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OREGON

SPOLIATION

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

In Oregon, spoliation of evidence occurs when evidence is intentionally or negligently withheld, hidden, altered, or destroyed.

Oregon has adopted the common-law principle that the destruction of evidence, when unsatisfactorily explained, warrants an inference that the documents were unfavorable to the person who destroyed them. *In re Kelly's Estate*, 150 Or 598, 626, 46 P2d 84 (1935). "When evidence is within the power of a party to produce and he does not produce it, the evidence which he has produced 'should be viewed with mistrust'. . . [a]nd that which he fails to produce should be presumed to be 'adverse' to him." *Whitney v. Canadian Bank of Commerce*, 232 Or 1, 5, 374 P2d 441 (1962) (quoting former ORS 17.250 (1981) and former ORS 41.360 (1961)). The Oregon Evidence Code presumes that "[e]vidence willfully suppressed would be adverse to the party suppressing it." OEC 311(1)(c).

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

Oregon courts have made no distinction between first-party and third-party spoliation.

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

Oregon courts have not recognized a cause of action for intentional or negligent spoliation of evidence.

Although the Oregon Supreme Court has not addressed whether either intentional or negligent spoliation of evidence is recognized as an independent cause of action under state law, the Court of Appeals has suggested that such claims may exist. *Marcum v. Adventist Health System/West*, 168 P.3d 1214 (Or. App. 2007) (discussing negligent spoliation), rev'd on other grounds, 193 P.3d 1 (Or. 2008); *Classen v. Arete NW*, LLC, 294 P.3d 520 (Or. App. 2012) (discussing negligent and intentional spoliation and declining to "address the precise contours of a cognizable claim for spoliation under Oregon law", but noting that even those "jurisdictions that recognize an independent claim for spoliation of evidence require the plaintiff to have first brought the underlying claim and lost or suffered diminution in its value" and "none has permitted a plaintiff to bring such claim after the statute of limitations on her underlying claims has expired...."); *but see Blincoe v. Western States Chiropractic College*, 2007 WL 2071916 (D. Or. 2007) (concluding that Oregon law does not and would not recognize a tort of intentional spoliation of evidence).

4. Remedies when spoliation occurs:

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Oregon has a statutory provision allowing that willful suppression of evidence raises an unfavorable presumption against the party who suppressed it. O.R.S. § 40.135(1)(c).

If evidence has been destroyed in a manner that may interfere with or prejudices the proof of a cause of action, a party can consider pursuing the following possible remedies:

> (1) filing a motion for default or summary judgment on the liability issues, *OmniGen Research v. Yongqiang Wang*, 321 FRD 367, 377 (D Or), appeal dismissed, No 17-35519, 2017 WL 6507124 (9th Cir Oct 5, 2017) (granting a motion for default judgment because of the defendants' spoliation of evidence); or
>
> (2) requesting a jury instruction that the contents of destroyed evidence are presumed detrimental to the party who destroyed it. O.R.S. § 40.135(1)(c).

Additionally, criminal sanctions could be imposed. *See* O.R.S. § 162.295.[1]

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

Oregon courts and rules make no distinction between spoliation of traditional documents and evidence, and spoliation in the context of electronic evidence and information. *Kerr v. Bd. of Psychologist Examiners*, 304 Or. App. 95, 113, 467 P.3d 754, 766, review denied, 367 Or. 75, 472 P.3d 267 (2020).

6. Retention of surveillance video.

Oregon courts consider unpreserved surveillance video under the same standards as spoliation of traditional documents or evidence. *See State v. Nelsen,* 219 Or. App. 443, 452, 183 P.3d 219, 225 (2008).

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. Evidence regarding collateral sources of recovery is not admissible. ORS 31.580. A plaintiff may claim and recover the "reasonable value of the medical expenses for which he was billed and which were necessary to treat his injuries." *White v. Jubitz Corp.*, 347 Or. 212, 243, 219 P.3d 566, 583 (2009).

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?

That evidence is not admissible at trial under the collateral source rule. S*ee White*, 347 Or. at 243, 219 P.3d at 583.

