DEVELOPMENTS IN SPOLIATION LAW AND EDISCOVERY SINCE *PHILLIPS VS HARMON*

In 2018, it is difficult to imagine a lawsuit, or workers compensation claim, which does not involve electronically stored or transmitted information. This information must be preserved and searched. Every trial attorney must have a working knowledge of EDiscovery, spoliation, and technology issues.

Although the issue of spoliation can arise outside the context of EDiscovery, these issues are related. Most claims materials, including photographs, recorded statements, police reports, medical records, videos, and claims notes will be stored and transmitted electronically. This article will summarize recent Georgia cases about spoliation, and then turn to recent cases, from around the country, regarding some EDiscovery topics.

RECENT GEORGIA CASES REGARDING SPOLIATION

In 2015, the Georgia Supreme Court overruled longstanding precedent that a defendant's duty to preserve evidence arises only when a plaintiff provides actual or express notice that the plaintiff is contemplating litigation. In *Phillips v Harmon,* 297 Ga. 386, 774 S.E.2d 596 (2015), the Georgia Supreme Court ruled that notice can be actual or **constructive**. Defendants were given the duty to preserve evidence if litigation was reasonably foreseeable, based upon circumstances such as the severity of an injury, history of conduct between the parties, financial exposure, whether the defendant conducted more than a routine investigation after the event, and whether the defendant was obviously at fault. The *Phillips*

case, and constructive notice, were discussed in the 2016 GDLA Law Journal in "Spoliation: Is Foresight The New Trrigger To Preserve Evidence?" by Sandra Vinueza Foster.

The Georgia Supreme Court issued their opinion in *Cooper Tire and Rubber Company v. Koch, et al* S17G0654 on March 15, 2018. This opinion establishes that plaintiffs have the same obligations to preserve evidence and when that duty arises. [1] Ruling that both the trial court and Court of Appeals properly followed the guidelines set forth in *Phillips v Harmon,* the Supreme Court affirmed the finding of both courts that the plaintiff did not spoliate evidence. Although plaintiffs have a duty to preserve evidence when litigation is actually contemplated, or reasonably foreseeable, the facts of *Cooper Tire* supported the trial court's decision that no spoliation occurred.

The *Cooper Tire* case arose from a one vehicle rollover accident involving Mr. Gerald Koch on April 24, 2012. While driving on I-16, Mr. Koch's 2000 Ford Explorer swerved out of control when some tread on his left rear tire detached. The vehicle crashed into a guardrail, continued traveling and overturned several times before coming to an "uncontrolled" rest in the eastbound ditch. Mr. Koch was hospitalized in the ICU at the Medical Center of Central Georgia. Unfortunately, he died on June 3, 2012 as a result of the injuries. Mr. Koch never left the ICU.

During the hospitalization, Mr. Koch was sometimes able to discuss the accident with his wife. He described the accident by saying that the tire "blew," and his vehicle flipped several

[1] As of the deadline for publication, the *Cooper Tire* opinion was still subject to motions for reconsideration and not yet final.

times. The Ford Explorer was towed from the scene by a wrecker service and placed in the wrecker service's storage yard. Before Mr. Koch's death, the wrecker service informed Mrs. Koch that there would be storage fees for the Ford Explorer. Alternatively, if title to the vehicle was signed over to the wrecker service, no storage fees would be charged. The wrecker service would sell the vehicle for scrap.

Mrs. Koch discussed this issue with her husband. He said to save the blown tire and may have asked that all the tires be saved. There is some dispute whether Mr. Koch said to save all the tires or just the left rear tire which had blown. When that discussion occurred, Mr. Koch was still in the ICU. No attorney had been hired or consulted. Mr. and Mrs. Koch were focused on his injuries and treatment as well as storage fees which Mr. and Mrs. Koch could not afford. They decided to transfer title to the vehicle to the wrecker service.

