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VIRGINIA

SPOLIATION

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

When a party either fails to preserve or destroys potential evidence in foreseeable litigation, it can be deemed to have engaged in the "spoliation of evidence," and a trial court may use its inherent power to impose an appropriate sanction. *Loveless v. John's Ford, Inc.*, 232 Fed.Appx. 229, 236 (4th Cir. 2007). "[A] judicial response to a spoliation of evidence should serve the twin purposes of "leveling the evidentiary playing field and ... sanctioning the improper conduct," and may include dismissal. Id.

In Virginia, when a party fails to produce evidence that may have been favorable to the opposing party, this gives rise to the inference that the evidence would have been adverse to the party that failed to produce it. *Hoier v. Noel*, 199 Va. 151, 154, 98 S.E.2d 673, 675 (1957); *Jacobs v. Jacobs*, 218 Va. 264, 269, 237 S.E.2d 124, 127 (1977). Spoliation does not require intent, and the inference arises "if, at the time the evidence was lost or destroyed, 'a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action.'" *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, 40 Va. App 565, 581, 580 S.E.2d 467, 475 (2003).

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

The actions of a third party may give rise to an inference based on spoliation where the third party is in privity with the party against whom the inference is being asserted. *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, 40 Va. App 565, 581, 580 S.E.2d 467, 475 (2003). In Wolfe, the plaintiff brought her case under the Virginia Birth-Related Neurological Injury Compensation Act to recover damages for her child, who developed cerebral palsy shortly after her birth. *Id*. at 572. Plaintiff claimed she was entitled to a favorable evidentiary inference because the delivering doctor had failed to maintain certain blood testing data. *Id*. at 582. The court determined that the Act made the doctor in privity with the defendant Program, and that the actions or inactions of the doctor could therefore constitute spoliation and give rise to an evidentiary inference favorable to Plaintiff. *Id*. at 584.

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

Virginia does not recognize a cause of action for intentional or negligent spoliation of evidence. *Austin v. Consolidation Coal Co.*, 256 Va. 78, 84, 501 S.E.2d 161, 164 (1998)

4. Remedies when spoliation occurs:

- Negative inference instruction

Virginia courts allow an evidentiary instruction permitting a negative inference to be drawn from missing evidence, with several important caveats. First, an inference is appropriate only when spoliated evidence would have been relevant. *Robey v. Richmond Coca-Cola Bottling Works, Inc.*, 192 Va. 192, 64 S.E.2d 723 (Va. 1951). Second, the spoliation negative inference is permissive, not mandatory. *Rahnema v. Rahnema*, 47 Va. App. 645, 626 S.E.2d 448 (Va. Ct. App. 2006). Third, this evidentiary remedy is an inference, not a presumption. *Jacobs v. Jacobs*, 218 Va. 264, 237 S.E.2d 124 (1977). Finally, intentional conduct or bad faith is not required in order to trigger this inference. *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, 40 Va. App. 565, 580 S.E.2d 467 (Va. Ct. App. 2003).

Corresponding federal case law is contained within *Vodusek v. Bayliner Marine Corp.*, decided by the Fourth Circuit in 1995. Like Virginia, the Fourth Circuit adopted an approach allowing the adverse inference instruction absent bad faith, so long as the spoliation was willful. *See Vodusek*, 71 F.3d 148 (4th Cir. 1995).

- Dismissal

In Virginia, dismissal is only an appropriate remedy in cases involving bad faith by the party or its counsel. *Gentry v. Toyota Motor Co.*, 252 Va. 30, 471 S.E.2d 485 (1996). Federal courts allow dismissal absent bad faith, looking instead to two questions: (1) that the conduct and resulting loss of evidence was so severe as to "amount to forfeiture of his claim" or (2) that the loss of evidence was so prejudicial that it substantially denies the defendant the ability to defend itself in the lawsuit. *Silvestri v. General Motors*, 271 F.3d 583 (4th Cir. 2001).

- Criminal sanctions

Criminal sanctions for spoliation of evidence are one of the most severe consequences available to a court and are typically reserved for cases of egregious, intentional bad faith conduct. As opposed to civil contempt, which seeks to incentivize a spoliating party to comply with remedial measures, criminal contempt proceedings are purely punitive in nature. Federal courts in Virginia will pursue criminal contempt proceedings in cases of egregious spoliation in order to "vindicate the authority of the court." *SonoMedica, Inc. v. Mohler*, No. 1:08CV230(GBL), 2009 U.S. Dist. LEXIS 65714 (E.D. Va. July 28, 2009). Nevertheless, this severe sanction is a last resort and avoided whenever possible by courts in the Fourth Circuit. *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010). When the party alleging spoliation shows that the other party acted willfully in failing to preserve evidence, the relevance of that evidence is presumed in the Fourth Circuit. *Id*.

