Georgia Defense Lawyers Association

Advancing the Civil Defense Bar©

2020 GDLA Law Journal

Photo courtesy of Georgia's Judicial Council/ Administrative Office of the Courts

Georgia Defense Lawyers Association
Advancing the Civil Defense Bar©

2020 Law Journal

TABLE OF CONTENTS

PRESIDENT'S MESSAGE

David N. Nelson is a partner with Chambless, Higdon, Richardson, Katz & Griggs, LLP and has been defending lawsuits throughout Georgia for 25 years. He has worked tirelessly to advance the Georgia Defense Lawyers Association during his term as President.

As anyone who has served on a law school editorial board can attest, a publication like the Georgia Defense Lawyers Association's *Law Journal* is not an effortless undertaking. Rather, it takes considerable time and energy on the part of many.

At the head of that extraordinary group effort is the Editor-in-Chief, who must identify the timeliest topics that will have the broadest appeal to our readership – GDLA members and judges at all levels of the bench. The Editor-in-Chief must recruit authors, ensure articles are submitted by the deadlines, review and edit, and otherwise ensure the entire publication is worthy of the name it bears. This year's Editor-in-Chief has had to deal with the unique challenges presented by the COVID-19 pandemic so many thanks to both her and the authors for taking the time to participate in this endeavor.

This year, GDLA Vice President Pamela Lee in Atlanta, has done a terrific job as Editor-in-Chief, and I know you join me in thanking her for her considerable efforts.

Without the authors, though, there would be nothing for Pamela to edit. This year, many talented attorneys have taken time away from their busy practices to prepare seven insightful and practical articles to benefit us all. We all owe them a debt of gratitude for their hard work in making the *Law Journal* a great reflection of the civil defense bar in Georgia.

And perhaps most importantly, our organization has one great executive director who pulls it all together and makes it all happen. Every day of every year, for every president and every board, Jennifer Davis Ward shows us why she is simply the best at what she does – period! We are so incredibly fortunate to have her as a member of the team.

I want to thank you for the privilege of serving as your President. With the support of the Board, and so many of you, it has truly been an honor.

I hope you enjoy this year's *Law Journal*.

For the defense

David N. Nelson
GDLA President
Chambless, Higdon, Richardson, Katz & Griggs

EDITOR'S ACKNOWLEDGEMENT

Pamela Newsom Lee is a partner with Swift, Currie, McGhee, & Hiers, LLP in Atlanta, Georgia. She has been a trial lawyer for 14 years and currently serves as a Vice President for the Georgia Defense Lawyers Association.

I am pleased to present the 2020 GDLA *Law Journal*. There are some very interesting and practical articles herein and, no matter your specific practice area, I encourage you to read the entirety of the *Journal* for your own interest and education, but also as a way to thank the authors for the time, effort and energy expended in bringing you this journal. This Journal has been a long time in the making and I thank all of authors for volunteering to contribute.

The last drafts of many of these articles were crafted in a very uncertain time as many of our authors worked from home, away from their offices and staff, due to the COVID-19 crisis. For that, we are especially thankful for their hard work.

I am extremely appreciative of the many hours of dedication by the authors of this publication. I also could not have done this without the tireless effort, dedication, and formatting skills of my assistant, Denise Muscatell. She keeps all my trains running on time and this publication was no different.

Please thank the authors for their important contribution when you see them, or drop them a note or email. I personally hope to see all of you soon.

For the Defense,

Pamela Newsom Lee
Vice President, GDLA
Swift, Currie, McGhee & Hiers, LLP

Post-Judgment Considerations
by
Nelofar Agharahimi

Nelofar Agharahimi is an associate attorney at Swift Currie Mcghee & Hiers LLP in Atlanta. A former Assistant State Attorney, Nelofar's practice involves primarily the defense of tort suits on behalf of insureds, self-insureds, and insurers.

INTRODUCTION

Non-attorney friends and family of lawyers have the impression that their loved ones know "everything" there is to know about the law, right? However, we know that there is always something to learn, particularly when it comes to the nuances of civil procedure that may not apply to every case.

As you go through the everyday motions of developing your litigation strategy, drafting pleadings, taking depositions, and defending a client at trial, it is easy to overlook post-judgment procedures because of how rare the issues in this article are to your litigation practice.

However, it is important to look out for them, as they can truly change the outcome of your case. Even the most seasoned attorney may not know these procedures because of how uncommon these circumstances can be.

In this article, I will share with you situations to look out for and the procedural rules to be aware of that could help save your case, and bring your client resolution, without a lengthy delay.

1. Did the Opposing Party Waive His Right to a Transcript?

In civil cases, a court reporter and official transcript are not generally required, and Georgia courts do not provide court reporting services for civil cases. If the parties desire a transcript, or the possibility of a transcript in the future, they must pay the court reporter to take down the proceeding. Only those who participate in the takedown will have a right to the court reporters' notes. That is because the court reporter's notes belong to the party that hired them, and a court reporter cannot just share them with anyone. In cases where a party lacks the necessary resources to participate in those costs, or chooses not to participate for another reason, the other side often gains a

significant advantage. They can control access to the transcript! If the hearing goes in their favor, that party can keep the losing party from challenging the ruling on appeal. If the hearing goes against them, they have access to the transcript and can appeal the ruling.

A transcript is often an essential element to a successful appeal. Often, an appeal is impossible without a transcript. This is because Georgia Courts have long held that without access to the necessary trial transcript, an appellate court must conclude that the trial court did not err.[1] In other words, because they don't have a transcript to review, the appellate court will have to assume as a matter of law that the evidence presented in the proceeding supported the court's findings. [2]

If there is any possibility of an appeal being necessary for the party, a party should share in or pay for, the take down. The ***moment*** a party voices its position on take down, and ***to whom*** the election is made to is typically overlooked, but very important.

At the beginning of trial, the court reporter will ask which party, if any, wants the proceeding taken down. Because transcripts are often necessary to obtain full appellate review, there is usually a general interest by both parties in having the proceedings taken down. However, Georgia places this burden on the parties. While typically both parties will agree to share in the takedown, there are occasions where a party will not, and in those cases, the decision not to participate in take down has cost them on appeal.

This is particularly important in circumstances where a party is silent during preliminary matters and his silence is interpreted as a refusal to participate in the takedown. While many us have argued that if a Plaintiff wanted to participate in the takedown and wanted to have access to the transcript, they "would have said something," the Georgia Courts have found that the silence of a party is not sufficient to prevent them access to the transcript.[3] To ensure that the party foregoing its right to the transcript is not doing so by inadvertence or mistake, Courts have held that silence will not be considered a refusal, and as such, not a proper mechanism to prevent access to a transcript.[4] Additionally, a Consolidated Pre-Trial Order where only one party memorializes their intent to pay for the takedown, with no mention of the other party, will also not be considered a refusal in participating in the takedown.[5] A bright-line procedural rule, known as the *Harrington* Rule, established the requirements that need to be met before a party is denied access to a transcript.[6]

In the *Harrington* case in 1968, one party contracted with a court reporter to take notes on a trial, with him alone responsible for the reporter's fee. The opposing party expressly refused to participate in the agreement with the court reporter, and the trial court made no order respecting the reporting of the case under the statutory predecessors to OCGA §§ 5-6-41 (c) and 15-14-1.[7] Under these circumstances, the Supreme Court held, the opposing party could not later compel the reporter to transcribe his stenographic notes even though the party offered (after the proceeding) to pay the entire cost of reporting the case and the cost of transcribing the same.[8]

In 1978, the Supreme Court further clarified that in this context, an "'express' refusal to participate in the costs" of a court reporter is a refusal that is "'manifested by direct and appropriate language, as distinguished from that which is inferred from conduct.'"[9] Thus, "mere failure to respond to inquiries of the court reporter" was not found to amount to an 'express' refusal.[10]

In order to invoke the *Harrington* rule, a party must make the express refusal known to the judge ***before*** trial, in order for him to exercise his supervisory role over the proceedings and the reporter. Thus, to rely upon the *Harrington* rule, and challenge a party's request for access to the transcript, the opposing party must invoke a "ruling of the trial judge at the commencement of the proceedings, that his opponent has expressly refused to participate in the costs of reporting."[11] It is not enough for the court reporter to confirm with the parties if they want to participate in the take down. It must be ruled upon by the Court.

In sum, be sure to pay close attention to your opposing counsel when conducting housekeeping matters before trial. Always be aware of the following:

- Whether Plaintiff, by pleading, has expressly memorialized his refusal to participate in the takedown;
- Whether, at the beginning of trial, the Court inquired, and obtained a response, as to whether Plaintiff was electing to share in the cost of the takedown. Some Judges may rely on the court reporter's inquiry moments earlier, and that is not sufficient under Harrington.

If an opposing party initially refuses to participate in the takedown at the beginning of trial, and changes their mind after an unfavorable ruling, offering to share in the cost of the takedown, be sure to voice your objection to the party's access to the transcript ***before*** the court reporter transcribes the proceedings. This is

particularly important in preserving control of the transcript because once notes of a proceeding have been transcribed, the court reporter must certify the transcript and file the original and one copy with the clerk of the trial court.[12] Upon filing, the transcript becomes a public record that is equally available to all parties.[13] Thus, if you are not careful, a plaintiff who initially waived his right to the transcript will get a second bite at the apple, and may succeed on appeal because they were able to produce a copy of the transcript that they otherwise would not have had.

While at the table, gearing up for trial, it is easy to focus on your case and not pay attention to the other side, particularly in whether or not the plaintiff elected to share in the takedown. An attorney may not even think twice about an opposing party who initially declined to share costs of the takedown, and changes his mind after a proceeding. After all, it saves the client money, right? Not intervening and instead, allowing the Plaintiff to change his mind, will increase his chance of success on appeal by provide him with an opportunity to obtain the transcript that he may not otherwise have been able to get.

You never know when an appeal will be sought and following the simple procedural rule established by *Harrington* can give your client a significant advantage and protect them from a lengthy appeal following a favorable result.

2. Discretionary Appeals v. Direct Appeals

Appeals can be either discretionary or of right. An appeal of right is one that the higher court must hear, if the losing party demands it, while a discretionary appeal is one that the higher court may, but does not have to, consider.

In Georgia, cases involving a judgment of $10,000 or less will only be heard on appeal if the party dissatisfied with the judgment first submits an application to the Court of Appeals.[14] The legislature intended to remove the right of direct appeal when a claimant prevails but a fact finder has determined that the damage suffered is not substantial.[15] That is not to say that there is no right to appeal, but merely requires that the party seeking to appeal apply to show error and why the appeal should be granted and heard.[16]

If no such application is made within 30 days of the judgment, the Court of Appeals is without jurisdiction to entertain the appeal, and the appeal will be dismissed.[17] However, do not confuse this rule in cases where the judgment is zero because of a loss on liability.[18] Those appeals remain directly appealable.

Therefore, when evaluating a case where Plaintiff files a notice of intent to appeal, first look to the amount of the judgment and whether or not an application to the Court of Appeals was timely filed. A procedural error or miscalculation by an opposing party may save you and your client from a lengthy appeal.

3. Hurdles to Opening Default

Once a case is in default, the judge may, upon the plaintiff's request, hear and decide the case without hearing the defendant's side. This is called a default judgment.

A defendant does not have unlimited time to file a motion to vacate the default judgment. A motion to vacate must be filed within the same term of court as when the judgment was entered to ensure that the Court has jurisdiction to set aside the default judgment.[19] Once a defendant becomes aware of the judgment against him, he must file a motion to vacate it within a reasonable time. However, there are different procedural rules to be aware of if the post-judgment proceeding is filed more than 30 days after judgment.

Any post-judgment proceeding filed more than 30 days after judgment in an action shall be considered as a new case for the purposes of calculating filing costs.[20] This is important because while State court clerks are entitled to treat post-judgment filings as a "new case" for the calculating filing costs, practitioners who are unfamiliar with default judgments and post-judgment procedures will run into roadblocks when attempting to file their motions to vacate the default judgment under the existing case number. The clerk's office requires parties to submit the post-judgment motion as a new case entirely, resulting in a new civil action number where the post-judgment filing is "linked" to the existing case number.

However, this requirement is outside the authority of the clerk of court. State court clerks have the legal duty to file pleadings, not to ascertain their legal effect.[21]

In *Gibson*, the Clerk for the State Court of Gwinnett County refused to file a post-judgment motion to compel discovery under a particular case number requested by the filing party, Thomas Gibson. The requested case number had been previously assigned to a case to which the motion to compel was directly related, and Gibson filed for a writ of mandamus in an effort to force the clerk to file the motion to compel under the requested case number. The Supreme Court of Georgia upheld the trial court's decision to grant the mandamus petition, because the Clerk of the court had a clear duty to file the motion under the requested case number without making an independent

determination about whether a new case number should be assigned. The Court further recognized that O.C.G.A. 15-6-77(e)(1) does not deal with the assignment of case numbers, but the calculation of costs for post-judgment motions filed more than 30 days after a judgment is entered.[22] While post judgment motions filed more than 30 days after judgment shall be considered a new case, the Court further held that the Clerk of court may only rely upon O.C.G.A. 15-6-77(e)(1) and may treat Defendant's post-judgment motion as a new case only ***for purposes of calculating the costs the court clerk is entitled to charge and collect***.[23]

While the clerk's requirement to file under a new civil action number should not be a problem, the procedural steps required by the clerk's office can be detrimental to a motion to vacate if a practitioner is not already aware of these procedural rules.

With most Georgia courts requiring electronic filing, a practitioner may get stuck with a rejected filing if attempting to file under the existing case number as most e-file websites do not differentiate between post-judgment filings filed before or after the 30 days. As such, the filing costs for post-judgment motions filed after 30 days are not correctly calculated to take into account the "new case" charges and results in a rejected filing "for failing to pay the correct filing costs." By not following the procedure of filing the post-judgment motion as a new civil action, as required by many clerks of court, the rejection of a client's motion to vacate can be fatal if the filing is at or near the end of the term of court. By the time the filing attorney receives the clerk's rejection notice, it may be too late to remedy the incorrect filing, and the Court will be without jurisdiction to hear the motion.

As time is of the essence when handling matters already in default, it is important to be aware of this 30-day time frame to avoid confusion with your client's motions to vacate default. The last thing you want is your motion to vacate rejected, leaving you in a tailspin trying to understand why.

CONCLUSION

While these procedures are not new, the circumstances where these rules apply do not happen in every case. They are not difficult to overlook and can often be forgotten. However, failing to recognize these post-judgment procedural rules can expose your clients to unnecessary legal fees and costs.

By properly invoking the *Harrington* Rule, a party can hold the other side to his refusal in participating in the taking down of a proceeding, which will prevent him from access to a transcript that could have resulted

in a successful appeal. Paying close attention to the procedural requirements for the opposing party to pursue an appeal will also allow you to find technical error that can result in dismissal of an appeal before significant costs are incurred. Being aware that post-judgment motions filed after 30 days of the judgment require an additional cost, and therefore, may require a new civil action, will prevent your client's motion to vacate from unnecessarily being rejected.

While the application of these procedures are not common, being aware of them will protect your clients from unnecessary litigation and by bringing their cases to a close without much delay.

[1] *Malin Trucking v. Progressive Casualty Ins. Co.,* 212 Ga. App. 273 (1994)
[2] *Johnson v. State*, 261 Ga. 678, 679 (2) (409 S.E.2d 500).
[3] *Kent v. Kent*, 289 Ga. 821 (2011).
[4] *Id*. at 824.
[5] *See Moore v. Ctr. Court Sports & Fitness, LLC*, 289 Ga. App. 596 (2008).
[6] *See Harrington v. Harrington*, 224 Ga. 305 (1986).
[7] *Id*.
[8] *Id*.
[9] *See Giddings v. Starks*, 240 Ga. 496, 496 (241 SE2d 208) (1978) (emphasis added) (quoting Black's Law Dictionary (4th ed. 1968)).
[10] *Id*.
[11] *Giddings* at 496-497.
[12] *See* OCGA §§ 15-14-5, 5-6-41(e).
[13] See OCGA § 5-6-41(e); *Ga. American Ins. Co. v. Varnum,* 182 Ga.App. 907, 907, 357 S.E.2d 609 (1987).
[14] O.C.G.A.§ 5-6-35(a)(6)
[15] *Brown v. Assocs. Fin. Servs. Corp.*, 255 Ga. 457, 457 (1986).
[16] *Id.* at 457-458.
[17] *Hogan v. Taylor County Bd. of Ed.,* 157 Ga. App. 680, 680 (1981) (finding that appellant's failure to obtain an order from the Court of Appeals permitting the filing of its appeal from the lower court's review of an administrative agency's decision must result in the appeal's dismissal); *St. Simons Island Save the Beach Association, Inc. v. Glynn County Board of Commissioners*, 205 Ga. App. 428, 429 (1992) (holding that because no application for appeal was made in a case that required an application, the Court of Appeals is without jurisdiction and the appeal must be dismissed); *Ledford v. Mobley*, 321 Ga. App. 761, 762 (2013) (holding that where the party seeking appeal fails to follow the discretionary appeal procedures, the Court of Appeals lacks jurisdiction, and the appeal must be dismissed).
[18] *Brown v. Assocs. Fin. Servs. Corp.,* 255 Ga. 457, 457 (1986).
[19] See O.C.G.A. §§ 15-6-3(20) and 15-6-19.
[20] See O.C.G.A. 15-6-77(e)(1).
[21] *Alexander v. Gibson*, 300 Ga. 394 (2016).
[22] *Id*.
[23] *Id*. (citing *McFarland & Associates, P.C. v. Hewatt*, 242 Ga. App. 454 (2000)).

Spoiling the Defense:
Duties to Preserve Evidence and the Aftermath of Non-Compliance

By

Martin A. Levinson and Elliott C. Ream

Martin A. Levinson is a Partner at Hawkins Parnell & Young, LLP in Atlanta. His practice is focused primarily on significant matters in the areas of premises liability, product liability, and trucking/ transportation as well as appellate matters.

Elliott C. Ream is an Associate at Hawkins Parnell & Young, LLP in Atlanta. His practice is focused primarily on premises liability, including third-party criminal attacks, and trucking/transportation.

Increasingly, enterprising attorneys have begun using spoliation of evidence as a sword to improve their chances of winning lawsuits. Quite often, the spoliation claim is leveled by the plaintiff, and the defendant finds himself trying to fend off potentially severe sanctions. Regardless of who makes the claim, the potential significance of a spoliation claim cannot be overstated. The potential penalties for spoliation of evidence range from prohibiting a party from relying on the spoliated item to precluding a party from arguing for or against a particular issue of fact or even striking a party's claims or defenses entirely. Advising clients on how to avoid potential spoliation of evidence sanctions is a key item in the modern litigator's toolbox.

Recent developments in Georgia case law suggest that the duty to preserve evidence may arise long before receiving "actual" notice of a claim. Additionally, a party's experience and sophistication in matters of litigation may be an important factor in determining when a party's duty to preserve evidence is triggered. This article explores when the duty of preservation first arises, the

potential sanctions for failing to preserve relevant evidence, and other recent developments in Georgia law relating to spoliation claims.

1. Defining spoliation.

"Spoliation" is a bad word. Whereas simply "losing" something suggests carelessness or inadvertence, the word "spoliation" traditionally has meant "intentional destruction, mutilation, alteration, or concealment of evidence."[1] Indeed, in the federal courts, the loss or destruction of potential evidence is only punishable as "spoliation" when a party has acted in bad faith or with the intent to deprive another party of using the information in litigation.[2]

Georgia's appellate courts, however, have been willing to approve severe sanctions for the loss of evidence even absent a showing of ill intent by the spoliator. The Supreme Court of Georgia has defined spoliation of evidence as the "destruction or failure to preserve evidence that is relevant to contemplated or pending litigation."[3] Thus, as outlined in greater detail below, the Supreme Court of Georgia has held that even seemingly innocent conduct can result in severe sanctions; a party's good faith, while a factor in which sanctions should be imposed, is not dispositive. Instead, as discussed below, whether a party acted in good or bad faith is compressed into the analysis of whether and how severely to sanction the spoliating party.[4] Apparently, in Georgia courts, the only relevant questions in determining whether spoliation has occurred are: (i) whether evidence has been lost or destroyed; (ii) whether the evidence is relevant to some claim, issue, or defense in the case; and (iii) whether a party was under a duty to preserve the evidence, *i.e.*, whether litigation was contemplated or pending, at the time the evidence was lost or destroyed.

