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1. Spoliation

a. What is the rule regarding spoliation of evidence in your state?

The duty to preserve materials arises by statute, contract, or by a properly served discovery request. *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004). Additionally, the duty to preserve materials arises when a person or organization "should reasonably foresee litigation". *League of Woman Voters of Florida v. Detzner*, 172. So.3d 363, 391 (Fla. 2015) (citing collected cases). A successful assertion of spoliation requires proof of: (1) existence of a potential civil action; (2) a legally recognized duty to preserve evidence; (3)

destruction of that evidence: (4) a significant impairment in the ability to prove the claim or defense; (5) a causal relationship between the evidence destruction and the inability to prove the claim or defense; and (6) damages. See *Continental Ins. Co. v. Herman*, 576 So. 2d 313, 315 (Fla. 3d DCA 1990); *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004); *Hagopian v. Publix Supermarkets, Inc.*, 788 So. 2d 1088, 1091(Fla. 4th DCA 2001).

The Florida Supreme Court has abolished "first party" spoliation claims. Accordingly, a plaintiff cannot bring an independent cause of action against a defendant/tortfeasor who negligently or intentionally destroys evidence. *Martino v. Wal-Mart Store, Inc.*, 908 So.2d 342, 347 (Fla. 2005). Instead, the available remedies against a first party for spoliation of evidence range from discovery sanctions and striking a party's pleadings for intentional spoliation, to adverse inferences, in circumstances of negligent destruction of evidence. *Id.* In its discretion, a court may allow for an adverse inference because of the spoliation of evidence in the first-party context if it finds that: (1) the evidence existed at one time; (2) the spoliator had a duty to preserve the evidence; and (3) the evidence was critical to an opposing party being able to prove its prima facie case or a defense. *Id.* See also, *Hagopian v. Publix Supermarkets, Inc.*, 788 So. 2d 1088, 1090 (Fla. 4th DCA 2001); *Fed. Ins. Co. v. Allister Mfg. Co.*, 622 So. 2d 1348, 1351 (Fla. 4th DCA 1993).

In contrast, an independent cause of action for third-party spoliation continues to exist in Florida. *Martino*, 908 So.2d at 346, n.2. But as a general rule, a third-party spoliation claim does not accrue until the underlying lawsuit is completed. *Yoder v. Kuvin*, 785 So. 2d 679, 681 (Fla. 3d DCA 2001); *Shaw v. Cambridge*, 888 So. 2d 58, 63 (Fla. 4th DCA 2004)("A spoliation claim compensates the plaintiff for the loss of recovery in the underlying case due to the plaintiff's inability to prove the case because of the lost or destroyed evidence and not for the 'bodily injury' actually sustained. 'Because of the nature of the claim, liability for spoliation does not arise until the underlying action is completed.'). *But see Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 28 (Fla. 3d DCA 1990) (for reasons of "judicial economy, and to prevent piecemeal litigation" destruction of evidence claim permitted before underlying lawsuit complete.)

b. Is there a duty to preserve evidence absent a specific demand?

Yes. In addition to a specific demand, the duty to preserve may arise pursuant to a contract, a statute, or when litigation is reasonably foreseeable. *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004); *League of Women Voters of Florida v. Detzner*, 172 So.3d 363, 391 (Fla. 2015) (holding that litigation was inevitable and the systematic deleting of emails and other documents relating to the dispute, justified the trial court judge in giving an adverse inference against the organization deleting the materials.). Thus, the duty to preserve any item may arise prior to commencement of litigation, if the person or organization in custody or control of the item reasonably should know that the item relevant to imminent or pending litigation.

Additionally, a duty to preserve evidence can also arise as a result of an express or implied agreement. *Miller v. Allstate Insurance Co.*, 573 So.2d 24, 27 (Fla. 3d DCA 1990) (plaintiff's insurer had agreed with plaintiff that it would preserve her vehicle which she needed in a planned product liability action against the manufacturer, which vehicle had been totaled, allegedly as a result of the accelerator becoming stuck. Her insurer sold the vehicle to a salvage yard, thereby significantly impairing her ability to bring a claim against the manufacturer for a defect. The court found that the insurer owed had a contractual duty to plaintiff to preserve the vehicle.)

c. What is the rule of spoliation of evidence specifically relating to electronic data?