Only the portion of the left rear tire was saved by the wrecker service. The detached portion of the tread at the scene was never retrieved. The Explorer was crushed for scrap. The Supreme Court noted that the decision to sign over title to the vehicle was based upon financial concerns which arose when Mr. and Ms. Koch were focused on his injuries and recovery rather than litigation. They had not spoken to or hired an attorney. There was no nefarious intent or expectation of litigation when the decision was made. Another point emphasized by the Supreme Court was that destroying the Explorer and the other three tires, might hurt the plaintiff's case more than the defendant. Without the vehicle or other tires, plaintiff could not do testing to exclude other possible causes of the accident. Even without an adverse spoliation instruction, the jury would learn that the vehicle and other tires were destroyed.

After her husband's death, Ms. Koch hired counsel. Plaintiff's counsel retrieved the preserved tire on September 26, 2012; suit was filed in 2014. Cooper Tire eventually moved for a dismissal of the case, or some other spoliation sanction, arguing that its defense had been irretrievably prejudiced by the spoliation of the remaining tires and the vehicle. The trial court denied this motion. At the time the Ford Explorer was destroyed, Mr. and Mrs. Koch were not actually contemplating litigation, nor was litigation "reasonably foreseeable" to them. No lawyer or expert witness had been consulted or hired.

The *Cooper Tire* opinion establishes that plaintiffs have a duty to preserve evidence once litigation is actually contemplated, or when litigation was reasonably foreseeable, to that plaintiff. The court wrote:

> "The duty is defined the same for plaintiffs and defendants, and regardless of whether the party is an individual, corporation, government, or other entity. However, the practical application of that duty in particular cases may depend on whether the party is the plaintiff or the defendant as well as the circumstances of the party and the case." See *Cooper Tire.*

With the same set of facts, litigation may be reasonably foreseeable to a corporation when litigation is **not** reasonably foreseeable to a potential plaintiff who has not yet consulted with or hired an attorney or expert. "The duty often will not arise at the same moment for the plaintiff and the defendant, because of their differing circumstances." See *Cooper Tire.* The opinion continues by noting, however, that "there will be … cases with clear proof that the plaintiff *actually* contemplated litigation at the pertinent time – because, for example, she consulted an attorney and authorized the litigation (emphasis in original)." See *Cooper Tire.* At that point, litigation is, obviously, both contemplated and foreseeable. The potential defendant will not necessarily have constructive notice of pending litigation when the plaintiff knows that

litigation is contemplated. Plaintiff's counsel may wait months, or over a year, before putting a potential defendant on actual notice of litigation.

> "During that intervening time, the plaintiff would have a duty to preserve relevant evidence, while the defendant's duty might not yet have been triggered if other circumstances did not put the defendant on constructive notice of litigation….a plaintiff also must act reasonably in anticipating whether litigation arising from her injury will occur….Neither party may manipulate the civil justice system by destroying relevant evidence and then asserting (and hoping a judge will ultimately credit) a failure to have actually contemplated litigation at that time, when a reasonable person in the party's situation would have anticipated a lawsuit." See *Cooper Tire.*

Spoliation will be a double edged sword. When plaintiff's attorneys argue and investigate whether the defendant had constructive notice of pending litigation, defense counsel should be investigating whether plaintiff met his duty to preserve evidence when plaintiff had hired counsel and **knew** that litigation was pending.

Spoliation cases will always be fact intensive. Actual contemplation of litigation can be inferred from comments or the actions of a party. When either party has consulted with counsel, or a potential expert witness, it appears that the duty to preserve evidence will always be triggered by those actions. A routine or cursory investigation by a party, without more, will likely not prove that litigation was contemplated at the time. As noted in *Cooper Tire* and citing *Phillips v Harmon,* the duty to preserve "does not arise *merely* because the [party] investigated the incident, because there may be many reasons to investigate incidents causing injuries." See *Phillips* at 297 Ga. 386, 397 n.9. In the *Cooper Tire* case, the mere act of saving the blown out tire, without more, was not enough to prove contemplation of litigation. Defendants can raise a similar argument where there are no other circumstances to create an expectation of litigation.

