FOR MORE INFORMATION

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CONNECTICUT

SPOLIATION

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

   A victim of spoliation must prove that: (1) the spoliation was intentional, in the sense that it was purposeful, and not inadvertent; (2) the destroyed evidence was relevant to the issue or matter for which the party seeks the interference; and (3) he or she acted with due diligence with respect to the spoliated evidence. Moore v. Commissioner of Motor Vehicles, 172 Conn.App. 380 (2017).

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

   A first party spoliator is a party to the underlying action who has destroyed or suppressed evidence relevant to the plaintiff's claims against that party, while a third-party spoliator is oftentimes a stranger to the underlying litigation. Diana v. NetJets Services, Inc., 50 Conn.Supp. 655 (December 12, 2007) (Bellis, J.), citing Dowdie Butane Gas Co. v. Moore, 831 So.2d. 1124, 1128-29 (Miss. 2002).

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

   The Connecticut Supreme Court first recognized an independent cause of action for intentional spoliation of evidence in Rizzuto v. Davidson Ladders, Inc., 280 Conn. 225 (2006). There, plaintiff climbed a ladder manufactured by defendant, when the ladder suddenly collapsed causing plaintiff injuries. Plaintiff alleged defendants' intentional, bad faith destruction of the ladder deprived him of the evidence he needed to establish a prima facie case of product liability.

   The Court concluded existing nontort remedies were insufficient to compensate victims of spoliation, and were ineffective in deterring future intentional, bad faith spoliation of evidence and, thus, recognition of the new cause of action against first party defendant spoliator was warranted.

   In Diana v. NetJets Services, Inc., 50 Conn.Supp. 655 (December 12, 2007) (Bellis, J.), the superior court looked to the reasoning in Rizzuto and held Connecticut also recognizes a cause of action for third party, intentional spoliation of evidence.

4. **Remedies when spoliation occurs:**

   Victims of spoliation may be entitled to recover compensatory and possibly punitive damages for loss of a prospective lawsuit, arising out of said spoliation. Rizzuto v. Davidson Ladders, Inc., 280 Conn. 225, 236 (2006).

   - Negative inference instruction

   In Rizzuto v. Davidson Ladders, Inc., the Supreme Court held "the trier of fact may

draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been favorable to the party that destroyed it" once that party has established a prima facie case of spoliation. Id. at 243. See also Beers v. Bayliner Marine Corp., 236 Conn. 769, 775 (1996).

- Dismissal

Connecticut courts have declined to adopt a blanket rule whereby a party is entitled to summary judgment or dismissal based solely upon spoliation at the hands of an opposing party. See Beers v. Bayliner Marine Corp., 236 Conn. 769, 775 (1996). However, summary judgment may be appropriate if a party cannot establish liability as a matter of law due to the destruction of evidence. Id. at 779-80.

- Criminal sanctions

In criminal actions, it is a felony to destroy or to tamper with evidence while an official proceeding is pending. Connecticut General Statutes § 53a-155 and 53a-146(1).

- Other sanctions

Connecticut rules of practice provide for sanctions related to spoliation of evidence. Specifically, Connecticut Practice Book § 13-14 provides, in part, a party's failure to comply with an order of discovery may result in: (1) the entry of a nonsuit or default judgment; (2) the payment of the opposing party's costs of seeking discovery, including reasonable attorney's fees; (3) entry of an order that the matters regarding which the discovery was sought or other designated facts shall be taken to be established for the purposes of the action; (4) entry of an order prohibiting the party who has failed to comply from introducing designated matters in evidence; and (5) if]f the party failing to comply is the plaintiff, the entry of a judgment of dismissal.

In addition, Connecticut Practice Book § 2-37 sets forth sanctions that can be imposed upon an attorney who engages in the intentional spoliation of evidence including among other things, reprimand and/or assessment of costs.

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

A party to a pending or impending civil action has a legal duty to preserve relevant evidence. Rizzuto v. Davidson Ladders, Inc., 280 Conn. 225, 251 (2006).

Federal courts in the District of Connecticut have applied a similar test, concluding that for a duty to preserve evidence to be imposed on a party, "the litigant must be on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence." McGinnity v. Metro-N. Commuter R.R., 183 F.R.D. 58, 60 (D. Conn. 1998); see also Bagley v. Yale Univ., 318 F.R.D. 234, 239 (D. Conn. 2016).

6. **Retention of surveillance video.**

See above.

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 Connecticut a plaintiff can submit to the jury the full amount charged by a medical provider as part of his or her economic damages.

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?**

Subsequent to a plaintiff's verdict, the defendant can request a collateral source hearing pursuant to Conn. Gen. Stat. § 52-225a. The collateral source hearing asks the court to reduce the economic damages by the applicable collateral sources. The collateral source offset is subject to several limitations. Specifically, the plaintiff is entitled to credit for any insurance premiums paid during the treatment period. Also, if the collateral source is an ERISA plan then the amount paid by the plan would not offset. This area of law is in a state of flux as a recent decision has held that a valid lien for part of the economic damages may apply to all of the economic damages. *Marciano v. Jimenez, et al.*, 324 Conn. 70 (2016). Connecticut Superior Courts have begun to interpret this ruling and have recently held that the lienholder need not have taken any affirmative steps to seek subrogation in order for there to be no collateral source hearing and that the simple fact that the right exists precludes the hearing. *Ashmore v. Hartford Hospital*, 2017 WL 3975529 (Conn. Super. 2017).