The first question is most likely a given when a spoliation argument is raised. The second question, regarding the relevance of the lost or destroyed item, is highly case-

specific. With regard to the final question, there most likely would not be much of an issue at all if a party were to destroy relevant evidence during pending litigation. Thus, most cases involving questions of whether a party has spoliated evidence center around whether litigation was contemplated or anticipated when the evidence was lost or destroyed.

2. When does the duty to preserve evidence arise?

Before a party may be subject to sanctions, the spoliating party must first have been under a duty to preserve the evidence at issue.[5] But exactly when does that duty arise? Obviously, a claimant's threat to file a lawsuit serves as sufficient notice of a potential claim to impose a duty on a would-be defendant to preserve potential evidence.[6] The Supreme Court of Georgia has recently held, however, that the duty to preserve evidence may arise even where a party does not have actual notice of pending or threatened litigation. Rather, the "duty to preserve relevant evidence in [a party's] control arises when that party actually anticipates or reasonably should anticipate litigation."[7]

In 2015, the Supreme Court of Georgia endeavored to clarify the legal standard for spoliation in Georgia, and in doing so, drastically expanded the potential for spoliation sanctions against defendants. In *Phillips v. Harmon*, 297 Ga. 386 (2015), the plaintiffs brought a medical malpractice lawsuit against numerous medical professionals and facilities following the death of a young child. Specifically, the plaintiffs alleged that the defendants were negligent in monitoring and responding to changes in the child's heart rate, causing him to suffer oxygen deprivation shortly before birth. A central issue in the case was the defendants' alleged failure to preserve printed paper fetal heart rate monitoring strips.

The monitoring strips at issue evidenced electronic monitoring of the child's heart rate during birth. Though the facility's medical records were saved electronically, nurses would often make notes or notations on the paper monitoring strips during labor and delivery. The fetal monitoring strips were not generally considered part of the official medical record, but nurses would refer to notes made on the monitoring strips when completing the official record. The paper monitoring strips were routinely destroyed 30 days post-delivery, and that was what the defendants said had happened with the strips at issue in this case.

At trial, the plaintiffs requested a jury charge on spoliation of evidence. The trial court declined to give the requested jury charge, finding that there was no spoliation because the defendants had "no knowledge or notice of potential litigation" when the monitoring strips were destroyed.[8] The trial court did permit the parties to present evidence on the fetal monitoring paper strips, including the destruction of the strips.[9] The jury found for the defendants, and the plaintiffs appealed.

On appeal, the plaintiffs argued that it was error for the trial court to deny the requested jury charge concerning spoliation of the paper monitoring strips. The Georgia Court of Appeals rejected this argument, concluding the defendants did not have actual notice of "pending or contemplated" litigation when the strips were destroyed. In support of its holding, the court noted:

> [M]erely launching an internal investigation and taking some steps pursuant to company policies do not, without more, equate to notice that litigation is contemplated or pending, and that the mere fact that someone is injured, without more, is not notice that the injured party is contemplating litigation sufficient to automatically trigger the rules of spoliation[10].

Relying on the Supreme Court's decisions in *Baxley v. Hakiel Industries*[11] and *Silman v. Associates Bellemeade*,[12] the Court of Appeals interpreted the phrase "potential for litigation" to mean litigation that is *actually* contemplated or pending at the relevant time.[13]

After granting *certiorari*, the Supreme Court of Georgia reversed. Although the Court of Appeals correctly concluded that "potential for litigation" meant "contemplated or pending" litigation, the Supreme Court held that the lower court had erred in interpreting and applying the standard. Citing to federal cases from the Eleventh and Second Circuits, the Court stated that "the duty to preserve 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."[14]

The Supreme Court in *Phillips* identified a "non-exhaustive" list of factors to be considered by trial courts in determining when and whether a party first anticipated litigation:

a. The type and extent of the injury;
b. The extent to which fault for the injury is clear;
c. The potential financial exposure if faced with a finding of liability;
d. The relationship and course of conduct between the parties, including past litigation or threatened litigation; and
e. The frequency with which litigation occurs in similar circumstances.[15]

In *Phillips*, the Court agreed that the defendants did not have actual notice of pending litigation from the plaintiffs. But the Court nonetheless held that the trial court was required to continue its analysis to determine whether the defendant had constructive knowledge such that it "actually or reasonably should have anticipated litigation,

even without actual notice of a claim."[16] After expressly stating that it had "no view on what that decision should be," the Court remanded the case to the trial court for reconsideration of the plaintiffs' spoliation argument based on the above factors.[17]

Certainly, the Supreme Court's holding in *Phillips* gave trial courts even broader discretion to decide when and how to punish a party for alleged spoliation of evidence. Ultimately, this likely has made it easier for plaintiffs to assert and prevail on spoliation arguments in Georgia.

Indeed, in *Phillips*, the Court explicitly held that, as to a defendant, the duty to preserve potential evidence arises "when [the would-be defendant] knows or reasonably should know that the injured party is in fact contemplating litigation."[18] Often, clients assume that the duty to preserve arises after actual notice of a potential claim, often through a letter of representation or spoliation letter. But as the Court indicated in *Phillips*, notice to a defendant can be actual or constructive. A defendant's actions after an incident may reveal that it did, in fact, contemplate or anticipate litigation—even through no actual notice had been received at that time.

Defendants do sometimes make spoliation arguments to fend off a plaintiff's claims.[19] Far more often, however, the topic of alleged spoliation is raised by a plaintiff seeking to diminish or avoid entirely his or her burden of proving the elements of a negligence. This is borne out by the list of factors announced by the Supreme Court in *Phillips* to be considered by trial courts. Now that a duty to preserve evidence can arise without actual notice, how should potential litigants interpret the broad constructive notice factors set out in *Phillips*?

In *Sheats v. Kroger Co.*,[20] the plaintiff sought spoliation sanctions against Kroger for allegedly failing to preserve a cardboard container. The Court of Appeals had previously remanded the case to the trial court for reconsideration the plaintiff's

motion for sanctions in light of the factors recently set forth in *Phillips.*[21] In this second appeal, the court addressed the *Phillips* factors.

Because each spoliation analysis is fact-specific, some background information is necessary for context. While shopping at Kroger, the plaintiff lifted a cardboard package of glass ginger ale bottles from a shelf and as she did, the bottom of the package broke open and a glass bottle fell onto Sheats' foot. Sheats was assured by a store security guard that the box would be preserved and was escorted to the front of the store. Upon reaching the front of the store, the Kroger manager completed a three-page incident report titled "Customer Incident Report and Investigation Check List." The form stated, "This report is being prepared in anticipation of litigation under the direction of legal counsel." Sheats departed the store and later required surgery to address a blood clot in her foot, allegedly relating to the incident. Shortly after the incident, the store manager inventoried the cardboard package as a "lost" item due to breakage and placed with outgoing trash to be discarded.

The Court of Appeals analyzed several of the factors identified in *Phillips* to determine whether Kroger had constructive notice that the plaintiff was contemplating litigation when the package was discarded. The court held that the factors tended to support the trial court's ruling that Kroger did not have such notice, and, thus, sanctions were not appropriate:

a. <u>The type/extent of injury</u>. The plaintiff's injury did not seem to be extensive and was limited to her big toe. There was also no evidence of a severe or permanent physical limitation at the time of the incident.

b. <u>The extent to which fault is clear</u>. The unrebutted store manager's affidavit demonstrated he knew of no one who had been injured in a similar manner in the store and that the issue with the package was an isolated event that had never occurred before and that. Thus, it appeared the package

failure was not something Kroger should have reasonably foreseen it would be found at fault by a jury.

c. Potential financial exposure. The plaintiff's medical bills totaled less than a few thousand dollars. Also, there was no evidence Kroger learned of the full extent of the plaintiff's injury and treatment before it disposed of the package. Instead, the plaintiff refused immediate medical treatment at the store and showed no signs of any physical limitations at that time.

d. Frequency of similar litigation. Here again, the court found no history of this type of accident and, thus, no prior similar litigation. The Court of Appeals rejected the plaintiff's argument that the trial court's interpretation was unreasonably narrow and limited to circumstances where a person's big toe was injured by a falling soda bottle. Instead, the court relied on the store manager's affidavit which tended to show he was unaware of anyone who had been injured "by a package failure like the one involved with this ginger ale." Thus, the court's interpretation of similar circumstances appeared to consider incidents of falling objects as a result of similar packaging failures, not just ones involving soda bottles falling on a patron's toe.

e. The defendant's response to the injury. Perhaps most important was the trial court's and Court of Appeals' consideration of the incident report form which stated, "This report is being prepared in anticipation of litigation under the direction of legal counsel." The Court noted the very fact that Kroger produced the report during discovery suggests Kroger did not treat the document as if it in fact had been created in anticipation of litigation.[22] The Court also rejected the plaintiff's argument that "Kroger should be bound by the language it chose to place" on the form, noting that such a narrow interpretation "would require courts to ignore the *Phillips* Court's instruction that multiple factors may be considered in determining

whether litigation was reasonably foreseeable."[23] Accordingly, the trial court was empowered to find the report form was routinely used to report incidents regardless of whether litigation was anticipated.

The Court of Appeals' opinion in *Sheats* provides a roadmap for how the facts and issues of constructive notice of contemplated litigation may be examined by trial and appellate courts. Notably, the appellate court in *Sheats* emphasized its "necessarily deferential standard of review" of the trial court's consideration of the *Phillips* factors, again highlighting the broad degree of discretion enjoyed by the trial judge on spoliation issues.[24]

Recently the Supreme Court of Georgia weighed in again on spoliation—this time considering when a plaintiff's duty to preserve relevant evidence arises. In *Cooper Tire & Rubber Co. v. Koch*,[25] the Court held that "like a defendant's duty, a plaintiff's duty to preserve relevant evidence in her control arises when that party actually anticipates or reasonably should anticipate litigation."[26]

The underlying facts of the *Koch* case primarily concerned Gerald Koch's 2001 Ford Explorer, which was involved in a single-vehicle accident, allegedly due to a tire tread separation on the left rear tire. Following the accident, the Explorer was towed to a storage yard. Sometime later, but before Mr. Koch died about a month after the accident, his wife spoke with the owner of the wrecker yard regarding daily storage fees for the vehicle. Mrs. Koch could not afford the storage costs and agreed to transfer the title of the totaled vehicle to the wrecker owner instead of paying the storage costs. She was told at that time that the vehicle would be sold to a salvage yard, where the vehicle would be crushed for scrap. After Mr. Koch told her to tell the wrecker owner to "save the tires," Mrs. Koch apparently told the wrecker owner to save only the left rear tire, which he did. The Explorer and the other three tires were later crushed for scrap.

Following extensive discovery, Cooper Tire filed a motion to dismiss or impose other sanctions for spoliation. The trial court denied the motion, finding that litigation was not reasonably foreseeable and should not have been reasonably contemplated by the plaintiff when the vehicle was destroyed so as to trigger her duty to preserve the vehicle.[27] On appeal, the Court of Appeals held that "reasonable foreseeability is the touchstone for determining whether a plaintiff was contemplating litigation, and that test has traditionally been described with objective and subjective components — what a reasonable person in the same circumstances as those in which the injured party has found himself would do."[28] Further, in applying the "reasonably foreseeable" test [to plaintiffs], it may be appropriate for trial courts to consider similar factors as those described by the Supreme Court in *Phillips*.[29]

The Supreme Court of Georgia held that the Court of Appeals' analysis was "essentially correct" and affirmed its judgment.[30] The Court further noted, as mentioned above, that the duty to preserve relevant evidence "is defined the same for plaintiffs and defendants, and regardless of whether the party is an individual, corporation, government, or other entity."[31] However, as a practical matter, "the duty often will not arise at the same moment for the plaintiff and the defendant, because of their differing circumstances."[32] That is to say, because a plaintiff generally controls when litigation will be pursued, spoliation claims involving a plaintiff's duty to preserve evidence will more frequently and easily be resolved based on an actual knowledge of litigation inquiry.[33]

Turning to the *Phillips* factors, the Court noted that not all the listed, non-exclusive factors will be relevant in each case, there may be other pertinent factors and some factors may deserve more weight than others in determining whether litigation should have been reasonably contemplated. Additionally, the Court noted "some factors may be more

pertinent in determining whether litigation was reasonably anticipated based not on whether the alleged spoliator is a plaintiff or a defendant but rather on the party's experience and sophistication in matters of litigation."[34]

Under the Court's rationale, an individual plaintiff with no prior experiences with litigation, or no prior serious injuries resulting in litigation, may well be found to have reasonably anticipated litigation in much more limited circumstances as compared to, for example, a corporate party such as an insurance company seeking subrogation, a business owner who has been on the other side of numerous claims, or perhaps a landlord with multiple dispossessory proceedings under his or her belt. "Likewise, a plaintiff debt collection company might well be found to reasonably anticipate litigation earlier than an individual defendant who has never fallen behind on a debt or been involved with such litigation."[35]

These determinations are often highly case-specific, but trial courts must examine them. The Court also urged the trial and appellate courts to "make every effort to eliminate the 'distorting effects of hindsight' in evaluating whether the accused party reasonably should have anticipated litigation."[36]

In *Koch*, at the time the Explorer and tires were destroyed the relevant evidence included: (i) Mr. Koch's statements while in the hospital that the accident occurred after "the tire blew" and that Mrs. Koch should tell the wrecker owner to "save the tires" or "save the tire," (ii) the vehicle was totaled with no collision insurance, (iii) Mrs. Koch could not afford to pay the storage costs, (iv) the family was not investigating the crash, and (v) counsel had not been notified or retained. In considering all of these case-specific factors, and mindful of its standard of review, the Court affirmed the trial court's ruling that the plaintiff should not reasonably have contemplated litigation at the time the

Explorer and tires were destroyed and thus had no duty to preserve such lost evidence.[37]

Other cases have highlighted the significance of the level of sophistication of a party or the relationship of the parties in determining whether a duty to preserve evidence arises. In *Delphi Communications v. Advanced Computing Technologies*,[38] the Court of Appeals affirmed a trial court's imposition of spoliation sanctions against the defendants for failing to preserve data on the defendants' hard drives after being served with the plaintiff's complaint alleging that the defendant had copied the plaintiff's software products and stolen its customers. The plaintiff's complaint also demanded that the defendants preserve and "image" the data on their hard drives. The court held that the defendants, who were experienced in computer software design, were aware of the importance of the information on their hard drives and the nature of the plaintiff's claims. Based on that specialized knowledge and sophistication, the defendants were required to preserve and image their hard drives until they could be examined in the litigation.[39]

And in *Reid v. Waste Industries USA, Inc.*,[40] the Court of Appeals held that a trial court had not properly considered and applied the *Phillips* factors in ruling on a plaintiff's motion for spoliation of a video. In *Reid*, the plaintiff was arrested for allegedly brandishing a gun and threatening his supervisor and co-workers. There was a video of the incident which the plaintiff's employer failed to preserve. The trial court denied the plaintiff's motion for sanctions for destruction of the video, but the Court of Appeals remanded with instruction that the trial court was required to apply the proper analysis under *Phillips*.

In its opinion, the Court of Appeals specifically noted the possible importance of the "relationship of the parties" in considering whether to sanction the defendant employer for spoliation. In particular, the court noted that the defendant knew the plaintiff had been arrested due to

the incident, remained in jail, and likely would be prosecuted based on a manager's statements to police that the plaintiff had pointed a gun at him while making threatening remarks. The court remanded with instructions that the trial court make appropriate findings of fact and apply the *Phillips* factors.[41]

3. When are sanctions authorized for spoliation, and how should a court determine the appropriate sanction?

Georgia trial courts are given a great deal of discretion in deciding the proper sanction where spoliation has occurred. The trial court sits as the trier of fact in discovery disputes such as motions for spoliation sanctions and routinely makes factual findings regarding the occurrence of spoliation and appropriate sanctions.[42] In determining whether to impose a sanction and which sanction to impose, "each case must stand upon its own particular facts."[43]

Historically, Georgia courts held that "the good or bad faith of the party is a relevant consideration" in whether and how to sanction a party for alleged spoliation of evidence.[44] That is because "one of the rationales" for sanctioning a party for spoliation "is that it deters parties from pretrial spoliation of evidence and serves as a penalty, placing the risk of an erroneous judgment on the party that *wrongfully* created the risk."[45] Thus, Georgia courts explained that "a party should only be penalized for destroying the documents if it was wrong to do so."[46]

Ultimately, however, Georgia trial courts are vested with discretion to sanction a party for the loss of evidence even in the absence of bad faith by the party.[47] That is because destruction of evidence by a party, even when not rising to the level of bad faith, may be "nevertheless wrongful."[48] Appellate courts have provided little guidance or restriction as to when a party should be deemed to have acted "wrongfully" though not in bad faith.

The Georgia Court of Appeals has identified five factors a trial court should weigh before exercising its discretion to impose sanctions for spoliation:

(a) whether the party seeking sanctions was prejudiced as a result of the destroyed evidence;

(b) whether the prejudice could be cured;

(c) the practical importance of the evidence;

(d) whether the destroying party acted in good or bad faith; and

(e) the potential for abuse if any expert testimony about the destroyed evidence was not excluded.[49]

Trial courts have several options where a party is found to have wrongfully destroyed or failed to preserve evidence. The Georgia Court of Appeals has identified three specific types of sanctions that a trial court may impose for spoliation of evidence:

(1) Charging the jury that spoliation of evidence creates the rebuttable presumption that the evidence would have been harmful to the spoliator;

(2) Dismissing the case;

(3) Excluding testimony about the spoliated evidence.[50]

The above is "not an exhaustive list of sanctions" available to trial courts, which are afforded "wide latitude to fashion sanctions on a case-by-case basis, considering what is appropriate and fair under the circumstances."[51]

As noted above, spoliating evidence can give rise to a rebuttable presumption that the evidence would have been harmful to the spoliating party.[52] But given that lost or destroyed evidence is often equally or even more important to the case of the party who controlled the evidence, "factfinders should not readily presume that lost evidence was favorable to the opposing party absent a showing that the evidence was lost intentionally to deprive the other party of its use in litigation."[53] And, generally speaking,

a rebuttable presumption or adverse inference jury instruction should be used as a remedy for spoliation "only in exceptional cases," and the "greatest caution must be exercised in its application."[54] The loss of relevant evidence due to mere negligence— including negligence in determining when the duty to preserve evidence arose—normally should result in lesser sanctions, if any at all.[55]

4. Imposing spoliation sanctions when other, similar sources of proof are available.

In some cases, although spoliation has occurred, there are other sources of proof available which would provide the same or similar information as the lost or destroyed evidence. Under those circumstances, it would appear that either the non-spoliating party will not have been prejudiced, or the prejudice can be cured. Furthermore, if evidence of a similar quality or probative nature remains despite the purported spoliation, that would appear to lessen the "practical importance" of the evidence. In those situations, under the five-factor *AMLI Residential Properties* test, it would appear that either no sanction at all or, at most, a lesser sanction would be warranted.[56]

In *Anthem Cos. v. Wills*,[57] a patron at a BCBS of Georgia cafeteria in Columbus observed what she believed to be an insect in her food. The patron took photos of the supposed insect with a digital camera and emailed copies of the photos to the building superintendent. The patron also had the photos printed at Walgreens and delivered those to the superintendent as well. Wills, the owner of the vendor from which the patron had purchased the allegedly contaminated food, later filed a libel suit in against the building superintendent and Anthem Companies based on an email the superintendent sent about "the worm an associate found in her peas."