The court is only obligated to reduce the judgment post-verdict by the amount of any advance payments made by the tortfeasor. O.R.S. § 31.555(1). The judgment is not reduced by third-party payments, allowing the plaintiff to "double-recover" on medical expenses.

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[1] (1) A person commits the crime of tampering with physical evidence if, with intent that it be used, introduced, rejected or unavailable in an official proceeding which is then pending or to the knowledge of such person is about to be instituted, the person:

> (a) Destroys, mutilates, alters, conceals or removes physical evidence impairing its verity or availability; or
> (b) Knowingly makes, produces or offers any false physical evidence; or
> (c) Prevents the production of physical evidence by an act of force, intimidation or deception against any person.

(2) Tampering with physical evidence is a Class A misdemeanor.

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, limited. Defendants are entitled to an offset only for the amount of certain advance payments made to an insured by their own insurer under "personal injury protection" benefits. ORS 31.555; *see also Dougherty v. Gelco Express Corp.* 79 Or.App. 490, 495-96 (1986) (offset was not available when it could not be determined whether the jury awarded plaintiff damages already compensated for by the PIP payments).

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?**

    If an investigation or report is prepared prior to receiving a demand, it is a question of fact as to whether it is deemed to be privileged and prepared in anticipation of litigation. At least one Oregon trial court has somewhat recently ordered disclosure of reports prepared prior to a demand or threat of litigation. *See* September 14, 2016 Order, Case No. 1:15-cv-01371-CL aff'd *Wenzel v. Klamath County Fire Dist*., U.S. Dist. Ct. Case No. 15-cv-01371-CL (D Or March 14, 2017) ("[A]n internal investigation and employment decision cannot be turned into attorney work product merely by the 'generalized fear' that termination of an employee could lead to litigation," . . . "[i]f that were the case, every single employment decision made…with input from an attorney would be shielded").

    However, waiver of work-product is analyzed document by document, rather than on the basis of subject matter. *See Meyer v. Oregon lottery* 292 Or.App. 687 (2018). Thus, disclosure of the final report does not necessarily destroy work product protection and require production of other associated documents.

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?**

    Deposition (oral or written), requests for production, requests for admission, subpoenas.

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.**

    Oregon courts have not imposed any special limitations on parties obtaining social media evidence from an opposing party. The general standards and limitations applicable to discovery apply.

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

    Oregon has not set forth any particularized standards for spoliation of social media.

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).**

    Oregon courts use the same standards for getting social media into evidence as they do for other types of evidence. Evidence must first be relevant under OEC 402. Next, evidence must be authenticated under OEC 901, and these questions are always contextual, whether the evidence in question is social media evidence or another type of evidence. *See State v. Acosta,* 311 Or. App. 136, 161, 489 P.3d 608, 622 (2021) ("the showing required to authenticate evidence of postings from social media accounts is contextual"). For instance, if a

party is offering evidence “that a Facebook message originated from an account profile—with no additional claim of evidentiary value as to authorship, account ownership, or the content of the post—the proponent must authenticate only that much: that it is a message that originated from that account.” *Id* at 622. Alternatively, where “a proponent claims more—that the message originated from a particular account and was authored by a particular person—more is required.” *Id.*

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

Under Oregon law (ORS 659A.330), employers (and managers) may not: (1) compel or require applicants and employees to establish, maintain, or provide access to a personal social media account; (2) compel or require applicants and employees to access a personal social media account in the presence of the employer; (3) compel or require applicants and employees to accept a “friend” request or similar mechanism that would add the employer to the employee’s list of contacts for a personal social media account; and (4) require an employee or applicants to advertise or promote the employer’s business on their personal social media accounts. It is an unlawful employment practice to retaliate against an employee or applicant who refuses to comply with an unlawful request.

Employers may however require an employee to provide relevant information from a personal social media account (without the employer accessing the account) when conducting workplace investigations. There are also no restrictions on the employer’s right or ability to monitor or view publicly available portions of employee social media account.

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

Oregon state courts have not addressed or imposed limitations on employment terminations relating to social media, outside of the restrictions imposed by ORS 659A.330, addressed above in (15).