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).**

See above.

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?**

In short, it depends. As a general rule, a party may obtain discovery of documents and tangible things otherwise discoverable and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative only upon a showing that the party seeking discovery has substantial need of the materials and is unable to obtain substantially equivalent materials by other means without undue hardship. Connecticut Practice Book § 13-3. A party may obtain the party's own statement or any nonprivileged statement of another party concerning the action or its subject matter without a showing of substantial need and undue hardship.

However, even upon such showing, the judicial authority shall not order disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation (i.e., work product). Connecticut Practice Book § 13-3. See also Binkowski v. Danbury Hosp., 19 Conn. L. Rptr. 603, 1997 WL 344731.

In Stanley Works v. New Britain Redevelopment Agency, the Connecticut Supreme Court provided a general definition of attorney work production, as follows: "Work product can be defined as the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation. The attorney's work must have formed an essential step in the procurement of the data which the opponent seeks, and the attorney must have formed an essential step in the procurement of the data which the opponent seeks, and the attorney must have performed duties normally attended to by attorneys."

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?**

Social media evidence may be obtained by discovery requests and/or subpoena, subject to certain restrictions. For example, in motor vehicle accidents, Connecticut has standard interrogatories and requests for production that must be utilized. However, a party may move the court for permission to serve non-standard discovery and may also request a party produce documentation outside standard discovery at their deposition.

Of course, parties may also engage in informal discovery including searches for information available to the public on various social media platforms. However, in a recent decision the court determined an attorney's behavior was unethical when he attempted to conduct informal discovery by connecting with a third-party witness via Facebook. Specifically, counsel sent a friend request to the witness, who was also married to the defendant, without disclosing his role and interest in the case, or the purpose of the request. See Rosenay v. Taback, Conn.Super., Judicial District of Ansonia-Milford, Docket No. AAN-CV-15-6019447S, 2020 WL 4341767 (July 2, 2020) (Pierson, J.).

Counsel for the defendant filed a motion for sanctions including disqualification of counsel, alleging the friend request violated the Connecticut rules of professional conduct and constituted harassment. The court ultimately held the attorney's conduct violated the rules of professional conduct but declined to impose any sanctions "in the absence of controlling guidance, given that the issue has been the subject of well-reasoned dispute, and without evidence of actual harm." Id. at *10.

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.

Objections that may be raised during the course of formal discovery are applicable to social media discovery as well, including, for example, relevancy and inadmissibility at trial.

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

This issue has not yet been addressed by Connecticut courts.

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 same rules of evidence regarding authentication and relevance apply to social media as they do any other form of evidence.

"[T]he emergence of social media such as email, text messaging and networking sites like Facebook may not require the creation of new rules of authentication with respect to authorship. An electronic document may continue to be authenticated by traditional means such as the direct testimony of the purported author or circumstantial evidence of distinctive characteristics in the document that identify the author." State v. Papineau, 182 Conn.App. 756, 790 (2018).

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

In 2015, Connecticut enacted a statute restricting the ability of employers to require employees and job applicants to provide the employer access to their personal online accounts, including accounts used for social media. See Conn. Gen. Stat. § 31-40x.

The statute generally prohibits covered employers from requesting or requiring that a job applicant or employee supply the employer with a username, password, or any other authentication means for accessing a personal online account, requesting or requiring that a job applicant or employee access such an account in the presence of the employer, or requiring a job applicant or employee to invite the employer or to accept an invitation from the employer to join a group affiliated with any personal online account. See Conn. Gen. Stat. § 31-40x(b).

The statute also prohibits an employer from discharging or disciplining or otherwise penalizing an employee based on the employee's refusal to engage in an action restricted by the statute and from failing to hire a job applicant for the same refusal. See Conn. Gen. Stat. § 31-40x(b)(4).

However, the statute does not prohibit an employer from requesting or requiring that an employee or job

applicant provide the employer with the username, password, or other means of authentication for accessing an account or service provided by the employer or by virtue of the employment relationship with the employer, that the employee uses for the employer's business purposes, or for any electronic communications device, including a computer or cellular phone, that is supplied or paid for in whole or in part by the employer. See Conn. Gen. Stat. § 31-40x(c).

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

Connecticut state courts have not addressed such limitations.

The Second Circuit Court of Appeals, however, has addressed the issue on appeal from a National Labor Relations Board decison, which arose out of the termination of a Connecticut employee. See Three D, LLC v. N.L.R.B., 204 L.R.R.M. (BNA) 3514, 2015 WL 6161477 (2d Cir. 2015).