Andrews conceded that at some point in the ensuing nine years, 2008 and 2017 he lost the printed photos. Wills moved for sanctions for spoliation, arguing that the Anthem e-

mail images and the Walgreens digital images had been altered. The trial court granted Wills' motion for sanctions and agreed to instruct the jury to infer that the lost photos would have been harmful to Anthem. The Supreme Court of Georgia granted *certiorari* to consider whether the trial court properly imposed sanctions for the loss of the printed versions of electronically stored information ("ESI").[58]

Anthem argued the trial court erred in finding that it committed spoliation and in issuing sanctions against it because the lost photos were merely prints of digital images that were preserved in unaltered electronic form.[59] The Supreme Court agreed, noting that the e-mail images sent to the superintendent and the Walgreens digital images were still available electronically on their respective servers. The patron who took the photos also testified that the Walgreens digital images were identical to the lost Walgreens prints she took to Andrews.[60] The Court further held that generally, "absent other statutory or regulatory obligations, a party does not have to keep printed versions of ESI that is otherwise preserved and which contain the same or even less relevant information than the ESI, unless the existence of the printed version is independently relevant to the litigation."[61]

Notably, the Supreme Court held that the trial court erred when, "in a departure from the general rule, the trial court imposed an extreme sanction absent any finding of intentionality, bad faith, or incurable prejudice."[62] Thus, after *Wills*, it appears that absent incurable prejudice to the non-spoliating party, a trial court typically may not assess extreme sanctions, such as an adverse inference jury instruction, for spoliation unless the spoliating party acted in bad faith or intentionally.

In the event relevant evidence is lost or destroyed, attorneys would do well to consider, locate and preserve other sources of evidence showing the same or similar information the spoliated evidence would

have shown. For example, if a commercial vehicle driver's post-accident drug/alcohol test results have been lost, there may be room to avoid sanctions by presenting evidence that demonstrates a lack of prejudice or that the lost results are of minimal practical importance. The driver may give testimony as to whether or not he/she had consumed alcohol or drugs; the investigating police officer may give testimony as to his/her observations; the police report may describe the driver condition as "not drinking"; and there may be video evidence of the exact manner in which the driver was travelling along the roadway. Of course, there also is the consideration of intentionality and bad faith. All of these things may be presented by a party—and must be considered by the court—as comparable, available evidence which should weigh against the imposition of drastic sanctions.

5. Can the destruction of or failure to preserve evidence by one person/entity be imputed to another party?

Georgia appellate courts have begun to address some of the additional issues that have arisen since the Supreme Court's broadening of the realm of spoliation claims in 2015. One such issue concerns when and whether a party can be sanctioned for spoliation of evidence by someone else, including other parties and non-parties. In other words, does a party who anticipates or should reasonably anticipate litigation have an affirmative duty to instruct a third-party to retain or preserve potential evidence? At least to this point, the Court of Appeals' answer has been a resounding "no."

An older Court of Appeals decision lays the foundation here. In *Owens v. American Refuse Systems*,[63] the plaintiff sued several companies after his eye was injured when the cap blew off a pressure tank used to clean the inside of the garbage truck to which it was

attached. The plaintiff alleged that one of the defendants, ARS, had destroyed a pressure tank ARS owned, but had allegedly promised to keep safe for the plaintiff. The plaintiff alleged that because ARS destroyed the tank, he was forced to dismiss his product liability lawsuit and that the defendants should be liable for damages due to spoliation, among other claims. The Court of Appeals joined a majority of jurisdictions by "declin[ing] to recognize an independent third-party tort of evidence spoliation in this case."[64]

In *Sheats I*,[65] discussed *supra*, the plaintiff brought claims against both the Kroger Company and Clayton Distributing Company, Inc., the manufacturer or producer of the cardboard package container that had been lost. The plaintiff sought sanctions against Kroger and Clayton for destruction of the package container after Kroger's store manager inventoried the package container as a "lost" item due to breakage and put it with outgoing trash to be discarded. There was no evidence that Clayton directed Kroger to destroy the package, or that Clayton was even aware the incident had occurred before the package was destroyed. Accordingly, the Court of Appeals held that the trial court properly denied the plaintiff's motion for sanctions against Clayton, since "[s]anctions for spoliation cannot be applied against a party who did not destroy the evidence when there is no evidence to show that the destroying party was acting at the behest of the other party."[66]

In *Phillips v. Owners Insurance Co.*,[67] the Court of Appeals went a step further by rejecting the plaintiff's claim and theory of an independent tort of negligent third-party spoliation. In that case, the plaintiff was involved in a motor vehicle accident following a tire blowout. Defendant Owners Insurance Company was made aware of the accident and injuries a few days after the accident. The plaintiff's vehicle was stored at a garage. About a week after the accident, the plaintiff's attorney notified Owners that he was investigating the cause of the accident

and instructed Owners to maintain the vehicle for that purpose. Owners and the attorney later agreed to move the vehicle to a different storage lot to reduce costs, and Owners agreed to notify the attorney before making any additional changes to the storage location. Thereafter, the plaintiff transferred the vehicle title to Owners.

About a year and a half later, the owner of the storage lot instructed Owners they would begin incurring additional storage costs. After receiving that notification, Owners released the seller hold on the vehicle, without notice to the plaintiff or his attorney, and it was sold a few days later. A few months later, the plaintiff's attorney learned for the first time the vehicle had been sold, but not before he communicated a demand for damages to the tire manufacturer who in turn had requested to inspect the damaged tire. The plaintiff later sued Owners, claiming the sale of the vehicle foreclosed his opportunity to recover his full damages from the tire manufacturer. The plaintiff alleged claims including purported "third-party spoliation of evidence."[68]

The Court of Appeals affirmed the trial court's grant of summary judgment to Owners on the third-party spoliation claims, holding that "[w]hile a number of states have recognized causes of action for third-party spoliation of evidence (including many in the years since *Owens* was decided), neither a statute nor any ruling of the Supreme Court of Georgia has established third-party negligent spoliation of evidence as an independent tort in this state."[69] The Court noted that even without a cause of action for third-party spoliation of evidence, "a vigilant litigant already has traditional means of securing evidence available. Those means include, for example, a court order directing preservation, along with remedies for a violation of that order, or a contractual agreement with the property owner."[70]

The Court of Appeals noted that while its decision in *Lustre-Diaz v. Etheridge*[71] recognized that sanctions for

spoliation may be assessed against a litigant based on the conduct of a third party, such sanctions are limited to situations in which the third party is acting "as an agent or contractual privy of a party to an underlying lawsuit when it destroys or fails to preserve the evidence at issue."[72] With no such evidence presented by the plaintiff in that case, Owners was entitled to summary judgment.

In *Wilkins v. City of Conyers*,[73] the Court of Appeals held that a trial court had abused its discretion by attributing bad faith to the plaintiff and dismissing his complaint as a spoliation sanction for the destruction of key evidence by a third party. In that case, the plaintiff alleged that the City of Conyers had negligently failed to maintain a storm drain which resulted in pooled water on a roadway. The plaintiff hydroplaned through the pooled water and struck another vehicle, killing the plaintiff's wife and unborn child. A non-party wrecker operator subsequently destroyed the plaintiff's truck before the defendant was able to inspect the vehicle.

As in *Phillips v. Owners Insurance Co.*, the plaintiff's vehicle in *Wilkins* was kept at a wrecker yard after the accident. The plaintiff's attorney called the wrecker yard about a week later to confirm its possession of the truck and to inform them that he was representing the plaintiff and would be sending a letter requesting that the vehicle be preserved. The plaintiff's attorney then sent a letter and request by facsimile and certified mail, addressed to the manager in accordance with the wrecker's express instructions, specifically stating that failure to preserve the vehicle might result in severe sanctions, and directing the wrecker to contact counsel with any questions.

Nevertheless, the same week, the wrecker sent a certified letter to the plaintiff himself, demanding payment and notifying him that the "vehicle and its contents will be deemed abandoned after thirty (30) days, and will be sold at public sale for all charges due." The

wrecker did not copy the plaintiff's attorney on the letter, which was received at the home of the plaintiff's mother and signed for by his aunt.

About a month later, the plaintiff's attorney, still unaware of the letter demanding payment, contacted the wrecker yard to confirm that the vehicle was still being preserved. The plaintiff's attorney was told at that time that the vehicle had been preserved. The City later moved to strike the plaintiff's complaint as a sanction for alleged spoliation of the plaintiff's vehicle. The trial court granted the City's motion, and the plaintiff appealed.

In its analysis, the Court of Appeals explained that "when spoliation results from the acts of a third party, it is sanctionable against a litigant if the third party acted as the litigant's agent in destroying or failing to preserve the evidence."[74] Under the facts of this case, the court held there was "no way to construe the evidence so as to conclude the wrecker service was acting as Wilkins' agent when it disregarded his counsel's repeated requests to preserve the vehicle."[75] To hold otherwise would be completely contrary to the notions of agency where Wilkins' counsel expressly instructed the wrecker service to preserve the vehicle.

Lastly, in *French v. Perez*,[76] the plaintiff was injured as a passenger in an automobile accident with another vehicle driven by Perez. About a month later, Perez's wife (the owner of the vehicle) executed a power of attorney to her auto insurer, State Farm, so it could secure the title to the vehicle. State Farm subsequently took possession of the vehicle. About two weeks later, French sent State Farm a notice to preserve any evidence related to the accident, including the damaged car itself. There was no evidence that the notice was sent to or received by either Perez or his wife. Despite the request to preserve, State Farm sold the vehicle the following month.

The plaintiff subsequently filed a motion for sanctions against Perez for spoliation

related to the loss of the vehicle. The trial court denied the motion for sanctions, and the Court of Appeals affirmed. In reaching its decision, the Court of Appeals noted that Perez was not on notice to preserve the vehicle and did not own the vehicle when the plaintiff sent the preservation request to State Farm. Furthermore, there was "no evidence that Perez maintained any authority over disposition of the vehicle" after it was transferred to State Farm, and "no evidence that he authorized State Farm to destroy the vehicle or that he ratified State Farm's destruction of the evidence."[77] The Court also rejected the plaintiff's argument that Perez should be held to have spoliated the evidence because Perez provided no evidence that State Farm was not acting as his agent when it received the spoliation letter then disposed of the vehicle.[78] That was because "where the existence of an agency is relied upon, the burden of proof rests with the party asserting the relationship."[79]

1. Spoliation in relation to claims for punitive damages.

In some cases, plaintiffs have attempted to show spoliation as a purported basis for punitive damages. Thus far, Georgia appellate courts have rejected those attempts, holding that spoliation of evidence cannot itself be the basis for an award of punitive damages.

In *Brito v. Gomez Law Group, LLC*,[80] the plaintiffs sued their former attorney in connection with a lawsuit filed by the plaintiffs against U-Haul Corporation after one of the plaintiffs was injured while using a piece of equipment obtained from a U-Haul dealer. The plaintiffs alleged they would have had a claim for spoliation of evidence against U-Haul in the underlying lawsuit because the company was unable to produce the specific piece of equipment involved in the incident. As part of the malpractice claim against their attorneys, the plaintiffs contended that they should or would have been authorized to recover punitive damages from U-Haul in the

underlying lawsuit in connection with U-Haul's loss of the equipment.

On appeal, the court explained that although a "court may instruct the jury to presume that the missing evidence would have been adverse to the party who failed to produce it or to remove from the jury's consideration issues related to the spoliated evidence…[the plaintiffs] have not cited to any authority to support a court imposing punitive damages as a sanction for spoliation of evidence."[81] The court held that unlike cases in which a defendant was found to have intentionally fabricated evidence, "mere spoliation" of potential evidence, such as by losing the evidence, could not support a claim for punitive damages.[82]

The Court of Appeals in *Brito* specifically distinguished its earlier decision in *J.B. Hunt Transport, Inc. v. Bentley*.[83] In *Bentley*, the appellate court "allowed the presumption that a safety regulation logbook destroyed by the defendant trucking company contained evidence that the company was out of compliance with the regulations," which presumption in turn was held to support an award of punitive damages. In that case, however, the defendant trucking company was not subjected to punitive damages simply because it had destroyed the defendant driver's log book; among other things, the evidence in that case allegedly showed that the company "was a 'habitual violator' of the hours-in-service requirements of the Georgia Public Service Commission for its vehicles" as shown by logbook violations of other drivers. A presumption that the log book would have shown that the driver was over his permissible hours of service was, thus, permissible in that case because that would have shown a pattern or practice by the motor carrier of allowing its drivers to drive while fatigued.[84] In other words, the presumption supported an award of punitive damages, but the punitive damages were not themselves a sanction for the spoliation of the logbook.[85]

To be clear, in *Bentley*, the plaintiff was not entitled to a jury instruction about the lost log book simply due to the spoliation; there instead was other evidence that supported the conclusion that the defendant truck driver in that case was fatigued. Multiple witnesses testified that for some 10 to 20 miles, they "were afraid to pass because the truck was driving very erratically, swinging from left to right, going well off into the emergency lane across the solid white line and then veering back to the left across the center white broken line."[86]

To date, there remains no basis in Georgia law for permitting a plaintiff to seek punitive damages as a sanction for spoliation of evidence or otherwise permitting spoliation to serve as a basis for punitive damages.[87] This seems only logical where Georgia law does not provide for an independent tort for spoliation of evidence.[88]

2. Conclusion.

Following *Phillips v. Harmon*, the potential for spoliation sanctions against defendants seems to have expanded considerably. Spoliation claims undoubtedly require a determination of whether a defendant should have anticipated litigation far more often than the same inquiry would apply to a plaintiff. Perhaps this can be attributed to the presumption that defendants will more often be sophisticated and/or experienced in claims and litigation. But as stated by the Supreme Court of Georgia in *Cooper Tire & Rubber Co. v. Koch*, a plaintiff also must act reasonably in anticipating whether litigation arising from her injury will occur.[89] Whereas courts once focused to a greater extent on the good or bad faith of the alleged spoliator, the *Phillips* and *Koch* cases have rendered the analysis a more complex one. Under the current framework, it is likely that the relevant party's degree of sophistication and experience in litigation, the parties' relationship, and the availability of other sources of proof will be among the most important considerations on many motions for spoliation sanctions. As with

many other issues in litigation, whether plaintiffs and defendants are treated equitably in considering motions for sanctions in the spoliation context will depend a great deal on the facts of the particular case, along with the thoughtfulness and fairmindedness of the court.

[1] *Spoliation*, Black's Law Dictionary (11th ed. 2019) (emphasis supplied).
[2] *ML Healthcare Servs., LLC v. Publix Super Mkts. Inc.*, 881 F.3d 1293, 1308 (11th Cir. 2018); *SEC v. Goble*, 682 F.3d 934, 947 (11th Cir. 2012). *See also* FED. R. CIV. P. 37(e)(2) (permitting more severe sanctions for spoliation of electronically-stored information only where the spoliating party "acted with the intent to deprive another party of the information's use in the litigation").
[3] *Phillips v. Harmon*, 297 Ga. 386, 393 (2015); *Silman v. Assocs. Bellemeade*, 286 Ga. 27, 28 (2009); *Baxley v. Hakiel Indus.*, 82 Ga. 312 (2007); *Bouve & Mohr, LLC v. Banks*, 274 Ga. App. 758, 762 (1) (2005). *See also Ga. Bd. of Dentistry v. Pence*, 223 Ga. App. 603, 608 (6) (1996) (distinguishing other cases in which spoliation sanctions were authorized because "[i]n all of those decisions…litigation was pending or contemplated at the time of the alleged spoliation").
[4] *See* Section 3, *infra*.
[5] *Phillips v. Harmon*, 297 Ga. at 394. *See also Sheats v. Kroger Co., 336 Ga. App. 307, 310 (2016)*; *Reid v. Waste Industries USA, Inc.,* 345 Ga. App. 236, 245 (2018).
[6] *Wal-Mart Stores, Inc. v. Lee*, 290 Ga. App. 541 (2008).
[7] *Cooper Tire & Rubber Co. v. Koch*, 303 Ga. 336, 336 (2018).
[8] *Phillips*, 297 Ga. at 395.
[9] *Id*.
[10] *Id.* at 395-96.
[11] *Baxley v. Hakiel Indus.*, 282 Ga. 312 (2007).
[12] *Silman v. Assocs. Bellemeade*, 286 Ga. 27, 28 (2009) (rejecting appellants argument that *Baxley* expanded the spoliation standard to include cases where the potential for litigation could exist even where litigation is not actually contemplated or pending.).
[13] *Phillips*, 297 Ga. at 396.
[14] *Id.*, citing *Graff v. Baja Marine Corp.,* 310 Fed. Appx. 298, 301 (11th Cir. 2009); *West v. Goodyear Tire & Rubber Co.,* 167 F3d 776, 779 (2nd Cir. 1999).
[15] *Phillips*, 297 Ga. at 397.
[16] *Id*.
[17] *Id.* at 398, n.11.
[18] *Id.* at 396.
[19] *See*, *e.g.*, *Cooper Tire & Rubber Co. v. Koch*, 303 Ga. 336 (2018), discussed *infra*.
[20] 342 Ga. App. 723 (2017).
[21] *Sheats v. Kroger Co.*, 336 Ga. App. 307 (2016) ("*Sheats I*").
[22] *Sheats v. Kroger Co.*, 342 Ga. App. 723, 730 (2017) ("*Sheats II*").
[23] *Id*.
[24] *Id*.
[25] 303 Ga. 336 (2018).
[26] *Cooper Tire & Rubber Co. v. Koch*, 303 Ga. 336, 336 (2018).
[27] *Id*. at 338.
[28] *Id*. at 338-39.
[29] *Id*. at 339.
[30] *Id*.
[31] *Id*. at 340.
[32] *Id*.
[33] *Id*. at 341.
[34] *Id.* at 342. (emphasis added).
[35] *Id.* at 342.
[36] *Id*. at 343.
[37] *Id*. at 345.
[38] 336 Ga. App. 435, 437 (2016).
[39] *Id.*
[40] 345 Ga. App. 236 (2018).
[41] *Id.* at 246-47 (6).
[42] *Demere Marsh Assocs., LLC v. Boatright Roofing & Gen. Contr., Inc.*, 343 Ga. App. 235 (2017).
[43] *Phillips*, 297 Ga. at 398.
[44] *Id.* at 398; *Johnson v. Riverdale Anesthesia Assocs., P.C.*, 249 Ga. App. 152, 155 (2001) (2), *overruled on other grounds*, *Condra v. Atlanta Orthopaedic Group, P.C.*, 285 Ga. 667 (2009).
[45] *Phillips*, 297 Ga. at 398-99; *Johnson*, 249 Ga. App. at 155 (2) (internal punctuation omitted; emphasis in original), *quoting Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988).
[46] *Phillips*, 297 Ga. at 399, *quoting Johnson*, 249 Ga. App. at 155 (2).
[47] *Phillips*, 297 Ga. at 399 ("Exclusionary sanctions may be appropriate where the spoliator has not acted in bad faith."); *AMLI Residential Props. v. Ga. Power Co.*, 293 Ga. App. 358, 363 (2008) (same).
[48] *AMLI Residential Props.*, 293 Ga. App. at 364.

