 441, 446 (N.C. 1966); White v. Lowery, 352 S.E.2d 866, 868 (N.C. App. 1987). The rational for the collateral source rule is that a defendant "should not be permitted to reduce his own liability for damages by the amount of compensation the injured party receives from an independent source." Fisher v. Thompson, 275 S.E.2d 507, 513 (N.C. App. 1981).

However, such evidence may be admitted for other purposes, such as to show that the plaintiff's total amount of medical bills was not paid and, thus, not recoverable under N.C. Rule of Evidence 414, or to otherwise impeach the plaintiff's testimony. See White, 352 S.E.2d at 868.

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. This is the exact result intended by North Carolina's adoption of N.C. Rule of Evidence 414.

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?**

Whether an accident or incident report is protected from discovery depends on whether the document at issue was prepared in the ordinary course of business, who prepared it, and what it consists of.

North Carolina courts have held that when the defendant has a policy of preparing such reports whenever an unusual event or event affecting safety occurs, then the accident or incident reports prepared by that defendant are prepared in the ordinary course of business and not subject to protection by the anticipation of litigation doctrine. See Fulmore v. Howell, 657 S.E.2d 437, 443 (N.C. App. 2008); Cook v. Wake County Hosp. System, Inc., 482 S.E.2d 546, 551-552 (N.C. App. 1997).

It should also be noted that, even when the anticipation of litigation doctrine is applicable, it does not afford absolute protection. In North Carolina, "[a] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." N.C. R. Civ. P. 26(b)(3).

However, "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought or work product of the attorney or attorneys of record in the particular action" are not discoverable under any circumstances. N.C. R. Civ. P. 26(b)(3). Accordingly, if such a report is prepared by an attorney and consists entirely of the attorney's work product, it is protected from discovery. On the other hand, if the report includes other items in addition to attorney work product, such as witness statements, those other items may be discoverable but any attorney work product associated with them should be redacted as they remain protected from

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?**

The usual discovery procedures can be used to obtain social media evidence in North Carolina. A party can serve interrogatories pursuant to Rule 33 of the North Carolina Rules of Civil Procedure and requests for production of documents and electronically stored information pursuant to Rule 34 of the North Carolina Rules of Civil Procedure directed at obtaining social media evidence on another party to the litigation. A party may also be able to obtain information regarding social media evidence during depositions conducted pursuant to Rule 30 of the North Carolina Rules of Civil Procedure, including without limitation what social media accounts exist and what the usernames, passwords, or other login information are for those accounts. Finally, a party can attempt to obtain social media evidence directly from people and entities that are not parties to the litigation through a subpoena issued pursuant to Rule 45 of the North Carolina Rules of Civil Procedure.

We serve the following interrogatory on a party from whom we are attempting to obtain social media evidence:

> From ______________________ to the present, have you used any online social or professional networking or blogger sites, including but not limited to: Facebook, Twitter, Instagram, MySpace, LinkedIn, Google+, YouTube, or Flickr? If your answer is in the affirmative, provide the following information for every social or professional networking or blogger site you have used:
>
> a. Name and uniform resource location ("URL") address of the site;
> b. The specific URL address of your account profile on the site;
> c. Your account name and the real names or pseudonyms you have used to identify yourself on the site;
> d. Your user ID or logon and password used to access your account on the site;
> e. The date range that you used the site;
> f. The email address(es) used by you in registering for the site;
> g. Your account User ID number, if applicable;
> h. Any account identification other than that listed above.

We also serve the following request for production on a party from whom we are attempting to obtain social media evidence:

> All documents identified by you in response to Interrogatory No. [the social media interrogatory], and all documents that relate to or reflect the information on your account(s) with the social or professional networking or blogging sites identified by you in response to Interrogatory No. [the social media interrogatory]. (For example, for each Facebook account maintained by you, please

produce your account data for the period of _________________ through the present. You may download and print your Facebook data by logging into your Facebook account, selecting "Settings" under the triangle-shaped tab on the top right corner of your homepage, clicking on the "Download a copy of your Facebook data" link and following the directions on the "Download Your Information" page.)

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.**

North Carolina does not have a body of appellate case law enumerating any specific or special limitations on the discovery of social media evidence from an opposing party. Therefore, North Carolina's general discovery rules apply to social media evidence.

