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OHIO

SPOLIATION

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

In Ohio, spoliation of evidence occurs when (1) the evidence it relevant, (2) the offending party had the opportunity to examine the unaltered evidence, and (3) the evidence was intentionally or negligently altered without providing an opportunity for inspection to the nonoffending party, even though the offending party was on notice of the impending litigation.

In Ohio, spoliation of evidence can occur when evidence is negligently destroyed, and the nonoffending party is disadvantaged by the loss.

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

First-party spoliation occurs when a party to litigation engages in spoliation of evidence that harms the nonoffending party. Third-party spoliation occurs when a person, who is not a party to the litigation, spoils evidence and harms a litigant.

Ohio recognizes a cause of action for intentional spoliation against parties to the primary litigation, as well as third parties. The tort can be brought at the same time as the primary action and does not need to wait for an adverse action.

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

Ohio does recognize a separate tort for *intentional* spoliation of evidence. The tort was first recognized in *Smith v. Howard Johnson Co., Inc.,* 67 Ohio St. 3d 28, 29, 1993-Ohio-229, 615 N.E.2d 1037. The elements for the spoliation tort are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of the defendant that litigation exists or is probable, (3) willful destruction of evidence by the defendant designed to disrupt the plaintiff's case, (4) disruption to the plaintiff's case, and (5) damages proximately caused by the defendant's actions.

4. Remedies when spoliation occurs:

- Negative inference instruction

Ohio courts can give a jury instruction allowing the jury to draw inferences against the offending party.

- Dismissal

Ohio courts can dismiss an action if there is evidence that the evidence in question was spoiled in bad faith.

- Criminal sanctions

In Ohio there are no statutes criminalizing spoliation of evidence. However, if a party purposefully destroys evidence to hinder a criminal investigation, that party

may be subject to criminal sanctions under Ohio Revised Code 2921.32, Ohio's obstruction of justice statute.

- Other sanctions

Generally, Ohio courts can use their power under Civil Rule 37, Ohio's sanction rule, to fashion a remedy for spoliation with the goal of reducing the prejudice created by the offending party's action. Under Rule 37, courts are allowed to take action such as excluding expert testimony offered by the offending party, or in more extreme cases, enter a default judgment against the offending party.

Additionally, a plaintiff can seek money damages for the spoliation tort.

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

In Ohio, the duty to preserve evidence arises when litigation is reasonably foreseeable or imminent. This duty applies to electronic evidence as well. Until a party reasonably anticipates litigation, it can maintain its routine retention/destruction policy of electronic information. However, once litigation is anticipated, the party must place a "litigation hold" to ensure the preservation of electronic information.

6. Retention of surveillance video.

In Ohio, the duty to retain surveillance video is the same as other electronic evidence and information. Once there is a reasonable anticipation of litigation, the party has a duty to retain surveillance video; however, before there is a reasonable anticipation of litigation, a party can destroy surveillance video.

For example, in *Yontz v. Gregg Appliances,* No. 12-CV-004331, 2003 Ohio Misc. LEXIS 10039 (Ct. Com. Pl. Oct. 25, 2013), the court found the destruction of surveillance video showing an employee being terminated was not spoliation because the video was deleted before litigation was reasonably foreseeable to the defendant. At the time of the firing, which the surveillance video captured, the plaintiff did not express his belief that his firing was unlawful, and neither the plaintiff nor his attorney sent a demand or preservation letter or threated litigation.

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 Ohio, a plaintiff can submit to a jury the total amount of their medical expenses, even if a portion of the expenses were reimbursed or paid by their insurance carrier. Ohio plaintiffs are entitled to the reasonable expenses from their injury. Ohio courts have held that entire medical bills are relevant to those expenses and are reasonable representations of the expenses incurred by the plaintiff. Additionally, under Ohio Revised Code 2317.421, entire medical bills are prima facie evidence of the reasonableness of charges for medical services.

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?