When determining whether litigation was reasonably foreseeable to any party, the identity, knowledge and experiences of the person, corporation, business, or governmental entity will be important. An individual with no history of prior significant injuries or litigation, and who has not consulted with an attorney, will not necessarily foresee litigation against a tire manufacturer after an accident involving a tread separation of a tire. When that tire manufacturer learns of an accident involving a tread separation of one of their tires, however, that manufacturer probably will have an immediate duty to preserve evidence. A corporate tire manufacturer, which may have litigated tire tread separation cases in the past, will be presumed to know that litigation is foreseeable as soon as the tire manufacturer learns an accident which is allegedly due to a tire defect.

Attorneys will be left to argue what the party knew, and what the party should reasonably have foreseen. Once a court determines that litigation was contemplated, or reasonably foreseeable, then that party has a duty to preserve evidence regardless of who (or what) the party is.

Trial judges will have broad discretion to determine whether spoliation occurred, whether a duty to preserve evidence existed, and in crafting remedies for any violations. Unless there is a showing that the trial judge applied the wrong standards, appellate courts will likely determine that any findings about spoliation were "within the discretion of the trial judge" and affirm.

The remaining Georgia spoliation cases can be summarized more quickly. In *Delphi Communications, Inc v Advanced Computing Technologies,*336 Ga. App. 435, 784 S.E. 2d (2016)

the Court of Appeals affirmed the trial court's decision to strike Defendant's answers due to spoliation of evidence. This lawsuit was filed by Advanced Computing Technologies ("ACT") against two former employees who left ACT and formed a company called Delphi Communications. ACT claimed that the former employees were improperly soliciting and taking former ACT clients, and that Defendants copied ACT software products without permission or consent. When the suit was filed, ACT sought **and received** a temporary restraining order precluding defendants from "destroying, deleting or removing from any computers any data or software before the hard drives of each computer are imaged for inspection and analysis by a special master[.]" The information on defendant's hard drives, at the time the lawsuit was filed, was central to the lawsuit.

Defendants did not preserve their hard drives or allow the creation of "mirror images" of their hard drives as required by the TRO. In effect, after being sued for stealing clients and software from ACT, defendants failed to preserve evidence which would demonstrate whether client information and proprietary software was stolen. Not surprisingly, defendant's answer was stricken. The case proceeded to trial on the issue of damages including assessed attorney's fees pursuant to O.C.G.A. 13-6-11. The jury awarded nominal damages and assessed attorney's fees. The trial court limited attorney's fees to only those fees performed for work on the computer theft/computer trespass claim. Despite that fact, plaintiff's counsel presented attorney's fees for all the work performed except for appellate work and work on the summary judgment claim. Because the plaintiff failed to prove attorney's fees only for the computer theft/computer trespass claim, the award of assessed attorney's fees was reversed.

Despite Defendant's egregious destruction of evidence, which resulted in their answer being stricken, the Plaintiff still had to prove damages. Most of the damages were attorney's fees necessitated by the spoliation; without the spoliation, Defendant might have won the case.

In *Bath v. International Paper,* 343 Ga.App. 324, 807 S.E.2d 64 (2017), the Court of Appeals reversed the grant of summary judgment to Defendants because Defendants lost evidence which was crucial to the case. Plaintiff was electrocuted while working at Defendant International Paper's plant as an electrician for White Electrical. While replacing a broken wire, Plaintiff cut into a live wire which he believed was turned off. International Paper allegedly warned the employees of White Electrical that their plans showing the wiring, and location of the circuit boxes, were inaccurate. White Electrical employees denied hearing this warning. Plaintiff was using a tic tracer on the date of his accident to determine whether a wire was live before cutting into it.

After the electrocution, International Paper took control of the scene immediately. They saved the wire and light in question in a box – but lost the box. The tic tracer being used by plaintiff was also lost. The trial court granted summary judgment despite the failure to preserve the wire, light, and tic tracer. The trial court determined that this evidence was not crucial to Plaintiff's claim, and Plaintiff had an incontrovertible duty to use his tic tracer before cutting the wire. Plaintiff insisted that he had used the tic tracer. Without that equipment being provided, he could not test whether the tic tracer had malfunctioned. Since that lost evidence was crucial to the question of liability, summary judgment was not proper.