- Other sanctions

Other remedies are available for courts to address spoliation issues. One such remedy is the exclusion of testimony relating to spoliated evidence. *Delaney v. Sabella*, 39 Va. Cir. 64, 1995 WL 1055990 (Va. Cir. Ct. 1995).

Courts may also award attorney fees and costs associated with responding to an opposing party's spoliation. In Virginia, an award of attorney's fees and costs is reserved for bad faith and intentional spoliation, with this sanction serving to deter further misconduct and to punish the offender. *E.I. DuPont de Nemours & Co. v. Kolon Indus.*, No. 3:09CV58, 803 F. Supp. 2d 469 (E.D. Va. July 21, 2011).

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

Litigants have the same duty to preserve electronically stored information (ESI) as they would any other form of evidence. Due to the volume and storage media of this evidence, however, companies may delete this information as part of their routine operations. Doing so is permissible from a legal perspective, so long as this deletion is done in good faith. Fed. R. Civ. P. 37(e). Upon receipt of a litigation hold letter, however, it is

incumbent upon the holder of ESI to intervene in the routine deletion of ESI to preserve this evidence for litigation. *See* Committee Notes to 2008 Amendment to Fed. R. Civ. P. 37(f).

Rule 26 of the Federal Rules of Civil Procedure states that "a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." Fed. R. Civ. P. 26(b)(2)(b). The key case analyzing this ESI rule was the 2003 Southern District of New York case, *Zubulake v. UBS Warburg LLC*. The court in *Zubulake* outlined five categories of ESI: (1) active on-line data; (2) near-line data; (3) offline storage/archives; (4) backup tapes; and (5) erased, fragmented, or damaged data. *See Zubulake*, 217 F.R.D. 309 (S.D.N.Y. 2003). The court found that the first three categories were "accessible" pursuant to Rule 26(b)(2)(b), while the fourth and fifth categories were not. District courts in the Fourth Circuit have generally adopted *Zubulake. See Adair v. EQT Prod. Co.*, No. 1:10CV37, 2012 U.S. Dist. LEXIS 90250 (W.D. Va. June 29, 2012); *Adkins v. EQT Prod. Co.*, No. 1:10CV41, 2012 U.S. Dist. LEXIS 75133 (W.D. Va. May 31, 2012); *Parkdale Am., LLC v. Travelers Cas. & Sur. Co. of Am.*, No. 3:06CV78-R, 2007 U.S. Dist. LEXIS 88820 (W.D.N.C. Nov. 19, 2007). Within the context of preservation of ESI for anticipated litigation, it is important to understand the breadth that any discovery would likely have in order to understand one's obligations to preserve evidence.

6. Retention of surveillance video.

Owners of premises with video surveillance have a duty to preserve such evidence for litigation like any other form of evidence. Failure to do so may result in adverse consequences in subsequent litigation in the form of the adverse inference instruction. An adverse inference instruction was granted in *Aaron v. Kroger L.P.*, in which a store manager received a litigation hold letter requesting that video surveillance videos be preserved following a slip-and-fall. *See Aaron*, No. 2:10CV606, 2011 U.S. Dist. LEXIS 111004 (E.D. Va. September 27, 2011). Even after receiving the litigation hold letter, the store manager allowed surveillance videos to be destroyed because he concluded the videos were not relevant to the case and did not depict the accident scene.

In contrast, the same court found in a similar case that the destruction of video surveillance tapes merited no sanction from the court, due to the fact that the tapes did not depict the scene of the accident. *Stroupe v. Wal-Mart Stores East, LP*, No. 3:07CV267, 2007 U.S. Dist. LEXIS 79898 (E.D. Va. Oct. 29, 2007). *Stroupe* can be distinguished from *Aaron* in that no litigation hold letter existed in *Stroupe*, and the video surveillance tapes were destroyed in accordance with the company's retention policy. Nonetheless, it is clear that the best course of action for companies is to adopt a reasonable retention policy and to establish internal administrative procedures that will ensure that litigation hold letters are routed and acted upon promptly.

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?

The plaintiff can "blackboard" the full amount of his/her medical expenses, regardless of any preexisting agreement between the insurance carrier and medical provider.

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?

Virginia's Collateral Source Rule prevents the introduction of the existence of insurance, or any type of collateral payment, given to offset the costs of medical expenses or lost wages. Virginia's rationale is that the wrongdoer should not get a windfall for the plaintiff being provided relief because the plaintiff sought insurance coverage.

