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Discovery of Computerized Litigation Support Databases

An Uncommon Practice

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As the legal profession has continued to embrace the technology revolution, the use of litigation support computerized databases is becoming more commonplace. Most often utilized in mass tort cases to handle immense amounts of information, litigation support systems are also proving to be valuable tools in other smaller, complex cases such as medical malpractice or products liability, where large volumes of documents and/or bodies of scientific literature are involved. These litigation databases, in turn, may be subject to discovery requests, the propriety of which often turns on issues of work product protection. It has been suggested in a recent article in this publication that computerized litigation databases are discoverable. While discovery of these databases occurs on occasion, it is a decidedly uncommon occurrence.

Work Product Protection

The work product doctrine established in *Hickman v. Taylor*, 329 U.S. 495 (1947), and later

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Answers To The Most Commonly Asked Questions About Spoliation

By Lee Tarte Wallace
The Wallace Law Firm, L.L.C.

Lee Tarte Wallace

Spoliation is the destruction or alteration of evidence. *See Sharpnack v. Hoffinger Industries Inc.*, 231 Ga. App. 829, 830, 499 S.E.2d 363, 364 (1998). The law historically has provided, "omnia praesumuntur contra spoliatorem," or "all things are presumed against a despoiler or wrongdoer." Black's Law Dictionary 980 (5th ed. 1979). Georgia case law makes the same presumption: "[s]poliation of evidence raises a presumption against the spoliator." *Bennett v. Associated Food Stores*, 118 Ga. App. 711, 716, 165 S.E.2d 581, 586 (1968). A Georgia statue codifies this presumption. O.C.G.A. § 24-4-22 (1995).

This article answers the most common questions about spoliation under Georgia law.

Why punish spoliation?

Courts are sensitive to spoliation because it seems particularly unfair to let one party profit by destroying evidence. In *Horton v. Eaton*, 215 Ga. App. 803, 805-06, 452 S.E.2d 541, 544 (1994), the court held that it was error to permit the defendant doctor to testify about what his missing medical records would have shown, and thus "to benefit from his omission of record and memory." *Id.*

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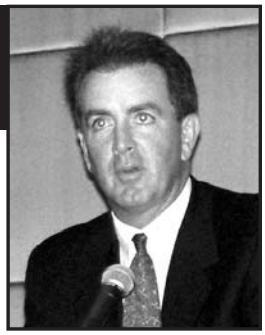
Message from the Chair

Dart Meadows



Thanks to the leadership and hard work of Stephanie Parker and Lee Tarte Wallace over the past several years, the Product Liability Section of the State Bar of Georgia is active and thriving. The Product Liability Section currently has over 464 members and hosts two annual seminars, including one in December and the second one in May. We publish four newsletters annually and host lunch meetings for corporate counsel in Georgia to address product liability issues of interest to corporations. If you are not a member of the Product Liability Section of the State Bar of Georgia, please consider joining our section.

The Product Liability Section has five board members including a chair, vice-chair, secretary and two members at large. This structure, which Stephanie and Lee put into place, has kept the Section active and will assure its success well into the future. Al Pearson is the Vice-Chair and has organized two excellent seminars over the course of the year. Andy Bayman is the Secretary who is overseeing the four newsletters our Section will publish on a quarterly basis, along with the hard work of his colleague, Amy Power. Lance Cooper and Bill Custer are the two at large members for the July 2002-2003 year. If you are interested in a leadership role in the Section, please get involved in either writing articles for the newsletters, or speaking at one of the upcoming seminars.

Our latest seminar on December 13, 2002 included five speakers who addressed four very timely topics. Professor Tom Eaton of the University of Georgia Law School discussed how the new Restatement of Torts has impacted the development of product liability law both nationally and in Georgia. Stephanie Parker spoke on the subject of trial techniques in the defense of product liability cases, including new ideas and proven strategies which involved a very effective power point presentation. Leslie Brueckner, Staff Attorney at Trial Lawyers for Public Justice, talked about developments in preemption cases, including the *Sprietsma v. Mercury Marine* case which she successfully argued in the United States Supreme Court on October 15, 2002. Leslie's talk also addressed various federal statutes which are involved in preemption issues. Finally, Jamie Carroll and Lee Wallace talked about spoliation from both the plaintiff's and defendant's perspectives. You will find Lee's spoliation article in this newsletter very useful.