Generally, electronic data is subject to the same rules of spoliation as any other information or material. *League of Woman Voters of Florida v. Detzner*, 172. So.3d 363, 391 (Fla. 2015). However, under Rule 1.380(e) of the Florida Rules of Civil Procedure, a party cannot be sanctioned for the failure to produce electronically stored information that was lost due to the "routine, good faith operation of an electronic information systems." Nevertheless, Rule 1.380's Committee Notes make clear that a person or organization cannot avoid preservation obligations simply because electronically stored information was destroyed in the routine operation of an electronic information system. As a rule, when an item of electronically stored information is potentially relevant to reasonably anticipated litigation a "litigation hold" should be put in place to ensure preservation of the electronically stored information, and particularly to avoid inadvertent destruction by routine operations.

d. What has been your experience with its application to onboard equipment like DriveCam?

Drive cams on the road ahead (facing outward) are frequently beneficial from a defense perspective. A drive cam facing outward will often show the negligence of the other driver. Additionally, when it clear liability on trucking the insured, the cam is helpful in evaluating the case.

However, drive cams facing on the driver (facing inward), regularly do more harm than good. The cam facing inward creates evidence (and sometimes liability) where otherwise none would exist. There are instances where a driver tells us he was paying attention, facing forward, looking at the road, or similar, which is usually confirmed by the drive cam, but unfortunately the drive cam also shows the driver briefly distracted by his phone or in some other way shortly before the subject accident occurred. In that instance, it is doubtful the phone affected the driver (i.e., the driver was not looking at the phone or other distraction during the time when he could have avoided an accident), yet the mere fact that the driver was looking at his phone was otherwise distracted shortly before the sequence of events began that resulted in an accident is enough to create liability in the minds of some jurors (and all plaintiff attorneys).

e. Does your state allow direct actions against responsible parties for spoliation?

Yes, in the context of a claim against a third-party, but the Florida Supreme Court has abolished "first party" spoliation of evidence claims. Accordingly, a plaintiff cannot bring an independent cause of action against a defendant who negligently or intentionally destroys evidence. *Martino v. Wal-Mart Store, Inc*., 908 So.2d 342 (Fla. 2005). Rather, the available remedies against a first party defendant for spoliation of evidence are discovery sanctions, striking pleadings, and adverse inferences. *Id.*

Florida law still provides for an independent cause of action for third-party spoliation claims. *Martino*, 908 So.2d at 346, n.2. For example, a plaintiff can sue an evidence custodian, not a party to the lawsuit, for negligent or intentional destruction of evidence.

2. Citations or criminal convictions resulting from an accident

a. Are citations admissible in the civil litigation?

Under Florida law, a party's past driving record is not admissible under normal circumstances. *See Dade County v. Carucci*, 349 So. 2d 734 (Fla. 3d DCA 1977). Section 316.066, Florida Statutes, provides that crash reports made by a person involved in a crash and statements made by such a person to a law enforcement officer for the purpose of completing a crash report may not be used as evidence in any civil trial. *See Angelucci v. Gov't Emples. Ins. Co.*, 412 Fed. Appx. 206 (11th Cir. 2011). Furthermore, Section 316.650, Florida Statutes, provides that traffic citations shall not be admissible evidence at trial, except when used as evidence of falsification, forgery, uttering, fraud, or perjury, or when used as physical evidence resulting from a forensic examination of the citation. Fla. Stat. § 316.650(9). However, the results of breath, urine, and blood tests administered in accordance with Sections 316.1932 or 316.1933, Florida Statutes, are not confidential and are admissible into evidence when otherwise admissible for any civil action arising out of acts alleged to have been committed by any person while driving, or in actual physical control of, a vehicle while under the influence of alcoholic beverages or controlled substances, when affected to the extent the person's normal faculties were impaired or to the extent that he or she was deprived of full possession of his or her normal faculties. See Fla. Stat. § 316.1934(2).

b. How does a guilty plea or verdict impact civil litigation? Pleas of no contest?

Evidence of a criminal conviction, except for impeachment purposes, is typically inadmissible in a civil suit. *Stevens v. Duke*, 42 So. 2d 361 (Fla. 1949). A party may attack the credibility of any witness by evidence that the witness has been convicted of a crime punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment, unless (1) the conviction was so remote in time that it has no bearing on the present character of the witness, or (2) the crime was a juvenile adjudication. Fla. Stat. § 90.610(1). Additionally, a record of any prior conviction may be introduced at trial to impeach the credibility of a witness who denies a prior conviction. *Rommell v. Firestone Tire & Rubber Company*, 394 So. 2d 572 (Fla. 5th DCA 1981). In Florida, a defendant's no contest plea with adjudication of guilt withheld constitutes a prior "conviction" under the sentencing guidelines. *See Montgomery v. State*, 897 So. 2d. 1282 (Fla. 2005). "Conviction" means a guilty verdict by a jury or judge, or a guilty or nolo contendere plea by a defendant, regardless of adjudication of guilt. Fla. Stat. § 960.291(3).

