SPOLIATION OF EVIDENCE

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Spoliation "is the destruction or the significant and meaningful alteration of evidence." The word comes from the Latin word *spoliare*, which means "to plunder." The word has "evil connotations, and the dictionaries make it synonymous with pillaging, plundering, and robbing." A party is responsible for spoliation "when the party has evidence within its control, . . . and fails to produce the evidence to negate constructive knowledge." A party also may be responsible for spoliation even if a third party disposes of the evidence. For example, in *American Casualty Company of Reading, Pennsylvania v. Schafer*, a defendant claimed that he stored the key evidence in a building, but that a tenant in the building later destroyed those documents. The court found the defendant company could be responsible for spoliation if its owner "caused or contributed to the loss of the records," and it reversed summary judgment for the defendant.

Courts are sensitive to spoliation because it seems particularly unfair to let one party profit by destroying evidence. For example, in *Horton v. Eaton*, the doctor's duty turned on the contents of a requisition form that had "mysteriously disappeared" from the defendant doctor's files. The trial court admitted the doctor's testimony about the form's typical content, but the appellate court found the admission erroneous; admitting the testimony would let the doctor "benefit from his omission of record" by blocking the plaintiff's efforts to discover the truth and by giving the doctor

"the benefit of an unimpeachable version of the contents" of the document, a version which "happens to favor" the doctor's position.

This article will focus on recent judicial developments that expand the remedies for spoliation and the factors courts should consider in choosing a remedy. It also will discuss the problematic case in which the evidence is in the possession of a non-party and offer concrete steps that practitioners can take to protect their clients from spoliation of their key evidence.

THE REMEDIES FOR SPOLIATION

Courts have traditionally punished spoliation by applying a presumption that the destroyed evidence was adverse to the party that destroyed it. Recently the Georgia Court of Appeals has expanded the available remedies. The trial court has great discretion in choosing which remedy to apply.

The law historically has provided, *omnia praesumuntur contra spoliatorem*, or "all things are presumed against a despoiler or wrongdoer." Georgia case law makes the same presumption: "[s]poliation of evidence raises a presumption against the spoliator." This presumption is closely related to the statutory presumption that, if a party fails to produce evidence "in his power and within his reach," then "the charge or claim against him is well-founded." The presumption from withholding, suppression, or spoliation of evidence is rebuttable, and the jury decides whether it has been rebutted. If no effort has been made to rebut a presumption that concerns an essential element of a claim, the court may find against the spoliator as a matter of law.

In 1996, the court in *Chapman v. Auto Owners Insurance Co.* expanded the remedy beyond a jury instruction on the presumption:

> [W]e find that in certain circumstances, allowing the case to proceed or an expert to testify about destroyed evidence which the opposing party is unable to test may result in trial by ambush which cannot be cured by a jury instruction. Accordingly, we conclude that where a party has destroyed evidence which may be material to

ensuing litigation, the trial judge may be authorized to dismiss the case or prevent that party's expert witnesses from testifying in any respect about the evidence.

Thus, Georgia courts now have three remedies for spoliation: "a trial court may (1) charge the jury that spoliation of evidence creates the rebuttable presumption that the evidence would have been harmful to the spoliator; (2) dismiss the case; or, (3) exclude testimony about the evidence."

The appellate court has provided factors, discussed below, for trial courts to use in selecting the appropriate remedy. The court has recognized that the selection is within the trial court's discretion to ensure a fair trial and that appellate review is governed by the abuse of discretion standard. That review has been deferential. The Court of Appeals has upheld the exclusion of expert testimony about a product even though all parties were able to inspect it before its destruction. It also has deferred to a trial court that levied a lighter sanction even though the ultimate sanction of dismissal would have been authorized. Finally, it has deferred to a decision not to levy a sanction at all in a case in which an anesthesiologist failed to print out vital sign data that would prove or disprove central liability issues.