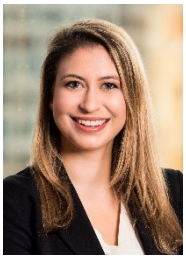
[49] *Id*. at 361.
[50] *Sheats v. Kroger Co.*, 336 Ga. App. 307 (2016) (*en banc*); *Kitchens v. Brusman*, 303 Ga. App. 703, 709 (1) (2010).
[51] *Id.*
[52] *Phillips*, 297 Ga. at 394.
[53] *Koch*, 303 Ga. at 346-47.
[54] *Phillips*, 297 Ga. at 398, *quoting Cotton States Fertilizer Co. v. Childs,* 179 Ga. 23, 31 (1934).
[55] *Koch*, 303 Ga. at 343.
[56] *AMLI Residential Props.*, 293 Ga. App. at 361.
[57] 305 Ga. 313 (2019).
[58] *Anthem Cos. v. Wills*, 305 Ga. 313, 315 (2019).
[59] *Id*.
[60] *Id*. at 316.
[61] *Id.* at 316-17.
[62] *Id.* at 316.
[63] 244 Ga. App. 780 (2000) (phys. prec.).
[64] *Owens v. Am. Refuse Sys.*, 244 Ga. App. 780, 781 (2000) (phys. prec.).
[65] 336 Ga. App. 307 (2016).
[66] *Id.* at 311, *citing Boswell v. Overhead Door Corp.*, 292 Ga. App. 234, 235-236 (2008).
[67] 342 Ga. App. 202 (2017).
[68] *Phillips v. Owners Ins. Co.*, 342 Ga. App. 202, 203 (2017).
[69] *Id*. at 204.
[70] *Id.* at 205, *citing Owens*, 244 Ga. App. at 781.
[71] 309 Ga. App. 104 (2011).
[72] *Phillips v. Owners Ins.*, 342 Ga. App. at 204, n.5.
[73] 347 Ga. App. 469 (2018).
[74] *Id.* at 472, *citing Bouvé & Mohr, LLC*, 274 Ga. App. 758, 762 (1) (2005).
[75] *Wilkins*, 347 Ga. App. at 473.
[76] 349 Ga. App. 763 (2019) (phys. prec.).
[77] *Id.* at 765.
[78] *Id*. (emphasis in original).
[79] *Id*. at 765-66, *citing Carter v. Kim*, 157 Ga. App. 418, 418 (1981).
[80] 289 Ga. App. 625 (2008).
[81] *Id.* at 631.
[82] *Id.* at 631-32.
[83] 207 Ga. App. 250 (1993).
[84] *Brito*, 289 Ga. App. at 631-32.
[85] *Id.* at 632. (emphasis added).
[86] *Bentley*, 207 Ga. App. at 251.
[87] *See also Clark v. Irvin*, No. 1:09-CV-101 (WLS), 2011 U.S. Dist. LEXIS 165577, at *27 (M.D. Ga. May 31, 2011) (noting, in case where truck's onboard computer data was spoliated, there was no applicable authority authorizing an award of punitive damages as a sanction for spoliation).
[88] *See Owens v. Am. Refuse Sys.*, 244 Ga. App. 780, (2000) (phys. prec.); *Richardson v. Simmons*, 245 Ga. App. 749 (2000).
[89] *Cooper Tire & Rubber Co.,*303 Ga. at 341.

It's Been a Privilege:

The Erosion of the Attorney-Client Privilege

By

Alycen A. Moss and Danielle C. Le Jeune



Alycen A. Moss and **Danielle C. Le Jeune** are with Cozen O'Connor. Alycen is partner and Danielle is an Associate in the Atlanta office. They focus their practice on general litigation and insurance coverage.

INTRODUCTION

Across each area of practice in the legal profession, the importance of the attorney-client privilege reigns supreme. Known as one of the "oldest recognized privileges for confidential communications,"[1] the attorney-client privilege encourages open and direct communications between counsel and those who seek their advice.[2] In recent years, however, this important privilege is eroding.

Bad faith cases provide a particularly unique situation for courts to interpret the application of the attorney-client privilege. An insurance company may face a bad faith claim in several circumstances. For example, an insured may make claim against their insurer where an event occurs and the insurance company denies coverage and refuses to pay.[3] Another example is where an insurer refuses to settle a third-party claim within policy limits and an excess judgment is later rendered against the insured.[4] This claim may be assigned to plaintiffs, who can then seek damages against the insurer. How do courts properly resolve the dichotomy between protecting the attorney-client privilege and also allowing the discovery of the reasoning behind the insurer's decision to

determine whether it was justified or, indeed, bad faith?

Courts across the country have developed various approaches for handling these situations. The first is the Restrictive Test, which is utilized by Georgia courts. Under the Restrictive Test, the privilege is only waived where the party that possesses the privileged communication puts the attorney advice directly at issue. This would most commonly be seen where the advice of counsel is raised as a defense in a bad faith claim.

The most commonly followed approach is Case-by-Case/Primary Purpose Waiver Test. In this situation, the privilege is waived where the material is both relevant to the issues in litigation and is necessary for the opposing party's case.

Finally, some jurisdictions have adopted the Automatic Waiver Rule. Where the Automatic Waiver Rule is applied, the privilege is generally waived when a claim is made that puts communications at issue, such as a declaratory judgment action or bad faith claim. For reasons explained further below, this approach, which is showing recent growth, allows for an unprecedented encroachment into the communications between an attorney and his or her client.

I. THE RESTRICTIVE TEST

The Restrictive Test, which is utilized in Georgia, finds that the attorney-client privilege will only be waived where the party in possession of the privilege materials interjects the advice of counsel as an essential element of a claim or defense.[5] In other words, only direct, express reliance on a privileged communication by a client in making his claim or defense will waive the privilege.[6] This approach avoids the over-inclusiveness of the automatic waiver rule and the uncertainty of the ad hoc, case-by-case approach; however, an opposing party may argue that it denies them access to information or documentation that may provide evidence to support its position.[7]

A. Georgia

Under Georgia law, the application of the attorney-client privilege is narrowly construed, but near absolute, for those communications which it covers.[8] There are very few cases in Georgia state and superior courts which address the application of the attorney-client privilege in the context of bad faith litigation.[9] However, federal cases interpreting Georgia law provide guidance on how this principle is interpreted.

For example, in *Liberty Mutual Fire Insurance Company v. APAC Southeast, Inc.*, Judge Walter E. Johnson of the Northern District of Georgia, Atlanta Division, established a narrow approach to when the attorney-client privilege may be waived in Georgia claims.[10]

There, APAC-Southeast, Inc. ("APAC") was the primary contractor for the Georgia Department of Transportation for a highway construction project.[11] Costello Industries, Inc., APAC's subcontractor, obtained a comprehensive general liability insurance policy that covered APAC as an additional insured.[12] After a fatal accident, Liberty Mutual Fire Insurance Company ("Liberty Mutual") accepted a tender of defense and indemnity and assigned counsel. APAC later mediated with the plaintiffs in the underlying case, settled for approximately $3.85 million, and then demanded that Liberty Mutual tender policy limits of $1,000,000 to indemnify it.[13] Liberty Mutual sought a declaratory judgment that APAC settled the underlying lawsuit without its consent, which terminated its obligation to APAC under the policy.[14] A Motion to Compel for documents withheld or redacted was filed.[15]

With regard to the attorney-client issue, the Court stated that the attorney-client privilege may not be overcome based on a showing of need.[16] Further, in the context of a bad faith claim, "although the entire insurance claims file may be relevant, the party seeking discovery is not entitled to documents protected by the attorney-client privilege."[17]

The Court found that Liberty Mutual did not contend that it relied on the advice of counsel or based its decision on its knowledge of the law in its Answer.[18] Furthermore, it did not place the advice of counsel at issue by basing a claim or defense on it.[19] Rather, in response to deposition questions by the opposing party, Liberty Mutual noted that it relied on the advice of counsel with regard to the subject matter of the claim. Because Liberty Mutual did not use the privilege to assert or prove its claims or defenses, the Court held the attorney-client privilege was not waived.[20]

Subsequent cases, both in the area of bad faith, and otherwise, have demonstrated that Georgia courts are reluctant to waive the attorney-client privilege.[21] In *Federal Deposit Insurance Corporation v. Bryan*, the Court asserted that it was "aware of no case in which the attorney-client privilege has been deemed implicitly waived on grounds of fairness (or because privileged information has been placed 'in issue') where the party claiming the privilege has not injected the issue of advice of counsel or knowledge of the law into the case."[22]

B. Texas

The Supreme Court of Texas confirmed its application of a narrow interpretation of the attorney-client privilege in *Republic Insurance Company v. Davis*. This case involved a bad faith claim for wrongful refusal to settle in a fatality case.[23] Defendant Republic Insurance Company ("Republic") objected to certain Requests for Production of Documents.[24] Arguments were heard before a special master, who recommended that some documents, including attorney-client privileged materials, be produced based on the fact that the communication had occurred in connection with another lawsuit.[25]

After discussing the importance of the attorney-client privilege in promoting effective legal services and administration of justice, the Court held that the privilege is only waived where it is being used as a sword

rather than a shield.[26] In making this determination, there were three factors outlined.[27] First, the party asserting the privilege must be seeking affirmative relief. Second, the privileged information must be not merely relevant, but outcome determinative of the case. Third, disclosure of the privileged material must be the only way that the opposing party can obtain the evidence. Where any of these requirements are not met, the attorney-client privilege will be upheld.[28]

Texas courts have continued to allow expansive application of the attorney-client privilege in bad faith litigation. For example, reservation of rights letters may be protected.[29] Further, an attorney who is acting in other capacities, such as performing tasks of an investigator or adjuster as part of providing legal services is considered to be functioning as an attorney.[30] This varies substantially from some of the more wide-ranging applications seen in other jurisdictions.

II. THE CASE-BY-CASE/PRIMARY PURPOSE WAIVER TEST

In the majority of jurisdictions, whether the attorney-client privilege is waived in bad faith litigation is based on a case-by-case factual analysis that attempts to balance the need for protecting confidential client communications with the need for disclosure.[31] Examples of some states which follow this approach are: Alabama, South Carolina, California, Illinois, Louisiana, Missouri, New Jersey, and Pennsylvania. These cases will often look at the role and actions of the attorney, the arguments raised by both sides in the litigation, and potential import of the information being sought. As noted by the Supreme Court of New Jersey, "[t]here must be a legitimate need of the party to reach the evidence sought to be shielded."[32]

With regard to the role of the attorney, most states hold that when an attorney performs investigative work in the capacity of an insurance claims adjuster,

rather than performing legal work, the privilege will not apply.[33] The relevant question becomes whether the attorney was retained to conduct an investigation or whether the "investigation was related to the rendition of legal services."[34]

The claims, defenses, and other arguments made by the parties will be evaluated in determining whether the attorney-client privilege will protect certain materials. For example, in the Supreme Court of Arizona decision, *State Farm Mutual Auto Insurance Company v. Lee*, a class of insureds brought claims for insurance fraud and bad faith seeking, in discovery, insurer files.[35] State Farm Mutual Auto Insurance Company ("State Farm") denied that it intended to use the defense of reliance on advice of counsel, which would constitute an implied waiver under almost any test.[36] The Court held that the "party that would assert the privilege has not waived unless it has asserted some claim or defense, such as the reasonableness of its evaluation of the law, which necessarily includes the information received from counsel."[37] State Farm claimed that its actions were based on a reasonable and good faith belief that the conduct was permitted by law and a subjective believe based on the legal evaluation and investigation of its claims agents.[38] The Court found that subjective legal knowledge of the claims analysts "necessarily included the advice of counsel as part of the decision-making process" and, thus, the attorney-client privilege was waived.[39]

In June 2019, the Supreme Court of South Carolina adopted the approach outlined in *Lee*. However, it imposed an additional requirement that the party seeking waiver of the attorney-client privilege make a prima facie showing of bad faith.[40] As a small, but important distinction, the Supreme Court of Rhode Island highlighted that the other cannot merely plead bad faith sufficient to waive this privilege. In *Mortgage Guaranty and Title Company v. Cunha*, it

found "the mere fact that plaintiff made a claim for attorneys' fees as part of the claim for damages does not indicate a waiver of the attorney-client privilege."[41]

When evaluating the potential import of the documents, there are certain restrictions which have influenced discoverability. First, the document or information must contain actual legal advice. In Illinois, the courts distinguished between "merely providing legal information and providing legal 'advice.'"[42] *Huntington Chase Condominium Association v. Mid-Century Insurance Company*[43] involved a breach of insurance contract claim arising out of a property damage claim. The Court held that emails, previously withheld based on the attorney-client privilege, must be disclosed as they contained merely factual discussions.[44] The privilege was inapplicable because legal advice or discussion of legal consequence of the factual materials was not provided.[45] The Court noted that the "transfer of insurance claim information between [a party] and its insurer through an attorney does not transform otherwise purely factual data into legal analysis warranting privilege protections."[46]

Further, the attorney-client privileged material being sought generally must be not only relevant, but go to the heart of the issues involved in the case. Where there are non-privileged means for obtaining the same information, the need for disclosure of materials protected by attorney-client privilege is diminished.[47] Instead, the decision of whether an implicit waiver has occurred typically "turns on whether the actual content of the attorney-client communication has been placed in issue [in such a way] that the information is actually required for the truthful resolution of the issues raised in the controversy." [48]

III. THE AUTOMATIC WAIVER RULE

The approach most destructive to the principles underlying the attorney-client privilege is the Automatic Waiver Rule. In these jurisdictions, when a bad faith claim is

made, the attorney-client privilege is presumptively inapplicable to the pre-litigation claim adjustment and coverage determination process.[49]

A. Washington

The seminal case in Washington that established this principle is *Cedell v. Farmers Insurance Company of Washington*.[50] There, the plaintiff Bruce Cedell ("Cedell") insured his home with Famers Insurance Company of Washington ("Farmers") for twenty years.[51] In November 2006, a fire broke out completely destroying the second story of his home.[52] The fire department determined that the fire was likely accidental and the Farmers' fire investigator agreed there was no evidence of incendiary origin.[53] After eight months of investigation, Farmers offered Cedell a one-time, good for ten days, offer of less than one-third of the estimated exposure.[54] Cedell filed suit for, among other claims, bad faith.[55] Farmers objected to producing more than a heavily-redacted claim file on the basis of privilege.[56]

The Supreme Court of Washington asserted that the insured needed access to the insurer's file to discover facts to support a bad faith claim and that permitting a blanket privilege, merely because lawyers participated in the investigation, would "unreasonably obstruct discovery of meritorious claims and conceal unwarranted practices."[57] A presumption was established that "there is no attorney-client privilege relevant between the insured and the insurer in the claims adjusting process."[58] This presumption can be overcome by demonstrating the attorney was providing counsel to the insurer as to their potential liability, as opposed to engaging in "quasi-fiduciary tasks," such as investigating, evaluating, and processing the claim.[59] At such point, an in-camera review and redaction of mental impressions would occur, absent a showing of an act of bad faith rising to the level of potential civil fraud upon such review.[60]

Cedell remains good law and the guiding standard on this issue in Washington cases.[61] The presumption has been extended to encompass third-party bad faith claims.[62] While this presumption does not subject post-litigation communications or materials to discovery,[63] it has been used to compel the deposition testimony of pre-suit coverage counsel to determine whether the actions of the insurer in denying a tender were reasonable.[64]

B. New York

A recent ruling of the Supreme Court of New York establishes its adherence to the Automatic Waiver Rule, including for the coverage opinions of counsel. In *Otsuka America, Inc. v. Crum & Forster Specialty Insurance Company*,[65] the Court ruled that several communications between Crum & Forster Specialty Insurance Company ("CF") and its attorneys were not privileged and must be produced.

Plaintiff Pharmavite LLC, a wholly owned subsidiary of Plaintiff Otsuka America, Inc. ("Otsuka"), and a manufacturer of dietary supplements, experienced a recall of certain products that resulted in a loss in the amount of $9,000,000.[66] After retaining counsel to conduct an investigation, CF denied coverage.[67] Plaintiffs sued for breach of contract and declaratory judgment.[68]

The parties disputed the discoverability of several documents withheld based on the attorney-client privilege.[69] After conducting an *in-camera* review, the Court issued a decision ordering CF to disclose all of the withheld documents or move to re-argue.[70] CF moved to re-argue and this decision was rendered.[71]

The Court noted that the decision to pay or reject "claims is a part of the regular business of an insurance company."[72] Further, where counsel is acting not as an attorney, but as a claims investigator, communications with the insurer are not privileged.[73] It was asserted that, where attorneys are retained to provide a coverage

opinion, which is an opinion as to whether the insurer should pay or deny a claim, counsel is primarily engaged in claims handling.[74]

There were five categories of documents that CF was required to disclose. First, a memorandum written by a CF representative, which summarized counsel's legal opinion regarding the merits of Otsuka's legal claim.[75] The Court found it was not a communication of primarily legal character as it was not prepared by an attorney, communication between counsel and client, and was "prepared in the ordinary course of an insurance company's investigation to determine whether to accept or reject coverage."[76]

Second, two emails were deemed discoverable. One, from non-party Marsh Risk Insurance to CF, was deemed not primarily or predominantly of legal character.[77] The second, an email from CF to counsel, demonstrated that CF retained the attorneys to act as claims investigators regarding the issue of whether coverage should be accept or rejected and the extent of loss, which is part of the ordinary course of CF's investigation.[78] As with the prior memorandum, the Court highlighted that the fact that counsel was retained did not render these communications privileged.[79] Bolstering this finding was that the correspondences were dated before CF denied Otsuka's claim.[80]

Third, correspondences by email and letter were determined not to be privileged because they were not prepared by attorneys acting as counsel and contained no materials which were "uniquely the product of a lawyer's learning and professional skills."[81] Fourth, communications before the denial of coverage where counsel states its opinion regarding the coverage issue, based on the current state of law and policy language, were deemed discoverable.[82] The Court found them to be part of the regular course of CF's business, which is payment or rejection of claims, and stated they demonstrated counsel was primarily engaged in claims handling.[83]

Finally, the coverage opinion of counsel, which the Court said showed that the attorney was primarily engaged in claims handling, and thus, not protected by privilege.[84] Even a marking of "Privileged and Confidential Attorney Work Product" did not influence this finding as a party's own labels are not determinative.[85] The Court noted, "[e]ven if this memorandum has a mixed multipurpose insofar as it was also composed in anticipation of litigation, it is still discoverable and not privileged."[86]

This ruling, while seemingly a drastic change in the policy and position of courts regarding the attorney-client privilege, is not an outlier. Additional states, such as Indiana, Minnesota, and Montana, have rendered similar opinions regarding the discoverability of communications between an insurer and counsel during a claims or coverage investigation.[87] The import of these decisions is that counsel and an insurer should assume or, at least be aware, that communications prior to a coverage may be discoverable, particularly where counsel is retained to perform the function of an adjuster, and act accordingly.

