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GEORGIA

SPOLIATION

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

Spoliation refers to the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation. AMLI Residential Props. v. Ga. Power Co., 293 Ga. App. 358, 361 (2008). See also Phillips v. Harmon, 297 Ga. 386, 393 (2015). Thus, one of the main questions surrounding whether spoliation occurred is whether litigation was contemplated or anticipated, and whether the specific evidence would be necessary or relevant to the proceedings. The duty to preserve relevant evidence, which applies equally to plaintiffs and defendants, "must be viewed from the perspective of the party with control of the evidence and is triggered not only when litigation is pending but when it is reasonably foreseeable to that party." Phillips v. Harmon, 297 Ga. 386, 396 (2015). Put another way, the duty arises when the alleged spoliator "actually or reasonably should have anticipated litigation." Phillips, 297 Ga. At 397. Litigation may be reasonably foreseeable to a defendant based on circumstances such as:

> the type and extent of the injury; the extent to which fault for the injury is clear; the potential financial exposure if faced with a finding of liability; the relationship and course of conduct between the parties, including past litigation or threatened litigation; and the frequency with which litigation occurs in similar circumstances.

Phillips v. Harmon, 297 Ga. 386, 397, 774 S.E.2d 596, 605 (2015). This is a non-exhaustive list of factors; not all of the factors will be pertinent in every case and there may be other factors pertinent in other sorts of cases. Cooper Tire & Rubber Co. v. Koch, 303 Ga. 336, 342 (2018). As for claims of spoliation against plaintiffs, because the plaintiff generally controls whether and when litigation will be pursued, "spoliation claims involving a plaintiff's duty to preserve will more frequently and easily be resolved based on actual knowledge of litigation than will claims aimed at defendants." Cooper Tire & Rubber Co. v. Koch, 303 Ga. 336, 341 (2018).

Last, the destruction or failure to preserve relevant evidence need not have an intentional or fraudulent component to be deemed spoliation. In Georgia, mere negligent destruction, or failure to preserve relevant evidence can be spoliation. Still, upon a request for sanctions following the spoliation of evidence, trial courts should consider the spoliating party's level of intent. Bagnell v. Ford Motor Co., 297 Ga. App. 835, 840 (2009). "The fact that lost evidence is often equally or even more important to the case of the party that controlled it is why factfinders should not readily presume that lost evidence was favorable to the opposing party absent a showing that the evidence was lost intentionally to deprive the other party of its use in litigation." Cooper Tire & Rubber Co. v. Koch, 303 Ga. 336 at 346-347 (2018).

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

A party to a lawsuit in Georgia may be liable for spoliation based on the acts of a third party. For example, when a third party destroys or fails to preserve relevant or necessary evidence, such spoliation is sanctionable against a party litigant "if the third party acted as the litigant's agent" in destroying or failing to preserve the evidence. Wilkins v. City of Conyers, 347 Ga. App. 469, 472 (2018) citing Bouve & Mohr, LLC v. Banks, 274 Ga. App. 758, 762 (2005). Under Georgia law, "an agency relationship exists where one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf." Wilkins v. City of Conyers, 347 Ga. App. 469 (2018). See also O.C.G.A. § 10-6-1.

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

Georgia does not recognize an independent tort for spoliation alone. See Phillips v. Owners Ins. Co., 342 Ga. App. 202, 206 (2017); Owens v. Am. Refuse Sys., 244 Ga. App. 780 (2000).

4. Remedies when spoliation occurs:

In Georgia, a trial court has wide discretion in resolving spoliation issues. A trial court's finding of spoliation may lead to sanctions, including the striking of pleadings, adverse jury instructions, and exclusion of evidence or select testimony. However, before a remedy for spoliation may be imposed, the party seeking the remedy must show that the allegedly spoliating party was under a duty to preserve the evidence at issue that was then breached. Cooper Tire & Rubber Co. v. Koch, 303 Ga. 336, 339 (2018). Georgia trial courts are required to weigh five factors prior to issuing any sanction for alleged spoliation of evidence:

(1) whether the party seeking sanctions was prejudiced as a result of the destruction of the evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the party who destroyed the evidence acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded.

Phillips v. Harmon, 297 Ga. 386, 399 (2015), n.12; AMLI Residential Props., Inc. v. Georgia Power Co., 293 Ga. App. 358, 361 (2008).

- Negative inference instruction

If a trial court finds that a party has engaged in spoliation, it may instruct the jury regarding O.C.G.A. § 24-14-22, which provides:

If a party has evidence in such party's power and within such party's reach by which he or she may repel a claim or charge against him or her but omits to produce it or if such party has more certain and satisfactory evidence in his or her power but relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim against such party is well founded; but this presumption may be rebutted.

