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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 is "the non-preservation or significant alteration of evidence for pending or future litigation" *Pyeritz v. Commonwealth*, 32 A.3d 687, 692 (Pa. 2011). The spoliation doctrine applies when evidence which is relevant either to a claim or defense "has been lost or destroyed." *Mt. Olivet Tabernacle Church v. Edwin L. Weigand Div.*, 781 A.2d 1263, 1269 (Pa.Super. 2001).

Spoliation has occurred when all of the following factors have been satisfied: "(1) the evidence is within the alleged spoliator's control; (2) there has been actual suppression or withholding of the evidence; (3) the evidence was relevant; and (4) it was reasonably foreseeable that the evidence would be discoverable." *State Farm Fire & Cas. Co. v. Cohen*, 2020 WL 5369626 (E.D. Pa. 2020) (internal citations omitted).

The duty to retain evidence is established where a party "knows that litigation is pending or likely" and "it is foreseeable that discarding the evidence would be prejudicial [to the other party]." *Mt. Olivet, supra*. at 1270-71. Where spoliation has occurred, three factors are weighed by the court in assessing the proper penalty: "(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future." *Parr v. Ford Motor Co.*, 109 A.2d 682, 702 (Pa.Super. 2014)(en banc) (*citing Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3rd Cir. 1994), *cert. denied*, 577 U.S. 1008 (2015).

Pennsylvania courts have held that a spoliation sanction requires proof that the alleged spoliation was beyond accident or mere negligence. The party seeking a spoliation sanction must demonstrate the spoliation of evidence was intentional and that the alleged spoliator acted in "bad faith" before an adverse inference instruction will be provided, *State Farm Fire & Cas. Co. v. Cohen*, 2020 WL 5369626, *6 (E.D. Pa. 2020).

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

First party spoliation claims are those claims for destruction or alteration of evidence brought against actual parties to underlying litigation. Conversely, third party spoliation claims are those destruction or alteration of evidence claims against non-parties to underlying litigation.

There is no general duty to preserve evidence imposed upon non-parties to litigation unless there exists a special relationship between the parties, or some other duty recognized by law. *Elias v. Lancaster Gen. Hosp.*, 710 A.2d 65, 68

(Pa.Super. 1998).

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

The Pennsylvania Supreme Court, in concurrence with the overwhelming majority of states, has declined to recognize a separate cause of action in tort for negligent spoliation of evidence and has clearly stated, "Pennsylvania law does not recognize a cause of action for negligent spoliation of evidence." *Pyeritz v. Commonwealth of Pennsylvania*, 32 A.3d 687, 695 (Pa. 2011).

No tort exists in Pennsylvania for spoliation against a third party who had custody of the evidence, absent some special relationship, such as a contractual obligation to preserve the evidence. *Elias, supra.*

4. Remedies when spoliation occurs:

Where a party destroys or loses evidence or other proof which is pertinent to a lawsuit, a variety of remedies and sanctions may be imposed by the court, including "entry of judgment against the offending party, exclusion of evidence, monetary penalties such as fines and attorney fees, and adverse inference instructions to the jury." *Hammons v. Ethicon, Inc.*, 190 A.3d 1248, 1281 (Pa.Super. 2018) (*quoting Mt. Olivet, supra*. at 1272-73).

- Negative inference instruction

The traditional sanction in Pennsylvania for spoliation of evidence is the negative inference, which is generally accomplished through the use of a jury instruction, however the spoliation adverse inference jury instruction is now considered a "moderate sanction." *Donohoe v. American Isuzu Motors, Inc.*, 155 F.R.D. 515, 519 (M.D. Pa. 1994).

A spoliation instruction, where the jury is advised that they may infer that the party who destroyed evidence did so because the evidence was unfavorable to their claim or defense, "attempts to compensate those whose legal rights are impaired by the destruction of evidence by creating an adverse Inference against the party responsible for the destruction." *Duquesne Light v. Woodland Hills Sch. Dist.*, 700 A.2d 1038, 1050 (Pa.Cmwlth. 1997). When a party spoliates evidence, the trial court may instruct the jury to infer that the evidence would have been adverse to the spoliator. *Schroeder v. Commonwealth*, 710 A.2d 23, 28 (Pa. 1998).

