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Spoilation

By William M. Davis September 9, 2016

A party's duty to preserve evidence is triggered by the circumstances under which the evidence came in to existence. Such circumstances might include "the type and extent of injuries, the high damages that can flow from such injuries, the frequency of litigation in [such] circumstances, and the defendant's internal investigation and notification to its counsel and insurer."[1] Actual notice of the existence of a claim by the plaintiff need not exist.

What Are the Legal Elements of Spoliation?

The failure to preserve evidence gives rise to a claim for spoliation, which is defined in Georgia as: the destruction, significant alteration, or failure to preserve evidence that is necessary to contemplated or pending litigation.[2] A party asserting a spoliation claim must establish: 1) evidence existed at the time litigation was contemplated; 2) the evidence was in the control of the alleged spoliator;[3] and, 3) the evidence was necessary to the litigation.[4]

What Is The Possible Result of a Spoliation Claim?

In Georgia, a party's failure to preserve evidence can result in a rebuttable presumption or adverse inference jury instruction that the lost evidence was unfavorable to the party who failed to preserve it. These two sanctions can have a severe impact on the outcome of litigation, and the Georgia Supreme Court has cautioned that they are only to be applied "in exceptional cases" in which "the greatest caution must be exercised in [their] application."[5]

How Can a Party Take Steps to Avoid Spoliation Claims?

A spoliation claim arises as soon as relevant evidence is lost or destroyed. Avoiding such claims requires diligence on the part of parties to ensure that proper steps are taken to preserve evidence. Some best practices include:

- *Take Immediate Action to Preserve Evidence*: When an incident occurs which has the potential—however slight—to result in a claim or in litigation, steps should be taken to preserve all evidence. Typically, this involves: 1) copying/backing-up documents and electronic records to a secure location; 2) advising all persons with access to the information that it must be preserved and must not be altered until further notice; and, 3) taking steps to prevent any routine maintenance operations which might result in the loss of the evidence (for example, ensuring that electronic data is not auto-deleted as part of an automated policy, or ensuring that the scene of an incident is not cleaned up by janitorial staff until evidence can be preserved.

- *Where Possible, Preserve Evidence in its Original Condition*: The best evidence is evidence in its original form; an original document is preferable to a photocopied document. This is also true for tangible evidence. For example, if a company automobile is involved in an accident, it is preferable to preserve the vehicle for inspection and testing as opposed to photographing the vehicle and disposing of it. If evidence cannot be preserved indefinitely, it is advisable to contact all potential adverse parties and advise them that the evidence may be destroyed/relocated due to business necessity. In such situations, adverse parties should be provided reasonable time to inspect/test/memorialize the evidence. Finally, all attempts should be made to preserve the evidence in some format which would be useful to all parties should litigation ensue (for example, hire an engineering firm to produce a 3-D scan of a vehicle prior to scrapping so that it can be digitally re-created if necessary).

- *Pay Particular Attention to Requests from Adverse Parties to Preserve Evidence*: While actual notice is not required, adverse parties will frequently send "spoliation" or "litigation hold" letters which request that a party preserve certain categories of evidence. If such a letter is received, it should be immediately forwarded to counsel and considered for inclusion in any ongoing evidence-preservation program.

Our attorneys are experienced in matters attendant to evidence preservation/ management and spoliation claims. Please do not hesitate to reach out to us with any questions you may have.

Footnotes:

[1] *Phillips .v Harmon*, 297 Ga. 386 (2015).

[2] *Baxley v. Hakiel Industries, Inc.*, 282 Ga. 312 (2007); *Bridgestone/Firestone North American Tire, LLC v. Campbell*, 258 Ga. App. 767, 768 (2002); *R.A. Siegel Co. v. Bowen*, 246 Ga. App. 177 (2000) (includes "significant alteration*"); see Georgia Bd. of Dentistry v. Pence*, 223 Ga. App. 603, 608 (1996).

[3] *Sentry Select Ins. Co. v. Treadwell*, 318 Ga. App. 844, 847 (2012); *Clayton County v. Austin-Powell*, 321 Ga. App. 12 (2013), *overruled on other grounds by Phillips v. Harmon*, 297 Ga. 386 (2015).

[4] *de Castro v. Durrell*, 295 Ga. App. 194 (2008); *Baxley*, 282 Ga. at 313.

[5] *Cotton States Fertilizer Co. v. Childs*, 179 Ga. 23 (1934).