Furthermore, following a finding of spoliation and a request for sanctions, a trial court may "charge the jury that spoliation of evidence creates the rebuttable presumption that the evidence would have been harmful to the spoliator." R.A. Siegel Co. v. Bowen, 246 Ga. App. 177, 180 (2000). However, the Georgia Supreme Court has held that a rebuttable presumption or adverse inference jury instruction is to be given as a remedy for spoliation of evidence "only in exceptional cases," that "the greatest caution must be exercised in its application," and that "each case must stand upon its own particular facts." Phillips v. Harmon, 297 Ga. 386, 398 (2015).

- Dismissal

One permissible sanction for spoliation of evidence includes dismissal of a plaintiff's complaint, or the striking of an answer. See Cooper Tire & Rubber Co. v. Koch, 339 Ga. App. 357, 359 (2016); The Kroger Co. v. Walters, 319 Ga. App. 52 (2012).

- Criminal sanctions

There does not appear to be any Georgia law which subjects one to criminal punishment for spoliation. However, Georgia courts do recognize a form of criminal contempt, as opposed to civil contempt, for willful violation of a court order. Cabiness v. Lambros, 303 Ga. App. 253 (2010). Accordingly, it is possible that a party could face criminal sanctions should a party spoliate evidence following the entry of a court order directing the preservation of such evidence.

- Other sanctions

In addition to those sanctions noted above, a spoliating party may be barred from presenting select evidence or otherwise introducing evidence to rebut certain facts. Bouve & Mohr, LLC v. Banks, 274 Ga. App. 758, 764 (2005). A party may also be prevented from introducing certain expert testimony. Bridgestone/Firestone N. Am. Tire v. Campbell Nissan N. Am., 258 Ga. App. 767 (2002). As stated at the outset, the trial court has wide discretion to fashion sanctions for spoliation on a case-by-case basis. The Kroger Co. v. Walters, 319 Ga. App. 52, 52 (2012).

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

The duty to preserve electronic information is governed in the same fashion as the duty to preserve any relevant or necessary evidence to contemplated or pending litigation. See Cooper Tire & Rubber Co. v. Koch, 303 Ga. 336, 343 n.5 (2018).

6. **Retention of surveillance video.**

With surveillance videos becoming more commonplace, issues surrounding preservation of such evidence have continued to rise. Nonetheless, the duty to preserve relevant or necessary surveillance video is governed in the same fashion as any other relevant or necessary evidence discussed above. The Kroger Co. v. Walters, 319 Ga. App. 52 (2012). How much video footage surrounding a subject incident must be preserved is often a fact-specific inquiry not subject to hard and fast rules. See Metro. Atlanta RTA v. Tyler, 860 S.E.2d 224 (Ga. Ct. App. 2021).

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 Georgia, a plaintiff can submit the total amount of his/her billed medical expenses and a defendant cannot introduce evidence or testimony that a lesser amount was paid or reimbursed, or that any payments were made by third parties. Harper v. Barge Air Conditioning, Inc., 313 Ga. App. 474, 480 (2011); Kelley v. Purcell, 301 Ga. App. 88, 91 (2009).

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?**

This kind of evidence is not admissible. In Georgia, the collateral-source rule "bars the defendant from presenting any evidence as to payments of expenses of a tortious injury paid for by a third party and taking any credit toward the defendant's liability and damages for such payments." Harper v. Barge Air Conditioning, Inc., 313 Ga. App. 474, 480 (2011).

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. A plaintiff is entitled to seek full recovery for the reasonable and necessary medical expenses "undiminished by insurance payments or write-offs" under a medical provider's contract with insurance carriers. MCG Health, Inc. v. Kight, 325 Ga. App. 349, 353 (2013).

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?

Generally, this question depends on whether it is the regular practice of the business to prepare such reports and whether such reports were prepared in anticipation of litigation. Material obtained or collected by a party is protected from discovery as work product "even before claim is instituted" if "reasonable grounds exist to believe that litigation is probable. . . ." and "the material need not contain the mental impressions, conclusions, opinions, or legal theories of the preparer, but need only have been prepared in anticipation of litigation." Dep't of Transp. v. Hardaway Co., 216 Ga. App. 262, 263 (1995) (reversed in part on other grounds) citing Lowe's of Ga., v. Webb, 180 Ga. App. 755, 757 (1986). In determining whether a party anticipated litigation, and assuming a party lacks actual notice that an opposing party is contemplating litigation, litigation may be reasonably foreseeable to the defendant based on:

the type and extent of the injury; the extent to which fault for the injury is clear; the potential financial exposure if faced with a finding of liability; the relationship and course of conduct between the parties, including past litigation or threatened litigation; and the frequency with which litigation occurs in similar circumstances.

Phillips v. Harmon, 297 Ga. 386, 397 (2015).