The standard Pennsylvania jury instruction which is read when a party has spoliated evidence, provides: "If a party [disposes of] [alters] a piece of evidence before the other party had an opportunity to inspect it, and the party who [disposed of] [altered] the evidence should have recognized the evidence was relevant to an issue in this lawsuit, then you may find that this evidence would have been unfavorable to them, unless they satisfactorily explain why they [disposed of] [altered] this evidence." Pa.S.S.J.I. 5.60,

- Dismissal

Pennsylvania state and federal courts have both adopted a "public policy rule" that a plaintiff in a product liability action "must produce the product for the defendant's inspection." If the plaintiff couldn't do so, even if beyond his control, the case was dismissed." *Schwartz v. Subaru of America, Inc.*, 851 F. Supp. 191 (E.D. Pa. 1994); *Sipe v. Ford Motor Co.*, 837 F. Supp. 660 (M.D. Pa. 1993); *Butler v. Samsonite Furniture Co.*, 1994 WL 904455 (Pa.Com.Pl. 1994). The rationale behind the rule is that allowing a lawsuit to proceed where evidence of an allegedly defective product has been disposed of without allowing the defendant an opportunity to examine and inspect the product would encourage false claims, while inhibiting and prejudicing the defense of claims. *Schwartz*, 851 F.Supp. at 193.

In a products liability case alleging a manufacturing (rather than a design) defect, summary judgment for the defendant may be warranted if the plaintiff spoliates evidence, or if the plaintiff fails to ensure that a third

party protects the evidence. *Creazzo v. Medtronic, Inc.*, 903 A.2d 24 (Pa. Super. 2006).

- Criminal sanctions

We are not aware of Pennsylvania cases where criminal sanctions have been imposed due to spoliation of evidence, however it is not inconceivable that, if the spoliation is egregious and in violation of a court order to preserve evidence, some criminal sanction could arguably be imposed.

- Other sanctions

Even if there is no court order in effect or the evidence was destroyed prior to suit, courts have the inherent power to sanction parties who spoliate evidence. *Schmid, supra.* Based upon each case's unique factual scenario, Pennsylvania courts will attempt to craft a fair resolution of the legitimate competing interests and the court has broad power in determining appropriate remedies for spoliation of evidence. *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3d Cir. 1994); *Gordner v. Dynetics Corp.*, 862 F. Supp. 1303 (M.D. Pa. 1994).

In *Schmid*, the Third Circuit developed the three "key considerations" (set forth above) for determining whether a preclusion order is appropriate for spoliation that results in dismissal because of plaintiff's inability to prove its case. *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994).

In *Gordner*, a federal district court judge analyzed the spoliation issue under Pennsylvania law and noted that the more extreme sanction of preclusion of evidence may not be appropriate in Pennsylvania when "no conduct on the part of the plaintiff is the cause of the loss of the allegedly defective product." *Gordner v. Dynetics Corp.*, 862 F. Supp. 1303, 1307 (M.D. Pa. 1994). *Gordner* disagreed with the Pennsylvania state and federal courts that had stated the broad "public policy" rule that a plaintiff must produce the product regardless of fault, and noted that all of the cases which were dismissed either had some spoliation attributable to the plaintiff, or where plaintiff, because of the lost evidence, could not identify the manufacturer. *Id.*

The Western District noted, that if the defendant has had an opportunity to examine the evidence before it was destroyed, the prejudice to the defendant is greatly reduced. *Shultz v. Barko Hydraulics, Inc.*, 832 F. Supp. 142 (W.D. Pa. 1993). With such facts, and without fraud or intent on the part of the party who spoliated evidence, the *Shultz* court felt a spoliation instruction was more appropriate than outright dismissal. *Id.*

Finally, if plaintiff is asserting a design defect claim, the loss of the particular product is also not as critical because the defendant can theoretically examine other existing products allegedly containing the same defect. *Quaile v. Carol Cable Company, Inc.*, 1993 W.L. 53563 (E.D. Pa. 1993).

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

Pa.R.Civ.P. 2012 is applicable to the duty to preserve electronically stored information ("ESI") and that duty is governed by a proportionality standard. *PTSI, Inc. v. Haley*, 71 A.3d 304, 316 (Pa.Super. 2013) (quoting Pa.R.C.P.2012, Explanatory Comment).

In determining whether the requested ESI is proportional to the case, and thus the duty to preserve ESI, courts will consider the nature and scope of the litigation, including the importance and complexity of the issues, and the amounts at stake. *Id.* The court will also consider whether the failure to preserve and produce ESI was due to the innocent clean-up of extraneous information from personal electronic devices, as part of a routine practice. *Id.* The court will also consider the availability to obtain the ESI from other ediscovery custodians and other sources with less burden and difficulty. *Id.*

Where it is shown that a party deleted, destroyed, or failed to preserve relevant ESI in bad faith, that

destruction of evidence will be sanctioned, including, where the party intentionally destroys relevant, irretrievable evidence, the entry of default judgment. *Gentex Corp. v. Sutter*, 827 F.Supp.2d 384 (2011).

