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VERMONT

SPOLIATION

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

Most of Vermont's spoliation law comes from federal rather than state courts. In Vermont, spoliation is defined as "the destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc., 473 F.3d 450, 457-58 (2d Cir. 2007) (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)) (holding that the spoliation sanction imposed on the plaintiffs was an abuse of discretion because the defendant had not only failed to request that plaintiffs preserve the evidence but had also affirmatively disclaimed any interest in the evidence).

Three elements must be established to make out a claim for spoliation. Ross v. Int'l Bus. Machines Corp., 2006 U.S. Dist. LEXIS 4166, at *12 (D. Vt. Jan. 24, 2006). First, the party having control over the evidence must be shown to have "had an obligation to preserve it at the time it was destroyed." Id. (quoting Byrnie v. Town of Cromwell, 243 F3d 93, 107 (2d Cir. 2001)). Second, it must be shown that the evidence was "destroyed with a culpable state of mind." Id. (quoting Byrnie, 243 F3d at 109). Third, it must be shown "that the destroyed evidence was relevant to the other party's claim or defense." Id. (citing Byrnie, 243 F3d at 109). When a court finds that a party has engaged in spoliation, it has "broad discretion to fashion an appropriate sanction." Id. (citing West, 167 F.3d at 779).

The only Vermont state case addressing spoliation directly requires that a party must have reason or obligation to preserve evidence before a "presumption of falsity" will arise. Lavalette v. Noyes, 205 A.2d 413, 415 (Vt. 1964). Other cases have implied without ruling on the matter that an instruction on lost evidence or spoliation may be appropriate at a civil trial. See e.g. In re Campbell's Will, 102 Vt. 294 (1929).

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

Vermont has not addressed the issue of third-party spoliation claims.

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

Vermont does not recognize a separate cause of action for spoliation. See Naylor v. Rotech Healthcare, Inc., 679 F.Supp.2d 505, 511 (D. Vt. 2009) (holding that spoliation is by definition an ancillary issue in a lawsuit and, therefore, to recognize a separate claim of spoliation would be cumbersome and unnecessary "at least where the alleged spoliator is a party to the underlying lawsuit").

4. Remedies when spoliation occurs:

- Negative inference instruction

The Vermont Supreme Court has traditionally favored discovery sanctions, such as the negative inference instruction, to punish spoliators. Naylor v. Rotech Healthcare, Inc., 679 F.Supp.2d 505, 511 (D. Vt. 2009). See also In re Campbell's Will, 102 Vt. 294, 304, 147 A. 687, 691 (1929) (applying a presumption of fact arising from the spoliation of evidence). C.f. Lavalette v. Noyes, 124 Vt. 353, 355, 205 A.2d 413, 415 (1964)(considering a presumption of falsity as a sanction for the destruction of evidence, but declining to apply the sanction because the evidence was destroyed by a third party "who had no apparent reason nor obligation to preserve it"); Ellis J. Gomez & Co. v. Hartwell, 97 Vt. 147, 152-53, 122 A. 461, 464 (1923) (noting the rule that willful destruction of evidence gives rise to an inference that the contents would be injurious to the one who destroys it, but declining to impute the act of spoliation to the defendant because it was wholly outside the partnership business).

- Dismissal

Sanctions of dismissal or default judgment are considered severe and should be reserved for extreme circumstances, such as a showing of "willfulness, bad faith, or fault." Ross v. Int'l Bus. Machines Corp., 2006 U.S. Dist. LEXIS 4166, at *14 (D. Vt. Jan. 24, 2006) (holding that although defendant should have preserved the document plaintiff was accused of falsifying, its failure to do so was "not sufficiently extreme" to require the sanction of default judgment). Generally, the sanctioned party's conduct must rise at least to the level of gross negligence. Id. at *15 (comparing Cine Forty-Second Street Theatre v. Allied Artists, 602 F.2d 1062, 1068 (2d Cir. 1979) with Sec. & Exch. Comm'n v. Research Automation Corp., 521 F.2d 585, 588 (2d Cir. 1975)).

- Criminal sanctions

Vermont courts have not discussed or imposed criminal sanctions on spoliators, but, as previously noted, courts have "broad discretion to fashion an appropriate sanction." Ross v. Int'l Bus. Machines Corp., 2006 U.S. Dist. LEXIS 4166, at *12 (D. Vt. Jan. 24, 2006) (citing West, 167 F.3d at 779).

- Other sanctions

Vermont courts have not imposed other sanctions.

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

Vermont courts have not addressed spoliation of electronic evidence.

6. **Retention of surveillance video.**

Vermont has not addressed the issue of surveillance video retention.

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 trend in the Vermont trial courts is to permit the jury to hear the total amount of the medical expenses, even if a portion was paid by a third party, so long as the third party was not connected to the tortfeasor. See Buker v. King, Docket No. 523-11-05 Wrcv (Vt. Sup'r Ct. Jun. 23, 2008)(Morris, J.)(refusing to limit the reasonable value of plaintiff's medical services to the amounts plaintiff's medical providers agreed to accept as a recipient of Medicaid funds, relying on the collateral source rule).