A party can obtain all non-privileged social media evidence that is relevant to any claim or defense at issue in the litigation from another party. N.C. Rule of Civ. P. 26(b)(1). Moreover, "[i]t is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Id. A party responding to discovery may move for a protective order, however, in order to protect itself from "unreasonable annoyance, embarrassment, oppression, or undue burden or expense" during the discovery process. N.C. Rule of Civ. P. 26(c). Accordingly, the social media discovery requests should not be unnecessarily cumulative or seek entirely irrelevant information. The social media evidence must have a connection or potential connection to the case.

Additionally, to the extent the sought after social media evidence constitutes "electronically stored information" ("ESI"), the only metadata that a responding party need provide under North Carolina's discovery rules is "that which will enable the discovering party to have the ability to access such information as the date sent, date received, author and recipients;" unless the parties agree otherwise or the court orders otherwise upon motion of a party and "a showing of good cause for the production of certain [additional] metadata." N.C. Rule of Civ. P. 26(b)(1). Moreover, North Carolina courts have authority under Rules 26(b)(1b) and 34(b) of the North Carolina Rules of Civil Procedure to specify the conditions for the discovery of ESI, including the specific format that the ESI must be produced in and the allocation of discovery costs related to the sought after ESI between the parties.

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

The North Carolina State Bar adopted its 2014 Formal Ethics Opinion 5 on "Advising a Civil Litigation Client about Social Media" on July 17, 2015. It provides that a lawyer can and must give a client advice about the legal implications of postings on social media websites and coach the client on what should and should not be shared on social media, both before and after the lawsuit is filed. However, it also provides that a lawyer cannot advise a client to remove existing postings on social media if their removal would result in spoliation of evidence, illegal activity, or violation of a court order, because "relevant social media postings must be preserved." It further states:

> If the lawyer advises the client to take down postings on social media, where there is a potential that destruction of the posting would constitute spoliation, the lawyer must also advise the client to preserve the posting by printing the material, or saving the material to a memory stick, compact disc, DVD, or other technology, including web-based technology, used to save documents, audio, and video. The lawyer may also take possession of the material for purposes of preserving the same.

Lastly, the North Carolina State Bar found that a lawyer may "instruct the client to change the security and privacy settings on social media pages to the highest level of restricted access," so long as such an instruction "is not a violation of law or a court order."

Spoliation of evidence is defined as the "concealment, destruction, alteration, or mutilation of evidence, usually documents, thereby making them unusable or invalid." N.C. State Bar, Formal Ethics Opinion 5, n. 1 (citing *Black's Law Dictionary*). There does not appear to be any case law in North Carolina addressing spoliation of social media evidence, but the general spoliation doctrine that would presumably apply to social media evidence "holds that when 'a party fails to [produce] documents that are relevant to the matter in question and within his control . . . there is a presumption or at least an inference, that the evidence withheld, if forthcoming, would injure his case.'" Id. (citing Jones v. GMRI, Inc., 551 S.E.2d 867, 872 (N.C. App. 2001) and Yarborough v. Hughes, 51 S.E. 904, 907-908 (N.C. 1905)).

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).**

Although there are many cases in North Carolina that reference social media evidence, there is surprisingly little case law addressing the evidentiary standards for admitting social media into evidence. Those cases that have addressed the issue have applied general evidentiary rules to proffers of social media evidence. See, e.g., In re K.W., 666 S.E.2d 490, 494 (N.C. App. 2008); State v. Townsend, 706 S.E.2d 841, 2010 WL 5421427 at 7-8 (N.C. App. Dec. 21, 2010) (unpublished opinion).

This means that social media evidence can be admitted as substantive evidence if: (1) it is properly authenticated and identified under Rules 901-903 of the North Carolina Rules of Evidence, (2) it is deemed to be relevant under the standards set in Rules 401 and 402 of the North Carolina Rules of Evidence, (3) it survives a Rule 403 analysis, meaning its relevance is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, (4) it is either deemed to be not hearsay or one of the many hearsay exceptions applies to it, and (5) no other specific exclusionary evidentiary rule bars its admission. Even if the social media evidence cannot be admitted as substantive evidence, however, it may be admitted for other purposes, such as to impeach the credibility of a witness through prior inconsistent statements. See, e.g., In re K.W., 666 S.E.2d at 494.

