FOR MORE INFORMATION

HIGGINS, CAVANAGH & COONEY, LLP
Providence, Rhode Island
www.hcc-law.com

Peter Garvey
pgarvey@hcc-law.com

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RHODE ISLAND

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 of evidence." Farrell v. Connetti Trailer Sales, Inc., 717 A.2d 183, 184 n. 1 (R.I. 1999). The doctrine provides that "the deliberate or negligent destruction of relevant evidence by a party to litigation may give rise to an inference that the destroyed evidence was unfavorable to that party." Tancrelle v. Friendly Ice Cream Corp., 756 A.2d 744, 748 (R.I. 2000). Although showing that a party destroyed evidence in bad faith or in anticipation of trial may strengthen an inference of spoliation, such a showing is not required to permit such an inference. R.I. Hosp. Trust Nat'l Bank v. Eastern Gen. Contractors, Inc., 674 A.2d 1227, 1234 (R.I. 1996).

Further, underlying the spoliation doctrine is the "policy-based resolve to 'decline to allow defendant[s] to benefit from [their] own unexplained failure to preserve and produce responsive and relevant information during discovery.'" Almonte v. Kurl, 46 A.3d 1, 22 (quoting Mead v. Papa Razzi Restaurant, 840 A.2d 1103, 1108 (R.I. 2004)). Thus, "Rhode Island courts usually deal with the issue of spoliation through an appropriate instruction to the jury indicating that the jurors are free to draw an adverse inference against the despoiler." Ferris Avenue Realty, LLC v. Huhtamaki, Inc., 110 A.3d 267, 283 (R.I. 2015).

More specific instructions have been provided for corporate parties. In these cases, it is appropriate for the judge to give a spoliation instruction when the corporation or entity "(1) failed to produce a document which the evidence tended to show was routinely generated by the corporation, and (2) was unable to provide a satisfactory explanation as to why the document was not prepared with respect to the incident in the case before the court." Mead v. Papa Razzi, 899 A.2d 437, 442-43 (R.I. 2006).

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

The Rhode Island Supreme Court has yet to distinguish between first and third party spoliation. The Court has held, however, that "the deliberate or negligent destruction of relevant evidence by a party to litigation may give rise to an inference that the destroyed evidence was unfavorable to *that* party." Kurczy v. St. Joseph Veterans Ass'n, Inc., 820 A.2d 929 (R.I. 2003) (emphasis added). Therefore, it appears the inference can only be drawn against the party who actually engaged in the acts of destruction or spoliation.

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

"Neither the Rhode Island Legislature nor the Rhode Island Supreme Court has yet established or recognized the existence of an independent tort for the spoliation of evidence." Malinowski v. Documented Vehicle/Drivers Systems, Inc., 66 Fed.Appx.

216, 222 (1st Cir. 2003).

In Malinou v. Miriam Hosp., the Rhode Island Supreme Court specifically stated that the doctrine of spoliation is "only [ ] an evidentiary matter, which may warrant a jury instruction, but not as giving rise to an independent cause of action." 24 A.3d 497, 511 (R.I. 2011).

4. Remedies when spoliation occurs:

The Rhode Island Supreme Court has discussed five factors (adopted by other regional district courts) to determine the appropriate sanction for the spoliation of evidence, which include: "(1) whether the defendant was prejudiced * * *; (2) whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether the [despoiler acted] in good faith or bad faith; and (5) the potential for abuse if the evidence is not excluded." Farrell, 727 A.2d at 187.

- Negative inference instruction

Rhode Island currently recognizes a negative inference instruction remedy in the case of spoliation of evidence. The Court has held that "the deliberate or negligent destruction of relevant evidence by a party to litigation may give rise to an inference that the destroyed evidence was unfavorable to that party." McGarry v. Pielech, 47 A.3d 271, 282 (R.I. 2012). However, this inference is not conclusive.

Additionally, the Courts do not require that the party seeking the negative inference instruction bolster this inference with additional evidence. Id. at 283.

- Dismissal

In Farrell, the Court held that the trial judge erred in refusing to permit the defendants from introducing evidence concerning the condition of a motor home after the repair work was conducted. 727 A.2d at 188. The Court limited the remedy to a negative inference jury instruction. Thus, it appears as though the Court will only recognize a jury instruction as a remedy in these cases.

- Criminal sanctions

The Rhode Island Supreme Court has yet to impose criminal sanctions for the spoliation of evidence.

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

The Rhode Island Supreme Court has yet to provide specific instructions or remedies for spoliation of electronic evidence. However, it is likely that the general rules and operation of the doctrine of spoliation would equally apply with regard to electronic information and evidence.