---

[1] *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S. Ct. 2081, 2084, 141 L. Ed. 2d 379 (1998).
[2] *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981).
[3] O.C.G.A. § 33-4-6; *BayRock Mortg. Corp. v. Chicago Title Ins. Co*., 286 Ga. App. 18, 19, 648 S.E.2d 433, 435 (2007).
[4] *Southern General Insurance Company v. Holt*, 262 Ga. 267, 409 S.E.2d 852 (1991); *Cotton States Mut. Ins. Co. v. Brightman*, 276 Ga. 683, 685, 580 S.E.2d 519, 521 (2003) ("Judged by the standard of the ordinarily prudent insurer, the insurer is negligent in failing to settle if the ordinarily prudent insurer would consider choosing to try the case created an unreasonable risk. The rationale is that the interests of the insurer and insured diverge when a plaintiff offers to settle a claim for the limits of the insurance policy. The insured is interested in protecting itself against an excess judgment; the insurer has less incentive to settle because litigation may result in a verdict below the policy limits or a defense verdict.")
[5] *See Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir. 1994); *Remington Arms Co. v. Liberty Mut. Ins. Co*., 142 F.R.D. 408, 414 (D. Del. 1992).
[6] *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 172, 829 S.E.2d 707, 714 (2019)
[7] Restatement (Third) of the Law Governing Lawyers § 80 (2000).
[8] *See Atl. Coast Line R. Co. v. Daugherty,* 111 Ga. App. 144, 149, 141 S.E.2d 112, 116 (1965); *Liberty Mut. Fire Ins. Co. v. Apac-Se., Inc.*, No. 1:07-CV-1516-JEC-WEJ, 2009 WL 10664868, at *3 (N.D. Ga. June 29, 2009).
[9] *Camacho v. Nationwide Mut. Ins. Co*., 287 F.R.D. 688, 692, fn. 3 (N.D. Ga. 2012); *Skinner v. Progressive Mountain Ins. Co.*, No. 1:13-CV-00701-JOF, 2013 WL 12073464, at *5 (N.D. Ga. Nov. 14, 2013) ("No Georgia court has applied the attorney-client privilege in the context of a bad faith failure to settle claim.")
[10] *Liberty Mut. Fire Ins. Co. v. APAC-Se., Inc.*, No. 1:07-CV-1516-JEC, 2008 WL 11320055, at *6 (N.D. Ga. May 16, 2008).
[11] *Id.* at 1.
[12] *Id.*

[13] *Id.* at *2.
[14] *Id.*
[15] *Id.*
[16] *Id.* at *4.
[17] *Id.*
[18] *Id.* at *6.
[19] *Id.*
[20] *Id.*
[21] *Perrigo Co. v. Merial Ltd*., No. 1:15-CV-03674-SCJ, 2017 WL 5203054, at *4 (N.D. Ga. Oct. 5, 2017) (holding that Georgia courts will only find implicit waiver of the attorney-client privilege where a party intends to manipulate the privilege to their advantage and the failure to disclose would necessarily impact fairness and justice, which is limited to the client's position resting on the attorney having done or said something); *Fed. Deposit Ins. Corp. v. Bryan*, No. 1:11-CV-2790-JEC, 2014 WL 11517836, at *3 (N.D. Ga. Feb. 14, 2014) (noting that attorney-client privilege can be impliedly waived, such as a good faith defense based on knowledge of the law supplied by attorney or attorney malpractice).
[22] , No. 1:11-CV-2790-JEC-GGB, 2012 WL 12835873, at *7 (N.D. Ga. Nov. 28, 2012), aff'd, No. 1:11-CV-2790-JEC, 2014 WL 11517836 (N.D. Ga. Feb. 14, 2014).
[23] *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 159 (Tex. 1993)
[24] *Id* at 160.
[25] *Id.*
[26] *Id. at 163.*
[27] *Id.*
[28] *Id.*
[29] *In re Madrid*, 242 S.W.3d 563, 569 (Tex. App. 2007).
[30] *In re Subpoena of Curran*, No. 3:04-MC-039-M, 2004 WL 2099870, at *2 (N.D. Tex. Sept. 20, 2004).
[31] Restatement (Third) of the Law Governing Lawyers § 80 (2000).
[32] *Matter of Kozlov*, 79 N.J. 232, 243, 398 A.2d 882, 887 (1979).
[33] *Argo Sys. FZE v. Liberty Ins. PTE, Ltd*., No. CIV.A. 04-00321-CGB, 2005 WL 1355060, at *3 (S.D. Ala. June 7, 2005)
[34] *Cutrale Citrus Juices USA, Inc. v. Zurich Am. Ins. Grp.*, No. 5:03-CV-420-OC-10GRJ, 2004 WL 5215191, at *3 (M.D. Fla. Sept. 10, 2004) (*quoting Connecticut Indem. Co. v. Carrier Haulers, Inc.*, 197 F.R.D. 564, 572 (W.D.N.C. 2000); *see also Dunn v. State Farm Fire & Cas. Co.,* 927 F.2d 869, 875 (5th Cir. 1991) ("The privilege does not require the communication to contain purely legal analysis or advice to be privileged. Instead, if a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged.)"
[35] *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 55, 13 P.3d 1169, 1172 (2000)
[36] *Id.* at 58, 1175.
[37] *Id.* at 62, 1179.
[38] *Id.* at 66, 1183.
[39] *Id.* at 67, 1184.
[40] *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 177, 829 S.E.2d 707, 717 (2019)
[41] *Mortg. Guar. & Title Co. v. Cunha*, 745 A.2d 156, 160 (R.I. 2000) (noting further that merely because attorney-client communications are relevant does not place them at issue).
[42] Dawson v. New York Life Ins. Co., 901 F. Supp. 1362, 1367 (N.D. Ill. 1995).
[43] *Huntington Chase Condo. Ass'n v. Mid-Century Ins. Co.*, No. 16 C 4877, 2017 WL 440730, at *1 (N.D. Ill. Feb. 1, 2017).
[44] *Id.* at *4.
[45] *Id.*
[46] *Id.*
[47] *Ex parte Dow Corning Alabama, Inc.*, No. 1171118, 2019 WL 6337291, at *4 (Ala. Nov. 27, 2019).
[48] *Vakili v. First Commercial Bank*, No. 2:08-CV-276-VEH, 2009 WL 10670046, at *3 (N.D. Ala. May 21, 2009), aff'd sub nom. *Vakili v. Stephenson*, 478 F. App'x 660 (11th Cir. 2012) (quoting *Ex parte State Farm Fire and Cas. Co.,* 794 So.2d 368, 376 (Ala. 2001)).
[49] *Cedell v. Farmers Ins. Co. of Washington*, 176 Wash. 2d 686, 698–99, 295 P.3d 239, 246 (2013).
[50] *Id.*
[51] *Id.* at 690, 242.
[52] *Id.* at 691, 242.
[53] *Id.*
[54] *Id.* at 691-92, 242.
[55] *Id.* at 692, 242.
[56] *Id.*
[57] *Id.* at 696-97, 245.
[58] *Id.* at 699, 246.
[59] *Id.*
[60] *Id.* at 699-700, 246.
[61] *See e.g., Hoff v. Safeco Ins. Co. of Illinois*, 449 P.3d 667, 675 (Wash. Ct. App. 2019) (applying principles established in *Cedell*); *Canyon Estates Condo. Ass'n v. Atain Specialty Ins. Co.*, No. 2:18-CV-1761-RAJ, 2020 WL 363379, at *1 (W.D. Wash. Jan. 22, 2020).
[62] *See Carolina Cas. Ins. Co. v. Omeros Corp*., No. C12-287RAJ, 2013 WL 1561963, at *3 (W.D. Wash. Apr. 12, 2013) (*quoting St. Paul Fire & Marine Ins. Co. v. Onvia,* 165 Wash.2d 122, 196 P.3d 664, 668 (Wash.2008).
[63] *Richardson v. Gov't Employees Ins. Co*., 200 Wash. App. 705, 716, 403 P.3d 115, 122 (2017) ("*Cedell* does not suggest that privileged or work product information generated postlitigation is also subject to discovery.")

[64] *Everest Indem. Ins. Co. v. QBE Ins. Corp.,* 980 F. Supp. 2d 1273, 1280 (W.D. Wash. 2013)
[65] *Otsuka America, Inc v Crum & Forster Specialty Ins. Co*., No. 650463/2018, 2019 WL 4131024, at *5 (N.Y. Sup. Ct. Aug. 30, 2019)
[66] *Id.* at *1.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at *2 (*quoting Bertalo's Rest. v Exchange Ins. Co.*, 240 AD2d 452, 454-455 (2d Dept. 1997)).
[73] *Id.*
[74] *Id.* (*citing National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v TransCanada Energy USA, Inc.*, 119 AD3d 492, 493 (1st Dept. 2014).
[75] *Id.* at *3.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.* at *4.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id. (citing Bombard v. Amica Mut. Ins. Co.*, 11 A.D.3d 647, 648 (2d Dep't, 2004)(holding that reports prepared by attorneys before coverage decision is made are discoverable even when they are "mixed/multipurpose reports, motivated in part by the potential for litigation.")
[87] *See e.g., Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 671 (S.D. Ind. 1991) (finding no privilege for communications with outside counsel who was hired to monitor progress of the claim, ensure compliance with report requirements, and conduct examination under oath noting that, "[t]o the extent that this attorney acted as a claims adjuster, claims process supervisor, or claim investigation monitor, and not as a legal adviser, the attorney-client privilege would not apply"); *Mission Nat. Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986) (holding that attorney-client privilege does not depend whatsoever on anticipation of litigation, but only on the nature of the relationship involved and whether an attorney is acting as legal counsel or as an ordinary businessman.); *Silva v. Fire Ins. Exch*., 112 F.R.D. 699, 699–700 (D. Mont. 1986) ("The time-worn claims of work product and attorney-client privilege cannot be invoked to the insurance company's benefit where the only issue in the case is whether the company breached its duty of good faith in processing the insured's claim")

There's an Expert For That—Or Maybe Not: An Analysis of Recent (and Future) Decisions that Address When an Expert Affidavit is Required for Medical Malpractice Actions Involving Decisions on Formulation of Policies, Staffing, and Credentialing

By

Tracie Macke

Tracie Macke is a partner with the Savannah office of Brennan Wasden & Painter, LLC. She has a general civil trial practice with interests in the areas of medical malpractice, insurance defense, employment litigation and commercial litigation. Tracie is a GDLA Board Member.

Medical malpractice practitioners are fully aware that an affidavit of an appropriate licensed professional must accompany a complaint for medical malpractice action to satisfy the requirements of O.C.G.A. § 9-11-9.1. The intent behind O.C.G.A. § 9-11-9.1 was to reduce the number of "frivolous" negligence claims by requiring claims be supported by a properly qualified expert, and this additional pleading requirement of having an expert affidavit is one of the most litigated areas in Georgia law.[1] Although decisions involving formulation of hospital policies, staffing or credentialing (the process of evaluating a healthcare professional's qualifications in order to grant an applicant the right to provide services at a healthcare institution) do not actually involve direct treatment to a patient, any alleged negligence as to these types of acts can be encompassed by Georgia's statutory definition of a "medical malpractice" action.

Here, Georgia defines an action for medical malpractice as a claim for damages resulting from the death or injury of a person arising out of:

(a) health, medical, dental, or surgical service, diagnosis, prescription, treatment, or care rendered by a person authorized by law to perform such services by any person acting under the supervision or control of a lawfully authorized person; or

(b) care or service rendered by any public or private hospital, nursing home, clinic, hospital authority, facility, institution, or by any officer, agent, employee thereof acting within the scope of his employment.[2]

The last section, O.C.G.A. § 9-11-20(b), shows the legislature contemplated medical malpractice actions to include criticisms on policies and processes which involve, in whole or part, the decision-making of those individuals trained to provide health care services, potentially

ranging on multiple issues – policies governing the delivery, ordering and reporting of tests, labs and consults; staffing levels and assessing and the credentials of professionals (credentialing or hiring).

Over the past year, Georgia appellate courts have decided whether claims involving the implementation of a policy governing the staffing of radiology services at hospitals and the staffing levels at nursing homes constituted medical malpractice actions which required support of expert testimony. In one case, the claim required an expert affidavit, and in the other circumstance, no affidavit was required.[3] In an unpublished decision, the Court of Appeals characterized that decisions on whether a physician was properly granted hospital privileges (i.e. the process known as credentialing) was a medical malpractice action for the purposes of applying the five year (5) statute of repose limitation period.[4]

In these decisions, the appellate court grappled with situations portrayed by plaintiffs as ones where: (1) the same acts or omissions were undertaken, in part, by employees who were not medical professionals or (2) medical professionals who were not exercising medical judgment at the time of alleged negligence.

This article examines these recent decisions focusing on the interplay of facts, and sometimes tortured analysis of determining when an action sounds in professional negligence requiring expert support.

1. **Alleged Negligent Implementation of Radiology Agreement Regarding Staffing of Hospital with On-site Radiologists Required Expert Testimony – *St. Mary's Health Care System v. Roach*[5]**

a. Facts and Procedural Posture

The plaintiffs took their son to the emergency department at 10:36 p.m. on November 8, 2013, with complaints of chest pain, nausea, and fever.[6] The emergency room physician ordered and read the chest x-rays, deciding the x-rays showed an enlarged heart but no obvious infiltrate, and discharged the patient with a diagnosis of acute febrile illness and atypical chest pain.[7] The next morning, the radiologist interpreted the x-ray images and noted that there was opacity in the suprahilar region on the right, and recommended a chest CT with IV contrast.[8] Less than four hours after the radiologist interpreted these films, the patient collapsed at home, and was transported to the hospital where resuscitative efforts were unsuccessful.[9] In the amended complaint, the patient's parents alleged that because the

hospital's imaging interpretation system provided that x-rays ordered after 11 p.m. on a Friday night would not be interpreted by a radiologist until the next morning (unlike those ordered during regular hours), the hospitals was negligent in its staffing which led to an untimely interpretation and diagnosis of the images.[10] No expert affidavit was submitted with the plaintiffs' amended complaint.[11]

The heart of the plaintiffs' claims for negligent implementation of policy securing 24/7 coverage for radiology coverage (or negligent staffing) centered on the hospital's agreement with a group of radiologists where the radiologists agreed to provide in-person or on-call services 24 hours per day, 365 days a year; but that the radiologists could fulfill this obligation by contracting with a teleradiology group to preliminarily interpret CT, MRI, and ultrasound studies between the hours of midnight and 7 a.m. Mondays-Thursdays and 11 p.m. through 8 a.m. Fridays-Sundays, and the radiology group would have an "on-call" radiologist who could also be available during those times for consultation whenever requested by a medical staff physician with consultation being conducted either by teleradiologist or the radiologist physically returning to the hospital as the circumstances determined.[12]

The patient's treating emergency room physician testified that the hospital's radiology policy provided that every x-ray image would be reviewed and interpreted by a radiologist, although as in this case, any x-rays performed after hours would not be reviewed until the following day.[13] The emergency room physician further testified she could have obtained a radiology consultation on the night of the patient's emergency room visit by contacting the on-call radiologist; however, she believed she had accurately read and interpreted the chest x-rays before discharging the patient.[14]

The trial court denied the hospital's motion for summary judgment, ruling that the plaintiffs' claims sounded in ordinary negligence as the hospital's radiology policy was "the product of business negotiations between the hospital and the radiology group to provide exclusive radiology services", and the resulting contract showed "no indication that the physicians were involved in contract negotiations".[15] However, the Court of Appeals overturned the trial court's decision finding that although the hospital policy allowed a process for an immediate consult with a radiologist, the emergency room physician had exercised her medical judgment when she decided it was not necessary for the radiologist's consult and

therefore the decision as to how and when the hospital would provide a radiologist to interpret x-rays of its patients was not a purely administrative act but one that involved the exercise of professional knowledge and judgment.[16]

b. Issues Presented by the Decision

In this case, the appellate court rejected the notion that even though evidence showed a business decision had determined that there was no need to have a radiologist physically on-site during all nights and weekends, this policy was not purely done from an administrative decision-making process. Instead, the Court focused on the emergency room physician's decision to read the films herself before deciding whether to obtain an immediate consult from an off-site radiologist or requesting the on-call radiologist come to the hospital. In other words, so long as a trained healthcare professional exercised judgment on whether additional expertise was needed (i.e. another physician), then the case sounded in professional negligence and an expert affidavit was required to establish how an agreement which did not require the hospital to have an on-site radiologist failed to meet the standard of care.

The apparent determining factor in *St. Mary's Health Care* thus focused on the exercise of the emergency room physician's judgment in determining whether she needed to have an immediate consult with a radiologist. By holding that the hospital's policy allowed for a medical professional to use her medical judgment to determine whether an on-call radiologist consult was necessary did not show a purely administrative act, rather it was an exercise of professional knowledge and judgment, and the appellate court decided that the claim sounded in professional negligence which required expert testimony.

With this precedent, it thus appeared that if a healthcare provider exercised his professional judgment regarding the implementation of a policy delivering services (or staffing), this was not a business decision even if factors such as cost efficiency in not having on-site medical providers at night might have entered into the decision. Yet, this analysis was subsequently questioned by a completely different appellate panel in the next case, *Lowndes County Health Services v. Copeland*,[17] when the plaintiffs alleged a nursing home did not have a registered nurse on staff 24/7, even though a licensed practitioner nurse ("L.P.N.") could exercise professional judgment in deciding to consult with an on-

site physician's assistant or physician for recommended treatment of a patient.

2. Claim Alleging Negligent Staffing at Nursing Home Did Not Require Expert Affidavit - *Lowndes County Health Services v. Copeland*[18]

a. Facts and Procedural Posture

In *Lowndes*, the plaintiffs sued for the wrongful death and other damages against Lowndes County Health Services, LLC d/b/a Heritage Healthcare at Holly Hill ("Holly Hill").[19] The jury returned a $7.6 million verdict against Holly Hill for both professional and ordinary negligence, but the verdict was apportioned between Holly Hill and four other non-parties.[20] As part of its appeal, Holly Hill challenged the denial of its motion for directive verdict on plaintiffs' negligent staffing claim.[21]

The negligent staffing claim centered on whether the night shift at the skilled nursing facility was appropriately staffed so a patient's condition could be evaluated. Specifically, on October 25, 2012, a 71-year-old-male resident at the facility was seen by a licensed practical nurse ("L.P.N.") during the "11:00 pm-7:00 am/night shift".[22] Upon finding brown vomit on the patient's clothes, noting his stomach was slightly distended and detecting a lack of bowel sounds in three out of four quadrants, the L.P.N. contacted the physician's assistant ("P.A.") to Holly Hill's medical director, and the L.P.N. was instructed by the P.A. not to send the patient to the hospital and instead a blood test, abdominal x-ray and nausea medication was ordered.[23] At 6:30 a.m., a registered nurse ("R.N."), who was Holly Hill's Assistant Director of Nursing, was requested to "get something done about this resident", but according to the chart, the patient was not actually assessed until 9:15 a.m. when another R.N., who served as the nursing facility's Director of Nursing, examined and found the patient's abdomen distended and noted his complaints of abdominal pain.[24] At 10 a.m., the x-ray that had been previously ordered was completed, and at 10:15, the patient was transported by ambulance and arrived 45 minutes later at the hospital where he was treated by a team that included the nursing facility's Medical Director and P.A.[25] The patient was admitted to the hospital's ICU around 5:30 p.m., but died later that night from complications related to aspirating fecal material, a risk associated with bowel movements.[26]

In addition to asserting claims of professional negligence, the plaintiffs alleged the facility negligently failed to provide appropriate staffing levels.[27] Specifically, the plaintiffs alleged that the facility failed to staff its night shifts with R.N.s who could

have properly assessed the patient's condition and asserted the staffing decision was a business decision which sounded in ordinary negligence.[28] Although L.P.N.s are licensed nurses, the plaintiffs argued L.P.N.s are not qualified to perform certain functions as those undertaken by R.N.s, such as assessing a patient's condition that identifies "the nature of the problem from a nursing standpoint and the suspected causes,"[29] and as the facility had not scheduled any R.N.s to work night shifts, the plaintiffs argued there were no qualified professionals on duty to perform an independent assessment of the resident's medical condition[30].

In moving for directed verdict, the facility argued its staffing decision required the exercise of a professional nursing judgment which had been made by its R.N./Director of Nursing and the plaintiffs failed to support their allegations with expert testimony.[31] Relying on her professional's training education and experience, the facility's Director of Nursing testified she was a R.N. who was responsible for staff scheduling, including certified nursing aides ("C.N.A."), L.P.N.s, and R.N.s[32]. She further explained that governmental regulations only required a R.N. be in the facility eight (8) consecutive hours per day, and she had chosen to staff the facility with a R.N. during the day shift rather than the night shift because most residents were asleep at night.[33] She also testified that the facility is required to staff above the governmental minimum requirements if necessary to meet corporate needs.[34]

The facility's 30(b)(6) corporate representative testified that its staffing decision were made "based on historically what has been done and on the judgment of the nurses who are at this facility, particularly the Director of Nurses"; that its nursing director determined the numbers and type of staff to place on each unit of the facility based upon her knowledge and nursing judgment; however, the 30(b)(6) deponent agreed that these decisions were made in collaboration with the facility administrator who was responsible for the general operations.[35]

In denying the directed verdict, the Court of Appeals concluded that the facility had engaged in a business-related *ordinary* negligence by "forcing" the Director of Nursing to choose only one shift in which to routinely schedule a R.N. and leaving the night shift staff "without anyone trained adequately to evaluate residents".[36] Pertinent to the court's analysis was finding that there was "no evidence that the overall determination regarding how many R.N.s were made available to schedule was made

by a medical professional rather than a business decision based on the higher cost of paying R.N.s".[37]

b. Issues Presented by the Decision

The court's opinion that a Director of Nursing's actions in making staffing decisions was not based upon the nurse's professional background and training, but was rather a "business" decision, appears to be at the cornerstone of its decision in holding the staffing decisions sounded in ordinary negligence. This analysis appears at odds with the earlier precedent of *St. Mary's Health Care* where that appellate panel held that reduced services/staffing of radiology coverage was not governed by a business motive (even though fewer radiographic studies many would be read on nights/weekends).

The decision that staffing decision at a nursing home are ones that a layperson could perform seems to be in stark contrast to the decision in *St. Mary's Health Care System* and earlier precedents. For example, courts have required an expert affidavit even when the allegations of malpractice appear to be obvious to the ordinary layperson. In *Grady General Hospital v. King*,[38] the appellate court held that an expert affidavit was required where a nurse gave the patient wrong medication even after patient informed the nurse the medication was incorrect. In *Roberson v. Northrup*,[39] an expert affidavit was required where the physician mistakenly injected the patient in the wrong leg. In *Griffin v. Carson*,[40] a failure to schedule follow up appointment sounded in professional negligence. In *Paden v. Read*,[41] the failure to obtain proper informed consent requires an expert affidavit; and in *Walls v. Sumter Regional Medical Hospital,*[42] a claim that hospital failed to implement recommended newborn screening protocol sounded in professional negligence.

