The Tort Report

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# A New Spoliation Standard? The Georgia Supreme Court Weighs In On When the Duty to Preserve Evidence is Triggered

By: Ashley D. Alfonso

In Georgia, the term "spoliation" refers to the destruction, significant alteration or failure to preserve evidence that may be relevant or necessary to contemplated or pending litigation. Under O.C.G.A. § 24-14-22, where spoliation is found, a rebuttable presumption arises that the charge or claim against the spoliating party is "well-founded." However, an injured party may only pursue a remedy for spoliation if there was a duty to preserve the evidence at issue. If a duty existed to preserve relevant evidence and the possessing party failed to do so, there may be serious legal consequences for failing to take such affirmative action even if the evidence did not seem significant or determinative at the time of the destruction. A recent decision by the Georgia Supreme Court has arguably broadened when a party may be on notice of contemplated or pending litigation, and therefore, when the duty to preserve evidence is triggered.

In *Phillips v. Harmon*, 774 S.E.2d 776 (June 29, 2015), a medical malpractice action was brought against Henry Medical Center and treating physicians and nurses for allegedly causing an infant to suffer oxygen deprivation before birth, resulting in permanent neurological injuries. At trial, Plaintiffs alleged Defendants failed to preserve paper monitoring strips of fetal heart rate with notations from the treating nurses. These paper monitoring strips were routinely destroyed after 30 days. Plaintiffs argued that Henry Medical Center was "aware of the potential litigation" at the time the strips were destroyed because the Center had initiated its own internal investigation regarding the care and treatment of the infant. Accordingly, Plaintiffs requested a jury charge on spoliation, instructing the jury that Plaintiffs were entitled to the rebuttable presumption pursuant to O.C.G.A. § 24-14-22. The trial court declined to give the charge on the basis that Defendants did not have "knowledge or notice of potential litigation." The jury returned a verdict for Defendants.

The Court of Appeals held there was no abuse of discretion as the hospital did not have notice of "pending or contemplated" litigation. In its opinion, the court cited the Georgia Supreme Court's decisions in *Baxley v. Hakiel Industries* and *Silman v. Assoc. Bellemeade* to stand for the proposition that the phrase "potential for litigation" referred to *actually* contemplated or pending litigation.

In reversing the lower court's decision in this case, the Georgia Supreme Court held the duty to preserve evidence must be viewed from the perspective of the party controlling the evidence and is triggered when litigation is *reasonably foreseeable to that party*. Contrary to the rationale of the Court of Appeals, the Supreme Court noted the duty to preserve evidence does not require *actual* notice of a claim or litigation from the plaintiff. Rather, notice of contemplated or pending litigation can be actual or constructive. The court provided a number of examples as to what information may put a party on constructive notice: (1) type and extent of the injury; (2) extent to which fault for the injury is clear; (3) potential financial exposure if held liable; (4) relationship or course of conduct between the parties, including past litigation or threatened litigation; and (5) frequency of litigation occurring in similar circumstances.

In the wake of this decision, it is clear that a letter of representation from counsel for an injured party is not required to trigger the duty to preserve evidence. Business and property owners are now left in the quandary of whether it is "reasonably foreseeable" that litigation will ensue after an occurrence and if so, what items should be preserved to avoid any future penalties for spoliation. While the factors provided in *Phillips* provide some guidance, the vast discretion provided to trial courts in spoliation matters may result in a wide range of factual circumstances being deemed sufficient to constitute "constructive notice" of pending litigation to the spoliating party.

In the presence of any uncertainty regarding the issue of evidence preservation, counsel should be consulted to discuss the facts surrounding an occurrence and whether constructive notice may be presumed to determine what preservation efforts should be taken. ■

## Banning the Box: The Impact on an Employer's Use of Criminal Records Information

By: Crystal Stevens McElrath and Dania L. Haider

In Georgia, an employer may be liable for negligent hiring/retention if the employer fails to exercise ordinary care in hiring or retaining an employee the employer knew or should have known was not suitable for the particular employment. This cause of action turns on a question as to whether the employer knew or should have known the employee posed a risk of harm to others where it is reasonably foreseeable from the employee's tendencies or propensities that the employee could cause the type of harm sustained by the plaintiff.

Where an employee has a criminal record, this cause of action can be particularly troubling for an employer who did not run a criminal background check. In a 2004 decision, the Supreme Court of Georgia expressly stated that employers will not be excused from negligent hiring/retention liability simply because criminal background checks are not mandatory in Georgia. "[W]hile there may be no statutory requirement that employers in other businesses conduct background or criminal checks on potential employees, we reject the position that employers who fail to conduct such searches can never be found liable for negligent hiring because of this failure." *Munroe v. Universal Health Services*, Inc., Ga. 861 (2004).