6. Retention of surveillance video.

The Rhode Island Supreme Court has yet to provide specific instructions for the retention of 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?

A plaintiff may submit to a jury the total amount of his or her medical expenses, even if a portion of the expenses were reimbursed or paid for by his or her insurance carrier. The collateral source rule is a well-established principle of Rhode Island law and prevents defendants in tort actions from reducing their liability with evidence of payments made to injured parties by independent sources. Esposito v. O'Hair, 886 A.2d 1197, 1199 (R.I. 2005); see also Votolato v. Merandi, 747 A.2d 455, 463 (R.I. 2000). Additionally, the Rhode

Island Supreme Court found that the collateral-source rule may serve to exclude evidence of receipt of workers' compensation benefits. Morel v. Napolitano, 64 A.3d 1176, 1182 (R.I. 2013).

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?**

The fact that all or a portion of the plaintiff's medical expenses were reimbursed or paid for by his or her insurance carrier is not admissible at trial. Rhode Island courts have repeatedly held that "the injured person is entitled to be made whole, since it is no concern of the tort-feasor that someone else completely unconnected with the tort-feasor has aided his victim." Gelsomino v. Mendonca, 723 A.2d 300, 301 (R.I. 1999).

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).**

A defendant cannot reduce the amount plaintiff claims as medical expenses by the amount that was actually paid by an insurer. Rhode island's collateral source rule "requires the negligent party to pay in full the damages suffered by the injured person without credit for any amounts received by the injured person from sources independent of the negligent party." Moniz v. Providence Chain Co., 618 A.2d 1270, 1271 (R.I. 1993).

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?**

Accident and incident reports can be protected as privileged attorney work product prepared in anticipation of litigation. The Rhode Island Supreme Court notes, "[t]he provisions of the Superior Court Rules of Civil Procedure pertaining to discovery generally are liberal, and are designed to promote broad discovery among parties during the pretrial phase of litigation." Henderson v. Newport County Regional Young Men's Christian Ass'n, 966 A.2d 1242, 1246 (R.I. 2009). In Henderson, the report at issue was prepared by a risk abuse management company to investigate sexual abuse of children one of defendant's employees. In so requesting the report, defendant's counsel specifically stated the request was made in anticipation of potential litigation and that all information learned in compiling the report would remain confidential between the defendant and defendant's counsel. Id. at 1245. The report was prepared and the cover contained the language "Attorney Client Work Product-PRIVILEGED AND CONFIDENTIAL," and was provided only to the defendant's Board of Directors and counsel. Upon learning of the report, plaintiffs first attempted to obtain a copy of the report via subpoena, and when that failed, requested an in-camera review to determine whether the report was discoverable. The trial justice ruled in favor of the plaintiffs and ordered the defendants to produce the report.

On review, the Supreme Court held that the report was qualifiedly immune from discovery and would not be produced to plaintiffs, absent a showing of substantial need for the report or inability to obtain equivalent material from the report. In examining the report, the court found that the letter authored by defendant's attorney revealed that the report was made in anticipation of litigation, and that nothing in the record indicated that the defendant had previously commissioned this type of investigation and that there was no indication that the investigation was solicited for any other reason than in anticipation of the impending lawsuit. The plaintiffs also failed to show a substantial need for the report and could obtain material equivalent to the report without undergoing undue hardship. As such, the report was shielded from discovery based on the work-product privilege.

Importantly, though, a party that withholds information that is "otherwise discoverable" on the basis of attorney work-product must be specific enough in its objections to support its privilege and to provide a means to assess the claim. See D'Amario v. State of Rhode Island, 686 A.2d 82 (R.I. 1996). However, factual work product covers "any material gathered in anticipation of litigation" and "it is not necessary for the attorney to have prepared the materials or the documents for them to constitute work product." State v. Lead Industries Ass'n, Inc., 64 A.3d 1183, 1193 (R.I. 2013) (quoting Henderson, 966 A.2d at 1248). Once the party asserting the work-product doctrine has established that the document or report was prepared in anticipation of litigation, the party seeking discovery must show "(1) that is has substantial need for the materials in preparation of its case and (2) that it is unable to obtain the information by other means without undue hardship." Id. (citing Crowe Countryside Realty Associates, Co. v. Novare Engineers, Inc., 891 A.2d 838, 842 (R.I. 2006)).

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?

Rhode Island courts have not addressed the means which an attorney may or may not use to obtain social media evidence. Subpoenas may be issued but are, of course, subject to motions to quash. Perhaps the most common method of seeking to obtain such evidence is through standard discovery requests made via interrogatories or requests for production of documents.