Although noting the *St. Mary's Health Care* decision,[43] the appellate court seemingly overlooked the fact that the L.P.N. did have training and knowledge to evaluate the patient's abdomen and call the Medical Director or a P.A. for further consultation.[44] Finding that staffing was more of a "business decision", the *Lowdnes* court pointed to *Lamb v. General Hospital*,[45] showing a hospital exercises ordinary care when furnishing equipment and facilities reasonably suited to the use as intended. In Lamb, the Georgia Supreme Court had held that the failure to replace disposable parts in an instrument involved in that case, as required for a safe performance, created an issue of simple negligence because

professional skill and judgment was not involved.[46]

Although a distinguishing factor in *Lowdnes* from *St. Mary's Health Care* could have been the fact that an expert in *Lowdnes* testified that the delay in the ultimate diagnosis contributed to the patient's death, this fact had not been decisive in *St. Mary's Health Care* when plaintiffs implied there had been a delay in obtaining a read from the on-site radiologist. Instead, the *Lowdnes* court believed that the decision not to staff its night shift with on-site R.N.s was a business decision.

Likewise, had the court found the corporate representative or the Director of Nursing indicated that the staffing decisions were based upon the fact they had established a chain of command, trained their L.P.N.'s, who were qualified to exercise professional training to assess patients and seek future consult by a physician's assistant and/or a medical director, *Lowdnes'* analysis would have mirrored *St. Mary's Health Care* where the L.P.N. exercised her professional judgment in deciding to seek additional consultation with a P.A. or physician, similar to that of an emergency physician deciding whether or not to seek a radiologist's opinion.

Finally, it seems that if the *Lowdnes* court had believed the evidence showing that the facility's staffing decisions were made under its registered nurse's judgment after her frequent reviews of the acuity of patients' needs to show staffing decisions were appropriately made to address needs of the patient population, this evidence showed the need for professional judgment to be exercised in deciding on staffing. Obviously, a business administrator cannot perform assessments of the patient population without having the required background to allow for a qualified evaluation of the population's medical needs.

When the *Lowdnes* court couched its decision as one based upon the fact that "R.N.s cost the facility more than L.P.N.s", because the hourly rate for a R.N. is greater than a L.P.N., it appeared to disregard whether any nursing judgment had been utilized in assessing in the patient populations which showed the majority of the residents during the evening were asleep, and that the facility had established a process which made a P.A. or medical doctor available for consult.

The different approaches taken in the two cases (*St. Mary's Health Care*_and *Lowdnes County* will need to be explained in future court decisions and may even impact decisions examining claims for negligent credentialing.

3. Negligent Credentialing Claims Deemed "Medical Malpractice Claims" - *Wiggins v. Wehmann*.[47]

a. Facts and Procedure Posture

In August 2010, after the patient presented to the emergency room, she was admitted and treated by multiple providers before being transferred to another hospital two days later where she received additional treatment and remained until her death on August 4, 2010. The plaintiffs' first medical lawsuit sought to recover for the patient's wrongful death and alleged professional negligence against the doctor, used the hospital for vicarious liability for the doctor, and a separate claim of negligent credentialing against the hospital. After litigating for three years, the plaintiffs voluntarily dismissed their lawsuit and refiled.[48]

In their renewed suit, the plaintiffs argued their claim for negligent credentialing was one of ordinary negligence where the hospital's responsibility to examine the qualifications of a physician seeking medical staff privileges at the hospital was an administrative function and did not require a medical professional's conduct in their area of expertise, and relied upon *Wong v. Chapell,*[49] (where physician's failure to adequately train his assistants deemed to not involve the exercise of professional judgment).

The hospital argued negligent credentialing claims are professional negligence actions and produced evidence that Georgia's Department of Community Health (DCH) regulations for hospitals state that: "the *medical* staff shall be responsible for the examination of credentials of any candidate for medical staff membership and for any individuals seeking clinical privileges and for the recommendations to the governing body concerning the appointment of such candidates". Ga. Comp. R. and Reg. 111-8-40-.11(a)(2) (i-vii).[50] Further, the hospital held O.C.G.A. §31-7-15 provides that committees of *physicians* conduct "the evaluation of medical and healthcare services or qualifications of professional confidence of persons performing or seeking to perform such services". By referring to the Georgia Legislature and the Georgia DCH (which is responsible for the healthcare facility regulation in Georgia), the hospital contended that the job of screening applicants for admission to practice at a hospital is a job to be conducted by physicians who would logically evaluate the training, qualifications and education of a physician by exercising due a professional judgment.

b. The Opinion

In its unpublished opinion,[51] the Court of Appeals relied upon its prior decision in *Ray v. Scottish Rite Children's Medical Center, Inc.,* [52] explaining that "a claim of negligent credentialing arising out alleged negligent case rendered to a patient qualifies as a medical malpractice claim" and as such, the Court of Appeals held that claims of negligent credentialing are subject to the statute of repose that govern medical malpractice claims.[53]

Although this unpublished decision did not expressly state negligent credentialing claims required expert testimony, it did hold that negligent credentialing claims were deemed medical malpractice claims, they imply these claims should be supported by expert testimony.

The issue of whether negligent credentialing requires expert testimony is ripe for review in Georgia[54] and such a case is currently pending in the Court of Appeals.[55] In *Houston Hospitals*, the plaintiffs have alleged that the physician was not qualified to perform cardiac catherizations; however, their supporting expert affidavit contained no criticisms against anyone involved in the credentialing process nor set from any alleged deficiencies in the credentialing. The trial court denied the hospital's motion to dismiss, but certified its July 10, 2019, order for immediate review, and the Court of Appeals issued an order granting interlocutory appeal.[56]

The plaintiffs have argued that an expert affidavit is not required, mirroring some of the very same arguments relied upon in the *Lowdnes County Health Services* decision.[57]

In support of its argument, the hospital is relying in part, upon the recent decision in *St. Mary's Health Care Systems, Inc. v. Roach*, a decision that was issued by judges Doyle and McFadden,[58] both of which will now decide on whether negligent credentialing claims require expert testimony.

4. Implications of *Roach, Lowndes County* and *Massey* for the Future

Hospitals and other healthcare facilities which face claims of negligence in formulation of policies, implementation of policies, staffing and credentialing should establish that the decisions (or decision-making process) involves the expertise of trained, licensed health care professionals. Litigators representing healthcare providers should focus on whether the decisions call into question the need for a professional's exercise of judgment based upon that individual's area of expertise, training,

education, and experience. For example, in cases alleging negligent credentialing, the emphasis should show the decision on whether to grant privileges is based upon the professional judgment of physicians reviewing the applicant's training, competency and the qualifications. Practitioners should carefully note that even though a hospital's medical staff office may not all be physicians, the actual review and recommendations for privileges is undertaken by a committee of physicians who must initially review the applicant's qualifications before recommending for privileges. "If a claim of negligence goes to the propriety of professional decision rather than to the efficiency of conduct in carrying out of a decision previously made, the claim will sound in professional negligence".[59]

As seen in *Lowdnes County*, it will not be enough to simply state that a professional made decisions without carefully establishing how the expertise of that professional entered into the decision-making process and showing that a professional's judgment was necessary (even if administrative personnel may have been involved in some of the process).

---

[1] *Labovitz v. Hopkinson*, 271 Ga. 330, 336, 591 S.E. 2d 672, 677 (1999); *Bell v. Phoebe Putney Health System, Inc.,* 272 Ga. App. 856, 614 S.E. 2d 115 (2005) (*cert denied*, 2005).
[2] O.C.G.A. §9-11-20.
[3] See *St. Mary's Health Care System v. Roach*, 345 Ga. App. 274, 811 S.E. 2d. 93 (2018) (*cert denied* 2018); *Lowdnes County Health Services v. Copeland*, 352 Ga. App. 233, 834 S.E. 2d. 322 (2019) (*cert. pending).*
[4] *Riggins v. Massey*, Ga. Court of Appeals, #A19A0845 (decided 10/22/19).
[5] 345 Ga. App. 274, 811 S.E. 2d. 93 (2018); *cert. denied* (2018). This case was decided by Judges Reese, Miller, and Doyle.
[6] *St. Mary's Health Care*, 345 Ga. App. at 274, 811 S.E. 2d. at 53.
[7] *Id.*
[8] *Id.*
[9] *Id*, 345 Ga. App. at 275, 811 S.E. 2d. at 94
[10] *Id*.
[11] *Id*, 811 S.E. 2d. at 95.
[12] *Id*.
[13] *Id*.
[14] *Id*, 345 Ga. App. at 276, 811 S.E. 2d. at 95.
[15] *Id*.
[16] *Id*., 345 Ga. App. at 276, 811 S.E. 2d. at 96.
[17] *Lowndes County Health Services v. Copeland*, 352 Ga. App. 233, 834 S.E. 2d. 322 (2019). The Court of Appeals judges were Judges Mercier, McFadding, and McMillian. As of February 3, 2020, certiorari to the Georgia Supreme Court is pending.
[18] *Id*.
[19] *Lowdnes County Health Services*, 352 Ga. App. at 233, 834 S.E. 2d. at 324.
[20] *Id*.
[21] *Id*.
[22] 352 Ga. App. at 234, 834 S.E. 2d. at 324.
[23] *Id*.
[24] *Id*.
[25] *Id*. 352 Ga. App. at 324-325, 834 S.E. 2d. at 235.
[26] *Id*.
[27] *Id*., 352 Ga. App. at 326-327, 834 S.E. 2d. at 238.
[28] *Id*.
[29] *Id*.
[30] *Id*., 352 Ga. App. at 327, 834 S.E. 2d. at 239.
[31] *Id*.
[32] *Id*. C.N.A.s are staff members who assist residents with daily living tasks such as bathing, toiletry, and eating. C.N.A.s report to L.P.N.s who in turn report to R.N.s.
[33] *Id*.
[34] *Id*.
[35] *Id*. 352 Ga. App. at 238-239, 834 S.E. 2d. at 327.
[36] *Id*. 352 Ga. App. at 239, 834 S.E. 2d. at 328.
[37] *Id*.
[38] 288 Ga. App. 101, 653 S.E. 2d 367 (2007).
[39] 302 Ga. App. 405, 691 S.E. 2d 547 (2010).

[40] 255 Ga. App. 373, 374, 566 S.E. 2d 36, 38 (2002).
[41] 294 Ga. App. 603, 605, 669 S.E. 2d 548, 551 (2008).
[42] 292 Ga. App. 865, 666 S.E. 2d 66 (2008).
[43] *St. Mary's Health Care*, 345 Ga. App. 274, 278, 811 S.E. 2d. 93.
[44] *Lowdnes County Health Services*, 352 Ga. App. at 233-234, 834 S.E. 2d. at 324.
[45] 262 Ga. 70, 71, 416 S.E. 2d 720 (1992).
[46] *Id*. Likewise, this Court observed in *Dent v. Memorial Hospital*, 270 Ga. 316, 509 S.E. 2d 908 (1998), that the plaintiff's allegations concerning the nursing staff's failure to activate the alarm on a sleep apnea monitor – its position and instruction – asserted simple negligence because it did not involve acts of professional judgment. (See also *Wong v. Chapel*, 333 Ga. App. 422, 773 S.E. 2d 496 (2015), case sounded in ordinary negligence when a medical clerk made a mistake in taking a patient's history as the clerk did not exercise any medical judgment but was merely a scrivener).
[47] *Riggins v. Wehmann*, Georgia Court of Appeals decision A19A0845 (unpublished decision October 22, 2019).
[48] In the re-filed lawsuit, the defendants argued that a dismissal should be granted because plaintiffs failed to refile before the statute of repose deadline expired; however, for the purposes of this article, we are concentrating on the Court of Appeals' decision on whether a negligent credentialing claim is an exercise of professional judgment requiring an expert affidavit.
[49] 333 Ga. App. 422, 426 (2005).
[50] See Ga. Comp. R. and Reg. 111-8-40-.11(a)(2) (i-vii) ("medical staff means the body of licensed physicians, dentists, or podiatrists appointed or approved by the governing body to which the governing body has assigned the responsibility and accountability to patient care provided to the hospital".)
[51] *Riggins*, CoA #A19A0845. This decision was issued by Judges Conner, P.J. Doyle, and J. Markle
[52] 251 Ga. App. 798, 800, 555 S.E. 2d 166 (2001).
[53] (*Riggins*, p. 3).
[54] In 2018, the Court of Appeals had granted interlocutory appeal following a trial court's denial to dismiss a claim for negligent credentialing against the hospital for failure to include an expert affidavit (*Mayo Clinic Health Systems in Waycross, Inc. v. Burcham*, Court of Appeals #A18A1299); however, this appeal was withdrawn before the appellate court could render a decision
[55] *Houston Hospitals, Inc. d/b/a Houston Medical Center v. Reeves*, Georgia Court of Appeals, Case #A20A0454 (2019). Oral argument is scheduled for February 19, 2020 and will be heard by Presiding Judge Sarah Doyle, Chief Judge Christopher McFadden, and Judge Ken Hodges.
[56] *Id*.
[57] See also *Ladner v. Northside Hospital, In*c.; *McCall v. Henry Medical Center, Inc.* 250 Ga. App. 679 (2001); *Sheffield v. Zilis*, 170 Ga. App. 62 (1984).
[58] 345 Ga. App. 274, 276-277 (2018).
[59] *Nail v. State*, 301 Ga. App. 7, 9, 686 S.E. 2d 483, 485 (2009), (expert affidavits required for negligent hiring claims); *Georgia Physical Therapy v. McCullough*, 219 Ga. App. 744, 466 S.E. 2d 635 (1995). These two cases illustrate the need for attorneys to focus their strategy on the skills necessary to implement or formulate decisions based upon expertise.

28 U.S.C. 1446(b): Procedures, Pitfalls, and Strategies When Contemplating Removal to Federal Court

By

Garett Murphy

Garrett W. Murphy is an associate with Brennan, Wasden & Painter LLC in Augusts. He maintains a broad civil litigation practice with an emphasis on medical malpractice and insurance defense.

I. Brief History of Removal Under 28 U.S.C. 1446(b)

Of the three ways to invoke federal jurisdiction – by filing in federal court, by removal from state court, or by invoking federal court review following a judgement in a state court – removal is widely considered the most contentious and controversial.[1] At the cornerstone of the controversy is the timing of a removal petition in a multi-defendant lawsuit.

Prior to the Federal Courts Jurisdiction and Venue Clarification Act of 2011, 28 U.S.C. 1446(b) provided a thirty-day window to file a removal petition following "receipt by the defendant" of the initial pleading.[2] The singularity of the word "defendant" created ambiguity in multi-defendant lawsuits, led to sharply divided federal circuit rulings and, in the aftermath, created three distinct interpretations of 28 U.S.C. 1446(b): the first-served defendant rule, the intermediate rule, and the last-served defendant rule.[3] The first-served defendant rule is the most restrictive, as it requires notice of removal to be filed within thirty days of the first-served defendant, regardless of when subsequent defendants are served.[4] In other words, if the first served defendant does not effect a timely removal, subsequently served defendants cannot remove.[5]

The intermediate rule requires a notice of removal to be filed within the first-

served defendant's thirty-day window, but gives later-served defendants thirty days from the date they were served to join the notice of removal.[6] The last-served defendant rule, as adopted by the Eleventh Circuit, allows earlier-served defendants who may have waived their right to independently seek removal by failing to timely file notice of removal to nevertheless consent to a timely motion by a later-served defendant.[7]

Without much fanfare, the Federal Courts Jurisdiction and Venue Clarification Act of 2011 was enacted, in part, to address the ambiguity of 28 U.S.C. 1446(b) and resolve the split among the federal circuits.[8] As a result, 28 U.S.C. 1446(b) was amended to include statutory language that embodied that last-served defendant rule.[9]

II. Adopting the Last-Served Defendant Rule Allows All Defendants to Potentially "Have Their Day" in Federal Court

28 U.S.C. 1446(b)(2)(C) reads "[i]f defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal."

Critics of the last-served defendant rule argue that it provides earlier served defendants "another bite at the apple", thereby treating single-defendant and multiple-defendant cases differently.[10] Critics further rationalize that if the first-served defendant fails to timely file a notice of removal, it is not that defendant which bars the subsequently served defendants from petitioning for removal, but rather, it is the rule of unanimity that does."[11]

Following the lead of the Sixth and Eighth Circuits, the Eleventh Circuit adopted the last-served defendant rule in *Bailey v. Janssen Pharmaceutica, Inc.* in 2008.[12] The *Bailey* Court held that "both common sense and considerations of equity favor the last-served defendant rule."[13] In adopting the last-served defendant rule, the Bailey Court

provided rationale that encompassed equality within the confines of formal service of process. First, the last-served defendant rule is not inconsistent with the rule of unanimity, noting that earlier-served defendants may chose to join in the later-served defendant's motion, or not, therefore, preserving the requirement that all defendants must consent to removal.[14] Second, in referencing the United States Supreme Court case, *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc*., the *Bailey* Court noted that formal process is required, therefore the thirty-day window to file a notice for removal starts only "upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend."[15] Accordingly, the last-served defendant rule is most logical because it recognizes that individual defendants are not required to seek removal or respond to another defendant's notice of removal until they are properly served, regardless of whether previously-served defendants had petitioned for removal.[16]

Lastly, and perhaps most transparent, the *Bailey* Court correctly identified that any rule that requires the first-served defendant to file a notice of removal within thirty days of service to protect the later-served defendant's rights to removal unjustly may cause those later-served defendants to lose their statutory right to seek removal.[17]

Contrary to the requirements of the first-served defendant rule and intermediate rule, the last-served defendant rule is equitable in that it does not shorten the window, or flatly deny, a later-served defendant their right to remove a case (as does the first-served defendant rule), nor does it require a later-served defendant to rely on a timely notice filing of the first-served defendant (as the intermediate rule requires).[18] Codification of the last-served defendant rule allows all defendants equally a thirty-day window to file a removal

petition, which not only seems logically the most balanced approach, but also proactively prevents unfair manipulation of the removal process through delayed service on defendants most likely to remove.[19]

III. Pitfalls to Avoid When Contemplating Removal

As a matter of course, corporate defendants frequently look to removal as a way to level the playing field. The benefits of removing a case to federal court, generally speaking, include the increased potential for granting dispositive motions, well-researched case law which leads to more predictability in outcomes, and a jury pool comprised of a larger geographic range. However, federal courts are also known for their strict deadlines and increased speed at which cases typically move. This holds true for removing a case as well.

A. The Georgia Civil Practice Act Allows for Extensions of Time in State Courts Through Stipulations of Parties or by Court Orders

O.C.G.A. §9-11-6(b) provides that "[w]hen by this chapter or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the parties, *by written stipulation of counsel filed in the action, may extend the period*, or the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period extended if request therefor is made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; provided, however, that no extension of time shall be granted for the filing of motions for new trial or for judgment notwithstanding the verdict."

However, the discretion allotted to parties in Georgia state courts related to time extensions does not hold ground when it comes to removal to federal court.

B. Neither Stipulation of the Parties Nor Court Order Can Extend the Statutory 30-Day Removal Window to Federal Court

Despite the greater flexibility afforded to defendants in a multi-defendant lawsuit by the Federal Courts Jurisdiction and Venue Clarification Act of 2011, the thirty-day window remains steadfast.