In *Sheats v. Kroger Company,* 336 Ga. App. 307, 784 S.E. 2d 442, (2016), the Court of Appeals reversed and remanded a case to the trial court which had issued its ruling before *Phillips v Harmon* was issued, and, therefore, applied the wrong legal standard. Ms. Sheats was lifting a case of ginger ale into her cart when the bottom of the case broke. The ginger ale fell from the box. At least one bottle hit her foot. It was undisputed that Kroger was aware of the collapse of the box which broke but failed to keep the broken box**.** Ms. Sheats sued both Kroger and the product manufacturer. The trial court granted summary judgment against the plaintiff but used the incorrect standard in denying a spoliation sanction. The case was remanded to the trial court for evaluation of the duty to preserve issue in light of the standards set forth in the *Philips v Harmon* opinion.

Sheats further sought the reversals of summary judgment for her claims against Kroger for product liability, *res ipsa loquitor,* and ordinary negligence. The Court of Appeals held that Kroger had a duty to supply goods packed by reliable manufacturers and without defects which could be discovered by the exercise of appropriate care. Without the box, Ms. Sheats could not prove that Kroger had overlooked a reasonably observable defect; Kroger could not show that it had not. Kroger had, therefore, destroyed evidence and prejudiced Ms. Sheats' claim.

The Court of Appeals affirmed the award of summary judgment against the product manufacturer. Without the box, Ms. Sheats could not prove that the product was defective. There was no evidence that the manufacturer had control of the product at the time of the accident, that the manufacturer requested the destruction of the box, or that the manufacturer even knew of the claim before the box was destroyed.

This case includes a blistering dissent from Judge Andrews in which he described the *Philips v. Harmon* opinion as "alarmingly" expanding situations where a defendant is on notice of a potential claim. Judge Andrews argued that defendants are now "damned if you do, damned if you don't" when conducting an inquiry about an accident. None of the other six judges who decided *Sheats* joined in the dissent. In light of the recent *Cooper Tire* opinion, it appears that constructive notice is here to stay.

In *Phillips et al v. Owners Insurance Company,* 342 Ga. App. 202, 802 S.E.2d 420, (2017), the Court of Appeals ruled that no independent cause of action exists for spoliation in Georgia. The court held adequate remedies exist for preserving evidence, and seeking damages when spoliation occurs.

In *DeMere Marsh Associates, LLC v. Boatright Roofing and General Contracting,* 343 Ga. App. 235, 808 S.E.2d 1 (2017), the trial judge had decided to allow the jury to make findings of fact regarding whether spoliation occurred. The Court of Appeals reversed that portion of the trial court's decision. The trial judge must make the necessary findings of fact to determine whether spoliation occurred. Those findings of fact are **not** for the jury. The jury may only hear about spoliation if the trial judge has already determined that spoliation occurred. At that point, the appropriate sanction could include mentioning the spoliation to the jury. If there is spoliation, the judge must craft a remedy appropriate to the harm or prejudice done. It is not for a jury to decide whether spoliation occurred.

CASES REGARDING EDISCOVERY AND SPOLIATION

The US Supreme Court case of *Goodyear Tire & Rubber Co. v. Haeger* 137 S. Ct. 1178 (2017) examines the powers of a Federal court to sanction a party for bad faith behavior. The Haegers settled a case with Goodyear after years of contentious discovery. After the settlement, an attorney for the Haegers learned that Goodyear had deliberately withheld testing data which should have been provided. Goodyear eventually conceded that the data was withheld. The trial court awarded $2,700,000.00 in assessed attorney's fees and costs. This amount was the entire amount expended by the Haeger's attorneys subsequent to the discovery response which deliberately withheld significant test results.

