

TRIAL PRACTICE CORNER PRESENTS:

THE SPOILIATION OF EVIDENCE

By Michael L. Goldberg

Michael L. Goldberg is a partner in the firm of Strawinski & Goldberg, L.L.P and concentrates his practice in handling serious personal injury and wrongful death cases in the areas of motor carrier liability, premises liability, products liability, and medical malpractice. He has written several articles for the Georgia Bar Journal, and is a frequent speaker at seminars and conventions.

Understanding the Concept of Spoliation

An employee shreds documents during the night on the top floor of an office building to destroy incriminating evidence. A supervisor discards an inspection report in the ordinary course of business not realizing that the report could be relevant to a future lawsuit. A mechanic repairs a broken bumper and rear guard on a tractor-trailer after the trailer is towed to his shop following an accident. Which of these scenarios involves spoliation of evidence? The answer is all three. Spoliation encompasses not only the intentional destruction of evidence but also any change or alteration to a tangible item through neglect, inadvertence or mistake. ¹ Although spoliation may result from the actions of either a plaintiff or defendant, for the purpose of this discussion, the reader should assume that the defendant has been charged with spoliation of evidence, and the plaintiff is seeking a remedy for the defendant's conduct.

Georgia, like most jurisdictions, does not recognize a separate cause of action for spoliation.² Because there is no separate tort of spoliation, a plaintiff does not have a remedy against a third party for spoliation if the third party is not related to a party defendant,³ and a plaintiff cannot attack an adverse judgment by filing a separate lawsuit claiming that the judgment was the result of the destruction of relevant documents.⁴ Georgia courts recognize three different kinds of sanctions when a party defendant or its representative destroys or alters evidence: (1) striking the defendant's answer and entering judgment in favor of the plaintiff; (2) excluding testimony about the evidence; or (3) charging the jury that spoliation of evidence creates the rebuttable presumption that the evidence would have been harmful to the defendant.⁵

Deciding the Appropriate Sanction

The central question in a spoliation situation is deciding the appropriate remedy for the defendant's actions.

In

determining the type of sanction to impose, Georgia courts take into account five factors: (1) whether the aggrieved party was prejudiced as a result of the destruction of the evidence; (2) whether the prejudice can be cured without a sanction; (3) the practical importance of the evidence; (4) whether the spoliating party acted in bad faith; and (5) the potential abuse if testimony about the evidence is allowed.⁶ The court will not impose a sanction if the destroyed evidence is not relevant to an issue in the case regardless of the intent of the spoliator.⁷

The striking of a defendant's answer is the harshest available sanction and is reserved for situations where a party has maliciously destroyed relevant evidence with the sole purpose of precluding an adversary from examining the evidence.⁸ There is no reported Georgia appellate decision where this sanction was imposed. A less severe sanction is the exclusion of testimony concerning the evidence. Georgia courts have approved this sanction as a remedy when the defendant's representative allows the destruction of evidence after the

opposing side provides notice that the evidence is relevant and requests its preservation.⁹

The most common sanction for spoliation is a jury charge as follows: "If a party has evidence in his power and within his reach by which he may repel a claim or charge against him but omits to produce it, or if he has more certain and satisfactory evidence in his power but relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim against him is well founded; but this presumption may be rebutted."¹⁰ This charge is authorized whenever relevant documents in the custody or control of the defendant cannot be located without a valid explanation.¹¹ If it is unclear whether a defendant had custody or control over the missing evidence, the jury must decide if the defendant is responsible for the unavailability of the evidence before applying an adverse inference for its spoliation.¹² In addition to this jury charge, a court may also allow the introduction of doubtful and inferior evidence by the aggrieved party on the same issue to compensate for the

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unavailability of the best evidence.¹³

