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SOUTH CAROLINA

SPOLIATION

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

A party bringing a motion for sanctions based on spoliation bears the burden of establishing three Independent elements before the court may determine which sanction, if any, is appropriate. These elements are:

(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed;

(2) that the records were destroyed with a culpable state of mind; and

(3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Hawkins v. Coll. of Charleston, 2:12-CV-384-DCN, 2013 WL 6050324 (D.S.C. Nov. 15, 2013).

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

A first party spoliation cause of action is brought against an opposing party. Cole Vision Corp. v. Hobbs, 394 S.C. 144, 151, 714 S.E.2d 537, 540 (2011) (*determining* present case was not first-party spoliation where co-defendant optometrist brought counterclaim of spoliation against co-defendant sublessor).

A third-party spoliation cause of action is brought against a non-party. *See* id.; *see also* Austin v. Beaufort County Sheriff's Office, 377 S.C. 31, 659 S.E.2d 122 (2008) (demonstrating potential third-party spoliation where defendant collected evidence from crime scene but subsequently destroyed it, and defendant would not have been a party to the underlying wrongful death action).

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

South Carolina does not recognize an independent tort for the negligent spoliation of evidence, third-party or otherwise, and generally relies on traditional non-tort remedies such as sanctions and adverse jury instructions for redress. Cole Vision Corp. v. Hobbs, 394 S.C. 144, 151-52, 714 S.E.2d 537, 541 (2011).

4. Remedies when spoliation occurs:

- Negative inference instruction

The South Carolina Supreme Court has upheld a jury charge which advised that "when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party." Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990).

- Dismissal

Dismissal is a potential punishment for spoliation. However, dismissal is "severe and constitutes the ultimate sanction for spoliation." Hawkins v. Coll. of Charleston, 2:12-CV-384-DCN, 2013 WL 6050324 (D.S.C. Nov. 15, 2013).

- Criminal sanctions

While there is no South Carolina case law directed at this issue, the South Carolina Rules of Civil Procedure state that the presiding judge has the authority to issue a contempt order for the failure to obey discovery orders. *See* Rule 37(b)(2)(D), SCRCP.

- Other sanctions

If spoliation has occurred, then a court may impose a variety of sanctions in addition to those discussed above. These sanctions can range from judgment by default, preclusion of evidence, or assessment of attorney's fees and costs.

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

There is no specific requirement or duty to preserve electronic evidence without a specific demand or the imposition of an obligation to preserve evidence; however, the elements to establish spoliation of evidence must be considered. On a related not, a specific demand to preserve electronic evidence is usually made by way of a preservation letter sent by an attorney in the action.

6. Retention of surveillance video.

Similar to the answer above, there is no specific requirement or duty to retain surveillance without a specific demand or the imposition of an obligation to preserve such evidence. In our experience, preservation of any such materials is generally preferred and better protects the interests of the entity in possession of the video footage.

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. The collateral source rule provides "that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the damages owed by the wrongdoer." Citizens and S. Natl. Bank of South Carolina v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995). A tortfeasor cannot "take advantage of a contract between an injured party and a third person, no matter whether the source of the funds received is 'an insurance company, an employer, a family member, or other source.'" Pustaver v. Gooden, 350 S.C. 409, 413, 566 S.E.2d 199, 201 (Ct.App.2002) (citations omitted); Covington v. George, 359 S.C. 100, 103-04, 597 S.E.2d 142, 144 (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. In South Carolina, a plaintiff can present the total medical bills incurred to the jury, regardless of payment, Medicare reduction, and like factors. Haselden v. Davis, 353 S.C. 481, 484, 579 S.E.2d 293, 295 (2003) (*citing* 22 Am. Jur. 2d *Damages*, § 198 (1988)).; Mitchell v. Fortis Ins. Co., 385 S.C. 570, 595-96, 686 S.E.2d 176, 189 (2009) (holding the trial court did not err in permitting the jury to evaluate the value of the plaintiff's medical care in assessing damages despite the fact that the plaintiff received the medical care for free); Covington v. George, 359 S.C. 100, 597 S.E. 2d 142 (2004)(evidence that amount hospital accepted in

payment was less than what it charged for its services was inadmissible under the collateral source rule).