THE FIVE FACTORS FOR SELECTING A REMEDY

The Georgia Court of Appeals has provided five factors for a trial court to consider in deciding what action to take when evidence has been spoliated: "(1) whether the defendant 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 [spoliator] acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded." Except for the fifth factor, these factors are fairly universal. In fact, a good argument can be made that factors (3) and (5) are just ways of restating factors (1) and (2). The *Chapman* court suggested as much when it remanded that case with instructions to the trial court to consider factors (1), (2) and (4). These five factors are analyzed below.

(1) Whether the non-spoliator was prejudiced. Spoliation only becomes important when

a party can show it was prejudiced by the spoliation; absent that showing, spoliation is irrelevant.

Whether spoliation is prejudicial has been especially hotly contested in product liability cases. Many courts have held that the loss of the product itself is irrelevant in a case that alleges a product-wide defect, since by definition the parties should be able to test any product to show the defect. A Georgia case followed that line of reasoning:

> Given the fact that plaintiffs' claim is based on the unfitness of thousands of turnbuckles for the purpose intended, as opposed to some idiosyncratic defect affecting only the lost turnbuckle, loss of the product does not impair either plaintiffs' ability to show the defect claimed or the defendant's ability to present a defense to the claim.

Another case allowed the plaintiff to maintain one claim for a product-wide defect, but not a second claim that was not for a product-wide defect.

(2) Whether the prejudice could be cured. If the prejudice from the loss of evidence can be cured, the party does not need a remedy. Courts decide whether the prejudice has been cured on a case-by-case basis. Spoliation may or may not be cured if a party had a chance to examine the lost evidence before it was destroyed, or if the party can view photographs and other indicia of the lost evidence.

(3) The practical importance of the evidence. When evidence is missing, courts naturally ask whether the evidence would have made any difference in the case. If the evidence was of no practical import, then the court does not need to remedy the spoliation. Arguably, this factor restates the first one: after all, if evidence is not important to the case, going without it will cause no prejudice. Hence, remedies for spoliation need not be addressed if they would not change the ultimate result or if they are of relative unimportance to the issues in the present case, but should be addressed where the party can articulate an important reason for needing the evidence.

(4) Whether the spoliator acted in good or bad faith. Although "malice may not always

be required before a trial court determines that dismissal is appropriate," in practical terms, courts look to this factor more than any other when deciding what sanction to apply. The spoliator's intent is critical because the objective of the law is to penalize *wrongful* acts that frustrate the court's truth-seeking function. The *Chapman* court quoted a case holding that "dismissal should be reserved for cases where a party has maliciously destroyed relevant evidence with the sole purpose of precluding an adversary from examining that relevant evidence." If the spoliation occurs in good faith, however, courts are reluctant to sanction it or to award a "premium" to the offended party. For example, in a case in which a dentist protested suspension of her license, the court refused to dismiss the dental board's claims even though the subsequent treating dentist (who was the board's expert) had allegedly "spoliated" the evidence by correcting the patient's dental work.

In assessing blame, courts hold parties seasoned in litigation to a higher standard than other citizens. Noting that an insurer was experienced in litigation and claims handling procedures and that it had a duty to preserve a damaged motor vehicle, the Court of Appeals held that the insurer should have had procedures to prevent the inadvertent sale of the vehicle and found spoliation remedies appropriate.

(5) The potential for abuse if expert testimony about the evidence is not excluded. Like factor (3), factor (5) is largely addressed by the other factors. For example, the Court of Appeals has upheld a finding of potential for abuse where permitting expert testimony would have "prejudiced plaintiffs' ability to rebut that expert opinion."

A SPECIAL PROBLEM: DESTRUCTION OF EVIDENCE BY NON-PARTIES

The remedies available in Georgia work well when a party has spoliated evidence, but those remedies apply only in the context of a lawsuit. When someone who is not party to a lawsuit destroys evidence, Georgia law does not provide a clear remedy.