A standard interrogatory relating to a party's social media accounts might request: "State the name, web address, and user name for all blogs, online forums, and social networking websites the Plaintiff has belonged or had a membership to from [INSERT DATE] to the present." Similarly, a standard request for production relating to a party's social media accounts might request: "All online profiles, comments, postings, messages (including, without limitation, tweets, replies, re-tweets, direct messages, status updates, wall comments, groups joined, activity streams, and blog entries), photographs, videos, e-mails, and online communications (including those posted by plaintiff or anyone on plaintiff's behalf on Facebook or any other social networking website), from [INSERT DATE] to the present."

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.

Rhode Island law does not address any particular limitations that might be imposed on a party seeking to obtain social media evidence from an opposing party. However, an inference may be drawn that any social media evidence is subject to the same "legally competent evidence" standard that governs the Rhode Island Supreme Court's standard of review. "Legally competent evidence" is defined in Rhode Island as "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance." Beagan v. Rhode Island Department of Labor and Training, 162 A.3d 619, 626 (R.I. 2017) (internal citations omitted).

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

Rhode Island courts have not established any specific spoliation standards relating to social media. As such, the spoliation of social media evidence lies within the larger parameters of the doctrine of spoliation in Rhode Island, which provides that "the deliberate or negligent destruction of relevant evidence by a party to litigation may give rise to an inference that the destroyed evidence was unfavorable to that party." McAdam v. Grzelczyk, 911 A.2d 255, 261 (R.I. 2006) (quoting Mead v. Papa Razzi Rest., 840 A.2d 1103, 1108 (R.I. 2004) (internal quotation omitted)).

The Rhode Island Supreme Court has upheld a spoliation instruction when a defendant failed to "preserve and produce responsive and relevant information during discovery" Kurczy v. St. Joseph Veterans Ass'n, 820 A.2d 929, 946-47 (R.I. 2003). The Court has also held that "an adverse inference from spoliated evidence 'ordinarily would arise where the act was intentional or intended to suppress the truth, but does not arise where the destruction was a matter of routine with no fraudulent intent.'" Id. (quoting State v. Barnes, 777 A.2d 140, 145 (R.I. 2001) (internal quotation omitted)).

For example, a spoliation instruction was warranted where "no evidence was adduced at trial that the minutes in question were destroyed–either intentionally or otherwise–and yet it was the practice of the association to retain copies of their board meeting minutes for the period in question." Id. "The fact that the minutes in question were not routinely destroyed by the corporation [did] not change the fact that they could not be located or produced by the defense–despite the fact that defendant usually would retain such records in the ordinary course of its business." Id. Significantly, the Court refused to place a burden on the plaintiff to "prove that the unavailable evidence in question was in fact destroyed by defendant in anticipation of trial." Id.

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).

Rhode Island courts have yet to set any specific standards for the introduction of social media information into evidence.

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

Rhode Island courts have not addressed an employer's right to monitor employees' social media use. However, Rhode Island statutory law prohibits employers from requiring, coercing, or requesting an employee to disclose their social media account information, access their social media account in the presence of the employer, alter their social media account to increase third=party access, or add any new contacts. See R.I.G.L. §§ 28-56-2, 28-56-3. Employers may, however, request social media account information from an employee "when reasonably believed to be relevant to an investigation of allegations of employee misconduct or workplace-related violation of applicable laws and regulations and when not otherwise prohibited by law or constitution." Id. § 28-56-2(3). Additionally, employers are free to access any "information about an applicant or employee that is publicly available." Id. § 28-56-5.

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

Rhode Island courts have not addressed specific limitations on employment terminations relating to social media. However, Rhode Island has a statute which states that employers cannot "[d]ischarge, discipline, or otherwise penalize or threaten to discharge, discipline, or otherwise penalize any employee for an employee's refusal to disclose or provide access to" their social media accounts "or for refusal to add the employer to his or her list of contacts associated with a personal social media account, or to alter the settings associated with a personal social media account." R.I.G.L. § 28-56-4(1). The same statute also prohibits employers from failing or refusing to hire applicants for the same type of refusals. See id. § 28-56-4(2).

Further, the Rhode Island Supreme Court (in a case of first impression) held that an employee discharged for posting derogatory comments about his supervisor on Facebook page was not disqualified from receiving unemployment benefits since his conduct was not connected to his employment. Beagan v. Rhode Island Department of Labor and Training, 162 A.3d 619 (R.I. 2017); see also R.I.G.L. § 22-44-18(a) Iwhich states that in order to determine whether an employee is ineligible for benefits based on a disqualifying reason, one must consider (1) whether there was an act of proven misconduct; and (2) whether the misconduct was

connected to the employee's work). In this case, the Court also noted that the supervisor had been blocked from accessing the employee's Facebook page and there was no evidence that the post was directly accessible by other employees or customers.