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).**

No. The collateral source rule provides "that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the damages owed by the wrongdoer." Citizens and S. Natl. Bank of South Carolina v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995). A tortfeasor cannot "take advantage of a contract between an injured party and a third person, no matter whether the source of the funds received is 'an insurance company, an employer, a family member, or other source.'" Pustaver v. Gooden, 350 S.C. 409, 413, 566 S.E.2d 199, 201 (Ct.App.2002) (citations omitted); Covington v. George, 359 S.C. 100, 103-04, 597 S.E.2d 142, 144 (2004).

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?**

An accident/incident report might be protected as privileged work product. Although discovery in South Carolina is broad, the courts recognize that the work product doctrine protects from discovery documents prepared in anticipation of litigation, whether they were prepared by attorneys or non-attorneys. *See* Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010). However, no work product privilege exists for documents prepared in the ordinary course of business. *See* id.; National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d, 980, 984 (4th Cir. 1992) (contrasting documents prepared in anticipation of litigation with documents prepared in the ordinary course of business).

When determining whether a document is prepared "in anticipation of litigation," most courts look to whether the document was prepared because of the prospect of litigation. *See* Tobaccoville, 387 S.C. at 294, 692 S.E.2d at 530 (emphasis added). According to the Fourth Circuit Court of Appeals:

> [T]he mere fact that litigation does eventually ensure does not, by itself cloak materials with work product immunity. The document must be prepared because of the prospect of litigation when the preparer faces an actual claim or potential claim following an actual event or series of events that reasonably could result in litigation. Thus, we have held that materials prepared in the ordinary course of business or pursuant to regulatory requirements of for other non-litigation purpose are not documents prepared in anticipation of litigation within the meaning of Rule 26(b)(3).

Nat'l Union Fire Ins. Co., 967 F.2d at 984 (*quoting* Brinks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d 1109, 1118 (7th Cir. 1983). Therefore, accident/incident reports could be protected if the party seeking protection can demonstrate the purpose for the report is use in cognizable, future litigation.

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?**

While there is very little reported South Carolina authority with regards to the admissibility and use of social

media, there is an increasing trend on the part of South Carolina courts allowing for the discoverability and admissibility of information obtained from social media sites. In fact, trial judges have repeatedly issued orders compelling the production of information from social networking sites, and even admitting the same into evidence at the trial stage.

Social networking information is regularly obtained through written discovery requests, provided that such requests are sufficiently tailored to the subject matter at issue. Such requests ask that the Plaintiff access, download, and provide the information themselves rather than requesting usernames and passwords for defense counsel obtain the information themselves. A sample Interrogatory and Request for Production that seek social media information and content are provided below.

Sample Interrogatory

List every "Social Networking Website" (SNW) utilized or accessed by the party for the past three years. For any SNW identified in response to this or any other interrogatory, provide the following information:

(a) name and internet address of the SNW;

(b) name, address, social security number, and date of birth of the SNW account subscriber, and if different, the individual financially responsible for the SNW account;

(c) each and every user name, screen name, friendID#, email address, or alias affiliated with the SNW account;

(d) full URL to each SNW profile;

(e) the last time the party accessed the SNW account; and

(f) whether the party posts photographs and "updates" on the SNW account.

Sample Request for Production

With regard to Plaintiff's "Social Networking Website" (SNW) accounts, please produce or make available for inspection all documents or things, including electronically stored information (ESI), in the party's possession, custody or control which evidence, depict or relate to the party's mental, emotional and physical condition from the date of the accident through the current, inclusive of all documents or information relating to the party's alleged damages stemming from the accident that is the subject of this lawsuit, including her alleged pain and suffering, loss of enjoyment of life, and alteration of lifestyle (all as referenced in Paragraph 2 of the Complaint). This Request includes, but is not limited to, all IP Logs, blog entries, "Wall Postings," photographs, bulletins and any additional information contained on SNW accounts maintained by the party. For purposes of this Request for Production, the party is in "control" of all ESI maintained by the Social Networking Site Administrator by virtue of the consent provisions of the Stored Communications Act ("SCA"), 18 U.S.C. § 2701 *et seq*.