We are in the process of completing for our next newsletter a detailed listing of over 50 previous articles that have been published in Product Liability Section newsletter and in seminars dating back to 1999. We are in the process of working out how we can make these readily available to section members. If you are interested in helping with future articles or helping the Product Liability Section of the State Bar of Georgia, please let me know.

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Corporate Counsel in Product Liability Committee Formed

A Corporate Counsel in Product Liability Committee has been formed by the Section. A total of 52 in-house counsel in Georgia responded to the Committee's initial invitation by indicating that they would like to become members of the Committee. The Committee has begun implementing the following action items:

- Host quarterly lunch meetings.
- Lunch meetings will feature a speaker and will include time for discussion of product liability issues.
- Create an e-mail distribution for all members of the Committee so that members can exchange and request information.
- Circulate recent cases and other news in the product liability area.
- Explore the possibility of a "nuts and bolts"-type seminar for Georgia's trial (and appellate) judges to educate them on basics of product liability law.

The Committee's meetings to date have featured the Honorable Yvette Miller of the Georgia Court of Appeals; Rick Fuentes, a partner in R&D Strategic Solutions (formerly DecisionQuest), who discussed recent trends in jury selection in product liability cases; and Chris Booth, who spoke on recent changes in the law of punitive damages. Attendees of the inaugural lunch meeting received copies of the Product Liability Desk Reference (contributed by Jones Day) and a summary of recent Georgia caselaw on product liability issues (contributed by Meadows, Ichter & Bowers). The Committee is open to all in-house counsel with an interest in products liability. For more information, please contact Stephanie Parker at separker@jonesday.com or at (404) 581-8552.

To Join the Product Liability Section

TO: MEMBERSHIP DEPARTMENT
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Product Liability Seminar - December 13, 2002

The Product Liability Section hosted its semi-annual Product Liability Seminar on December 13, 2002. A number of speakers from across Georgia and the country addressed topics ranging from the Restatement (Third) of Torts to federal preemption of product liability claims, the effect of spoliation of evidence, and trial techniques.

Clockwise from top left: *Leslie Brueckner of Washington, D.C.'s Trial Lawyers for Public Justice gives a tutorial on federal preemption; Professor Thomas Eaton of the University of Georgia discusses the impact of the Product Liability Restatement nationally and in Georgia, while Vice Chairman Al Pearson looks on; Stephanie Parker of Jones Day speaks on trial techniques in product liability cases; Jamie Carroll of King & Spalding provides a defense perspective on spoliation of evidence while Lee Wallace, seated at right, followed with an overview of spoliation.*

codified in part in Rule 26(b) of the Federal Rules of Civil Procedure, provides that a party may obtain discovery of "documents and tangible things" prepared in anticipation of litigation only upon a showing of substantial need and undue hardship. Fed. R. Civ. P. 26(b)(3). In addition, while ordinary, fact-based work product is subject only to those protections enumerated in Rule 26, opinion work product enjoys "a very nearly absolute immunity and can be discovered only in very rare extraordinary circumstances." *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846 (8th Cir. 1988); *see also Shipes v. BIC Corp.*, 154 F.R.D. 301, 305 (M.D. Ga. 1994) ("It is questionable whether any showing justifies disclosure of an attorney's mental impressions."). Opinion work product has been defined as documents or other materials containing "mental impressions, conclusions, or legal theories." *In re Chrysler*, at 846.

Included in the amorphous category of trial preparation materials protected under Rule 26 are "the fruits of the attorney's investigative endeavors and any compendium of relevant evidence prepared by the attorney." *United States v. Pfizer, Inc. (In re Subpoena Addressed to Murphy)*, 560 F.2d 326, 337 (8th Cir. 1977). In that regard, courts have protected litigation support systems created for pending or anticipated litigation under the work product doctrine. *See Scovish v. Upjohn Co.*, No. 526520, 1995 Conn. Super. LEXIS 3288 (Conn. Super. Ct. Nov. 22, 1995) (evaluating work product protection of litigation database, court noted "[o]pinion work product, includes such items as an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case, and the inferences he draws"); *see also* 8 Charles A. Wright *et al.*, "Federal Practice and Procedure" § 2024, at 342-43 (2d ed. 1994) (work product protection afforded to databases created with reasonable anticipation of litigation). Moreover, courts have protected documents and data which serve the dual purpose of litigation support and business purposes. *See, e.g., United States v. Adlman*, 134 F.3d 1194, 1202 (2nd Cir. 1998); *Enke v. Anderson*, 733 S.W.2d 462, 469 (Mo. Ct. App. 1987).