6. Retention of surveillance video.

When notice of impending litigation is provided to a party, where the party is directed to preserve video surveillance prior to and after the occurrence of an incident, and where the recorded video surveillance is arguably relevant to the impending litigation, the failure to preserve the video surveillance is spoliation and that action or inaction is subject to spoliation sanctions. *Marshall v. Brown's IA, LLC*, 213 A.3d 263 (Pa. Super. 2019). The *Marshall* court found that, whether or not the party acted in bad faith in failing to preserve video surveillance was not relevant to the issue of spoliation, and therefore an adverse instruction was warranted. *Id.*

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?

Under 75 Pa. C.S.A. § 1722, in any action for damages against a tortfeasor arising out of the maintenance or use of a motor vehicle, a person who is eligible to receive PIP benefits or benefits program, group contract or other arrangement for payment, is precluded from recovering the amount of benefits paid, or payable. In Pennsylvania, medical bills and expenses are inadmissible under 75 Pa.C.S.A. § 1722 as evidence of pain and suffering. *Carlson v. Bubash*, 639 A.2d 458, 462 (Pa.Super. 1994), *appeal denied* 655 A.2d 982. 75 Pa.C.S.A. § 1722 was again interpreted, and it was clarified that the effect of the statute is, "to preclude the admission of all evidence concerning, as well as the recovery of, *all medical bills paid by any insurance program . . .* " *Stroback v. Camaioni*, 674 A.2d 257, 259 (Pa.Super. 1996)(emphasis in original). Plaintiff is permitted to recover only the "reasonable value of medical expenses," and therefore only the amount actually paid by provider (or amount found by jury to be reasonable) is recoverable in a personal injury action. *Moorhead v. Crozer Chester Medical Center*, 765 A.2d 786, 789 (Pa. 2001), *abrogated on other grounds by Northbrook Life Insurance Co. v. Com.*, 949 A.2d 333 (Pa. 2008). When a medical provider accepts less than the amount billed for medical services as payment in full, the plaintiff's recovery for medical expenses is limited to the amount actually paid and accepted. *Id.* at 789-790; *Blanck v. Wyndham International, Inc.*, 2004 WL 5829760, at *1 (E.D.Pa. 2004)

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?

No, the fact that plaintiff's medical expenses were reimbursed or paid by an insurance carrier is not admissible at trial. *Carlson v. Bubash, supra.; Stroback v. Camaioni, supra.* However, the plaintiff at trial is only able to recover the amount paid by insurers, not the amount billed by the medical provider for services provided. Presumably, the insurer who paid the plaintiff's medical bills will have a lien for the amount paid, and after a verdict will be able to recover its lien from the damages the plaintiff recovers. A double recovery (for amounts paid by a third party) is unlikely to occur because the plaintiff will be required to repay amounts received by the collateral source through subrogation. *Armstrong v. Antique Automobile Club*, 670 F.Supp.2d 387, 394 (M.D.Pa. 2009); *Feeley v. U.S.*, 337 F.2d 924, 927-928 (3d Cir. 1964).

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).

If the medical provider accepted $25,000 as payment in full, the plaintiff will only be able to "board" $25,000 at trial. The plaintiff will not be able to recover any amount in excess of the $25,000 which was accepted as payment in full. The amount paid by an insurer will be subject to subrogation by that insurer from any amounts actually received by the plaintiff. *Armstrong, supra.*

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?

The work product doctrine, codified in Pennsylvania Rule of Civil Procedure 4003.3, protects the disclosure of mental impressions, conclusions, opinions, notes or summaries, or legal theories of a party's attorney, respecting the value or merit of a claim or defense or respecting strategy or tactics. Any document prepared in anticipation of litigation is an example of material that may be protected by the work-product doctrine.

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?

Subject to the limitations provided by Pennsylvania Rule of Civil Procedure 4011, any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or similar entity or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. 231 Pa. Code § 4005.

Examples of interrogatories and a request for production of documents used in typical discovery requests for social media are listed below.

