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UTAH

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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.

Utah does not recognize spoliation as an independent tort. *Hills v. United Parcel Service*, 2010 UT 39, 232 P.2d 1049, 1058 (declining to adopt a tort remedy for spoliation on the unique facts presented). However, Utah law provides discovery sanctions for spoliation of evidence and criminal penalties for evidence tampering in civil proceedings.

(A) Spoliation Under Utah's Discovery Rules

According to the Utah Rules of Civil Procedure, spoliation occurs when a party:

. . .destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty.

Utah R. Civ. P. 37(i). The discovery rules impose a negligent culpability threshold and sanctions may be imposed for any spoliation "in violation of a duty." Id. The Utah Court of Appeals held that sanctions may be imposed even if the offending party does not violate a court order or act with "willfulness, bad faith, fault or persistent dilatory tactics." *Daynight, LLC v. Mobilight, Inc.*, 2011 UT App 28, 248 P.3d 1010, 1012 (interpreting superseded Rule 37(g) which is functionally identical to Rule 37(i)).

(B) Tampering with Evidence

A person who spoliates evidence in a civil or administrative proceeding may be guilty of tampering with evidence:

A person is guilty of tampering with evidence if, believing that an official proceeding or investigation is pending or about to be instituted, or with the intent to prevent an official proceeding or investigation or to prevent the production of anything or item which reasonably would be anticipated to be evidence in the official proceeding or investigation, the person knowingly or intentionally: (a) alters, destroys, conceals, or removes any thing or item with the purpose of impairing the veracity or availability of the thing or item in the proceeding or investigation . . .

Utah Code Ann. § 76-8-510.5(2); *See also Hills v. United Parcel Service*, 2010 UT 39, 232 P.2d 1049, 1057 n.6 (encouraging prosecutors to use "existing non-tort remedies" including evidence tampering statute to combat spoliation) (Per Nehring J., with four Justices dissenting in part). The culpability threshold is met by "knowingly or intentionally" spoliating evidence. "Intentionally" and "knowingly" are criminal mental states, defined by statute. See Utah Code Ann. § 76-2-103(1)–(2) (2012).[1]

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

Utah has refused to adopt a spoliation tort in the context of first party spoilation. *Hills v. United Parcel Service*, 2010 UT 39, 232 P.2d 1049, 1058 (declining to adopt a tort remedy for spoliation on the unique facts presented). However, the dissent in that case indicated that third-party spoliation is more difficult to address

[1] "'Official proceeding' includes any civil or administrative action, trial, examination under oath, administrative proceeding, or other civil or administrative adjudicative process." Utah Code Ann. § 76-8-510.5(1)(a) (2012).

with traditional non-tort remedies and "nearly all jurisdictions that have adopted the tort in some form recognize a tort for third-party spoliation." *Hills v. United Parcel Service*, 2010 UT 39, 232 P.2d 1049, 1056 (Per Nehring J., with four Justices dissenting in part). Thus, Utah courts may be more amenable to adopting a tort for third-party spoliation than for first-party spoliation.

Currently there are no provisions directed towards third party spoliation. Utah's discovery rules only provide sanctions for spoliation by a party. *See* Utah R. Civ. P. 37(i). The evidence tampering statute, however, applies to third-party and first-party spoliation. The law prohibits any person or company from tampering with evidence, whether or not the person or company is a party to the lawsuit. *See* Utah Code Ann. § 76-8-510.5(2)(2012).

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

Utah does not recognize a separate cause of action for spoliation. *Hills v. United Parcel Service*, 2010 UT 39, 232 P.2d 1049, 1058 (declining to adopt a tort remedy for spoliation on the unique facts presented).

4. Remedies when spoliation occurs:

- Negative inference instruction

A court may "instruct the jury regarding an adverse inference" as a discovery sanction for evidence spoliation. Utah R. Civ. P. 37(i); 37(e)(2)(G). The Model Utah Jury Instructions propose the following spoliation instruction:

I have determined that [name of party] intentionally concealed, destroyed, altered, or failed to preserve [describe evidence]. You may assume that the evidence would have been unfavorable to [name of party].

Model Utah Jury Instructions.2d, CV131 (Utah State Bar 2011), available at https://www.utcourts.gov/resources/muji/.

- Dismissal

A court may "dismiss all or part of the action . . ." as a discovery sanction for evidence spoliation. Utah R. Civ. P. 37(i); 37(e)(2)(D).

- Criminal sanctions

A person who tampers with evidence is subject to criminal penalties. *See* Utah Code Ann. § 76-8-510.5(2) (2012). Tampering with evidence constitutes a third-degree felony if it "is committed in conjunction with an official proceeding;"[2] otherwise it constitutes a class A misdemeanor. Utah Code Ann. § 76-8-510.5(4) (2012). A third-degree felony is punishable by up to 5 years in prison and a $5,000 fine. Utah Code Ann. §§ 76-3-203(3); 76-3- 301(b) (2012). Class A misdemeanors are punishable by up to one year in jail and a $2,500 fine. Utah Code Ann. §§ 76-3-204(1); 76-3-301(c)(2012).