Enhancing Work Product Protection of Litigation Databases

Any party utilizing a litigation support system should be aware of the distinction between opinion and fact-based work product and make every effort to enhance the applicability of opinion work product protection to any litigation database. As opinion work product, the database should withstand nearly all attempts by an opposing party to compel production. Otherwise, a litigation support system created by counsel may be subject to at least partial production. Production of information maintained on a database created in anticipation of litigation nevertheless remains the exception, regardless of the type of work product protection.

A variety of characteristics of work product will serve to enhance protection and thereby diminish the possibility of discovery. In particular, a court will most likely afford greater protection to materials created or collected in anticipation of specific litigation. *See Harper-Wyman Co. v. Conn. Gen. Life Ins. Co.*, No. 86C9595, 1991 WL 62510, at *3 (N.D. Ill. April 17, 1991). Further, references to the specific litigation in the materials contained within the database suggest greater work product protection. *Id.* at *3; *cf. Burton v. R.J. Reynolds Tobacco Co.*, 170 F.R.D. 481, 488 (D. Kan. 1997) ("The documents are not tied to litigation, pending or anticipated. The summaries [of scientific research] make no reference to pending or anticipated legal issues."). Similarly, work product protection is most likely enhanced where an attorney or someone working under the immediate direction of an attorney is involved in creating or evaluating the materials. *See, e.g., Burton*, 170 F.R.D. at 488.

In addition, the greater the amount of subjective information within a litigation support database, the greater the work product protection. *See Scovish*, at *9-10; *In re The Bloomfield Mfg Co.*, 977 S.W.2d 389 (Tex. Ct. App 1998). In *Bloomfield*, the court ruled that a litigation support database was protected under the work product doctrine where it included attorney descriptions and analysis. *Id.* at 392; *see also Shipes v. BIC Corp.*, 154 F.R.D. 301, 309 (M.D. Ga. 1994) (entire database protected where created in anticipation of litigation); *but see Scovish*, at *9-10 (work product protection of database limited to redacting attorney subjective comments).

In *Shipes*, plaintiff sought production of defendant's in-house legal department's litigation database, which it used to manage claims. The court ruled that "[t]he computer data base undoubtedly contains a substantial amount of work product which would be impossible to separate from non-work product. In fact, the entire system arguably constitutes work product as it was created in anticipation of litigation." *Shipes*, 154 F.R.D. at 309.

Indeed, while integrating work product into a database enhances protection, a database that simply contains otherwise unprotected information in electronic form may be subject to discovery, even where such information was gathered in anticipation of litigation. *See Hines v. Widnall*, 183 F.R.D. 596 (N.D. Fla. 1998). In *Hines*, defendant resisted production of a database, which contained computerized images of certain corporate documents, created in anticipation of particular litigation. The court explained, "[t]he original documents were maintained by the defendant in the normal course of its business, but the electronic images were developed solely at the direction of defendant's attorneys and in anticipation of . . . this litigation." *Id.* at 598. As it appeared this database was nothing more than an electronic version of a body of corporate documents, the court ruled that it was subject to production. *Id.* at 600 ("the otherwise discoverable documents that have been imaged are kept in a format that does not contain or reveal any legal theories or mental impressions").

Nevertheless, the collection, compilation, and litigation database integration of otherwise unprotected documents, such as medical articles, is often considered "opinion work product" provided the database shows selectivity. *See, e.g., Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985) (though documents themselves were not protected, the selection and ordering of the documents was protected under the work product doctrine); *In re IBM Peripheral EDP Devices Antitrust Litig.*, No. 163-RM, 1975 U.S. Dist. LEXIS 13912 (N.D. Cal. Feb. 10, 1975). Accordingly, documents contained in the database should be selected by an attorney or under the direction of an attorney, and the documents should constitute a selective subset of the entire universe of documents relevant to the case. *Cf. State v. Phillip Morris Inc.*, 606 N.W.2d 676 (Minn. Ct. App. 2000) (court refused to protect voluminous, million document database under work product doctrine where "the sheer number of documents identified in the indexes at issue provides protection"); *Scovish*, at *9 (production of hundreds of thousands of pages from database would not reveal attorney "mental impressions"). Nevertheless, a party's concern that production of a database will reveal attorney thought processes must be "real, rather than speculative." *Id.*

Finally, installing security and limiting access to any litigation support system prevents unauthorized access that could jeopardize work product protection. Specifically, unauthorized dissemination of otherwise protected material may waive such protection. *See Castano v. Am. Tobacco Co.*, 896 F. Supp. 590 (E.D. La. 1995).