Maximizing the Effect of a Defendant's Spoliation

The driving force behind the imposition of sanctions for spoliation is the concept that it is unfair for a plaintiff's case to be adversely affected by a defendant's failure to preserve and maintain relevant evidence. A defendant will usually argue that the destruction of the evidence was inadvertent and that the evidence would have been preserved if the defendant had only known that it was relevant to plaintiff's case. Georgia courts have held that a party cannot be penalized for the inadvertent destruction of documents if it would have been unreasonable to preserve them and the party was not on notice of their relevance.¹⁴ The solution to this problem is to send a spoliation letter by certified mail to any potential defendants and their representatives as early in the litigation as possible. A standard spoliation letter lists in detail certain items of evidence which are to be "maintained and preserved" and not be "destroyed, discarded, changed, repaired, or altered in any manner." The letter states that this evidence is relevant to the plaintiff's cause of action and that sanctions will be imposed for the spoliation of any of the items. Once the spoliation letter is received, the defendant is on notice of the relevance of the listed items and must take affirmative steps to maintain and preserve this evidence or risk the imposition of harsh sanctions.

Despite the availability of sanctions for spoliation, there will be instances when a court will refuse to penalize the defendant for missing documents and will not even give a jury charge on spoliation. A good practitioner can still make use of missing evidence even without a charge. Plaintiff's counsel should still cross-examine the defendant's employees or representatives about the whereabouts of missing evidence so that the jury will question why the evidence is no longer available and what it would have shown. Many times the defendant's failure to produce relevant documents will cause a jury to believe that the defendant is hiding the truth and doubt the veracity of the defendant's testimony. In the hands of a capable attorney, any spoliation of evidence can become a powerful tool that persuades a jury to bridge the gap to a finding of liability or provides an aggravating circumstance to increase an award.¹⁵

Conclusion

While one should always review and utilize the documents that are produced during the discovery process, it is also important to note what documents are not produced and cannot be located by the defendant. If the defendant has allowed the destruction or alteration of evidence, a plaintiff may seek sanctions ranging from the striking of the

defendant's answer to a jury charge on the adverse inference resulting from the spoliation. The issue in determining the appropriate sanction is the defendant's degree of culpability and the resulting prejudice to the plaintiff's case. By sending a spoliation letter early in the litigation, plaintiff's counsel can place the defendant on notice of the relevance of certain documents and insure the maximum sanction for spoliation. Spoliation is a powerful weapon that should be used whenever possible. Everyone knows the power of the smoking gun but sometimes the missing bullets can be just as persuasive.

Endnotes

1. *Sharpnack v. Hoffinger Indus., Inc.*, 231 Ga. App. 829, 830, 499 S.E.2d 363 (1998).
2. *Owens v. American Refuse Systems, Inc.*, 244 Ga. App. 780, 781, 536 S.E.2d 782 (2000).
3. *Id.* at 781.
4. *Richardson v. Simmons*, 245 Ga. App. 749, 750, 538 S.E.2d 830 (2000).
5. *R.A. Siegel Co. v. Bowen*, 246 Ga. App. 177, 180, 539 S.E.2d 873 (2000).
6. *Chicago Hardware & Fixture Co. v. Letterman*, 236 Ga. App. 21, 23, 510 S.E.2d 875 (1999).
7. *Sharpnack v. Hoffinger Indus., Inc.*, 231 Ga. App. 829, 831, 499 S.E.2d 363 (1998).
8. *Chapman v. Auto Owners Ins. Co.*, 220 Ga. App. 539, 542, 469 S.E.2d 783 (1996).
9. *R.A. Siegel Co.* at 182.

10. *O.c.G.A. § 24-4-22.*

11. *Tecumseh Products Co., Inc. v. Rigdon*, 250 Ga. App. 739, 552 S.E.2d 910 (2001).

12. *American Cas. Co. of Reading, Pa. v. Shafer*, 204 Ga. App. 906, 909, 420 S.E.2d 820 (1992).

13. *Langlois v. Wolford*, 246 Ga. App. 209, 212, 539 S.E.2d 565 (2000).

14. *Johnson v. Riverdale Anesthesia Assoc., pc.*, 249 Ga. App. 152, 155, 547 S.E.2d 347 (2001).

15. *J.B. Hunt Transport, Inc. v. Bentley*, 207 Ga. App. 250, 256, 257, 427 S.E.2d 499 (1993) (Destruction of logbooks and inspection reports are aggravating circumstances warranting a punitive damages award).