The Supreme Court ruled that the $2,700,000.00 award was improper. The lower courts had not used the "but for" test. Although sympathetic to the lower courts' desire to sanction Goodyear for egregious conduct, Justice Kagan noted that in a civil case, damages must be compensatory rather than punitive. To be compensatory, the attorney's fees and court costs must be awarded pursuant to the "but for" test. What fees and costs would have been avoided "but for" the dishonest response? The award was vacated because the incorrect standard was used. Justice Kagan also noted that the courts do not, and should not, have to be accountants who run down every penny spent. "Rough justice" is sufficient. As long as a judge applies the correct legal standard to compute damages resulting from spoliation, reversals are unlikely.

O'Berry v. Turner, ADM Trucking, et al Civil Action Nos. 7:15-CV-00064-HL, 7:15-CV-00075-HL, April 27, 2016, from the Middle District of Georgia, contains an excellent discussion of spoliation law. This case involved a motor vehicle accident. The defendants were a trucking

company the driver of the truck. The trucking company failed to preserve the driver's relevant driver logs, failed to have adequate procedures to preserve driver logs, and other pertinent information, and were dilatory in their efforts to gather this important information. Judge Lawson held that there was an intentional spoliation of evidence. The evidence was not deliberately destroyed; the defendant had negligently failed, however, to meet its obligations of taking reasonable measures to preserve and gather pertinent records. Judge Lawson decided to instruct the jury that the lost information was damaging to the trucking company.

In *Ronnie Van Zant, Inc. v. Pyle*, No. 17 Civ. 3360 (RWS), 2017 WL 3721777 (S.D.N.Y. Aug. 28, 2017), the court sanctioned the Defendants because of the destruction of evidence by an independent contractor who was not party. The court held that Defendants had control over the evidence because of the close contractual relationship Defendants had with the non-party. That individual had a personal interest in the outcome of the litigation.

These facts go back to the 1977 plane crash which killed Ronnie Van Zant, the lead singer for Lynyrd Skynyrd, and other members of the band including Stephen Gaines. Cleopatra Records, through their subsidiary, Cleopatra Films, decided to make a film purportedly about the crash and surrounding events. Cleopatra hired Jared Cohn to direct and former Lynyrd Skynyrd drummer, Artimus Pyle, as a consultant. Cleopatra claimed that the film was a biography about Artimus Pyle, and told through Artimus Pyle's eyes, but about the 1977 crash.

The dispute arose because Pyle is subject to an agreement he, other surviving band members, and the estates of Ronnie Van Zant and Stephen Gaines, signed in 1988. This agreement placed significant restrictions on performing under the name "Lynyrd Skynyrd," or

otherwise profiting from that name. There were also restrictions on profiting from the names or likenesses of Ronnie Van Zant and Stephen Gaines. Individual band members could sell their personal biographies, and mention Lynyrd Skynyrd, as long as the primary purpose of the movie, book, or feature was an individual biography rather than a history of the band. This agreement was enforced and, at times, litigated. Artimus Pyle collected the royalties to which he was entitled pursuant to the agreement.

In 2016, Cleopatra hired Jared Cohn to direct the film which was purportedly a biography of Artimus Pyle, but primarily about the 1977 plane crash. Although Cohn was not an employee of Cleopatra, he ultimately answered to Cleopatra and had a direct financial interest in the movie. Artimus Pyle was to receive 5% of the net receipts in return for being a consultant. Apparently, Pyle told Cleopatra about the history of litigation but not the Consent Order, and its limitations on profiting from the Lynyrd Skynyrd name.

The movie was to be titled "Freebird." Cleopatra Films alleged that the movie title "Freebird" had nothing to do with the Lynyrd Skynyrd song of that same name.[2] The name for the film was changed to "Street Survivor" which – coincidentally or not – is the name of Lynyrd Skynyrd's last album.

When Ronnie Van Zant's widow learned of the project, she had hired counsel who immediately sent a cease and desist letter notifying Cleopatra Films of the original agreement, the consent order, and demanding that production cease immediately. Litigation followed with expedited discovery.