Conclusion

The weight of authority indicates that litigation databases created in anticipation of specific litigation are protected from discovery under the work product doctrine. Those databases that include attorney opinions, strategies, and mental impressions are often entirely immune to discovery, especially where the opinion work product cannot be separated from objective information. Databases that do not contain opinion work product, however, may be subject to at least partial discovery where the opposing party can make the required showing. Nevertheless, as shown above, parties can undertake measures to enhance the work product qualities of such databases to further protect this information.

Answers To Questions About Spoliation *Continued from page 1*

When is a party responsible for spoliation?

Generally, the presumption arises when a party fails to produce evidence that should be in its "custody or control." *American Casualty Company of Reading, Pennsylvania v. Schafer*, 204 Ga. App. 906, 909, 420 S.E.2d 820, 822 (1992). *See also Jones v. Krystal Company*, 231 Ga. App. 102, 107, 498 S.E.2d 565, 569-70 (1998).

Who decides whether spoliation occurred?

In most cases, spoliation is a question of fact, not of law, and the jury decides whether the presumption has been rebutted. *Glynn Plymouth v. Davis Chrysler Motors*, 120 Ga. App. 475, 482, 170 S.E.2d 848, 853 (1969), aff'd, 226 Ga. 221, 173 S.E.2d 691 (1970) (citation omitted). *See also Jones v. Krystal Company*, 231 Ga. App. at 107, 498 S.E.2d at 569; *Lane v. Montgomery Elevator Company*, 225 Ga. App. 523, 525, 484 S.E.2d 249, 251 (1997). Rarely, where the spoliation leaves a plaintiff without an essential element of his case, the court will grant summary judgment or direct a verdict. *See, e.g., Bennett*, 118 Ga. App. at 716-18, 165 S.E.2d at 586-87 (plaintiff who destroyed pertinent records had no way to prove his damages; directed verdict proper).

What are the possible remedies for spoliation?

Georgia trial courts have three remedies for spoliation: "(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." *R.A. Siegel Co. v. Bowen*, 246 Ga. App. 177, 180, 539 S.E.2d 873, 877 (Ga. App. 2000) (citing *Chapman v. Auto Owners Insurance*, 220 Ga. App. 539, 469 S.E.2d 783 (1996)).

How do the courts decide what remedy to apply?

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. *Chapman*, 220 Ga. App. at 542, 469 S.E.2d at 785 (citing *Northern Assurance Co. v. Ware*, 145 F.R.D. 281 (D. Me. 1993)).

Factor 1: Whether the non-spoliator was prejudiced.

Whether spoliation is prejudicial has been 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 or design defect, since by definition the parties should be able to test any product to show the defect. Some Georgia cases have followed that line of reasoning. *See Chicago Hardware and Fixture Co. v. Letterman*, 236 Ga. App. 21, 24, 510 S.E.2d 875, 878 (1999) (where claims were "based on the unfitness of thousands of turnbuckles and not some idiosyncratic defect," summary judgment should not be granted due to plaintiff's loss of the turnbuckle). Similarly, in *Glynn Plymouth*, 120 Ga. App. at 478-79, 170 S.E.2d at 851 (dismissing one claim that did not allege a product-wide defect, and allowing plaintiff to keep a second claim that did). *But see Bridgestone/Firestone North American Tire, LLC v. Campbell*, 574 S.E.2d 923, 926 (Ga. Ct. App. 2002), *cert. denied* (Ga. Feb. 24, 2003) (loss of truck "arguably" less material since all 1992 Pathfinders have the same design, but manufacturer still prejudiced by inability to show alterations to the truck which modified its design).

Factor 2: Whether the prejudice could be cured.

If the prejudice a party suffered 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. *See, e.g., Chapman*, 220 Ga. App. at 544, 469 S.E.2d at 785 (prejudice not cured by photographs; only one party's expert inspected and tested the destroyed evidence, and his opinion was "based almost entirely upon his examination and testing of the destroyed evidence"); *R.A. Siegel Co.*, 246 Ga. App. at 181, 539 S.E.2d at 877 (prejudice not cured by fact that both parties had inspected and photographed evidence before it was destroyed, due to loss of "tangible evidence for the jury's viewing"); *Campbell*, 574 S.E.2d at 926-27 (prejudice not cured by photographs taken by Plaintiff and his father, particularly because they had no expertise in taking such pictures).