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.**

South Carolina courts have found that the information found in social media is relevant and discoverable under its broad scope of discovery allowed by the Rules of Civil Procedure. Under South Carolina law, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of

any discoverable matter. Rule 26(b), SCRCP. "In South Carolina the scope of discovery is very broad and 'an objection on relevance grounds is likely to limit only the most excessive discovery request.'" Samples v. Mitchell, 329 S.C. 105, 110, 495 S.E.2d 213, 215 (Ct. App. 1997).

Notably, the relevance of information sought in the production of social media was recently addressed by a federal court in South Carolina, which resulted in the Court finding that the social media information sought was reasonably tailored and is relevant to the claims and defense in this matter. Yang-Weissman v. South Carolina Prestress, 4:07-CV-3643-RBH-SVH, Docket Entry No. 100 (D.S.C., May 14, 2010). In that case, the Plaintiff claimed that she suffered physical and emotional injuries as a result of the November 24, 2004 collision and that her injuries continue today. The Plaintiff's activity on social networks since the collision is relevant to her claimed loss of enjoyment of life and the attendant damages. Yang-Weissman, 4:07-CV-3643-RBH-SVH; *see also* Bass v. Miss Porter's School, 2009 U.S. Dist. LEXIS 99916 (D. Conn. Oct. 27, 2009) ("Facebook usage depicts a snapshot of the user's relationships and state of mind at the time of the content's posting.").

The Yang-Weissman Court also found that such discovery requests were not an invasion of privacy. Yang-Weissman, 4:07-CV-3643-RBH-SVH; *see also* Dexter v. Dexter, No. 2006-P-0051, 2007 WL 1532084, at 6-7 (Ohio Ct. App. May 25, 2007) (*noting* party "can hardly claim an expectation of privacy" as to online blogs that were admittedly subject to public view.); Steven Guest et al. v. Simon L. Leis et al., 255 F.3d 325 (6th Cir.2001) (users of such sites "logically lack a legitimate expectation of privacy in the materials intended for publication or public posting"); Romano v. Steelcase Inc., 2010 WL 3703242 (N.Y. Sup. Ct. Sept. 21, 2010) ("'[i]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking... [and] risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial.").

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

South Carolina has no specific spoliation standards applicable only to social media for party litigants. However, the United States District Court for the District of South Carolina has recently addressed the issue of spoliation in the social media context in Hawkins v. Coll. of Charleston, 2:12-CV-384-DCN, 2013 WL 6050324 (D.S.C. Nov. 15, 2013). In Hawkins, the Defendant argued that there were three alleged incidents of spoliation, all involving the Plaintiff's Facebook account and an element of willfulness on the part of the Plaintiff regarding the removal of content. Id. The magistrate judge found the destroyed evidence to be relevant, to which conclusion neither party objected. Id.

A party bringing a motion for sanctions based on spoliation bears the burden of establishing three Independent elements before the court may determine which sanction, if any, is appropriate. These elements are:

(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed;

(2) that the records were destroyed with a culpable state of mind; and

(3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. Id. (internal citations omitted).

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).

South Carolina courts generally recognize the relevance of social media in assessing a plaintiff's damages where a Plaintiff's physical or mental condition is at issue (particularly where Plaintiff alleged physical or

emotional injury). Additionally, a South Carolina District Court has described a "reasonable expectation" of relevance in the context of social media postings where Plaintiff has made a claim for severe emotional or mental injury:

> 'It is reasonable to expect severe emotional or mental injury to manifest itself in some [Social Networking Site] content, and an examination of that content might reveal whether onset occurred, when, and the degree of distress.' E.E.O.C. v. Simply Storage Management, LLC, 270 F.R.D. 430, 435 (S.D.Ind.2010); *see also* Robinson v. Jones Lang LaSalle Ams., Inc., 2012 WL 3763545 (D. Or. Aug.29, 2012) (finding it "reasonable to expect severe emotional or mental injury to manifest itself in some social media content"); Sourdiff v. Texas Roadhouse Holdings, LLC, 2011 WL 7560647 (N.D.N.Y. Oct.24, 2011) (*directing* plaintiff to produce social networking information related in any way to her emotional or mental state)."

Hawkins v. Coll. of Charleston, 2:12-CV-384-DCN, 2013 WL 6050324 (D.S.C. Nov. 15, 2013).

