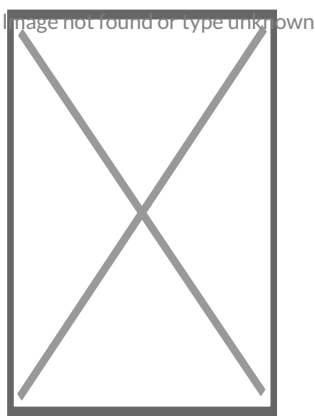


# What Business Owners Need to Know about Spoliation



By Gregory G. Sewell, Bouhan Falligant LLP

Special to ***Business in Savannah***

A case recently ruled on by the Georgia Supreme Court could have implications for business owners across Georgia when it comes to “spoliation,” the destruction of or failure to preserve evidence that is relevant to contemplated or pending litigation. Under Georgia law, the remedy for spoliation involves sanctions, sometimes dire, against the spoliating party that can vary depending upon the circumstances of each case.

In the case of *Phillips v. Harmon* (June 29, 2015), the plaintiffs asked the trial judge to instruct the jury to presume that certain missing evidence was harmful to the defendant's case as a sanction for the defendant's spoliation. The case came about after a child was born blind and paraplegic in October 2006 at Henry Medical Center. The plaintiffs claimed the boy's condition resulted from oxygen deprivation during delivery which, in turn, was caused by the medical negligence of the defendants.

One issue during the trial was the hospital's failure to save the paper fetal monitoring strips. The hospital's standard procedure was to maintain the official medical records in electronic form but destroy the paper strips 30 days after a child's delivery. The plaintiffs wanted those paper records produced by the hospital and admitted into evidence at trial since nurses often make handwritten notes on the strips to augment the electronic record. The plaintiffs asked the trial

court to give a spoliation instruction to the jury, but the trial court declined, finding that the hospital was not reasonably on notice that the plaintiffs were contemplating litigation and, thus, no spoliation had occurred with respect to the monitoring strips. The Court of Appeals agreed with the trial court, but the Supreme Court disagreed.

The Supreme Court determined the Court of Appeals' ruling regarding the fetal monitoring strips appeared to rest on an incorrect premise that a defendant's duty to preserve evidence is only triggered when notice of a potential claim or litigation is provided by the plaintiff. The Phillips Court determined that other factors should have been taken into consideration in evaluating whether the hospital had noticed that the plaintiffs were contemplating litigation based on the actions of the defendant, including the hospital's actions after the birth of the child – which included the launch of an internal investigation, contacting its insurance carrier and notifying legal counsel. The Supreme Court did not rule that spoliation occurred in this case but rather sent the case back to the trial court to re-evaluate the issue.

Defendants have always been expected to preserve evidence once put on notice that a plaintiff was contemplating litigation. Up until the Phillips decision, however, this notice principally came as a result of actions or overtures from the plaintiff that suggested to a reasonable defendant that the plaintiff was contemplating a potential claim or litigation. In this case, the Supreme Court concluded that spoliation should be considered more broadly and specifically disapproved of many prior rulings that considered only the plaintiff's actions in relation to the defendant.

The Phillips v. Harmon ruling potentially expands the responsibility on business owners to think about a lawsuit after an incident occurs before receiving any type of notice from a potential claimant or their representative that litigation is being contemplated. Under Phillips, Georgia courts should now evaluate not only the plaintiff's conduct, but also several other factors, including the type and severity of the injury, the extent to which fault is clear, the potential financial exposure if liability is established, the relationship and course of conduct between the parties, and the frequency with which litigation occurs in similar situations. Part of this consideration now includes the initiation and extent of any internal investigations, the reasons for any notification of insurers and legal counsel, and any expression by the defendant that they anticipated litigation.

Although the Phillips case was related to medical malpractice, the Supreme Court's ruling on evidence spoliation could have a broader effect on other industries. Any business where patrons can potentially be injured – a grocery store where slips and falls happen routinely, for example – should pay close attention to this issue. But what specific steps should business owners take?

As a best practice, every business should re-evaluate – and re-work, when necessary – its data retention policy. If your business does not have a data retention policy, it is important to determine your organization's needs and requirements. Not having an appropriate data retention policy or defined requirements based on the specific needs of your business may open your organization to possible court-imposed sanctions when documentation or other evidence (physical or electronic) is innocently destroyed in the ordinary course of business. For example, a business's standard procedure of auto-deleting video footage after 72 hours may not absolve it from spoliation sanctions if an injury-causing incident is shown on that video and the patron later sues for damages.

With the wide range of sanctions a court can impose, it would be pertinent for businesses to be proactive rather than reactive. Consult with legal, information technology, and human resources professionals to be prepared for potential litigation and the ways in which business data should be retained when potentially actionable incidents occur.

---

*Attorney Gregory G. Sewell is a partner at Bouhan Falligant LLP. His practice focuses on medical malpractice defense, personal injury defense, and business litigation. He can be reached at 912-644-5738 or [ggsewell@bouhan.com](mailto:ggsewell@bouhan.com).*

## Practice Areas

- Business & Corporate Law
- Malpractice & Professional Liability
- Personal Injury

## Attorneys

- Gregory G. Sewell