Section 318.14, Florida Statutes, provides that a person's admission to a noncriminal traffic infraction is not admissible in any civil proceeding. However, Section 318.19, Florida Statutes, provides that a traffic defendant's plea of guilty to (1) any infraction which results in a crash that causes the death of another, (2) any infraction that results in a crash that causes "serious bodily injury" of another as defined in Section 316.1933(1), (3) any infraction that involves driving a vehicle past a school bus on the side that children enter and exit when the school bus displays a stop signal, (4) any infraction that involves driving a vehicle on a highway which is not constructed so as to prevent any of its load from escaping therefrom, (5) any infraction that involves hauling, on a public road or highway open to the public, dirt, sand, lime rock, gravel, silica, or other similar aggregate or trash, garbage, any inanimate objects, or any similar materials that could fall or blow from such vehicle, without preventing such materials from escaping from such vehicle, or (6) any

infraction of exceeding the speed limit by 30 miles per hour or more, may be admissible in a civil trial. *See Mackey v. Reserve Ins. Co*., 349 So. 2d 830 (Fla. 1st DCA 1977).

3. Can a plaintiff maintain a negligent hiring/supervision/training claim where the employer admits scope and course of employment?

In Florida, the majority rule is that once an employer admits that it is liable for the tortious conduct of its employee, claims of negligent entrustment, hiring, and retention are no longer available to the plaintiff. If a party has admitted that it would be vicariously liable for the negligence of its driver, derivative-liability claims are improper where those claims impose no additional liability. *See, e.g., Clooney v. Geeting*, 352 So. 2d 1216, 1220 (Fla. 2nd DCA 1977); *Shaw v. Pizza Hut of Am., Inc*., No. 8:08-cv-27, 2009 WL 1519881, at *1 (M.D. Fla. June 1, 2009) ("This Court agrees with Defendant that the negligent hiring claim here is duplicative of the negligence claim and must be dismissed with prejudice."). That is because the vicarious-liability and derivative-liability theories are "concurrent theories of liability."

4. Admissible evidence regarding medical damages – can plaintiff seek to recover the amount charged by the medical providers or the amount actually paid, and is there a basis for post-verdict reductions or offsets?

Generally, a Plaintiff is entitled to submit gross or "retail" medical bills to the jury, subject to a post-verdict collateral source setoff. The following exceptions apply:

a. Social Security Disability Insurance, Automobile Insurance (PIP/BI only), Health Insurance, HMO/PPO Insurance, and Voluntary Disability Insurance.

Plaintiff may submit gross or "retail" bills to the jury. Defendant is entitled to a post- verdict reduction in the amounts paid by automobile insurance (PIP/BI only). F.S. §768.76(1)(2)(a)(1)-(4). Defendant is further entitled to a post-verdict reduction in the amounts contractually adjusted by provider in accepting payment. Plaintiff is entitled to collect damages for past medical expenses for health insurance and HMO/PPO lien amounts. *Goble v. Frohman*, 901 So. 2d 830, 833 (Fla. 2005).

b. Medicare, Medicaid, and Workers Compensation

The Florida Legislature has abrogated the common law collateral source damages rule. Trial courts must reduce awards by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources. § 768.76(1), Fla. Stat. There are certain exceptions to this rule. For example, there are no reductions for collateral sources for which a subrogation or reimbursement right exists. § 768.76(1), Fla. Stat.

Benefits received under Medicare, or any other federal program providing for a federal government lien on or right of reimbursement from the plaintiff's recovery, the Florida Worker's Compensation Law, the Medicaid Program of Title XIX of the Social Security Act or from any medical services program administered by the Florida Department of Health shall not be considered a collateral source. § 768.76(2)(b), Fla. Stat. This exception does not result in a windfall

to plaintiffs because Medicare and similar collateral sources retain a right of subrogation or reimbursement. Additionally, § 768.76 does not allow reductions for future medical expenses. *Joerg v. State Farm Mut. Auto. Ins. Co*., 176 So. 3d 1247 (Fla. 2015).