> From the time of the accident to the present have you had or do you have any social media accounts such as Facebook, Instagram, Twitter, etc.? If so, identify all of your social media accounts.
>
> Please state with specificity the substance of all social media posts made since the date of the accident that is the subject of Plaintiff's Complaint concerning and/or related to any of the injuries you sustained as a result of the accident, medical treatment you incurred, recovery, physical activity you performed after the date of the accident and any other items relevant to the claims you have set forth in the Complaint.
>
> Produce screen shot, PDF, or other print out of social media posts referenced.

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.

Pennsylvania courts have outlined a consistent standard for the discoverability of social media posts: there is no expectation of privacy. However, relevance is still important. A blanket discovery request for all posts from someone's private social media account likely will not be compelled. There is currently no meaningful appellate authority on social media discovery in Pennsylvania. Therefore, Pennsylvania trial courts have created their own tests to balance the need for the discovery of relevant "private" social media posts with the parties' privacy concerns. Many courts have taken the position that, where a party objects to the discovery of "private" social media posts under Rule 4011, the party seeking discovery must make a threshold showing that the "private" posts contain some relevant information. As stated in *Hunter v. PRRC, Inc.*, 2013 WL

9917150,. (York C.P. Nov. 4, 2013).

Note that Philadelphia Courts and ethics committees have consistently held that attorneys and law firms are prohibited from becoming social media "friends" with litigants in order to access the litigants' private social media pages. *See*, *e.g.*, *Philadelphia Bar Ass'n Prof'l Guidance Comm.*, Op. 2009-02 (2009) (an attorney, or someone under the attorney's supervision, seeking information to impeach an adverse witness, cannot friend request the witness without revealing the purpose of the communication and disclosing to the witness the attorney's role.

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

Under Pennsylvania law, plaintiffs have a duty to preserve social media materials related to their claims, such as descriptions of their injury recovery, relevant photographs, etc., just as thy have a duty to preserve physical and documentary evidence. While there are no known Pennsylvania opinions sanctioning plaintiffs for the destruction of social media, other jurisdictions have treated social media evidence like any other electronically stored information for the purposes of spoilation. Honorable Daniel J. Anders & Bobby Ochoa III, *1 LN Practice Guide: Pennsylvania Civil Discovery,* Sec 1.07 [1][a](2021).

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).

The Pennsylvania Superior Court has ruled that social media posts cannot be admitted into evidence without first a demonstration of proper authentication. To authenticate evidence, Pennsylvania Rule of Evidence 901 requires that its proponent produce evidence to show that the item is what the proponent claims it to be. Pa.R.E. 901(a). Subsection (b) of Rule 901 provides a number of means to accomplish that task, including through the testimony of a witness with knowledge or through circumstantial evidence.

The court addresses what showing is necessary to authenticate social media evidence, including Facebook posts and communications in *Commonwealth v. Mangel*, 2018 PA Super 57, 181 A.3d 1154 (Pa. Super. Ct. 2018). In that opinion, the court states that "The proponent of social media evidence must present direct or circumstantial evidence that tends to corroborate the identity of the author of the communication in question, such as testimony from the person who sent or received the communication, or contextual clues in the communication tending to reveal the identity of the sender." *Id.* at 1159. In short, the party offering the social media post must do more than prove who owns the social media account. The party must provide proof of who wrote the post.

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

Unlike other states, Pennsylvania has not enacted any state employment law regarding limiting the monitoring of employees' social media that would replace or supplement the federal Electronic Communications Privacy Act.

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

Employers recently prevailed in three separate lawsuits brought by Pennsylvania employees who were terminated for social media posts. In *Ellis v. Bank of NY Mellon Corp.*, 2020 WL 2557902 (W.D. Pa. May 20, 2020), a bank was inundated with complaints regarding an employee's public Facebook post concerning the arrest of an elected official for driving his car through a crowd protest. Similarly, in *Koslosky v. American Airlines, Inc.*, 2020 WL 1984886, 456 F.Supp.3d 681 (E.D. Pa. April 27, 2020), an airline employee created a viral firestorm when she made several racially insensitive posts on her Facebook account. In another recent social media decision, *Carr v. Commonwealth of PA, Dept. of Transportation*, 2020 WL 2532232, 678 A.3d 470

(Pa. May 19, 2020), the Pennsylvania Supreme Court rejected a public employee's claim of wrongful termination in violation of the First Amendment where she was terminated after posting a rant about school bus drivers pulling in front of her personal vehicle.

These cases illustrate that employers may lawfully discipline employees for personal social media posts that violate the employer's policies or core values, provided employers adhere to the same legal principles applicable to any other disciplinary action. By addressing social media restrictions in policies and training, employers may prevent issues from arising and bolster their ability to issue defensible disciplinary action if necessary.