The mandatory removal period of 28 U.S.C. § 1446(b) cannot be enlarged by court order, stipulation of the parties, or otherwise.[20] In an instructive case, *Harris Corp. v. Kollsman, Inc.*, the parties entered a stipulation into a state court that read, in part, "[t]he parties are engaged in discussions to reach an amicable resolution of this case. [Defendant] shall be relieved of the responsibility to file a responsive pleading, Motion, or required Notices in this case until such time as settlement discussions are declared by either party to have reached an impasse . . ."[21] Once settlement discussions failed, the defense filed a notice of removal, 104 days after it was served in the state court action.[22] Shortly thereafter, the plaintiff timely moved for remand. [23]

Under 28 U.S.C. § 1447(c), a federal court may remand an action back to state court based upon any defect in the removal procedure, including an untimely filed notice of removal.[24] "Absent a finding of waiver or estoppel, federal courts rigorously enforce the statute's thirty-day filing requirement."[25]

The Eleventh Circuit District Court in *Harris Corp.* held that "[f]ederal litigants cannot stipulate to ignore statutory time periods established by Congress. Moreover, federal courts may not use Fed.R.Civ.P. 6(b) to enlarge statutory time periods. Thus, section 1446(b)'s mandatory removal period cannot be enlarged by court order, stipulation of the parties, or otherwise."[26]

C. Defendant Bears the Burden of Demonstrating That Removal is Proper

Eleventh Circuit courts have made it clear that "removal jurisdiction raises significant federalism concerns."[27] As a result, federal courts construe removal

statutes strictly, with all doubts resolved in favor of remand to the state court. [28]

The moving party bears the burden of demonstrating that removal is proper, which includes showing the federal court that all procedural requirements have been met. [29]

1. Notice of Removal

28 USC § 1446(a) requires "a defendant or defendants desiring to remove any civil action from a state court shall file in the district court of the United States for the district and division within such action is pending a notice of removal signed . . . and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon each defendant or defendants in such action."[30] Surprisingly, in light of the strict scrutiny that federal courts have applied to removal, failure to attach the required state court papers is considered a *de minimis* procedural defect, but only curable before the expiration of the thirty-day removal period.[31]

2. Unanimity Requirement

Prior to The Federal Courts Jurisdiction and Venue Clarification Act of 2011, the Eleventh Circuit interpreted the previous language of 28 U.S.C. § 1446(b) to include a requirement that all served defendants in a multi-defendant lawsuit must consent, in writing, in order for a removal petition to be valid.[32] Known as the "unanimity rule," the Act codified this requirement under 28 U.S.C. § 1446(b)(2)(A), which states, "all defendants who have been properly joined and served must join in or consent to the removal of the action."[33]

The Eleventh Circuit has noted that the now codified last-served defendant rule is consistent with the unanimity requirement, noting that "[e]arlier served defendants may choose to join in a later-served defendant's motion or not, therefore preserving the rule

that a notice of removal must have the unanimous consent of the defendants."[34]

3. One-Year Limitation

Under 28 U.S.C.S. § 1446(b)(3), if the case as provided by the initial pleading is not removable, but later becomes removable through service on the defendant of a copy of an amended pleading, motion, order, or other paper, a notice of removal may be filed within thirty days of that service of process.[35] Examples include an amended complaint adding additional claims or discovery documents revealing an amount in controversy over seventy-five thousand dollars. However, a case within these parameters cannot be removed more than one year from the date it was commenced in state court, unless the plaintiff has acted in bad faith in order to prevent a defendant from removing the action, i.e., purposefully delayed service on a defendant beyond the deadline.[36] The Eleventh Circuit has clarified that this one-year limitation on removal is only applicable to cases that were not initially removable when originally filed, but later become so.[37]

D. Federal Case Law on Removal Sets a High Bar on Finding Bad Faith

A question that arises from a plain reading of 28 U.S.C.S. § 1446(b)(3) and 28 U.S.C.S. § 1446(c)(1) is how the federal courts address a case that is not removable from the outset solely because the amount in controversy does not exceed seventy-five thousand dollars but, after the one year threshold expires, it is determined through discovery that the amount in controversy is, in fact, higher. 28 U.S.C.S. § 1446(c)(3)(B) provides a safeguard where, if after one year from the commencement of the state court action, the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, then a "bad faith" exception exists.[38] Of course, the defendant bears the burden of proving bad faith, which can pose its own challenges.[39] The determination of

bad faith is left to the discretion of the district court, but the exception is only applicable when "extraordinary circumstances" are present.[40]

When there is no rationale for a bad faith claim, it is up to the defendants to utilize state court discovery procedures within the allotted one-year time frame to identify any damages that may place the amount in controversy over the seventy-five thousand dollar threshold.[41]

IV. Request Opposing Counsel's Waiver of Timeliness Objection or Plan to File a Notice of Removal

Although the parties to a state court action cannot stipulate to an extension of time in which to file a removal petition, plaintiffs can waive their right to object to removal on timeliness grounds.[42] To be effective, a defendant must show that it reasonably relied on a plaintiff's representation that it would not object.[43] "Plaintiff's representations must take the form of affirmative conduct or unequivocal assent of a sort which would render it offensive to fundamental principles of fairness to remand."[44] An example of this was given in *Transportation Indemnity Co. v. Financial Trust Co.,* where the court noted that "one can imagine a case in which defense counsel, just prior to the end of the statutory third day period, had made the determination to remove the case and, finding himself pressed for time, communicates that fact to Plaintiff's counsel and obtains from Plaintiff's counsel a specific agreement that the latter would not object to the removal petition on timeliness grounds if defense counsel was a few days late in filing. That might well constitute a true estoppel because defense counsel has reasonably relied to his detriment on the representations of his opponent."[45]

If parties in your case are involved in early settlement discussions but the thirty-day removal window is quickly approaching, it may be wise to have a conversation with opposing counsel wherein you request they

waive their right to object on timeliness grounds while the case is still pending in state court. If opposing counsel declines to do so, inform him or her that you may have no other option but to file a notice of removal pursuant to the statutory thirty-day limit found in 28 U.S.C. §1446(b). Dependent on the facts of the case, this may induce opposing counsel to either concede that the amount in controversy is less than seventy-five thousand dollars or change their mind on waiving their right to object on timeliness grounds. If opposing counsel (1) is willing to stipulate that the amount in controversy is below the threshold amount or (2) agrees to waive the right to object on timeliness grounds, remember to put it in writing before the thirty-day removal window expires. Should the need arise, this will assist in showing the court that you relied on opposing counsel's representations within the statutorily allotted time.

---

[1] *See* 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 107.03, at 107-20 (3d ed. 2011).

[2] Paul E. Lund, *The Timeliness of Removal and Multi-Defendant Lawsuits*, 64 Baylor L. Rev. 50, 53 (2012).

[3] Id. at 54.

[4] *See Brown v. Demco, Inc.,* 792 F.2d 478, 481 (5th Cir. 1986) (holding that the first-served defendant rule follows logically from the unanimity requirement, the thirty-day time limit, and the fact that a defendant may waive removal by proceeding in state court. "By restricting removal to instances in which the statute clearly permits it, the rule is consistent with the trend to limit removal jurisdiction and with the axiom that the removal statutes are to be strictly construed against removal.")

[5] *Id*.

[6] *See Barbour v. Int'l Union*, 640 F.3d 599, 607 (4th Cir. 2011) (holding that the McKinney Intermediate Rule is the most logical and faithful interpretation of the operation of 28 USC § 1446(b). "It seems eminently reasonable that, in drafting 28 USC § 1446(b), Congress intended for the first-served defendant to decide within his 30-day window whether to remove the case to federal court or to allow the case to remain in state court. Such routine removal decisions are made day-in and day-out in courts all across the nation. If the first-served defendant decides not to remove, later-served defendants are not deprived of any rights under § 1446(b), because § 1446(b) does not prevent them from removing the case; rather, it is the rule of unanimity that does. In other words, once the first-served defendant elects to proceed to state court, the issue concerning removal is decided under the rule of unanimity.")

[7] *See Bailey v. Janssen Pharmaceutica, Inc*., 536 F.3d 1202, 1203 (11th Cir. 2008).

[8] *See* Federal Courts Jurisdiction Clarification Act: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary, 109th Cong. (Nov. 15, 2005) (Subcommittee Chairman Lamar Smith noted that because removal affects both federal and state courts alike, "removal has been held as one of the most contentious aspects of civil litigation.")

[9], Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 103(b)(3)(B), 125. Stat. 758 (enacted Dec. 7, 2011) (codified as amended at 28 U.S.C. § 1446(b)(2)).

[10] *See Barbour*, 640 F.3d at 613 ("[t]hat single defendant who deliberately chooses not to remove a case cannot change his mind after the thirty-day window closes. However, if that single defendant is the first served in a multiple-defendant case, that

defendant gets another bite at the apple simply because he is part of a multiple-defendant case.")

[11] Id. at 611 ("[i]f the first-served defendant decides not to remove, later-served defendants are not deprived of any rights under [former] § 144(b) because [former] § 1446(b) does not prevent them from removing the case; rather, it is the rule of unanimity that does. In other words, once the first-served defendant elects to proceed in state court, the issue concerning removal is decided under the rule of unanimity."); *See also* Lund, *supra* note 2, 69-72.

[12] See *Bailey*, *supra* note 7, generally.

[13] *Id*.at 1207.

[14] *Id*. ("The unanimity rule requires that all defendants consent to and join a notice of removal in order for it to be effective. The last-served defendant rule is not inconsistent with the rule of unanimity. Earlier-served defendants may chose to join in a later-served defendant's motion or not, therefore preserving the rule that a notice of removal have the unanimous consent of the defendants. The unanimity rule alone does not command that a first-served defendant's failure to seek removal necessarily waives an unserved defendant's right to seek removal; it only requires that the later-served defendant receive the consent of all then-served defendants at the time he files notice of removal.")

[15]*See Marano Enters. Of Kan. V. Z-Teca Rests., L.P.,* 254 F.3d 753, 756 (8th Cir. 2001), citing to *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.,* 526 U.S. 344 (1999) (The *Marano* Court relied on the Supreme Court in *Murphy Bros. Inc.* when it held that "[t]he Court held that formal process is required, noting the difference between mere notice to a defendant and official service of process . . . Thus, a defendant is 'required to take action' as a defendant – that is, bound by the thirty day limit on removal – only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend. The Court essentially acknowledged the significance of formal service to the judicial process, most notably the importance of service in the context of the time limits on removal . . . We conclude that, if faced with the issues before us today, the Court would allow each defendant thirty days after receiving service within which to file a notice of removal, regardless of when- or if – previously served defendants had filed such notices.")

[16]*See Marano Enters. Of Kan.,* 254 F.3d at 756.

[17]*See Bailey v. Janssen Pharmaceutica, Inc.,* 536 F.3d at 1206 ("Second, we are convinced that both common sense and considerations of equity favor the last-served defendant rule. The first-served defendant rule has been criticized by other courts as being inequitable to later-served defendants who, through no fault of their own, might, by virtue of the first-served defendant rule, lose their statutory right to see removal.")

[18] *See* i, *supra* note 4; *See also Barbour*, *supra* note 6.

[19] Lund, *supra* note 2, 93.

[20] *See Harris Corp. v. Kollsman, Inc.,* 97 F. Supp. 2d 1148, 1151 (M.D. Fl. 2000) (holding that federal litigants cannot stipulate to ignore statutory time periods established by Congress.)

[21] Id. at 1150 (The stipulation in its entirety reads "[Defendant] was served with process in this cause on October 8, 1999. The parties are engaged in discussions to reach an amicable resolution of this case. [Defendant] shall be relieved of the responsibility to file a responsive pleading, Motion or required Notice in this cause until such time as settlement discussions are declared by either party to have reached an impasse and [Plaintiff] serves written notice on [Defendant] that a response is due, which notice, in any event, shall not be served before December 1, 1999. [Defendant] shall have twenty (20) days from the date of service of said notice within which to serve a response in this case.")

[22] *Id*.

[23] *Id*.

[24] *See* 28 U.S.C. 1447(c); *See also Harris Corp.,* 97 F. Supp. 2d at 1151; *In re The Uniroyal Goodrich Tire Co.,* 104 F.3d 322, 324 (11th Cir. 1997); *Wilson v. General Motors*, 888 F.2d 779, 781 (11th Cir. 1989).

[25] *See Harris Corp.,* 97 F. Supp. 2d at 1151.

[26]*See Harris Corp., supra* note 20; *See also Nicola Products Corp. v. Showart Kitchens, Inc.,* 682 F. Supp. 171, 173 (E.D.N.Y. 1988); *Transport Indemnity Co. v. Financial Trust Co.*, 339 F. Supp. 405, 407 (C.D. Cal. 1972).

[27] *See GS2 Corp. v. Bellemead Marina Del Rey Corp.,* 2017 U.S. Dist. LEXIS 158091, 5 (S.D.Fla. 2017).

[28] *See Univ. of S. Ala. V. Am. Tobacco Co.,* 168 F.3d 405, 411 (11th Cir. 1999) ("A presumption in favor of remand is necessary because if a federal court reaches the merits of a pending motion in a removed case where subject matter jurisdiction may be lacking it deprives a state court of its right under the Constitution to resolve controversies in its own courts.")

[29] *See Harris Corp.,* supra note 20, 1151; *See also GS2 Corp*, *supra* note 27, 6.

[30] 28 U.S.C. § 1446(a)

[31] *See Muhammad v. Jones*, 2015 U.S. Dist. LEXIS 159412, 10 (N.D.Fla. 2015) (holding that although [28 U.S.C.] § 1446(a) requires a notice of removal to contain a copy of all process, pleadings, and orders served upon the defendants, a *de minimis* procedural

defect curable before the expiration of the 30-day window does not necessitate remand.)

[32] *See Gen. Pump & Well, Inc. v. Laibe Supply Corp.,* 2007 U.S. Dist. LEXIS 80656, 3 (S.D.Ga. 2007).

[33] 28 U.S.C. § 1446(b)(2)(A)

[34] *See Bailey*, *supra* note 7, 1207.

[35] 28 U.S.C.S § 1446(b)(3)

[36] 28 U.S.C.S. § 1446(c)(1)

[37] *See Ala. Mun. Workers Comp. Fund, Inc. v. P.R. Diamond Prods., Inc.,* 234 F. Supp. 3d 1165, 1171 (N.D.Ala. 2017) (holding that since the case was removable when the plaintiff filed the original complaint, the one-year limitation does not apply. Therefore, when a defendant was added over one year after the original complaint, that defendant had thirty days to file its notice of removal).

[38] 28 U.S.C.S. § 1446(c)(3)(B)

[39] *See Hajdasz v. Magic Burgers, LLC*, 2018 U.S.Dist. LEXIS 222910 (M.D.Fla. 2018) ("The party asserting federal jurisdiction in a removal case bears the burden of showing, at all stages of the litigation, that the case is properly before the federal court.")

[40] *Id*. at 20, citing to *A.S. ex rel. Miller v. SmithKline Beecham Corp.,* 769 F.3d 204, 211-212 (holding that equitable tolling of the one-year bar was inappropriate where no "extraordinary circumstances" were present.)

[41] *See Wilbanks v. N. Am. Coal Corp.*, 334 F. Supp. 2d 921, 925 (S.D.Miss. 2004), citing to *McLain v. Am. International Recovery Inc.*, 1 F. Supp.2d 628, 631 (S.D.Miss. 1998) (In describing what the Court called the "Preferred Approach", the Court set forth as follows: "When a plaintiff has pleaded damages below $75,000 and defense counsel believes that the damages are in excess of $75,000, the defendant can have the case properly removed by utilizing state court discovery procedures. Specifically, the defense lawyer can have the plaintiff through a deposition, an interrogatory, or a request for admission that his damages do not exceed $75,000. If the plaintiff denies this request, the case can be removed and this discovery response should be filed in the record. This discovery response will constitute "other paper" that affirmatively shows that the jurisdictional amount may be satisfied.")

[42] *See Harris Corp.,* 97 F. Supp. 2d at 1151-1152 ("Although litigants cannot stipulate to ignore section 1446(b), certain conduct on the part of the plaintiffs has been held to preclude them from objecting to removal on timeliness grounds.")

[43] *Id*. at 1152.

[44] *See Harris Corp.,* 97 F. Supp. 2d at 1152; *See also Liebig v. DeJoy*, 814 F. Supp. 1074, 1076 (M.D.Fla. 1993); *Transportation Indemnity Co. v. Financial Trust Co.,* 339 F. Supp. 405, 408 (C.D.Cal. 1972); *Maybruck v. Haim*, 290 F. Supp. 721, 723-724 (S.D.N.Y. 1968).

[45] *Transportation Indemnity Co.*, 339 F. Supp. at 408-409.

ADA Title III Lawsuits: Business Beware

By

Robert Luskin

Robert Luskin is a Partner of Goodman McGuffey LLP working out of the Atlanta office and is an experienced trial lawyer who represents clients in a wide range of insurance matters and employment litigation in federal and state across Georgia and the Southeast.

I. INTRODUCTION

Congress enacted The Americans with Disabilities Act ("ADA") on July 26, 1990 in response to "widespread, systemic, inhumane discrimination against people with disabilities."[1] One of the motivating factors in passing the ADA was the hope that such legislation would reduce the social isolation historically experienced by individuals with disabilities.[2] In particular, Title III of the ADA endeavors to integrate disabled individuals into American society by establishing a comprehensive prohibition of barriers to access in places that constitute "public accommodations," such as restaurants and insurance companies.[3]

Though the ADA passed with relative ease, application of the statute has since proven to be both problematic and controversial.[4] Indeed, many businesses argue that Title III of the ADA has substantially impacted how they operate.[5] Many businesses do not debate whether they are violating the law, but rather challenge how easily they can be sued for what may be considered to be "minor" infractions.[6] A major concern is that well-meaning business owners will suffer at the hands of relentless lawsuits from those seeking monetary gain rather than ADA compliance.[7]

This article examines how Title III of the ADA impacts businesses. Part II provides an overview of Title III of the ADA. Part III considers Title III litigation, including how it

can be abused. Part IV discusses the applicability of Title III to websites. Finally, Part V explores possible defense strategies against Title III litigation.

II. TITLE III REQUIREMENTS

Title III of the ADA applies to places of "public accommodation," defined as any facility, operated by a private entity, whose operations affect commerce.[8] Because Title III prohibits places of public accommodation from discriminating against individuals on the basis of disability, any business that "owns, leases (or leases to), or operates a place of public accommodation" potentially faces claims under Title III.[9] In other words, any business with customers is fair game.