Ten years later, enter "Ban the Box." The "Ban the Box" advocacy campaign has lobbied to eliminate the check box commonly found on job applications inquiring about an applicant's criminal record. Advocates of "Ban the Box" argue the stigma associated with criminal records too often precludes an employer from seriously considering potential employees with a criminal history. In February 2015, Governor Nathan Deal signed an executive order banning the state from requiring job seekers to disclose their criminal histories in the initial application stage when applying for non-sensitive, governmental state positions. Seen as a policy that will improve public safety, enhance workforce development and provide increased state employment opportunities for applicants with criminal convictions on their records, the initiative may not only affect employers' hiring policies but also their defenses in negligent hiring claims and EEOC actions.

While "Ban the Box" policies typically do not prevent employers from asking about an applicant's criminal record altogether, and therefore would not insulate employers who do not run criminal background checks from liability, this initiative suggests that inquiries should be more limited (i.e. to convictions for crimes of a particular nature and gravity), should have a temporal limitation (i.e. seven years) and are delayed until much later in the hiring process (i.e. after the first interview or after extending a conditional offer of employment). This initiative also may suggest a shift in public policy regarding an employer's hiring of an individual with a criminal record and may lend some support to the defense of hiring policies and procedures which do not involve the performance of a criminal background check.

Georgia currently limits its policy to state jobs, but at least 6 out of nearly 20 states with "Ban the Box" policies apply them to private employment as well. Georgia may ultimately follow suit. As the "Ban the Box" movement continues to gain momentum, private employers in Georgia and across the country should start to take note of these policies and keep up with developing law to make any necessary adjustments to their background check procedures. "Ban the Box" policies are not identical and the nuanced differences make it difficult for employers operating across multiple states and municipalities. ■

## Emotional Distress and the Impact Rule Revisited

By: Steven R. Wilson

The impact rule, as it has been known in Georgia for over 100 years, allows a plaintiff to recover for emotional distress in a negligence case only when the emotional distress is caused by an injury resulting from physical impact. Despite a fear in many circles that the Georgia Court of Appeals had eviscerated the impact rule through its decision in the case *Oliver v. McDade*, 328 Ga. App. 368, 726 S.E.2d 96 (2014) (*Oliver I*), based on the Georgia Supreme Court's decision in the same case, it appears the impact rule lives to fight another day. *Oliver v. McDade*, 297 Ga. 66, 772 S.E.2d 701 (2015) (*Oliver II*).

## It's Not So Minor: Details That You Need to Know Regarding Settlement of a Minor's Personal Injury Claim

By: Jennifer L. Nichols

When resolving a claim for the personal injury of a minor, there are several things to be considered to determine whether the adult claimant may settle the minor's claim and whether court approval is necessary.

Under Georgia law, typically a natural guardian may demand and compromise a personal injury claim on behalf of a minor. A conservator must do so, however, if a conservator was previously appointed or if the "gross settlement" amount requires that conservatorship of the minor be established. Each parent of a minor is considered a minor's natural guardian. Divorced parents that share joint legal custody of a minor are each considered natural guardians. However, if one parent has sole legal custody of the minor, that parent is the sole natural guardian. The mother of a child born out of wedlock is considered the sole natural guardian of the minor, unless the father has legitimated the minor. If the minor is being raised by a relative and has no natural guardian, the appointment of a conservator will be necessary. Therefore, confirming that the party seeking to settle a claim on behalf of a minor possesses the legal right to settle is an important initial step.

O.C.G.A. §29-3-3(a) defines "gross settlement" of a minor's claim as "the present value of all amounts paid or to be paid in settlement of the claim, including cash, medical expenses, expenses of litigation, attorney's fees, and any amounts paid to purchase an annuity or other similar financial arrangement." Under O.C.G.A. §29-3-3(c), the natural guardian of a minor may compromise a minor's claim without becoming the conservator of the minor and without court approval, as long as the proposed gross settlement is $15,000 or less. This is true regardless of whether the settlement is reached pre-suit or while the case is in litigation.

The determination of whether a conservator will need to be appointed for the minor is dependent upon a number of factors. As discussed in O.C.G.A. §29-3-3(f), when the proposed gross settlement of a minor's claim exceeds $15,000, but the actual net settlement amount falls under the $15,000 threshold when reduced by payment of attorney's fees, expenses of litigation, medical expenses, and the present value of amounts to be received by the minor after reaching the age of majority, the minor's natural guardian may seek approval of the proposed settlement from the appropriate court without becoming the conservator of the minor or having a conservator appointed. If the net settlement amount still exceeds $15,000 after deduction of these items, the natural guardian may not seek approval of the proposed settlement without becoming the conservator of the minor or having one appointed. Whether a natural guardian is an appropriate person to be appointed as the minor's conservator is in the discretion of the court.