- Other sanctions

Additional discovery sanctions and administrative penalties are available to penalize spoliation.

1. Discovery Rules

To remedy spoliation, a court may impose several discovery sanctions. Utah R. Civ. P. 37(i). In addition to dismissal and negative inference instructions, a court may:

- "deem the matter or any other designated facts to be established in accordance with the claim or

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defense of the party obtaining the order" (Utah R. Civ. P. 37(e)(2)(A));

- "prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence" (Utah R. Civ. P. 37(e)(2)(B));
- "stay further proceedings until the order is obeyed" (Utah R. Civ. P. 37(e)(2)(C));
- "order the party or the attorney to pay the reasonable expenses, including attorney fees, caused by the failure" (Utah R. Civ. P. 37(e)(2)(E)); and
- "treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court . . ." (Utah R. Civ. P. 37(e)(2)(F)).

2. Administrative Rules

Some administrative regulations prohibit spoliation. For example, an employer is prohibited from removing evidence that pertains to a workplace accident that results in serious injury or death, until authorized by the Utah Labor Commission. Utah Admin. R. 614-1-5(C)(2). An employer who violates this provision is subject to civil penalties. Utah Code Ann. 34A-6-307(1) (2012). *See Hills v. United Parcel Service*, 2010 UT 39, 232 P.2d 1049, 1051.

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

Utah courts may impose discovery sanctions when "a party destroys, conceals, alters, tampers with or fails to preserve . . . electronic data . . . in violation of a duty." Utah R. Civ. P. 37(i). However, Rule 37 prohibits imposition of sanctions when electronic information is lost due to "the routine, good-faith operation of an electronic information system." *Id.*

6. Retention of surveillance video.

Utah law does not provide any special provision for retentionof 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?

Yes. *Pursuant to the collateral source rule, Utah law allows a* plaintiff to submit the total amount of his/her medical expenses to a jury, even if a portion of the expenses was reimbursed or paid for by an insurance carrier. *Wilson v. IHC Hospitals, Inc.*, 2012 UT 43, ¶¶ 31, 34, *289 P.3d 369. "[W]hen an insurance company pays a party a sum of money* pursuant to a policy, the premium of which was not paid by nor contributed to by the defendant, the payments so received belong to the plaintiff and are not to be credited to the defendant." *Phillips v. Bennett*, 439 P.2d 457, 457-58 (Utah 1968).

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. Any amounts of a plaintiff's medical bills that were satisfied by his/her insurance carrier are inadmissible at trial. Wilson ¶¶ 31, 34. The judge generally does not later reduce the verdict in a post-trial hearing in a standard case under the collateral source rule.

However, in the context of medical malpractice cases only, Utah has altered the collateral source rule by statute. In medical malpractice cases, the judge will reduce any damage award by the amount of any payments made by any collateral source during a post-trial hearing – provided that no subrogation right exists for any collateral source payments. Id. ¶ 32; Utah Code Ann. § 78B-3-405(1)–(2). Under the statute,

"collateral source" includes private insurance, except life insurance, and public assistance programs. Id. § 78B-3-405(3).

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).**

Utah appellate courts have not yet decided whether the full amount of a plaintiff's medical bills may be presented to a jury–or only amounts actually paid to satisfy those bills. *Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 24, 163 P.3d 615 (identifying the issue as one of first impression, but finding the issue was not preserved).

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?**

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Accident/incident reports are evaluated on a case-by-case to determine whether such reports were prepared in anticipation of litigation and thus entitled to work-product privilege. *Askew v. Hardman*, 918 P.2d 469, 474 (Utah 1996). To determine whether such reports are "prepared in anticipation of litigation" a court considers: "the nature of the requested documents, the reason the documents were prepared, the relationship between the preparer of the document and the party seeking its protection from discovery, the relationship between the litigating parties, and any other facts relevant to the issue." Id. While this test leaves considerable discretion to the trial court, Utah courts have been clear that the materials at issue need not be prepared by an attorney to be privileged. *Green v. Louder*, 2001 UT 62, ¶ 39, 29 P.3d 638. Specifically, the rule states that documents prepared by a party's insurer may qualify for work-product privilege. Id. (quoting Utah Rule of Civil Procedure 26(b)).

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 medial data is obtainable through discovery requests and subpoenas in Utah. Courts specifically allow parties to serve subpoenas to the social-networking sites Facebook and Twitter to help identify potential defendants. *1524948 Alberta Ltd. v. John Doe 1-50*, 2010 U.S. Dist. LEXIS 100482, 2010 WL 3743907 (D. Utah Sept. 22, 2010). The Court granted this expedited discovery due to the potential loss of "physical evidence from the passage of time." *1524948 Alberta Ltd.*, at *1-3.

Utah courts reference, without comment, the Federal Circuit Court's Model Order on E-Discovery, giving tact acceptance to that document's methods. *PPS Data v. Passport Health Communs.*, 2013 U.S. Dist. LEXIS 74060, 2013 WL 2295989 (D. Utah May 24, 2013).