South Carolina courts view social media messages and other content as writings and falls under a traditional Rule 901 analysis. *See* State v. Green, 427 S.C. 223, 230, 830 S.E.2d 711, 715 (Ct. App. 2019) ("the argument that social media should bear a heavier authentication burden because such a "modern" medium is particularly vulnerable to fraudsters may be seen for what it is: old wine in a new bottle."); Rule 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is question is what its proponent claims."). The judge decides whether a reasonable jury could find the evidence authentic, thereby requiring the proponent only make a prima facie showing that the true author is who the proponent claims to be. Green, 427 S.C. at 230, 830 S.E.2d at 714. Once this occurs, the evidence is admitted, and the jury decides its weight. Id. Generally, social media is authenticated through Rule 901(b)(4), which allows authentication to be proven through its distinctive characteristics. *See* id. at 232, 830 S.E.2d at 715 (*recognizing* growing trend for courts to use circumstantial evidence to authenticate social media content); State v. Hightower, 221 S.C. 91, 105, 69 S.E.2d 363, 370 (1952) ("Like any other material fact, the genuineness of a letter may be established by circumstantial evidence…."). However, South Carolina courts recognize that some cases may require more technical methods to authenticate social media content, including hash values and metadata. Id. at 233-34, 830 S.E.2d at 716 (expressing no opinion of these alternative methods of proof); United States v. Hassan, 742 F.3d 104, 133-34 (4th Cir. 2014) (authentication through tracking social media presence through internet protocol evidence); United States v. Recio, 884 F.3d 230, 236-37 (4th Cir. 2018) (authentication from a Facebook records custodian).

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

South Carolina courts have not expressly addressed an employer's right to terminate based upon an employee's social media use. However, it should be noted that the South Carolina State Constitution has been applied to protect the free speech of public employees from public institutions as well as the free speech of private employees where an employer's speech restrictions are unreasonable. *See e.g.* Botchie v. O'Dowd, 299 S.C. 329, 333, 384 S.E.2d 727, 729 (S.C. 1989) (*holding* statute granting discretionary authority to discharge deputies to sheriff did not bar wrongful discharge claim in violation of deputy's first amendment right); Mickens v. Southland Exchange Joint Venture, 305 S.C. 127, 406 S.E.2d 363 (S.C. 1991) (*affirming* trial courts reversal of Employment Security Commission denial of unemployment compensation due to "for cause" termination, in part, because plaintiff employee did not violate terms of defendant's Confidentiality and Non-Competition Agreement).

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

Like the above analysis, South Carolina courts have not expressly addressed an employer's right to terminate based upon an employee's social media use. However, it should be noted that the South Carolina State Constitution has been applied to protect the free speech of public employees from public institutions as well as the free speech of private employees where an employer's speech restrictions are unreasonable. *See e.g.* Botchie v. O'Dowd, 299 S.C. 329, 333, 384 S.E.2d 727, 729 (S.C. 1989) (*holding* statute granting discretionary authority to discharge deputies to sheriff did not bar wrongful discharge claim in violation of deputy's first amendment right); Mickens v. Southland Exchange Joint Venture, 305 S.C. 127, 406 S.E.2d 363 (S.C. 1991) affirming trial courts reversal of Employment Security Commission denial of unemployment compensation due to "for cause" termination, in part, because plaintiff employee did not violate terms of defendant's Confidentiality and Non-Competition Agreement).

Furthermore, the Fourth Circuit Court of Appeals provides three requirements for a public employee to state a claim for retaliatory discharge:

> (1) that he was a "public employee ... speaking as a citizen upon a matter of public concern [rather than] as an employee about a matter of personal interest;" (2) that his "interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public;" and (3) that his "speech was a substantial factor in the employer's termination decision.

McVey v. Stacy, 157 F.3d 271, 277-78 (4th Cir. 1998); *see* Shelton v. Newberry County School District, 8:16-3728-AMQ-KFM, WL 4573094 (D.S.C. May 17, 2018) (*denying* defendant school district's motion for summary judgment regarding plaintiff's retaliatory discharge cause of action because reasonable fact finder could determine that Facebook post was substantial/motivating factor in defendant's termination decision).