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. Virginia's Collateral Source Rule prohibits defendants from reducing/limiting the amount of medical damages claimed because the bills were paid by insurance or another source. *Acuar v. Letourneau*, 260, Va. 180, 189-193 (Va. 2000). Plaintiff can blackboard the full amount of billed medical specials he or she is claiming as a result of defendant's fault. However, the plaintiff may be required by the insurance carrier to reimburse the carrier for the adjusted amount the carrier paid.

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?**

Under certain circumstances, accident/incident reports can be protected as privileged work product. In order for the privilege to apply, the party asserting the privilege must show that the documents were in fact, prepared in anticipation of litigation, as opposed to being prepared in the ordinary course of a business. For example, reports prepared by an insurance adjuster, which are ordinarily prepared as part of the insurance company's normal course of business are unlikely to be protected. However, if litigation is foreseeable, the reports are more likely to be protected.

A. Virginia State Police Accident Reports

Of note, there is now a 30 day waiting period in order to obtain accident reports prepared by the Virginia State Police and requests for such reports must be directed to the Department of Motor Vehicles. Reports must be maintained by DMV for 36 months pursuant to Va. Code § 46.2-380.

Accident reports prepared by local police departments may be obtained by sending a Virginia Freedom of Information Act request directly to the local department. There is no waiting period to obtain these reports.

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?**

Informal searching of public information on social networking/social media sites is permissible, provided counsel does not inadvertently communicate with a represented party in violation of Rule 4.2 of the Rules of Professional Conduct.

Generally, courts will allow discovery of social media if relevant. Rule 4:1(b)(1) of the Rules of the Supreme Court of Virginia states that "any matter, not privilege, 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." In *James v. Edwards*, 85 Va. Cir. 139, 142 (Greensville Cir. Ct. 2012), the court found that a party seeking discovery of a plaintiff's social networking or social media activity that is not readily available to public access must establish a "factual predicate" with respect to the relevancy of the evidence.

A sample request might look like this: Produce all information, including but not limited to documents, photographs, postings, comments, messages, and videos posted, contained, or stored on any social media or social networking site profile belonging to Plaintiff that is in any way related to Plaintiff's claims in his lawsuit or alleged damages claimed in this action.

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.

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

Rule 3.4(a) of the Rules of Professional Conduct provides that a lawyer shall not obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall also not counsel or assist another person to do any such act.

In *Lester v. Allied Concrete Co.*, Case Nos. CL09-223 (Va. Cir. Ct. Sep. 1, 2011) and CL08-150 (Va. Cir. Ct. Oct 21, 2011), a plaintiff and his attorney were sanctioned for knowingly deleting potentially incriminating photographs on social media (Facebook). In *Lester*, the plaintiff filed a wrongful death suit after he lost his wife in a tragic accident. However, his Facebook page showed a photo of him after her death holding a beer can and wearing a t-shirt that said "I love hot moms." Plaintiff's counsel had instructed his client to "clean up" his Facebook page, and the plaintiff deactivated his Facebook page. Counsel then represented in discovery that the plaintiff did not have a Facebook page. This resulted in a sanction of $542,000 against the lawyer and $180,000 against the plaintiff. *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).

The standard governing the admission of social media material into evidence is the same for any other evidence in Virginia. According to Virginia Supreme Court Rules 2:401 and 2:402, the material sought to be introduced must be relevant, and is presumed admissible unless there is a specific exclusion that applies. Social networking sites are not self-authenticating. The authenticity of social media material is determined by circumstantial and direct evidence bearing on that issue, for instance, that the biographical information of the litigant and the owner of the social media account is the same. *See Bloom v. Commonwealth*, 262 Va. 814, 821 (2001).

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

Virginia allows employers to monitor employee social media activities only if the employee's social media is publicly available. An employer is not permitted to ask for an employee's password or otherwise obtain the password. It is important to note that Virginia does not have an action for invasion of privacy. However, employers should be mindful that if they learn information about an employee's protected category (i.e., disability, genetic information, sexual orientation, etc.) by looking at social media information, the employer may not discriminate against the individual in any aspect of the employment relationship based upon the

information learned.

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

The "liking" of a political campaign on Facebook is an exercise of a public employee's First Amendment rights as a private citizen, and an employer who terminates an employee who has engaged in such activity must demonstrate that the employee would have been terminated even had the free speech not occurred. *Bland v. Roberts*, 730 F. 3d 368, 375 (4th Cir. 2013).

Private employers, however, may terminate an employee who has engaged in political and other potentially-divisive speech on social media, provided the employer does not do so in a discriminatory or retaliatory manner that would violate the Virginia Values Act or Title VII of the Civil Rights Act of 1964. Certain speech is also protected under the National Labor Relations Act. For example, employees who "like" a comment on social media about unfair pay at their jobs would have protection under the NLRA.