

WYOMING

SPOLIATION

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

Spoliation occurs when relevant evidence is lost or destroyed, whether intentionally or negligently, and such loss or destruction "impairs a party's ability to prove or defend a claim." *U.S. ex rel Baker v. Cmty. Health Sys., Inc.*, No. 05-279 WJ/ACT, 2012 WL 12294413, at *3 (D. N.M. Aug. 31, 2012). A spoliation sanction is proper when a party had a duty to preserve evidence but failed to do so, and that party's failure is prejudicial to the opposing party. *Burlington N. & Santa Fe R.R. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007).

If sanctions are proper, the two most important considerations are the degree of culpability of the party charged with spoliation and the degree of actual prejudice to the opposing party. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).

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

Wyoming has not recognized the tort of spoliation. *Talmadge v. State Farm Mut. Auto. Ins. Co.*, No. 96-8044, 1997 U.S. App. LEXIS 3114, at *1 (10th Cir. Feb. 21, 1997) Rather than permit a tort claim in such cases, courts may, inter alia, allow an adverse inference to be drawn against the party responsible for the evidence's loss or destruction. *Continental Sheep Co. v. Woodhouse*, 256 P.2d 97, 99-100 (Wyo. 1953); cf. *Kieffer v. Weston Land, Inc.*, 90 F.3d 1496, 1500 (10th Cir. 1996). The Court can look at culpability of the party charged with spoliation, whether a first party or third-party, including issue of control, when determining whether a sanction is appropriate, what would constitute an appropriate sanction under the facts and circumstance of the case.

3. Remedies when spoliation occurs:

The trial court has broad discretion in determining the appropriate sanction for spoliation. *Helget*, 844 F.3d at 1225. But in any event, the sanction should "be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." *Helget*, 844 F.3d at 1226. Among other sanctions, the Court, for example, may dismiss a claim, grant judgment in favor of aggrieved party, suppress of evidence, exclude witnesses, issue an adverse-inference instruction, impose fines, or award attorneys' fees and costs. *Herrera v. Buckingham*, No. 15-cv-128-F, 2016 WL 7665190, at *2 (D. Wyo. Sept. 17, 2016). For sanctions such as dismissal, judgment as a matter of law, or adverse-inference instructions, there must be evidence of intentional destruction or bad faith. See, *103 Investors I, L.P. v. Square D Co.*, 470 F.3d 985, 988 (10th Cir. 2006). However, lesser sanctions may be imposed absent such a finding. *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1220 (10th Cir. 2008) Dismissal

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

Wyoming has not adopted any specific or separate standards for preservation of electronic information. However, it is standard for most courts, as part of their initial scheduling conference to specifically discuss any electronic discovery. A duty to preserve may arise when a party knew, or should have known, that litigation was imminent. *Johnson v. Eog Res.*, No. 18-CV-123-R, 2020 U.S. Dist. LEXIS 257192, at *14 (D. Wyo. Jan. 27, 2020). When there is a death or serious injury, particularly corporate Defendants familiar with civil litigation knows within reason that a personal injury claim maybe made, and thus the duty to preserve can be triggered from the event itself. *Johnson v. Eog Res.*, No. 18-CV-123-R, 2020 U.S. Dist. LEXIS 257192, at *15 (D. Wyo. Jan. 27, 2020)

5. Retention of surveillance video.

Depending on the serious nature of the injury or death when someone falls, a store should likely assume they will be sued. However, if Defendant's failure to preserve the video was nothing more than negligence, no spoliation sanction will be allowed. "When objects are discarded or destroyed in the ordinary course of business without the knowledge that a lawsuit has been or will be initiated, a spoliation instruction is not proper." Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case." *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997). *Swingholm v. Pilot Travel Ctrs. Ltd. Liab. Co.*, No. 1:13-CV-00159-ABJ, 2014 U.S. Dist. LEXIS 117886, at *8 (D. Wyo. Aug. 22, 2014)

COLLATERAL SOURCE

6. 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?

Wyoming is a bill medical expenses state, and any lessor amount actually paid (by anyone other the Defendant) is inadmissible as a collateral source. *Prager v. Campbell Cty. Mem'l Hosp.*, 731 F.3d 1046, 1060 (10th Cir. 2013)

7. 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?

Plaintiff can collect the full amount billed at trial. Unless some or all of the medical expenses are paid by the Defendant, there are no reductions to the award made post trial. *Prager v. Campbell Cty. Mem'l Hosp.*, 731 F.3d 1046, 1060 (10th Cir. 2013)

8. 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).

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ACCIDENT AND INCIDENT REPORTS

9. 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?

Accident/Incident reports are generally discoverable in Wyoming. The only basis to claim privilege is if the report is prepared by or done at the direction of outside counsel.

SOCIAL MEDIA**10. 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 media is discoverable through both discovery and subpoena.

A typical interrogatory would be: Please identify any and all email accounts, instant message, cell phone text message, social networking account (i.e. Facebook, Twitter, etc.), or other electronic media accounts that you have had from 2016 to present. Be sure to include all user identification information and state whether you still have access to the account.

A typical request for production would be: For all electronic accounts identified in response to Interrogatory, including all e-mail accounts, social networking accounts, other electronic media accounts, or documents stored electronically on a personal computer, cell phone, tablet, or other electronic device that you have owned at any time from 2018 to the present, please produce copies of all communications, correspondence, posts, e-mail, or other electronic data containing the following key words: (A) Accident or Incident, (B) Bills, etc.

11. 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.

Wyoming's only limit to obtaining social media information through discovery is whether the request is proportional to the needs of the case. However, Court are reluctant to ordering plaintiff to permit unlimited access to or produce complete copies of social networking accounts. Court's regularly require that social media discovery be limited in time and relate to specific issues in the case. *Gordon v. T.G.R. Logistics, Inc.*, 321 F.R.D. 401, 405 (D. Wyo. 2017)

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

None, other than the general duty to preserve relevant electronic information.

13. 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).

Wyoming has not adopted any special rules for getting various types of social media into evidence.

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

None. Wyoming State Legislature rejected legislation in 2014. The bill would have restricted an employer's ability to request or require access to a social media account of an employee or prospective employee. There has been no subsequent attempts to pass similar legislation.

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

No