Factor 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. Arguably, this factor restates the first one: after all, if evidence is not important to the case, going without it will cause no prejudice. *See, e.g., Reliance Insurance Company v. Bridges*, 168 Ga. App. 874, 884, 311 S.E.2d 193, 205 (1983) (spoliation might be of importance in a related suit, but not this one); *R.A. Siegel Co.*, 246 Ga. App. at 181, 539 S.E.2d at 877 (missing vehicle was of practical importance because Plaintiff wanted vehicle at trial as tangible proof of condition of car after collision).

Factor 4: Whether the spoliator acted in good or bad faith.

While "malice may not always be required before a trial court determines that dismissal is appropriate," *Campbell*, 574 S.E.2d at 927, in practical terms, courts look to this factor more than any other when deciding what sanction to apply. Courts reason that the purpose of the presumption is to "deter" and penalize, and "[a] party should only be penalized for destroying documents if it was wrong to do so." *Johnson v. Riverdale Anesthesia Associates*, 249 Ga. App. 152, 155, 547 S.E.2d 347, 350 (2001) (citations omitted), *aff'd*, 275 Ga. 240, 563 S.E.2d 431 (2002). Where spoliation was done in good faith, courts are reluctant to penalize the offending party or to award a "premium" to the offended party. *See, e.g., Georgia Board of Dentistry v. Pence*, 223 Ga. App. 603, 608, 478 S.E.2d 437, 443 (1996) (refusing to find "spoliation" where subsequent treating dentist had corrected poor dental work done by the suspended dentist); *Chicago Hardware and Fixture Co. v. Letterman*, 236 Ga. App. 21, 25, 510 S.E.2d 875, 878 (1999) (trial court authorized to find plaintiff not at fault when critical evidence was lost in transit between plaintiff's first attorney and his new attorney).

On the other hand, courts hold parties seasoned in litigation to a higher standard than ordinary citizens. Where St. Paul had accidentally destroyed evidence, the Court of Appeals held:

> St. Paul is experienced in litigation and claims handling procedure. Knowing it had an affirmative duty to preserve the evidence, St. Paul should have had procedures in place. . . . St. Paul was palpably remiss in failing to make reasonable arrangements to preserve the evidence, especially after the trial court issued an order to do so.

R.A. Siegel Co., 246 Ga. App. at 181, 539 S.E.2d at 878.

Factor 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. In fact, in its analysis, the *Siegel* court essentially folded factor (5) into factor (1), which addresses prejudice. *See R.A. Siegel Co.*, 246 Ga. App. at 181, 539 S.E.2d at 878.

What is the standard of review once the trial court chooses a remedy?

A trial court has great freedom as it selects among the available remedies. The appellate courts will seldom interfere with the trial court's choice. *R.A. Siegel Co.*, 246 Ga. App. at 179, 539 S.E.2d at 876 (citations omitted) (deferring to trial court decision to grant a severe sanction). *See also Campbell*, 574 S.E.2d at 927-28 (deferring to trial court decision to impose a lighter sanction than it could have); *Johnson v. Riverdale Anesthesia Associates*, 249 Ga. App. at 155, 547 S.E.2d at 350 (deferring to a trial court that chose to levy no sanction at all).

What is the remedy when a non-party destroys evidence?

The remedies provided for by Georgia law – a presumption, dismissal of the case, or exclusion of testimony – only apply in the context of a lawsuit.

Continued, p. 6

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 spoliation, but the Georgia Court of Appeals explicitly rejected this option. *Owens v. American Refuse Systems, Inc*., 244 Ga. App. 780, 781, 536 S.E.2d 782, 784 (2000). The court did leave the door open for other remedies for spoliation. The plaintiff in *Owens* tried other avenues such as breach of contract and promissory estoppel. While the court rejected each attempt, it suggested that the other avenues might work if they were set up properly. *Id.*

How do I protect my client when someone else owns the key evidence?

To protect your client when someone else owns the key evidence, if at all possible, take these steps:

(1) write a letter asking that the evidence be preserved, regardless of whether the evidence is being held by a party or a non-party;

(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; and

(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.