Under Ohio Revised Code 2315.20, evidence of collateral benefits is generally admissible. However, the statute contains an exception for when the source of the payment has a contractual right of subrogation, which is most insurance policies. Therefore, under the subrogation exception in O.R.C. 2315.20, a defendant is prohibited from offering evidence of an insurance coverage benefit paid to a plaintiff for their injury. But, in Ohio, there are no post-trial hearings to reduce verdict amount. Instead, the amount of compensatory damages owed to the plaintiff is a question of reasonableness left for the jury to decide.

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).

In Ohio, evidence of write-offs and discounts are not considered benefits paid by the insurer, so are admissible; therefore, the actual amount paid by the insurer to the medical provider is admissible. *See Robinson v. Bates*, 112 Ohio St. 3d 17, 2006-Ohio-6362, 857 N.E.2d 1195; *Jaques v. Manton*, 125 Ohio St. 3d 342, 2010-Ohio-1838, 928 N.E.2d 434. This evidence is submitted to the jury to determine the reasonableness of the amount to be paid to the plaintiff, which can reduce the amount a plaintiff claims as medical expenses by the amount that was actually paid by an insurer.

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?

There are two issues to consider: First, are accident reports privileged because they are written in preparation for litigation? Second, are accident reports privileged because they can constitute attorney-client communications?

As to the first question, though seemingly a fact intensive inquiry, as a general rule accident reports are not protected because they are generally not written in preparation for litigation.

Witt v. Fairfield Pub. Sch. Dist., No. CA95-10-169, 1996 Ohio App. LEXIS 1564, at *18 (Ct. App. Apr. 22, 1996) (where statements were made within a few months of accident, but litigation not commenced until nearly two years after accident, the statements were not protected by work product doctrine).

Hunter v. Wal-Mart Stores, Inc., 12th Dist. No. CA2001-10-035, 2002 Ohio 2604, P 38 (where defendant prepared witness statements shortly after accident occurred and well before plaintiff's filing of lawsuit, such statements and the related incident report were not protected by work product doctrine).

Joyce v. Rough, 2009-Ohio-5731, ¶ 11 (Ct. App.) ("the reports were not prepared 'in anticipation of litigation' within the meaning of the applicable law. The reports were prepared shortly after the October 26, 2005 accident, well before the case was filed, nearly two years later, on October 5, 2007. Therefore, the work product doctrine does not protect the subject documents from discovery.").

That said, it seems that sending those reports to an attorney might create attorney client privilege. "Ohio courts have repeatedly held that the attorney-client privilege protects from discovery witness statements or reports that are given to one's legal counsel for the purpose of preparing a defense to a lawsuit." *Joyce v. Rough*, 2009-Ohio-5731, ¶ 9 (Ct. App.); see also

See *Baker v. Meijer Stores Ltd. Partnership*, 12th Dist. No. CA2008-11-136, 2009 Ohio 4681, P 16 (accident report found privileged because it was turned over to defendant's attorneys in order to mount a defense to plaintiff's lawsuit).

In re Klemann, 132 Ohio St. 187, 193, 5 N.E.2d 492 (1936) (accident report was privileged when it was transmitted to an attorney in preparation for a lawsuit).

In re Tichy, 161 Ohio St. 104, 105-06, 118 N.E.2d 128, 128 (1954) (information obtained after an accident was privileged when turned over to the legal department).

Woodruff v. Concord City Discount Clothing Store No. 10072, 1987 Ohio App. LEXIS 5914 (Ct. App. Feb. 19, 1987) (notes taken by store managers after a slip and fall injury, per *Klemann*, were protected by the attorney-client privilege).

Leslie v. Kroger Co., CASE NO. 2824 and 2899, 1992 Ohio App. LEXIS 3219 (Ct. App. June 18, 1992) (incident report, per *Klemann* and *Woodruff*, was protected by attorney-client privilege).

Witt v. Fairfield Pub. Sch. Dist., No. CA95-10-169, 1996 Ohio App. LEXIS 1564, at *18 (Ct. App. Apr. 22, 1996) (witness statements were protected by the attorney-client privilege, per *Klemann*).

Hunter v. Wal-Mart Stores, Inc., 12th Dist. No. CA2001-10-035, 2002 Ohio 2604, P 39 (witness statements were protected by the attorney-client privilege when turned over to attorneys to prepare defense, per *Klemann* and *Witt*).