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

There is no current North Carolina state case law that addresses these issues. There also does not appear to be any guidance from North Carolina's federal courts on whether and to what extent an employer can monitor its employee's social media use when that employee is not "on the clock" or using the employer's devices, i.e., computers, smart phones, etc.

North Carolina's federal courts, however, have recognized that employees do not have a legitimate expectation of privacy with regard to internet use ***in the workplace*** so long as the employer has an internet employment policy sufficient to place its employees on notice that their internet use may not be kept private and may be audited, inspected, or monitored. U.S. v. Simons, 206 F.3d 392, 398-399 (4th Cir. 2000); see also U.S. v. Hamilton, 701 F.3d 404, 408-409 (4th Cir. 2012); Alexander v. City of Greensboro, 762 F. Supp.2d 764, 806 (M.D.N.C. 2011). But it is important to note that the employee may be able to maintain a reasonable expectation of privacy and confidentiality in his or her internet activities and communications even if the conduct at issue occurred in the workplace if the employer cannot show that the employee was actually notified of the employer's internet employment policy. See Mason v. ILS Technologies, LLC, 2008 WL 731557 at 4 (W.D.N.C. Feb. 29, 2008) (unreported decision).

Other Fourth Circuit case law highlights some of the potential dangers of monitoring an employee's social media use. In Van Alstyne v. Electronic Scriptorium, Ltd., the plaintiff alleged that her former employer accessed her personal email account that she sometimes used to conduct business for her employer both during her employment and after her employment ended in violation of the Stored Communications Act, 18

U.S.C. § 2707(a). See 560 F.3d 199, 201-202 (4th Cir. 2009). The Fourth Circuit vacated the jury's award of statutory damages under the Stored Communications Act because the plaintiff did not suffer any actual damages as a result of her employer accessing her personal email account; however, it found that the district court could still award the plaintiff punitive damages and attorneys' fees if appropriate under the facts and circumstances of the case. Id., at 210. There was no discussion of an employment policy regarding internet use or the potential effect of such a policy on a plaintiff's claim under the Stored Communications Act in the Fourth Circuit's opinion in Van Alstyne and North Carolina's federal courts do not appear to have addressed that issue.

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

There does not appear to be any North Carolina state case law addressing these issues. On the federal level in North Carolina, the United States District Court for the Middle District of North Carolina addressed a case where the *pro se* plaintiff claimed that his employment as a public school bus driver was terminated because of religious discrimination stemming from his MySpace.com profile that identified him as a practicing Wiccan. Shaver v. Davie County Public Schools, 2008 WL 943035 (M.D.N.C. Apr. 7, 2008) (unreported decision). The case was dismissed with prejudice in favor of defendants as to the Title VII claims because the plaintiff failed to exhaust his administrative remedies with the EEOC prior to filing suit; however, the plaintiff's First Amendment claims were only dismissed without prejudice due to a technical defense, leaving open the possibility of further litigation. It does not appear, however, that any further litigation was initiated by the *pro se* plaintiff.

The Fourth Circuit has also addressed such issues. In Bland v. Roberts, the plaintiffs alleged that the Sheriff of the City of Hampton, Virginia retaliated against them in violation of their First Amendment rights by choosing not to reappoint them because of their support of the Sheriff's electoral opponent. 730 F.3d 368, 371 (4th Cir. 2013). For at least some of the plaintiffs, that support manifested itself as "liking" the Sheriff's electoral opponent's Facebook page and/or making encouraging comments on the Sheriff's electoral opponent's Facebook page. Id., at 380. The court found that the social media evidence, particularly when coupled with other more traditional forms of evidence, could lead to a "reasonable jury" concluding that the plaintiffs' "lack of political allegiance to [the Sheriff] was a substantial motivation for the Sheriff's decision not to reappoint" them in violation of their First Amendment rights. Id., at 381-382. The court also held that "liking" something on Facebook is substantive speech worthy of protection under the First Amendment. Id., at 384-388 ("liking a political candidate's campaign page . . . is the Internet equivalent of displaying a political sign in one's front yard"). Thus, the Fourth Circuit has recognized that statements made on and actions taken on social media websites can constitute constitutionally protected free speech.