On the other hand, if a business has a practice or policy to create an incident report following every single incident, then those reports will likely be discoverable and not subject to the work product doctrine protections. Investigatory materials generated during a routine or regularly-occurring investigation does not fall within the work-product doctrine, even though the investigation was conducted under direct supervision of an attorney. Fulton DeKalb Hosp. Auth. v. Miller & Billips, 293 Ga. App. 601 (2008).

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 Georgia, social media evidence can be obtained through written discovery requests, including Request for Production of Documents and Interrogatories, as well as deposition testimony. Some examples of Request for Production of Documents and Interrogatories include:

Produce all social media or internet writings, statements, communications, or posts sent or made by Plaintiff since [incident date] or made regarding Plaintiff since [incident date], including, but not limited to: (a) any pictures or videos posted by Plaintiff, or by anyone else regarding Plaintiff, to the internet since [incident date]; (b) all Facebook posts or status updates made by Plaintiff, a copy of all pictures or videos posted by Plaintiff to Facebook, and a copy of Plaintiff's Facebook "wall," profile, and/or timeline since [incident date]; (c) all Myspace posts or status updates made by Plaintiff and a copy of all pictures or videos posted by Plaintiff to Myspace since [incident date]; (d) a copy of all statements, communications, or "tweets" made by Plaintiff on Twitter and any pictures or videos communicated by Plaintiff through Twitter since [incident date]; (e) a copy of any pictures or other information communicated by Plaintiff through Instagram, Flickr, or any similar website

or program since [incident date]; (f) a copy of any videos posted by Plaintiff or videos reflecting Plaintiff on YouTube since [incident date]; (g) any writings on blogs by Plaintiff since [incident date]; and (h) any posts made by Plaintiff to internet message boards since [incident date].

Identify all social media used by Plaintiff (e.g. Facebook, Instagram, TikTok, Linked-In, etc.) including all handles or public user names.

Identify each internet-based social networking site or platform that you have used during the past five years (e.g. Facebook, Instagram, LinkedIn, Pinterest, Reddit, Snapchat, TikTok, Twitter, YouTube, etc.).

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.**

Discovery in Georgia is quite broad. "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" and if "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." O.C.G.A. § 9-11-26(b). However, Georgia appellate courts have not issued many opinions specifically on the scope or limitations of discovery of social media evidence. Parties routinely make request for social media evidence, but those requests ought to be reasonably tailored to the parties and issues in the suit.

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

The State Bar and courts of Georgia have not set any spoliation standards on social media for party litigants at this time. However, attorneys and clients would do well to be mindful that social media evidence certainly could be deemed relevant or necessary for litigation and thus must be preserved when litigation is anticipated.

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 state courts in Georgia have not set any additional standards for the admissibility of social media evidence. However, Georgia's rules of evidence on relevance, hearsay, and authentication apply equally to social media evidence. "[D]ocuments from electronic sources such as the printouts from a website like MySpace are subject to the same rules of authentication as other more traditional documentary evidence and may be authenticated through circumstantial evidence." Redding v. State, 354 Ga. App. 525, 534-35 (2020). See also Cotton v. State, 297 Ga. 257 (2015). In Moore v. State, 295 Ga. 709 (2014), a criminal defendant's Facebook page was introduced into evidence, and the court found it was sufficiently authenticated where the girlfriend of the defendant testified the picture on the Facebook page was of the defendant, the page contained the defendant's phone number and nicknames the defendant used, the page contained details about the defendant not generally known, and the defendant had admitted to the girlfriend the Facebook page belonged to him. Moore v. State, 295 Ga. 709, 713 (2014).

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

It appears the state courts in Georgia have not addressed this issue specifically. However, Georgia does have a criminal law on Computer Invasion of Privacy, which can apply in certain situations, and which states:

Any person who uses a computer or computer network with the intention of examining any employment, medical, salary, credit, or any other financial or personal data relating to any other person with knowledge that such examination is without authority shall be guilty of the crime of computer invasion of privacy. O.C.G.A. § 16-9-93(c).

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

It appears the state courts in Georgia have not addressed this issue. One district court, in the Southern District of Georgia, reviewed some of these issues in an alleged discrimination and termination case. In Woodward v. Jim Hudson Luxury Cars, Inc., No. CV 118-032, 2019 U.S. Dist. LEXIS 169564 (S.D. Ga. Sep. 30, 2019), the court did announce a limitation on terminations relating to social media, but it did specifically consider the relevance of a racially charged social media post by a terminated employee and did find issues of material fact sufficient to preclude summary judgment. There, the Court found sufficient evidence for a jury to consider that the employer terminated the plaintiff because of the social media posts where other employees with similar social media posts were not terminated. Conversely, an employee's social media posts may serve as a legitimate, nondiscriminatory reason for taking adverse employment action. See Carney v. City of Dothan, 158 F. Supp. 3d 1263, 1282 (M.D. Ala. 2016).