5. What were the significant trucking verdicts or rulings in your state last year?

Astaphan v. Allied Trucking of Florida et al., 2017 WL 7794237 (Fla. 17th Jud. Cir., Broward County, Oct. 25, 2017) Plaintiff, the mother of the decedent, alleged that defendant Ranger Construction Industries entered into an $85 million contract with the state to improve the express lanes of I-75. It selected defendant Wantman Group as the designer, defendants Allied Trucking of Florida and Allied Trucking of Palm Beach (collectively "Allied") as the commercial trucking federal motor carrier and/or broker, and defendant Double B as a commercial trucking subcontractor. Plaintiff alleged that defendant truck driver employed by Double B, exited the work zone in a tractor-trailer, entered I-75 at a dangerously slow speed, and attempted a U-turn across all four lanes of southbound traffic on the interstate. According to plaintiff, at that same time, her son, also driving south, struck the side of the tractor-trailer, sheering the roof off his Mitsubishi Lancer. The rest of the car continued traveling underneath the tractor-trailer, then hit a concrete barrier and came to a stop. Decedent was killed instantly, suffering massive blunt trauma. His passenger survived; another driver was killed when her vehicle struck the back of the truck. Plaintiff, who sought damages for pain and suffering for herself and for her husband, alleged that Ranger was negligent in failing to design a reasonably safe maintenance of traffic plan and/or temporary traffic control plan to ensure the safety of the public. She alleged that the truck driver was negligent in, *inter alia*, entering the traffic lanes at an unreasonably slow speed, crossing all four travel lanes, attempting a U-turn across all four lanes, and not utilizing proper traffic control devices or procedures. The jury found that Ranger and the truck driver were each 50 percent negligent. It also found that Ranger violated the traffic safety provisions of its contract with the Florida Department of Transportation. Verdict: $45,005,000 for Plaintiff ($20 million - pain and suffering; $25 million - punitive damages against Ranger; $5,000 - punitive damages against the truck driver).

Cardona v. The Mason and Dixon Lines, Inc., et al., 2017 WL 5999399 (S.D. Fla., July 12, 2017) On July 19, 2013, defendant was operating a truck tractor/trailer for The Mason and Dixon Lines, Inc., and traveling eastbound on State Road 826. He allegedly attempted to change lanes and struck a vehicle being operated by plaintiff who was traveling in the next lane over. The impact caused plaintiff's vehicle to spin and collide with the center median. Plaintiff claimed that she had medical bills of $45,334.20 as a result of neck, back, and shoulder injuries sustained in the collision. Plaintiff filed a negligence action and defendants filed a notice of removal. Defendants' accident reconstruction expert opined that plaintiff was traveling faster than the truck driver and had been moving into his lane at the time of the collision. Defense verdict.

Tyler v. Gibbs & Register Inc., 2017 WL 2306227 (Fla. 9th Jud. Cir., Orange County, May 4, 2017) Roitiki Tyler was operating a vehicle south on U.S. 17, with her 11 year old son as a passenger, when a truck operated by a truck driver in the scope of his employment with Gibbs & Register Inc. was attempting to pass traffic when he struck their vehicle head on while travelling approximately 65 m.p.h. Tyler sustained fatal injuries, and the child sustained severe personal injuries as a result of the collision. The child and his mother's estate filed a lawsuit against Gibbs & Register, Inc.,

and the truck driver. The plaintiff's contended the truck driver was negligent in the operation of his employer's vehicle, which was the cause of the collision. They also claimed Gibbs & Register was vicariously liable for the truck driver's negligence. The plaintiffs sought compensation for the resulting death, and the bodily injuries, medical expenses, emotional distress, loss of future earning capacity, pain, suffering and loss of his mother's companionship. The defendant's admitted the truck driver was negligent and the court determined he was acting in the course of his employment with Gibbs & Register at the time of the collision. A jury awarded damages in the total amount of $12,240,000.

Maldonado et al. v. Clark et al., 2017 WL 3089963 (Fla. 5th Jud. Cir., Marion County, Feb. 17, 2017) This motor vehicle negligence case revolved around a collision between a tractor-trailer and a disabled passenger vehicle, resulting in the death of a 35-year-old mother and her 12-year-old son. The plaintiff's vehicle was initially struck from behind and disabled by a drunk driver who was named as a defendant, defaulted and dismissed from the case before trial. Approximately three minutes later, a tractor-trailer, operated by the defendant truck driver under the control of the two co-employer corporations, struck the plaintiff's darkened vehicle causing the deaths instantaneously. Evidence showed that the accidents occurred in the early morning hours of December 2, 2012, as the plaintiff family returned from a birthday celebration for the father in Orlando. The plaintiffs' Honda was disabled in the center lanes of northbound I-75 in Ocala after being struck by the drunk driver who fled the scene. The plaintiff contended that three minutes after the initial impact, the defendant truck driver approached from the same direction and struck the plaintiffs' car, pushing it some 1,400 feet north, causing it to catch fire and killing the plaintiff mother and son. The plaintiff father and 11-year-old daughter survived the collision, but witnessed the death of their family members. After a 12 day trial, the jury found the (defaulted) drunk driver 78% negligent and the defendant truck driver 22% negligent. The plaintiff was awarded $3,900,500 in gross damages. The award included $1,400,500 to the plaintiff father and $2,500,000 to the surviving daughter.