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 existence of health insurance may not be mentioned at trial. "The collateral source rule bars the introduction of the amount received by the injured party from a collateral source not connected with the tortfeasor. This prevents the wrongdoer from benefitting from the foresight of the injured party in buying insurance." Sherman v. Ducharme, Docket No. 334-5-08 Wrcv (Vt. Sup'r Ct. Nov. 10, 2009)(Eaton, J.)(citing Hall v. Miller, 143 Vt. 135, (1983)). Also, the judge does not reduce the verdict in a post-trial hearing for expenses that were reimbursed or paid for by the plaintiff's insurer because of 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. If a plaintiff's health insurer has an agreement with a hospital for a discount on payment for services, a plaintiff may still prove up the full amount that the hospital would have charged in the absence of such an agreement. See Buker v. King, Docket No. 523-11- 05 Wrcv (Vt. Super. Ct. Jun. 23, 2008) (Morris, J.) (refusing to limit the reasonable value of plaintiff's medical services to the amounts plaintiff's medical providers agreed to accept as a recipient of Medicaid funds); See also Beaudin v. Kupersmith, Docket No. S 0803-07 Cncv, (Vt. Sup'r Ct. Oct. 26, 2010) (Skoglund, J.) ("To the extent that Defendant's argument is that reasonable value of medical services can most accurately be proven through market transaction, i.e. the amount of payment the providers accepted, it is unavailing.")

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?**

Generally, accident/Incident reports are considered business records and are not privileged. Pursuant to Vermont Rules of Evidence 803(6), records of regularly conducted business activity are not excluded by the hearsay rule. The Rule identifies a "report ... in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the ... report ... as shown by the testimony of the custodian or other qualified witness." Business records are also admissible under the Uniform Business Records as Evidence Act, 12 Vermont Statutes Annotated § 1700.

A potential limitation to admission as a business record under Rule 803(6) is that, to be a business record, both the person making the record and the source of the information must have a business duty to transmit such information. See Vladyka v. Page, 135 Vt. 252, 253, 373 A.2d 539, 539-540 (1977)(police accident reports inadmissible to the extent they contain hearsay, or conclusions or opinions); see also, Kinney v. Johnson, 142 Vt. 299, 454 A.2d 1238 (1982)(trial court judge is given considerable discretion as to admissibility as business record, since the trial court judge is in the best position to review the proposed submissions and the circumstances surrounding their preparation). Accordingly, to the extent that an Accident/Incident report contains the statements of bystanders with no business duty to report, those statements may be excluded.

To the extent that the accident investigation and reporting was directed by counsel, however, a good faith argument could be made that the records are attorney work product and, therefore, not discoverable.

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?

Vermont's Rules of Civil Procedure and Evidence are based on the Federal Rules. Any of the usual means of discovery are available in Vermont to obtain social media evidence, along with all standard objections including privilege, confidence, and relevance. There is not a Vermont statute specifically addressing social media discovery.

An example of a typical interrogatory for social media is as follows:

> Please set forth each and every online social networking service with which you have an account, and/or to which you have made postings or submissions for the period five years prior to the alleged incident to the present. (By way of example, but not by way of limitation, social networking services include Facebook, Google+, YouTube, LinkedIn, Instagram, Pinterest, Tumblr and Twitter.)

One example of our typical request to produce social media is as follows:

> For each social network account you have (including but not limited to Ask.fm, Blogspot, BuzzFeed, CafeMom, Class mates, DeviantArt, Facebook, Flickr, Foursquare, Google +, Habbo, Instagram, LinkedIn, LiveJournal, Meet Me, Meetup, MyLife, MySpace, MyYearbook, Periscope, Pinterest, Quora, Reddit, Reunion, Snapchat, Tagged, Tumblr, Twitter, Vine, VK, Windows Live Spaces, YouTube, etc.), please produce a copy of each page and each photograph that refers or relates to (a) the alleged incident; (b) the alleged injuries or damages; (c) the defendant; and/or (d) includes your image for the period beginning January 1, 2018 up to and including 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.

Vermont does not have a statute or rule placing limits on a party obtaining social media from an opposing party. There is pending legislation in the Vermont Legislature that has not gotten far. All of the standard objections can be used for social media evidence.

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

Neither the Vermont Bar Association nor the Vermont state courts have set spoliation standards on social media evidence. Social media would be treated like all other electronic evidence, where there is a "hold" if litigation is suspected.

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 Vermont state courts have not set specific standards for getting various types of social media into evidence. Such evidence is subject to all of the Vermont Rules of Evidence. To begin with, the proffered social media must be relevant. Authentication of social media evidence poses particular difficulties, especially when the party who authored the evidence is not available for trial. Social media evidence may be excluded if it cannot be authenticated by the author of the media. As with the Federal Rules, under the Vermont Rules of Evidence, social media evidence may be excluded if the purpose of the evidence is to show that the person

acted in conformity with his or her alleged "social media character" on the day of the occurrence. V.R.E. 404(a). Exceptions to this exclusionary rule exist if the "social media character" is being used for impeachment purposes. See V.R.E. 607, 608 and 609. The usual rules of hearsay apply to exclude social media evidence that is being offered for by someone other than the witness on the stand for the truth of the matter asserted. V.R.E. 802. If the "social media evidence" would not be hearsay under the Vermont Rules of Evidence, see V.R.E 801(d) (prior statement by a witness, party admission, party statements), such evidence would likely be admitted. The typical hearsay exceptions also apply to such evidence (e.g. present sense impression, excited utterance, then-existing mental, emotional, or physical condition, recorded recollection, statement against interest). See V.R.E. 803 and 804.

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

The State courts have not addressed an employer's right to monitor employees' social media use.

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

Neither Vermont's state nor federal courts have addressed limitations on employment terminations relating to social media. Vermont courts would likely look to nearby jurisdictions, and the U.S. Court of Appeals for the Second Circuit, as well as the National Labor Relations Board's guidance for social media in the sphere of employment law.