When the proposed gross settlement of a minor's claim is more than $15,000, court approval of the settlement is always required. If the case is not in litigation, court approval can be obtained by filing a *Petition to Compromise Doubtful Claim of Minor* in the Probate Court of the county where the minor resides. If legal action has been initiated, gross settlements exceeding $15,000 must be submitted for approval to the court in which the action is pending. This is typically accomplished by the filing of a consent motion.

Under Georgia law, the minor and the minor's parents have separate and independent claims when a minor is injured. The claim of the parents includes all medical and other necessary expenses relating to the minor's injuries that are incurred prior to the minor's eighteenth birthday. The parents must pursue these claims within two years from the date of the incident. The minor's individual claim includes physical and mental pain and suffering and anticipated future medical expenses after he or she turns eighteen. The two-year statute of limitations is tolled for a minor until the age of majority, so these additional claims can be brought any time up until the minor's twentieth birthday. Typically, the natural guardian will resolve all aspects of the claim for personal injury to the minor within the two-year statute of limitations, including the minor's pain and suffering. ■

In *Oliver*, the plaintiff was a passenger in his truck that was being driven by a friend. The friend stopped the vehicle on the shoulder of the road to secure a load that was being towed. The plaintiff suffered physical injury after his truck was struck by a tractor-trailer that had swerved onto the shoulder of the road. In addition to his physical injuries, the plaintiff witnessed his friend being struck and killed by the tractor-trailer and came into contact with some of the blood and tissue from his friend The plaintiff sued the operator of the tractor-trailer, the operator's employer, and the employer's insurance company. The trial court denied the defendants' motion for summary judgment as to the plaintiff's claims of emotional distress on the basis of the pecuniary loss rule. The pecuniary loss rule allows recovery for emotional distress even in the absence of a physical impact if the plaintiff suffered both pecuniary loss and injury to his/her person and represents a softening of the impact rule.

In *Oliver I,* the Georgia Court of Appeals determined the impact rule did not preclude the plaintiff's recovery because the plaintiff suffered both a physical impact and physical injuries and, even if some of the plaintiff's emotional distress damages were unrelated to his physical injuries, he could recover for that emotional distress under the pecuniary loss rule. The *Oliver I* Court's reasoning was that the plaintiff could seek emotional damages under the pecuniary loss rule due to the presence of a non-physical injury (depression) and the presence of a pecuniary loss (medical bills from counseling). Many found this reasoning to be circular and troubling because the plaintiff was allowed to use the medical expenses incurred in treating the non-physical injury to serve as the pecuniary loss. Even more troubling was how this reconceptualization of the pecuniary loss rule appeared to render the impact rule useless as a limit on the recovery of emotional damages in negligence cases.

The Georgia Supreme Court has apparently rejected the Court of Appeals' troubling rationale in *Oliver II*. The court did not directly rule on the pecuniary loss portion of the opinion because it found there was a question of fact as to the allocation of the plaintiff's emotional distress damages between those related to his physical injury and those related to his friend's death. The plaintiff testified that his emotional distress was caused, in part, by his accident-related injuries and unemployment. The *Oliver II* Court recognized that the plaintiff was not "attempting to separately recover for the emotional distress of witnessing his friend's suffering and death, and, in fact, he [did] not dispute that he [could not] recover solely for these injuries" under the impact rule. Because a question of fact remained as to whether Plaintiff's emotional distress was attributable to his friend's death or his own physical injuries, the Supreme Court vacated the *Oliver I* Court's decision. The *Oliver II* Court held that the Court of Appeals "assume[d] facts not fully developed and opine[d] as to how the law would apply to assumed facts" and that these issues were not ripe for consideration. Therefore, for now at least, the impact rule has been returned to its longstanding meaning as it existed prior to the *Oliver I* decision. ■

# Events

**Swift Currie Golden Anniversary Firm-Wide Seminar and Cocktail Party**
October 8, 2015
Cobb Galleria Centre
Seminar: 8:30 am - 5:00 pm
*(Seminar will include breakout rooms for workers' compensation, liability, and property and coverage during the day as well as general sessions at the beginning and end of the day.)*
Cocktail Party: 5:00 - 7:00 pm

*Many Swift Currie programs offer CE hours for insurance adjusters. To confirm the number of hours offered, for more information on these programs, or to RSVP, visit www.swiftcurrie.com/events.*

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