

WEST VIRGINIA

SPOILIATION

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

Intentional spoliation of evidence requires (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) the spoliated evidence was vital to a party’s ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party’s ability to prevail in the pending or potential civil action; (6) the party’s inability to prevail in the civil action; and (7) damages. *Hannah v. Heeter*, Syl. Pt. 11 213 W.Va. 704, 584 S.E.2d 560 (W.Va. 2003). Negligent spoliation requires (1) the existence of a pending or potential civil action; (2) the alleged spoliator had actual knowledge of the pending or potential civil action; (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances; (4) spoliation of the evidence; (5) the spoliated evidence was vital to a party’s ability to prevail in the pending or potential civil action; and (6) damages. *Id.* at Syl. Pt. 8.

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

First party spoliation is spoliation committed by a party to a civil action while third party spoliation is spoliation committed by a non-party to a civil action with a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances. *See generally Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (W.Va. 2003).

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

Intentional spoliation of evidence is a stand-alone tort when done by either a party to a civil action or a third-party. *Hannah v. Heeter*, Syl. Pt. 9, 213 W.Va. 704, 584 S.E.2d 560 (W.Va. 2003) West Virginia does not recognize spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a party to a civil action. *Id.* at Syl. Pt. 2. West Virginia does recognize negligent spoliation of evidence as a stand-alone tort when the spoliation is done by a third-party. *Id.* at Syl. Pt. 5.

4. Remedies when spoliation occurs:

- Negative inference instruction

West Virginia allows for a negative inference instruction when a party commits spoliation of evidence. W. Va. R. Civ. Pro. 37(b)(2)(A) *see also Tracy v. Cottrell ex rel. Cottrell*, 206 W.Va. 363, 374, 524 S.E.2d 879, 890 (W.Va. 1999).

- Dismissal

West Virginia allows for dismissal of a claim when a party commits spoliation of

evidence. W.Va. R. Civ. Pro. 37(b)(2)(C).

- Criminal sanctions

West Virginia provides no criminal sanctions for spoliation of evidence.

- Other sanctions

Other sanctions for spoliation of evidence by a party include disallowing certain claims or defenses, rendering of default judgment, and contempt of court. W. Va. R. Civ. Pro. 37(b)(2).

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

While there is no specific statute or common law regarding spoliation of evidence and a duty to preserve electronic information, the above-stated rules are presumed to apply.

6. Retention of surveillance video.

While there is no specific statute or common law regarding retention of surveillance video, the above-stated rules are presumed to apply.

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 West Virginia, an injured plaintiff can submit to a jury the total amount of his or her medical expenses as evidence of the “reasonable value of medical services necessarily required by the injury.” West Virginia has adopted a “collateral source rule,” by which any evidence of a reduction in these types of expenses by way of reimbursement or of discount is typically inadmissible. *See generally Kenney v. Liston*, 233 W.Va. 620, 760 S.E.2d 434 (2014).

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?

West Virginia’s “collateral source rule,” described above, acts as both a rule of evidence and a rule of damages. Evidence of a portion of a given plaintiff’s medical expenses being reimbursed, discounted, or otherwise paid for by any source is inadmissible. Furthermore, the Judge will not reduce a jury verdict to account for these collateral sources of payment, because the collateral source rule “precludes the defendant from offsetting the judgment against any receipt of collateral sources by the plaintiff.” *See id.*

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. As stated above, West Virginia’s collateral source rule “precludes the defendant from offsetting the judgment against any receipt of collateral sources by the plaintiff.” This includes acceptance by a medical provider of a lower or discounted payment than what would have been or otherwise was originally billed. *See id.* The plaintiff in these instances is entitled to damages from a liable tortfeasor for the “reasonable value of [necessary] medical services”; so, in the hypothetical posed here, if the medical expenses of \$50,000 were found by the jury to be “reasonably necessary,” then the plaintiff would be entitled to the full \$50,000.

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?