Castillo v. Lara's Trucking, Inc., 2017 U.S. Dist. LEXIS 20003 (S.D. Fla. Feb. 10, 2017). The federal court addressed whether the trucking company was subject to the jurisdiction of the Secretary of Commerce and, if so, whether the defendant was exempt from the FLSA pursuant to the Motor Carrier Act, such that the truck driver was not entitled to overtime compensation. The answer to the first question was yes. Although plaintiff argued that his employment involved transporting goods within the state, the shipped goods were part of a continuous stream of interstate commerce. With regard to the second question, the court addressed the SAFETA-LA Technical Corrections Act of 2008, which applied the MCA exemption if employees worked with vehicles weighing more than 10,000 pounds. Here, the evidence showed that defendant's trucks weighed more than 10,000 pounds such that plaintiff was not entitled to overtime compensation.

6. What is the discoverability of insurance adjuster file materials in your state when outside counsel has not been retained?

There is a "well-established" rule in Florida "that an insurer's claims file constitutes work-product. *See Illinois Nat. Ins. Co. v. Bolen*, 997 So.2d 1194, 1196 (Fla. 5th DCA 2008). The Florida Supreme Court in *Allstate Indemnity Co. v. Ruiz*, 899 So.2d 1121 (Fla. 2005), recognized Florida's long-standing policy that "[g]enerally, an insurer's claim and litigation files constitute work

product and are protected from production[,]" but receded from prior precedent and held that a claim file prepared in anticipation of coverage litigation is discoverable in an insurance bad faith suit upon the conclusion of the coverage litigation. A request can be made that the trial court conduct an in-camera inspection of the withheld documents to ensure that each properly meets the specific criteria of the work product and/or attorney-client privilege. *State Farm Fla. Ins. Co. v. Aloni*, 101 So.3d 412, 414 (Fla. 4th DCA 2012) (*quoting Superior Ins. Co. v. Holden*, 642 So.2d 1139, 1140 (Fla. 4th DCA 1994)).

Additionally, a party may obtain privileged work product documents by making the required showing of a good cause exception to the work product privilege under Rule 1.280(b)(4), Florida Rules of Civil Procedure. This rule allows a party to obtain documents that are otherwise protected by the work product privilege if it can show that it 'has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

In contrast to the uniform position of Florida's state courts on this issue, the federal courts in Florida have criticized this rule and "generally have found that no work-product protection attaches to an insurer's claim file (even if an employee handling the claim is an attorney, or if the insurer hired outside or monitoring counsel to assist with the claim processing) because the claim file is a business record, prepared in the ordinary course of the insurer's business, until the date on which coverage is denied." *MapleWood Partners, L.P. v. Indian Harbor Ins. Co*., 295 F.R.D. 550, 629 (S.D. Fla. 2013).

7. Does your jurisdiction follow Carmack or are there jurisdictional specific rules regarding cargo liability?

Yes. A state law or common law claim against an interstate carrier of goods is generally preempted by the Carmack Amendment *unless* the claim alleges conduct or harm that is separate and distinct from the loss of or damage to the goods transported. *Mlinar v. United Parcel Service, Inc.*, 186 So. 3d 997 (Fla. 2016) (holding that Plaintiff's causes of action against UPS for conversion, criminal activity, and Florida's Deceptive and Unfair Trade Practices Act (FDUTPA) were not preempted by the Carmack Amendment as the claims did not allege negligence as to the loss of goods by UPS, but, rather, for larcenous misconduct by the carrier of the goods).

8. Does your jurisdiction require pre-trial disclosure of surveillance/social media investigations? If so, when are you required to make disclosures?

Upon request, a party must reveal the *existence* of any surveillance information he or she possesses which is or may be relevant to issues in the case as substantive, corroborative, or impeachment evidence, whether or not it is intended to be presented at trial. *Dodson v. Persell*, 390 So.2d 704, (Fla. 1980). However, as a general rule the party cannot be compelled to produce the *contents* of the surveillance unless the surveillance will be used at trial. *Hunt v. Lightfoot*, 2018 WL 794782 (Fla. 1st DCA February 9, 2018). It is within the trial court's discretion to permit the surveilling party "to depose the party or witness filmed before being required to produce the

contents of the surveillance information for inspection." *Id*.; *Nusz. v. Wal-Mart Stores East LP*, 2015 WL 12859328 (M.D. Fla. 2015).