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 little case law in Ohio concerning the discoverability of social media in Ohio—the cases that have been litigated concern admissibility. The general rules of discovery seem to apply which means the trial court has extraordinary discretion. Indeed, this discretion is sometimes functionally not subject to review.

In *Godwin v. Facebook, Inc.*, 2020-Ohio-4834, ¶ 12, 160 N.E.3d 372, 378 (Ct. App.), the court of appeals concluded that it did not have jurisdiction to hear an interlocutory challenge to the court's grant of a third party's motion to quash a subpoena. While this case does not offer a great deal of substantive guidance, It does demonstrate that the trial court's control of such matters is plenary.

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.

In *Lloyd v. Thornsbery*, 2021-Ohio-239, ¶ 70 (Ct. App.), the appellate court affirmed the trial court's decision to deny the plaintiff the defendant's social media usernames and passwords. Part of the court's reasoning was that the social media accounts were not private at the time the operative facts of the case arose and the plaintiff had hundreds of pages of social media posts attached to the complaint. Based on this, the appellate court determined the plaintiff suffered no prejudice from the trial court's decision.

While this case does not offer significant guidance on its face, it is possible to extract some principles. Presumably, if the plaintiff was prejudiced by the failure of the court to order discovery of the social media usernames and passwords, the outcome would have been different. This case also implicitly demonstrates that privacy settings likely play some role in determining the boundaries of a person's social media privacy. There does not appear to have been any obstacle to the plaintiff attaching hundreds of pages of public social media postings, but the court readily barred the plaintiff from access to those posts that were private. Thus, it appears that relevance and prejudice are the barriers to discovery of private social media information. But public social media information is readily available and therefore gathering that information through discovery seems unnecessary.

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

In Ohio, it seems the standard for spoliation in cases involving social media is the same as any other case – see above standards. *Key Realty, Ltd. v. Hall*, 2021-Ohio-1868 (Ct. App.).

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).

Ohio uses traditional evidence admission principles with regard to the admissibility of social media information. Online social media material must first be authenticated pursuant to Ohio Evidence Rule 901(A),

then must be found to be relevant and not prejudicial under Rules 401 and 403. *State v. Miller*, 2012-Ohio-1263 (9th Dist., Lorain Cty.) (photographs obtained from MySpace were admissible as a fair and accurate representation of individuals displaying a gang sign.). The exclusionary rule seemingly applies. *See State v. Shropshire*, 2016-Ohio-7224, ¶ 19 (Ct. App.) (Holding that there was probable cause to search a phone for social media and recordings because a gang's members often documented their crime.).

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

Regarding this question and the next question, I have not commented upon government employers monitoring or action related to social media. That would implicate first amendment concerns and fall largely under the United States Supreme Court's decision in *Garcetti*.

Focusing on private employers – employers can monitor website usage from company-owned devices.

Unlike about half of the states, Ohio does NOT have a law prohibiting an employer from demanding the username and password of employee's social media accounts. Since this, seemingly the most intrusive kind of monitoring, is legal, the only reasonable assumption is that there are no limitations on an employer's monitoring of an employee's social media activities.

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

Because Ohio is an at-will-employment state, assuming an employee is not a union employee or otherwise under contract, the employer can terminate an employee for pretty much anything – there is an exception for certain protected activities under the constitution and certain unlawful retaliation dismissals, but generally in Ohio, private employers can terminate non-contract employees for no cause. With that background in mind, it would not matter whether a social media post related to work or just a message with which the employer disagreed, termination would be lawful.

One nuance is that a terminated employee could allege an unlawful dismissal and the purported reason is pre-textual. In such circumstances, the court would likely review the reasonableness or consistency of the employer's decision to terminate the employee. In *Glenn v. Hose Master, L.L.C.*, 2016-Ohio-1124, 61 N.E.3d 609 (Ct. App.), for example, the court found that social media posts were discriminatory and termination based on those posts was not pre-textual. The former employee alleged he was fired in retaliation for filing a worker's compensation claim but did not deny racist content on his social media.