While accident/incident reports are typically not privileged attorney work product in West Virginia, there is no blanket rule in West Virginia that outright prohibits them from being privileged if they otherwise satisfy the standard for such protections. The standard for privileged attorney-client material in West Virginia is three-fold: “(1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from that attorney in his capacity as a legal advisor; and (3) the communication between the attorney and client must be [intended] to be confidential.” This standard typically forecloses, but does not necessarily prevent, accident/incident reports from meritorious claims of privilege. As for the work product doctrine, West Virginia requires that a document be prepared “primarily” for, or in anticipation of, litigation to be protected from disclosure. Typically, but not necessarily always, this prohibits accident/incident reports from qualifying for work-product protection, because these are often prepared in the course of business and are used for additional purposes such as human resources and compliance development, quality assurance, and other purposes, and not primarily as documents prepared in anticipation of litigation. See generally *State ex rel. United Hosp. Ctr. v. Bedell*, 199 W.VA. 316, 484 S.E.2d 199 (1997).

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?**

In West Virginia, social media evidence may be obtained through all conventional procedural avenues, including but not limited to, discovery requests and subpoenas.

Examples of typical discovery requests for social media are as follows:

- Interrogatory: Identify all materials you posted to a social media website or to social media applications relating to the allegations in your Complaint.
- Interrogatory: Identify all chat rooms, blogs, online forums, or social media or networking websites, applications services, software, or platforms (including but not limited to those involving video sharing, photograph sharing, blogging, messaging, or ephemeral messaging for which you have or had an account, or for which you have used someone else’s account to conduct activity, in the last year. For each item you identify list: (a) the name of the website, application, service, software, or platform; (b) if applicable, the website address, (c) the name of the account holder(s), (d) the username(s) or handle(s) for the account, and (e) the email address(es) associated with the account, if any.
- Request For Production: All communications by you to any person relating to this litigation. For purposes of this Request, the term “communications” includes, but is not limited to, e-mails; text messages; messages sent via Facebook, Twitter, LinkedIn, or other social media websites; chat or instant message conversations sent via Facebook or other social media websites; and instant messages sent via an instant messaging program, web-based or otherwise.
- Request For Production: With respect to the social networking sites, public blogs, e-mail, or web-based communication services (i.e. instant messages, chat rooms, or blogs) identified in response to any Interrogatory, please produce copies thereof, including, but not limited to: (a) Any status updates, wall posts, wall comments, tweets, messages, e.g. through Facebook Messenger, Twitter, or LinkedIn direct message systems, activity streams, blog entries, details, blurbs, since on or after August, 2021, which relate to your claims and damages alleged in this lawsuit, including but not limited to, your financial

status. (b) All photographs or videos posted by you, by anyone on your behalf, or by anyone that contains and image of you that you have access to, photographs which you have been “tagged” on Facebook, Google+, MySpace, Instagram, TikTok, Twitter, or any other social media site since on or after August 2021, which relate to your claims or damages alleged in this lawsuit, including, but not limited to, your financial status.

- Deposition Duces Tecum: To the extent not already produced by defendants herein, each deponent is required to produce at the time of such deposition the following documents or items of tangible evidence as described in the Requests for Production of Documents previously propounded herein, and being: all social media postings made by Defendants or others pertaining to the Property, the civil action or any of the allegations asserted in this civil 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.

Provided, case law on social media evidence in West Virginia is not well developed, the United States District Court for the Southern District of West Virginia has required that the party seeking social media evidence provide specific reasons for believing that the information sought in discovery would produce relevant information. *Tucker v. Momentive Performance Materials, USA, Inc. et al.*, 2016 WL 8252929 (S. D. W. Va. 2016).

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

The West Virginia Lawyer Disciplinary Board, an entity that is not accorded precedential authority, but is persuasive, issued an ethics opinion that attorneys may instruct clients to delete damaging information from social media accounts, provided the attorney’s conduct does not constitute spoliation or is illegal. However, the opinion further advises that attorneys must take the appropriate steps to preserve the deleted content in the event that it is deemed discoverable or becomes relevant to the clients’ cases. L.E.O. 2015-02.

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).

Currently, the West Virginia Supreme Court of Appeals has not promulgated any standards for getting various types of social media into evidence. The evidentiary standards applied to other evidence would presumably apply.

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

Under W. Va. Code § 21-5H-1, an employer shall not require that an employee grant an employer access to the employee’s personal accounts. Provided, this statute does not prevent an employer from accessing information about an employee that is publicly available. *Id.*

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

The West Virginia Supreme Court of Appeals held that a school board acted within its authority to terminate a school employee when the employee’s social media posts alerted the school board to her improper conduct. *Kanawha County Bd. Of Educ. v. Kimble*, 2014 WL 2404322 (W. Va. 2014).