FOR MORE INFORMATION

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WASHINGTON

SPOLIATION

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

In the seminal case of *Henderson v. Tyrrell*, 80 Wn. App. 592, 910 P.2d 522 (1996), the Washington Court of Appeals set forth the following test for evaluating spoliation claims. Initially, the alleged spoliation must in some way be connected to the party against whom the sanction is sought. If this connection can be established, the court will then apply a two-factor test evaluating: 1) the importance of the missing evidence; and 2) the culpability of the offending party.

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

There is no appellate case law addressing third-party spoliation.

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

In Washington, spoliation is a rule of evidence. There would be no basis for cause of action based upon spoliation.

4. **Remedies when spoliation occurs:**

- Negative inference instruction

In *Pier 67, Inc. v. King County*, 89 Wash.2d 379, 573 P.2d 2 (1977), the Court held: "where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him. 89 Wash.2d at 385-86, 573 P.2d 2. To remedy spoliation the court may apply a rebuttable presumption, which shifts the burden of proof to a party who destroys or alters important evidence. In deciding whether to apply a rebuttable presumption in spoliation cases, two factors control: "(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party." *Marshall v. Bally's Pacwest*, Inc.. 94 Wash.App. 372, 381-383, 972 P.2d 475,480 (Wash.App. Div. 2,1999). In weighing the importance of the evidence, the court considers whether the adverse party was afforded an adequate opportunity to examine it. Culpability turns on whether the party acted in bad faith or whether there is an innocent explanation for the destruction. *Id*.

- Dismissal

Dismissal is generally disfavored as a discovery/spoliation sanction.

- Criminal sanctions

Washington does not impose criminal sanction for spoliation.

- Other sanctions

A variety of sanctions have been discussed and imposed including: allowing the aggrieved party to argue an inference that the missing evidence would have been detrimental to the opposing party's case in closing argument; a jury instruction which allows the jury to conclude that the missing evidence must have been unfavorable to the offending party; an instruction which requires the jury to draw such an inference; and the imposition of a rebuttable presumption which shifts the burden of proof to the offending party. Other sanctions have been imposed such as excluding expert witness testimony, allowing an inference to defeat summary judgment or even granting summary judgment in favor of the aggrieved party.

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

As the Washington Court of Appeals recently noted in *Cook v. Tarbet Logging, Inc.*, 190 Wn. App. 448, 360 P.3d 855 (2016), there is *no general duty* to preserve evidence in Washington. The mere fact that litigation is foreseeable will not, by itself, impose a duty to preserve evidence. Instead, the party seeking sanctions will need to establish the existence of a specific duty. When a specific duty arises is, unfortunately, not very clear. It does appear that an explicit request to retain specific evidence will impose a duty to preserve in most, if not all, circumstances. *Henderson v. Tyrrell*, 80 Wn. App. 592, 610-611, 910 P.2d 522 (1996). It also appears that the actual initiation of a lawsuit will trigger a duty to preserve, *Pier 67, Inc. v. King Cnty.*, 89 Wn. 2d 379, 385, 573 P.2d 2 (1977) though presumably the defendant would need to be served with the suit before such a duty would arise. Beyond these specific events, initiation of a duty to preserve is less clear.

6. Retention of surveillance video.

See No. 5, *supra*. Further This is a highly case-specific inquiry. Courts are less likely to find spoliation where other evidence is available, such as photographs or reports which adequately depict or describe the evidence which was later destroyed. *Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 899, 138 P.3d 654 (2006); *Henderson v. Tyrrell*, 80 Wn. App. 592, 609, 910 P.2d 522 (1996).

Courts have also suggested that company retention policies may create a duty to preserve evidence. *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 136, 307 P.3d 811 (2013). From the case law, it would appear that courts are willing to consider a duty to preserve in the context of spoliation law even where that duty is not specifically owed to the litigant. If the party was required to preserve the evidence for any reason then its destruction may give rise to a finding of spoliation, even if the evidence did not necessarily need to be preserved for the aggrieved party's specific benefit.

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?

In Washington, plaintiffs may seek to recover the reasonable value of medical services received. *Patterson v. Horton*, 84 Wn. App. 531, 929 P.2d 1125 (1997). Plaintiffs will typically offer the full amount of the bills rendered by the provider. This amount is generally accepted by the defense. If the defense contests the reasonableness of the billing, this must be based upon expert testimony from the defense. See *Hayes v. Wieber Enterprises, Inc.*, 105 Wn. App. 611, 20 P.3d 596 (2001) (Testimony regarding discrepancy between amount physician billed and amount he accepted as payment in full was properly excluded in trial of personal injury claim by restaurant patron who fell down restaurant stairs, as amount physician accepted as payment was not determining factor in calculating reasonable value of medical services patient received).

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?

Such information is not admissible at trial; Washington does not generally permit post-verdict reductions or offsets.

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).**

   In Washington, plaintiffs are permitted to recover the reasonable value of the medical services they receive, not the total of all bills paid. *Hayes v. Wieber* Enterprises, 105 Wn. App. 611, 20 P.3d 496 (2001).

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?**

    A company's post-accident investigation may be discoverable. However, recent case law suggests that the attorney-client privilege protects reports and statements made by representatives of a party prepared in "anticipation of litigation." In *Doehne v. Empres Healthcare Management,* LLC, 190 Wn.App. 274, 360 P.3d 34 (2015) the Court of Appeals held that an incident report of an employee, who was directed by her risk management department to prepare the report after a trip and fall, was protected by attorney- client privilege. The Court held that the report was privileged because its purpose was to assess possible liability and was ultimately provided to an attorney. The Court also ruled that the report was also protected work product, even though similar reports were conducted in the regular course of business. Importantly here, the Court refused to examine the purpose of the report in pieces, but rather analyzed the report as a whole document and the specific circumstances under which the report was generated.

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?**

    Requests for social media evidence are made through standard discovery requests:

    Please identify all of your internet social media and networking websites and/or applications, which you have used and/or maintained an account in the last six (6) years. Internet social media websites include, but are not limited to, Facebook, LinkedIn, Twitter, Instagram, Foursquare, YouTube, Pinterest, Google+, Tumblr, Flicker, Skype, FaceTime, etc.

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.**

    Washington appellate courts have not yet ruled on these issues.

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

    Washington appellate courts have not yet ruled on these issues.

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).**

    Washington appellate courts have not yet ruled on these issues in the civil context.

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

A Washington statute prohibits recording private communications without the participants' consent. RCW 9.73.030; *see also Smith v. Employment Security Department*, 155 Wn. App. 24, 39, 226 P.3d 263 (2010) (holding that conversations between public employees in an office were private as a matter of law). Therefore, while employers may monitor employees, they may not record such monitoring. A violation of RCW 9.73.030 "requires exclusion of 'all evidence' of the contents of the illegally recorded conversations." *Marin v. King Cty.*, 194 Wn. App. 795, 806, 378 P.3d 203, 211 (2016) (citing, *inter alia*, RCW 9.73.050) (excluding recordings secretly made by employee during conversations with supervisor).

Likewise, a Washington State law prohibits employers from demanding that employees or job candidates surrender their usernames or passwords to Facebook, Twitter, or other social networks, as well as from requiring employees to add managers as friends or contacts. RCW 49.44.200. Employers cannot punish employees for refusing to disclose this personal information. *Id.*

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

Washington appellate courts have not yet ruled on these issues.