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SOUTH DAKOTA

SPOLIATION

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

Spoliation is the intentional destruction of evidence. *State v. Engesser*, 661 N.W.2d 739, 753 (S.D. 2003). If there is a showing of an intentional act of destruction of evidence, a spoliation instruction may be warranted.

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

South Dakota has not directly addressed the distinction between first and third-party spoliators. However, a third party can be sued for the destruction of evidence. *See Goings v. U.S.*, 505 F. Supp. 2d 576, 583 (D. S.D. 2007) (a third-party negligent spoliation of evidence "requires that the plaintiff prove the existence of a pending or potential cause of action and the inability to prove that cause of action because of the destruction of evidence").

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

The South Dakota Supreme Court has not addressed whether intentional spoliation is a separate cause of action. *See O'Neal v. Remington Arms Co., LLC*, 2012 WL 3834842, at *2 (D. S.D. Sept. 4, 2012) (noting that spoliation creates an evidentiary inference, but the state Supreme Court has yet to address whether there is a separate and independent tort). However, the *O'Neal* court predicted that the state Supreme Court would decline to recognize an independent tort for spoliation of evidence. *Id*. at *3.

4. Remedies when spoliation occurs:

When spoliation is established, the jury may infer that the evidence destroyed was unfavorable to the party responsible for the destruction. *See Thyen v. Hubbard Feeds, Inc.*, 804 N.W.2d 435, 439 (S.D. 2011). A spoliation instruction is warranted when substantial evidence exists to support a conclusion that the evidence was in existence, under the control of the spoliator, the evidence would have been admissible at trial, and the party destroyed it intentionally and in bad faith. *Red Bear v. SESDAC, Inc.*, 896 N.W.2d 270, 279 (S.D. 2017). The spoliator must show he or she acted in good faith without negligence or malice in destroying evidence. *Wuest ex rel. Carver v. McKennan Hosp.*, 619 N.W.2d 682, 686 (S.D. 2000).

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

South Dakota has not addressed issues pertaining to spoliation of evidence and discovery violations outside the "electronic discovery realm." *See, e.g.*, *State v. Mulligan*, 736 N.W.2d 808 (S.D. 2007); *State v. Bousum*, 663 N.W.2d 257 (S.D. 2003). A party's duty to preserve evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should have known that the evidence may be relevant to the anticipated litigation. *See Kendall*

v. Bausch & Lomb, Inc., No. Civ.05-5066, 2006 WL 8453961, at *4 (D. S.D. May 10, 2006) (recognizing the duty to preserve with respect to electronic data and confirming that "electronic data compilations and documents are no less discoverable than paper records").

6. **Retention of surveillance video.**

Once a duty to preserve is triggered, parties are required to take reasonable steps to preserve surveillance records, both video and audio. *Blazer v. Gall*, No. cv-2019 WL 3494785, at *4 (D. S.D. Aug. 1, 2019) (holding spoliation occurred based on the party's failure to preserve surveillance recordings, and the loss of evidence was prejudicial and warranted sanctions of the spoliator).

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. South Dakota recognizes the collateral source rule. *Moore v. Kluthe & Lane Ins. Agency, Inc.*, 234 N.W.2d 260, 269 (1975). Plaintiffs can submit to the jury the total amount of their medical expenses. In *Papke v. Harbert*, the South Dakota Supreme concluded that "when establishing the reasonable value of medical services, defendants in South Dakota are currently prohibited from introducing evidence that a plaintiff's award should be reduced because of the benefit received wholly independent of the defendants." 738 N.W.2d 510, 536 (S.D. 2007). Furthermore, the Court reasoned that changes to the application of the collateral source rule in the medical malpractice context is left to the Legislature. *Id*.

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 plaintiffs' medical expenses were paid or reimbursed by their insurance is not admissible. *See Papke v. Harbert*, 738 N.W.2d 510, 536 (S.D. 2007). The amount of damages a plaintiff is entitled to is a question for the jury. *Berry v. Risdall*, 576 N.W.2d 1, 4 (S.D. 1998). Plaintiffs are entitled to a reasonable value of medical services which is not controlled by whether a portion or all of the medical bills were paid or written off pursuant to an insurance agreement. *Lindholm v. Hassan*, 369 F. Supp. 2d 1104, 1111 (D. S.D. 2005).

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).**

There does not appear to be any case law addressing this precise question. However, where there is a contractual agreement between the insurance carrier and healthcare provider that reduces payments, it does not have any effect on a plaintiff's ability to recover medical bills because of the applicability of the collateral source rule. *See Papke*, 638 N.W.2d at 530-36.

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 general rule is that routine investigative materials, including accident reports, are not protected by the work product doctrine privilege and are discoverable. *Couture v. Anderson*, 2012 WL 369451, at *6 (D. S.D. Feb. 3, 2012) (compelling production of the accident report). Also, accident reports following a motor vehicle accident are not privileged and may not be held as confidential. SDCL 32-34-13.

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?**

    Social media evidence appears to be obtainable under the general means of discovery consistent with S.D. Civ. Pro. 15-6-26(b)(1). Social media posts can also be sought by issuing subpoenas. *See U.S. v. Delgado*, No. 11-30162-RAL, 2012 WL 4442810, at *1 (D. S.D. Sept. 25, 2012) (finding that defendant's issuances of subpoenas for "any and all Facebook postings" was sweeping and a fishing expedition).

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.**

    There appear to be no established limitations in South Dakota.

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

    There isn't a separate spoliation standard for social media. The general spoliation instruction is warranted when "substantial evidence exists to support a conclusion that the evidence was in existence, that it was in the possession or under the control of the party against whom the inference may be drawn, that the evidence would have been admissible at trial, and that the party responsible for destroying the evidence did so intentionally and in bad faith." *Young v. Oury*, 827 N.W.2d 561, 569-70 (S.D. 2013) (quoting *State v. Engesser*, 661 (N.W.2d 739, 755 (S.D. 2003)).

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).**

    Social media evidence appears to be subject to all the typical standards of admissibility of evidence. *See U.S. v. Seibel*, No. CR 11-10021, 2011 WL 3489803, at *2 (D. S.D. Aug. 9, 2011) (Facebook posts inadmissible as immaterial as to an issue in the case*); Onnen v. Sioux Falls Independent School Dist. No. 49-5*, 801 N.W.2d 752, 758 (S.D. 2011) (finding the Facebook post was not relevant to any facts regarding the case).

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

    There is no case law found on this precise question.

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

    There is no case law found on this precise topic. *See Black v. Division of Crimination Investigation*, 887 N.W.2d 731, 736-37 (S.D. 2016) (finding employer had cause to terminate employee following employee's conduct on Facebook and YouTube).