Several states have addressed this problem by creating a tort action for intentional

spoliation. In 1998, the Court of Appeals hinted that it might consider adopting a spoliation tort because existing remedies for the spoliation or concealment of evidence may be inadequate. In 2000, however, the court explicitly rejected a separate tort for spoliation because a vigilant litigant already has some means to secure evidence, as elaborated below. It has also reasoned that suits for spoliation would "undermine the principle that judgments are final and litigation must be brought to an end, and [could be] abused to harass or intimidate litigants with the threat of a subsequent collateral attack."

What may a party do to preserve evidence in the possession of non-parties, or before suit is filed? Two recent cases shed light on this question.

In *Owens v. American Refuse Systems, Inc.*, the plaintiff was injured on the job when a cap blew off a tank and hit him in the eye. After the accident, the employer ("ARS") threw the tank out, but Owens' workers' compensation lawyer wrote a letter asking that ARS get the tank back and give possession of the tank to the plaintiff. ARS retrieved the tank and wrote a letter saying that it would make the tank available for Owens to inspect, which Owens did. Owens then settled his workers' compensation claim, and filed a product liability suit. Meanwhile, ARS sold the tank for scrap metal. Upon learning that the product had been destroyed, Owens dismissed the product liability suit and then sued ARS for spoliation under several theories. The court refused to recognize a spoliation tort in Georgia. The court denied Owens's claim for promissory estoppel because Owens could not have justifiably relied on ARS to keep the tank, since "Owens failed to obtain either a discovery order or a written agreement incorporated into a consent order that the tank be indefinitely preserved." Furthermore, ARS had never promised to keep the tank indefinitely, or even agreed to the terms set out by Owens' lawyer. Owens also maintained a claim for breach of contract against an ARS employee who, Owens said, had promised, "nothing will happen to the tank," but the court rejected that claim as well, because Owens and the ARS employee had reached no specific terms. The *Owens* case implies, then, that a party can use

traditional principles of contract and estoppel to protect itself against spoliation. In *Smith v. Brooks*, three boys pried open the back of a gun safe owned by one of the boys' parents, and soon one of them was accidentally shot. Plaintiff contended that the parents had spoliated evidence because they disposed of the safe. After disposing of the contention on other grounds, the court added "that the record does not reflect that Smith ever sought through her attorney or by court order to have the cabinet preserved as evidence," despite a lengthy period between the shooting and the filing of suit. This dictum suggests the court might go so far as to place a duty on a party to seek a court order, even before suit is filed, to ensure that key evidence is preserved. If at all possible, a party who needs to preserve evidence should take these steps:

(1) write a letter asking that the evidence be preserved, then,

(2) if a party has the evidence, seek a court order requiring the party to preserve the evidence;

(3) if a non-party has the evidence, seek a clear agreement that the non-party will preserve the evidence, or seek an order requiring that the evidence be preserved;

(4) if evidence gets destroyed by a non-party, and no clear agreement or order was in place, do not dismiss the case and sue the entity that destroyed the evidence; instead, seek remedies in the presently-filed suit.

CONCLUSION

Courts punish spoliation because it frustrates the truth-seeking function of the court and allows a party to profit from his own wrongdoing. A party is only responsible for preserving the evidence that is in his custody or control. When a party has altered or destroyed evidence in his custody or control, the courts are charged with ensuring he does not profit from his wrongdoing. The trial court has several options in such cases. It can instruct the jury to presume that the evidence was harmful to the party that destroyed it unless the presumption is rebutted, and the jury then will decide whether the presumption has been rebutted. It can prevent the party from offering

testimony on the subject of the destroyed evidence. Ultimately, it can dismiss a case or enter a default for the most serious violations. Courts have fewer options when a non-party spoliates evidence, but the practitioner can take practical steps to minimize the risk of spoliation and to increase the chance that a remedy will be available if spoliation occurs.

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Endnotes