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NEWSLETTERS

Georgia Supreme Court Significantly Broadens The Duty To Preserve Evidence

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In *Phillips v. Harmon*, 297 Ga. 386, 774 S.E.2d 596 (2015), the Georgia Supreme Court in an (infrequent) unanimous decision broadly expanded the scope of a potential litigant's duty to preserve evidence, the breach of same triggering a range of jury charges and findings from adverse inference to default. The Phillips case represents a sea change in Georgia "spoliation" law and will have a dramatic impact on record-keeping and management.

The *Phillips* case arose in the medical and hospital professional liability context. Phillips brought a professional liability action against a certified nurse midwife, OB/GYN Associates and Henry Medical Center alleging that these defendants' negligence caused Phillips to suffer acute and prolonged oxygen deprivation during birth resulting in severe hypoxic injury, including spastic quadriplegia, blindness and speech impairment.

A routine part of any delivery includes the production of fetal monitor strips (FMS) which are generated from a machine monitoring the fetal heartrate. The FHS (which are similar to EKG reports) monitor the variation in fetal heartrate and can reflect signs of fetal compromise and danger. Often, nurses will make notes on the FHS as they are generated from the machine, noting points of concern in the fetal heartrate and possible hypoxic danger. In the Phillips case, the nurses made notes on the FHS but, pursuant to a standard hospital policy, the FHS were destroyed 30 days after the birth.

Henry Medical Center maintained its medical records electronically. There was some evidence presented that the nurses did make notations on the printed strips, which were not part of the electronic record. In accordance with the medical center's "Sentinel Events Policies," immediately after Phillips' birth, the medical center launched an internal investigation which involved questioning of involved personnel, subsequent notification to its insurance carrier, and contacting counsel shortly after the birth. The plaintiffs contended that once the Sentinel Events Policies were triggered, the medical center was required to obtain and preserve evidence as appropriate, including the FHS.

The trial court refused to give a "spoliation" charge and the case went to trial, resulting in a defense verdict. On appeal, the Georgia Court of Appeals found that the medical center did not have notice of "pending or contemplated" litigation when it destroyed the FHS, and therefore it was not an abuse of the trial court's discretion not to give the plaintiffs' requested spoliation charge. Relying upon a number of previous Georgia

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Court of Appeals cases, the intermediate appellate court found that the phrase “potential for litigation” used in *Baxley v. Hakiel Ind*., 282 Ga. 312, 647 S.E.2d 29 (2007), a prior Georgia Supreme Court case discussing spoliation, referred to litigation that is actually “contemplated or pending” and nothing more. Plaintiffs appealed.

The Georgia Supreme Court found that the court of appeals’ analysis (as well as at least seven other cases issued by the court of appeals) “missed the mark” and were formally disapproved. The supreme court held that “the duty to preserve relevant evidence 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” (emphasis added). However, to say that litigation is “contemplated or pending” does not address the question as to which party is “doing the contemplating,” namely who is anticipating the litigation. “As to the opposing party, usually the defendant, the duty arises when it knows or reasonably should know that the injured party, the plaintiff, is in fact contemplating litigation, which the cases often refer to in terms of ‘notice’ to the defendant.” The supreme court held that notice of a plaintiff contemplating litigation can be actual or constructive, and that defendant’s actions after an event “may demonstrate constructive notice.”

The court then described various other circumstances from which it might be reasonably inferred that the plaintiff is contemplating litigation. These “other circumstances” include at least the following:

- 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.

The court further held that in determining whether the defendant did or should have foreseen litigation by the plaintiff, courts should consider the “initiation and extent of any internal investigation, the reasons for any notification of counsel and insurers, and any expression by the defendant that it was acting in anticipation of litigation.” The court concluded by holding that: “certainly a trial court has wide discretion in adjudicating spoliation issues, and such discretion will not be disturbed absent abuse.”

The Georgia Supreme Court decision in *Phillips* reflects a “sea change” in the requirements for Georgia companies to maintain records following an event. The decision raises particular concern in the commercial context and may open the door to increasing requests for spoliation charges by a variety of claimants if business records are not properly maintained. Certainly in the case of any significant accident involving serious bodily injury or property damage, clients need to be more cautious in preserving potential evidence, otherwise they may face the potential for a spoliation charge ranging from an inference to a default.

But what about more subtle events that could trigger future liability? For example, are numerous change order requests on a construction project

indicative of a potentially foreseeable litigation? What about defective or damaged parts of a machine which have been removed in order to be replaced? An injured party, insurance company, or other party might later claim that very broad retention of documents and physical evidence would be required under the above circumstances because a claim would be "reasonably foreseeable to the party in control of that evidence…." The routine, automatic deletion of e-mails about the above subjects could be found to be spoliation of evidence resulting in potentially serious trial consequences (i.e. anything from an inference to default).

What's worse is that the Georgia Supreme Court confirmed that a trial court has "wide discretion in adjudicating spoliation issues" with such discretion being enforced "absent abuse." Thus, litigants in Georgia will need to win the battle in the trial court with regard to offering or objecting to appropriate jury charges, lest they lose the war in doing so because appellate courts will be giving wide deference to the trial judge's discretion.

Commercial litigants should develop policies and procedures for when and to what extent document and physical evidence retention is triggered. Otherwise, in light of the *Phillips* decision, a Georgia litigant might lose an otherwise defensible claim because of an adverse inference charge given to a jury. Sanctions could include fact preclusion and even the most severe sanction of default when records are destroyed in bad faith. However, good or bad faith is just one factor in whether the ultimate exclusionary sanctions may be appropriate. Indeed, such serious consequences can result even when the client has not acted in bad faith. *Id*. at 24-25; see also *AMLI Residential Prop. v. Georgia Power Co*., 293 Ga. App. 358, 667 S.E.2d 150 (2008).

The *Phillips* decision is clearly one of the most important decisions by the Georgia Supreme Court this year and will have long-lasting effects on many businesses and professions for years to come. Careful consideration of an evidence retention policy must be employed whenever there is an unexpected and untoward event or accident.

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