Examples of social media discovery requests:

Interrogatory No. 1: Identify the user name and email address for any Facebook account maintained by

you from [DOI] through the present.

Interrogatory No. 2: Identify the user name, registration information, account detail, login information, or any other identifying information for any job board or job search websites for which you are (or were) registered or of which you are (or were) a member, including but not limited to: Hot Jobs, Career Builder, Monster, job.com, and salesjobhunter.com from [DOI] through the present.

Request No. 1: For each Facebook account maintained by you,please produce your account data for the period of [DOI] through the present. You may download and print your Facebook data by logging onto your Facebook account, selecting "Settings" under the shaded downward arrow on the top of your news feed and clicking on the "Download a copy of your Facebook data" link. Follow the directions regarding "Start My Archive."

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.

The Utah State Legislature has not passed any laws regarding limits on obtaining social media evidence from an opposing party. Instead, Courts apply traditional rules of weighing discovery requests, as outlined in Utah Rule of Civil Procedure 26.

Publicly available information, such as YouTube videos and public Facebook pages, is admitted without challenge. *See*, e.g., *Lumos, Inc. v. LifeStrength, LLC*, 2014 U.S. Dist. LEXIS 124298 (D. Utah Sept. 3, 2014) (YouTube videos admitted into evidence to demonstrate copyright infringement); *Lewis v. Salt Lake County*, 2014 U.S. Dist. LEXIS 88844, 2014 WL 2919755 (D. Utah, June 27, 2014)(Facebook comments used as evidence of positive work reviews); *Amarosa v. Dr. John's Inc.*, 2014 U.S. Dist. LEXIS 91300,38 I.E.R. Cas. (BNA) 1275, 2014 WL 3015422(D. Utah July 2, 2014)(Facebook comments admitted); *Buckles v. Brides Club, Inc.*, 2010 U.S. Dist. LEXIS 82154, 2010 WL 3190751 (D. Utah Aug. 10, 2010)(personal blog and false LinkedIn account as evidence of defamation); *NobelBiz, Inc. v. Veracity Networks, LLC*, 2013 U.S. Dist. LEXIS 139709, 2013 WL 5425101 (N.D. Cal. Sept. 27, 2013)(business's Facebook page as evidence of personal jurisdiction in Utah).

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

There are no separate spoliation standards directed solely towards social media in Utah. Posts on social media are within the scope of "electronically stored information" as that term is used in Rule 34 of the Utah Rules of Civil Procedure. Spoliation of Facebook posts may lead to sanctions. *Ray v. Wal-Mart Stores, Inc.*, 2013 U.S. Dist. LEXIS 146778, 2013 WL 5572731 (D. Utah Oct. 8, 2013). Litigation hold letters are likely trigger an obligation to preserve such posts if they are reasonably related to the litigation. *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).

Courts evaluate public social media content in the same manner as traditional evidence, and where information from social media is relevant, and foundation is appropriate, it is admitted. Facebook screenshot evidence was incorrectly excluded under Utah Rule of Evidence 608(c), Evidence of Bias, where the Facebook screen capture was proffered to demonstrate the relevant issue of bias and not for the truthfulness or untruthfulness of child custody evaluator regarding her relationship with an attorney. *Black v. Hennig*, 2012 UT App 259, ¶ 15, 286 P.3d 1256.

Social media may be excluded based upon a challenge of authenticity, at which time the totality of the circumstances is examined. *State v. Moyer*, 2014 UT App 7, 318 P.3d 1182.

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

In 2013, Utah enacted the Internet Employment Privacy Act (IEPA), which prevents employers from requiring employees or job applicants to disclose their usernames and passwords for personal social media accounts. Utah Code Ann. § 34-48-101 et seq. Utah joins the growing trend of states in enacting this type of legislation. The IEPA does not prohibit employers from:

- Requesting or requiring employees to disclose usernames or passwords needed only to gain access to (1) an electronic communications device supplied by or paid for in whole or in part by the employer or (2) an account or service provided by the employer, obtained by virtue of the employee's employment, and used for the employer's business purposes;
- Disciplining or discharging an employee for transferring the employer's proprietary or confidential information or financial data to a personal Internet account without the employer's consent;
- Conducting an investigation or requiring employees to cooperate in an investigation to ensure compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct if (1) there is specific information about activity on an employee's personal Internet account or (2) the employer has specific information about an unauthorized transfer of its proprietary or confidential information or financial data to an employee's personal Internet account;
- Restricting or prohibiting employees' access to certain websites while they are using (1) electronic communications devices supplied by or paid for in whole or in part by the employer or (2) the employer's network or resources in accordance with state and federal law; or
- Monitoring, reviewing, accessing, or blocking electronic data stored on electronic communications devices supplied by or paid for in whole or in part by the employer or stored on the employer's network in accordance with state and federal law.

The IEPA defines "personal internet account" as an account

(i) used exclusively for personal communications "unrelated to any business purpose of the employer," and (ii) not an account "created, maintained, used, or accessed by an employee or accessed by an employee or applicant for business related communications or for a business purpose of the employer." The statute does not create employer duty to monitor employee personal account activity.

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

Utah courts have not addressed this issue.