[2] That assertion may have been the most ridiculous claim in the history of litigation.

The day after the lawsuit was filed, film director Jared Cohn, purchased a new cell phone. He saved all his photos from the old phone but deleted all of the texts. These texts included texts between Jared Cohn, Artimus Pyle, and other individuals about the movie. Although Jared Cohn was not a defendant, he was an independent contractor hired by Cleopatra Films and director. Additionally, Pyle and Cleopatra Films had access to these texts. They were deemed to have "control" over them. Pyle never hired an attorney or made any effort to defend the lawsuit.

The judge sanctioned Pyle and Cleopatra Films by striking their defenses and pleadings, and entering judgment in favor of the Plaintiffs. Cleopatra and Pyle were permanently barred from making the film. Given the importance of Jared Cohn to the project, his texts were deemed to be within the control of Cleopatra and Pyle.

It is an understatement to say that any duty to preserve evidence in the immediate control of a nonparty, who was also not an employee, is a source of potential concern. Fortunately, this case is not a Georgia, or 11th Circuit, case. There are also some unique facts such as Jared Cohn being the director of the movie, his deletion of all tweets the day after the suit was filed, and Artimus Pyle's refusal to hire a lawyer or mount a defense. Defendant's behavior in this case is a checklist of bad faith actions. Distinguishing this case factually should not be difficult if it is cited in support of an argument that parties must preserve evidence in the control of a nonparty.

Claw-back Agreements

Given that thousands of documents routinely have to be stored and searched during EDiscovery in large cases, there is always the risk of inadvertently turning over confidential or privileged information. Claw-back agreements are one of the steps counsel should take to preserve privilege and protect confidentiality. Although Georgia law does not have any statutory provisions regarding EDiscovery, claw-back agreements are specifically described in FRE 502(b) and (d). Unless and until Georgia passes EDiscovery statutory provisions, FRE 502 (b) and (d), along with federal case law, are probably the best guidelines to follow in all Georgia when using claw-back agreements in a pre-trial EDiscovery order.

Typically, claw-back agreements allow parties to recover inadvertently disclosed information which is confidential or privileged. The privilege is not waived by the inadvertent disclosure. FRE 502(b) requires that the disclosure be inadvertent; that the disclosing party show that reasonable steps were taken to prevent the disclosure, and that reasonable steps were taken to correct the error. These agreements are not a substitute for old fashioned review of documents and attention to detail.

In *Irth Solutions, LLC vs Windstream Communications, LLC* No. 2:16-CV-219 (S.D. Ohio August 2, 2017) a disclosure was not deemed to be subject to the terms of a claw-back agreement or protected by federal law. In that case, one of the firms, Baker, Hostetler, released 43 documents, amongst a total of 2,200 documents, which Baker Hostetler later claimed were privileged. The attorneys for the receiving party insisted that the disclosure was either not inadvertent, or not covered by the claw-back agreement. Baker Hostetler filed a motion to

enforce the claw-back agreement and to require the return of the documents. While that motion was pending, Baker Hostetler released the same 43 allegedly privileged documents as part of a supplemental response.

The court declined to enforce the claw-back agreement holding that the disclosure was "reckless" rather than inadvertent. In addition to releasing the 43 allegedly privileged documents again, while the motion was pending, the court was persuaded by the failure of the Baker Hostetler to double check what documents were being provided after the package of documents was created by the IT support staff.

Conclusion

All of the cases discussed are worth reading for the full discussion of the spoliation and EDiscovery issues presented.

Counsel should always encourage clients to err on the side of saving as much information as possible and insure that steps are taken to avoid the accidental deletion of important data. Defense attorneys should also investigate whether plaintiffs have destroyed evidence and seek appropriate sanctions. With respect to EDiscovery, remember that ignorance of EDiscovery laws and procedures will neither be excused nor forgiven by the courts or clients. Some states now require lawyers to have training or CLE hours for technology and EDiscovery issues. Although Georgia does not have those requirements, trial attorneys should consider self-imposed requirements for EDiscovery and spoliation training.