Places of public accommodation fall into two categories: 1) facilities constructed before the implementation of the ADA and 2) facilities constructed after the implementation of the ADA.[10] For buildings constructed prior to January 26, 1993 (the year of full implementation of the ADA), Title III requires that structural barriers be removed where readily achievable. [11] Even when the removal of such a barrier is not readily achievable, a facility may nevertheless run afoul of the ADA through "a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable."[12] Similarly, ADA compliance is also required when modifications are made to these pre-ADA buildings.[13] Any alteration that affects the usability of or access to a building or facility, even simple changes like installing a new toilet or replacing a door handle, must comply with the ADA requirements unless technically infeasible to do so.[14]

Buildings erected after January 26, 1993 are required to adhere to even stricter ADA standards that provide detailed specifications and measurements for architectural and design features such as

elevators, ramps, drinking fountains and water coolers, the opening force of interior doors, and the location and design of restrooms.[15] Regardless of whether a place of public accommodation is new or old, businesses are required to continually evaluate the accessibility of their facilities and make modifications to comply with the ADA whenever feasible.[16] Along with ADA regulations, businesses must also comply with state, county, or city regulations and ordinances.[17] This hodgepodge of regulations creates a significant constructional and monetary burden for businesses to negotiate.[18]

III. TITLE III LITIGATION

Complaints of Title III violations may be filed with the Department of Justice ("DOJ").[19] However, it is unnecessary for a plaintiff to file a complaint with the DOJ or receive a "right to sue letter," as Title III may also be enforced through private lawsuits.[20] Through a private right of action, an aggrieved party may only seek injunctive relief to remedy the violation as well as attorney's fees and costs.[21] The Attorney General, however, may seek monetary damages.[22] The difference in available remedies for private and governmental enforcement show Congress's intent of preventing private plaintiffs from receiving monetary gain under the ADA.[23] Nevertheless, ADA lawsuit abuse by private plaintiffs is prolific throughout the nation, giving rise to what is courts have described as "a cottage industry."[24]

The scheme is straightforward: an unscrupulous law firm sends a disabled individual, often called "testers," "drive-by" plaintiffs, or "serial" plaintiffs,[25] to as many businesses as possible in order to aggressively seek out ADA violations.[26] Sometimes the plaintiffs never even leave their vehicle or their own home computer. Then, rather than notifying the businesses of the violations and attempting to remedy the

matter through "conciliation and voluntary compliance," a lawsuit is filed.[27] Faced with the threat of costly litigation and a potentially fatal judgment against them, most businesses quickly settle the matter, leaving the testers and law firms to quietly accumulate wealth and move on to the next unsuspecting business.[28] One such scheme was perpetrated by Florida attorney John Mallah, who in just four short years filed 740 lawsuits against Florida businesses with the help of his disabled uncle.[29] Each of Mallah's cases typically settled for between $3,000 and $5,000, but sometimes it was more.[30]

The problem of tester plaintiffs is only getting worse. From January 1 to June 30 of 2019, nearly 5,6000 ADA Title III lawsuits were filed in federal court, representing a 12% increase in lawsuits filed over the same span in 2018.[31] Georgia had the fourth highest number of ADA Title III lawsuits in the first six months of 2019.[32]

One of the primary obstacles of conforming to the ADA is how easy it is to be non-compliant – for example, a single bathroom must meet over 95 standards, from the height of the toilet paper dispenser to the exact placement of handrails.[33] Indeed, it is estimated that less than 2% of public buildings nationwide are fully ADA compliant.[34] Even if a business puts forth a good faith effort, such as hiring an ADA compliance expert, it may still find itself targeted by a lawsuit for a minor and/or unintentional infraction, such as the volume control on a telephone needing adjustment.[35]

IV. APPLICABILITY OF TITLE III TO WEBSITES

As Americans increasingly spend the majority of their time online, website accessibility for disabled individuals has recently become a hotbed of litigation.[36] While businesses have clear guidelines on ADA standards for their physical facilities, the ADA is silent on how the standards

translate to digital platforms.[37] The implementation of the ADA to the internet has been fraught with confusion. Because the practical reality of making websites accessible to those with audio or visual impairments is a legal minefield of unarticulated standards, circuit court splits, and significant financial costs for businesses, the lack of clear standards exposes businesses to continuous liability.[38]

Currently, courts are split on whether Title III's definition of "public accommodations" is limited to physical spaces. The First, Second, and Seventh Circuits have broadly interpreted Title III's language to mean that a website can be a place of public accommodation independent of *any* connection to a physical space.[39] These courts argue that Congress did not intend to confine the ADA to physical locations and Title III should instead adapt to technological advances.[40]

The Third, Sixth, Ninth, and Eleventh Circuits interpret Title III's language more narrowly, holding that places of public accommodation must be physical places, but that goods and services provided by a public accommodation, including those through websites, may fall within the ADA if they have a *sufficient nexus* to a physical location.[41] Under this approach, a business's website violates the ADA when it prevents a disabled individual from "full enjoyment" of the goods and services provided at that business's physical location.[42] In other words, if a website does not prevent an individual from accessing goods and services at the business's physical location, the website does not violate Title III.[43]

The perplexing legal landscape left in the wake of the circuit court split is further complicated by a series of delays by the DOJ.[44] Title III leaves the DOJ to implement regulations establishing accessibility standards and put covered entities on notice

of their specific obligations under the law.[45] Though the DOJ supported a move toward regulating websites under the ADA during the Obama administration, it has since sent mixed messages regarding any proposed rule-making since President Trump took office.[46] In December 2017, the DOJ announced it had withdrawn the proposed rulemaking, stating it would evaluate "whether specific technical standards are necessary and appropriate to assist covered entities with complying with the ADA."[47] This signals that the DOJ does not intend to take any action towards expanding the coverage of Title III, but continues to leave businesses with an online presence without guidance or standards while the amount of website ADA lawsuits continues to rise.[48] Even companies wishing to fully comply with ADA standards have no certain way to do so – it is impossible to follow rules that don't exist. The lack of regulations leaves the creation of accessibility standards to a district court judge, with the net effect being that businesses with digital platforms must decipher the patchwork of decisions that has emerged in recent years.[49]

The hodgepodge of standards has also led to a new breed of testers: "surf-by" plaintiffs.[50] These surf-by lawsuits mimic the classic drive-by lawsuits, the only difference being the plaintiff hops from page to page to hunt inaccessible websites rather than drives from business to business.[51] Website claims are not only easy to identify, they are also extremely simple to file - most including boilerplate complaints with copy-and-paste language.[52] These straightforward complaints costs a plaintiff's firm next to nothing and are almost guaranteed to settle when defendant businesses attempt to stay above water by keeping litigation costs down.[53]

V. DEFENSE STRATEGIES.

The best and most efficient course of action for business owners is to be proactive.

Just an ounce of prevention can effectively take a business out of the danger zone. For larger businesses with multiple facilities, this can be accomplished through a corporate ADA compliance policy involving checklists for ADA compliance and periodic compliance checks for existing facilities.[54] Smaller businesses should implement either a compliance policy or recurring compliance inspections.[55] Obviously, the best-case scenario of attaining ADA compliance on the front end is not always realistic and Title III suits may prove to be unavoidable.

Upon receipt of a Title III complaint, first determine who is suing the business.[56] The domicile of the plaintiff, the nature of his or her disability, and whether an advocacy organization (such as Access 4 All or Disabled Patriots of America) is also a plaintiff are key issues that can effect litigation strategy.[57] Next, determine whether the alleged ADA violation exists. This may require the use of an ADA compliance expert (such as an architect) to inspect the facility.[58] Finally, consider affirmative defenses and discuss with your client whether they wish to fight the suit or settle.[59]

Because the only remedy available to private plaintiffs under the ADA is injunctive relief, which requires the plaintiff to demonstrate a "real and immediate" threat of injury, the most common defense raised in Title III claims is lack of standing.[60] It is important to note that if an advocacy organization is also a named plaintiff, "both organizational standing (i.e., standing of an organization to sue in its own right) and associational standing (i.e., standing of an organization to sue on behalf of its members) will need to be evaluated."[61]

To establish standing, a "plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[62] Past exposure to illegal

conduct does not constitute a present case or controversy, and plans to "someday" be exposed to the alleged harm is not a real and immediate threat.[63] District courts traditionally apply a four-part test to establish whether a plaintiff has standing to bring a Title III claim: (1) proximity to the defendant's property; (2) past patronage; (3) definitiveness of plaintiff's plan to return; and (4) frequency of nearby travel.[64]

Standing is usually tied to the third prong: the plaintiff's likelihood to return to the business where he or she claimed to have encountered a violation.[65] Some courts have held that a distance of more than 100 miles makes it unlikely that the plaintiff will return to the establishment and suffer additional future harm.[66] Similarly, a single visit to a facility creates a further presumption against future injury.[67]

Another affirmative defense to consider hinges on whether the facility was established before or after implementation of the ADA. A less stringent standard in Title III applies to existing facilities, where barrier removal must be "readily achievable."[68] The term readily achievable is defined as "easily accomplishable and able to be carried out without much difficulty or expense."[69] Thus, a barrier removal is not considered "readily achievable" if it would fundamentally alter the nature of the public accommodation.[70]

Though more stringent standards apply to facilities altered or built after the ADA was enacted, there are several defenses that may be useful. If alterations have been made to a building constructed before the ADA and a plaintiff claims these alterations are not ADA compliant, defenses include: the renovations did not constitute alterations; the alterations are accessible to the maximum extent feasible; or the alteration sought by the plaintiff is technically infeasible.[71]

The strictest standards apply to newly constructed buildings. In the case of new construction, a commercial facility or public

accommodation must be "readily accessible" to individuals with disabilities to the extent that is not "structurally impracticable."[72] However, the structural impracticability exception applies "only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features."[73]

Finally, settlement should always be an early consideration, especially when the business confirms that the alleged ADA violation actually exists.[74] Generally, settlement involves an agreement to remediate the violation and a payment of attorney's fees.[75] Advantages of settling are that a business can negotiate favorable terms (including more time to address the violation) and address budgetary constraints.[76]

VI. CONCLUSION

The current state of the ADA adequately serves neither the businesses that the statute is forced upon nor those it was designed to protect. Reforms to the ADA should focus on protecting businesses that have demonstrated good faith efforts to comply as well as providing clear standards for businesses with an online presence. In the meantime, however, there are numerous strategies business may employ to resist ADA tester attacks, as well as strategies to minimize the cost of having to retrofit the targeted facility in order to eliminate access barriers. Attorneys should work with their current clients to ensure ADA compliance and educate clients about the risks of being noncompliant.

---

[1] Robert L. Burdgorf Jr., *Why I wrote the Americans with Disabilities Act*, THE WASHINGTON POST (July 24, 2015), https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/.

[2] *See* 42 U.S.C. § 12101(a) (discussing Congress's findings and purpose for the ADA).

[3] Leslie Lee*, Giving Disabled Testers Access to Federal Courts: Why Standing Doctrine Is Not the Right Solution to Abusive ADA Litigation Note*, 19 Va. J. Soc. Pol'y & L. 319, 321 (2011).

[4] Jesse A. Langer, *Combating Discriminatory Insurance Practices: Title III of the Americans with Disabilities Act*, 6 Conn. Ins. L.J. 435, 436 (2000).

[5] Joseph Chandlee, *ADA Regulatory Compliance: How the Americans with Disabilities Act Affects Small Businesses*, 7 U. Balt. J. Land & Dev. 37 (2018).

[6] *Id.*

[7] *Id.*at 37-38.

[8] *Id.* at 41.

[9] Susan M. Leming, Benjamin S. Teris, *ADA Title III Litigation the Dramatic Increase in ADA Lawsuits That Is Forcing Many Businesses to Make Tough Decisions*, N.J. Law., April 2018, at 27; 42 U.S.C. § 12182(a).
[10] *Id.*
[11] 42 U.S.C. § 12182(b)(2)(A)(iv).
[12] 42 U.S.C. § 12182(b)(2)(A)(v).
[13] 42 U.S.C. § 12183(a)(2).
[14] Carri Becker, *Private Enforcement of the Americans with Disabilities Act Via Serial Litigation: Abusive or Commendable?,* 17 Hastings Women's L.J. 93, 94 (2006).
[15] *ADA Accessibility Guidelines (ADAAG)*, United States Access Board, https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/background/adaag.
[16] 42 U.S.C. § 12183(a)(2).
[17] Chandlee, *supra* note 5, at 42.
[18] *Id.*
[19] Brooke M. Nixon, *ADA Title III: Accommodating Disabilities or Encouraging Lawsuits?*, 78 Ala. Law. 270, 272 (2017).
[20] *Id.*
[21] 42 U.S.C. § 12188(b).
[22] *Id.*
[23] Becker, *supra* note 14, at 97.
[24] *Id.*
[25] Nixon, *supra* note 19, at 273.
[26] Becker, *supra* note 14, at n.31.
[27] *Id.* (quoting *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1281 (M.D. Fla. 2004).
[28] *Id.*
[29] *Id.* at 98.
[30] *Id.*
[31] Seyfarth Shaw LLP, Kristina Launey, Minh Vu, Susan Ryan, *Federal ADA Title III Lawsuit Numbers Continue to Climb in 2019*, JD Supra (July 29, 2019), https://www.jdsupra.com/legalnews/federal-ada-title-iii-lawsuit-numbers-56814/.
[32] *Id.*
[33] Becker, *supra* note 14, at 99.
[34] *Id.*
[35] *Id.*
[36] Lauren Stuy, *No Regulations and Inconsistent Standards: How Website Accessibility Lawsuits Under Title III Unduly Burden Private Businesses*, 69 Case W. Res. L. Rev. 1079, 1079-80 (2019).
[37] *Id.* at 1080.
[38] *Id.* at 1080-81.
[39] *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc*., 37 F.3d 12, 19 (1st Cir. 1994); *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012); *Nat'l Fed'n of the Blind v. Scribd Inc*., 97 F. Supp. 3d 565, 576 (D. Vt. 2015); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017); *Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co. & Am. Fed'n of Grain Millers, AFL-CIO-CLC*, 268 F.3d 456, 459 (7th Cir. 2001); *Doe v. Mut. of Omaha Ins. Co*., 179 F.3d 557, 558 (7th Cir. 1999).
[40] Stuy, *supra* note 36, at 1088.
[41] *Gil v. Winn-Dixie Stores, Inc*., 257 F. Supp. 3d 1340, 1349 (S.D. Fla. 2017); *Haynes v. Dunkin' Donuts LLC*, 2018 WL 3634720, at *2 (11th Cir. July 31, 2018); *Weyer v. Twentieth Century Fox Film Corp*., 198 F.3d 1104, 1114 (9th Cir. 2000); *Earll v. eBay, Inc.*, 599 F. App'x 695, 696 (9th Cir. 2015); *Ford v. Schering-Plough Corp*., 145 F.3d 601, 614 (3d Cir. 1998); *Peoples v. Discover Fin. Servs., Inc*., 387 F. App'x 179, 183 (3d Cir. 2010); *Parker v. Metro. Life Ins. Co*., 121 F.3d 1006, 1010 (6th Cir. 1997).
[42] Stuy, *supra* note 36, at 1090-91; *Nat'l Fed. of the Blind v. Target Corp*., 452 F. Supp. 2d 946, 954-56 (N.D. Cal. 2006).
[43] Stuy, *supra* note 36, at 1091.
[44] Ricardo Alvarado, *Online Businesses Beware: ADA Lawsuits Demand Website Accessibility for Blind Plaintiffs*, 21 SMU Sci. & Tech. L. Rev. 259 (2018).
[45] *Id.* at 264; *see also* 28 C.F.R. § 36.101 (2016) (describing purpose of DOJ's regulations).
[46] Alvarado, *supra* note 44, at 260.
[47] *Id.* at 264; *Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, U.S. DEP'T JUST., https://www.adatitleiii.com/wp-content/uploads/sites/121/2017/12/ada-rule-withdrawal.pdf.
[48] *Id.*
[49] Alvarado, *supra* note 44, at 290.
[50] Stuy, *supra* note 36, at 1085-86.
[51] *Id.*
[52] *Id.*at 1086.
[53] *Id.*
[54] Lemming, *supra* note 9, at 27.
[55] *Id.*
[56] *Id.* at 28.
[57] *Id.*
[58] *Id.*
[59] Nixon, *supra* note 19, at 273.
[60] *Id.*
[61] Lemming, *supra* note 9, at 28.
[62] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).
[63] Nixon, *supra* note 19, at 273.
[64] *Id.*
[65] Lemming, *supra* note 9, at 28.
[66] Nixon, *supra* note 19, at 273.
[67] *Id.*
[68] *Id.* at 274.

[69] 42 U.S.C. § 12181(9).
[70] Nixon, *supra* note 19, at 274.
[71] *Id.*
[72] *Id.; see* 42 U.S.C. § 12183 (a); 28 C.F.R. § 36.401(c)(2).
[73] 28 C.F.R. § 36.401(c)(2).
[74] Lemming, *supra* note 9, at 28.
[75] *Id.*
[76] *Id.*

It Pays to Be in the Know:
Remaining Compliant Under the Fair Labor Standards Act

By

W. Melvin Haas, III

Jason C. Logan and

Aaron Chang

W. Melvin Haas, III is an Equity Partner of Constangy, Brooks, Smith & Prophete, LLP and head of the Macon office. Mel has practiced management labor law for over 40 years, and has successfully handled over 150 elections, and numerous campaigns, arbitrations, and NLRB trials and appeals. Mel is a GDLA Past President.

Jason C. Logan is also an Equity Partner. He represents employers and insurers in all aspects of workers' compensation litigation and employment defense. Jason is a GDLA Board member.

Aaron Chang is an Associate at the firm. He practices employment defense with litigation prevention, labor law, and management training.

The Fair Labor Standards Act ("FLSA") is a tough act to follow. Employers are expected to follow and stay apprised of the statutes, regulations implemented by the Department of Labor ("DOL"), guidance issued by the DOL, and any relevant case law from the courts. Failure to stay compliant could mean a lawsuit by an employee or an audit from the DOL that is very costly for the employer in not only recovery of unpaid wages, but also in attorney's fees. In 2019, the Department of Labor (DOL) found over 20,000 cases of wage violations, which led to over $225 million in back pay for violations of the Fair Labor Standards Act.[1]

Over the past few years the DOL has made various changes to the wage and hour regulations that reflect the business goals of the Trump administration. In the last year the department has issued new regulations and guidance that have established new thresholds for overtime pay exemptions;[2]

clarified compensable hours for truck drivers and their assistants;[3] laid out the rules for compensation for employee volunteer hours;[4] and redefined joint employer liability.[5] It is important for employers to stay current with these changes to make sure they are compliant with the new regulations.

I. Coverage Under the FLSA

The FLSA is the federal law that establishes and governs the federal minimum wage, overtime pay rate and rules, recordkeeping and youth employment standards.[6] Most employers are covered under the FLSA, including:

- Employers who gross more than $500,000 in sales on an annual basis;
- Those engaged in the operation of a hospital, business providing medical or nursing care for residents, school or preschool; or
- An activity of a public agency.

Even if employers do not meet the above criteria, employees may be covered by the FLSA if they:

- Engage in interstate commerce;
- Produce goods for interstate commerce; or
- Handle, sell, or otherwise work on goods or materials that have been moved in or produced for such commerce.[7]

Because of its broad interpretation by the DOL and courts, most businesses will be covered under the interstate commerce requirement. In addition, even if an employer is not covered by the FLSA, it is more than likely covered by a state law equivalent to the FLSA.

II. New Salary Threshold

The FLSA states that all covered employees that do not fall into a specific exemption under the DOL's regulations be paid overtime pay, which is one and a half times their pay rate for any hours worked

beyond 40 in a workweek.[8] The DOL has defined many different exemptions but the most common exemptions utilized by employers to avoid overtime pay are for executive, administrative, professional, computer, outside sales employees, and "highly compensated employees."[9]

To qualify as exempt, employees must meet three requirements, (1) the salary level test, (2) the salary basis test, and (3) the duties test.[10] Basically, the employee must be paid a guaranteed salary every week, the salary must meet or exceed the set salary threshold, and the employee must actually perform the certain job duties as outlined under the exemption.[11]

In 2004, the DOL raised the salary threshold to $455 a week. It was not until 2016, when the Obama Administration introduced a new rule that would almost double the weekly rate to $913. The rule was set to take effect on December 1, 2016, but faced many legal challenges because of the obvious strain it would cause on business. Ten days prior to its set implementation date, a Texas federal judge blocked the rule from going into effect. Eventually the block was made permanent and with the change in administration, pursuit of this specific rule was effectively abandoned.

However, on September 24, 2019, the DOL issued a new final rule regarding overtime rules.[12] According to then Acting U.S. Secretary of Labor Patrick Pizella, the new rules would make over 1 million American workers newly eligible for overtime pay.[13] These new rules have established new, higher monetary thresholds for overtime exemptions, thus forcing employers to decide whether to raise salaries for these employees or transition them to non-exempt, thereby having to meet minimum wage and overtime requirements. The changes to the regulations took effect on January 1, 2020.[14]

Under the new rules, for an employee to be exempt from the overtime regulations of the FLSA under the executive, administrative, professional, computer and outside sales exemptions, the employee must be paid at least $684 per week or $35,568 per year.[15] The prior thresholds were $455 per week or $23,660 per year.[16] When calculating wages to determine whether they meet the thresholds, up to 10% of the required salary threshold can be satisfied by the payment of nondiscretionary bonuses, incentive payments, and commissions that are paid annually or more frequently.[17]

For an employee to be exempt from overtime under the "highly compensated employee" exemption, they must be paid at least $107,432 per year, of which at least $684 per week must be paid on a salary or fee basis.[18] The remaining minimum annual compensation may include commissions, non-discretionary bonuses and other non-discretionary compensation.[19] The prior threshold had been set at $100,000 a year.[20]

Finally, the DOL established special thresholds that apply in certain circumstances. $455 per week for workers in Puerto Rico, the Virgin Islands, Guam and the Commonwealth of the Northern Mariana Islands.[21] $380 per week for workers in American Samoa.[22] $1,043 per week for workers in the motion picture industry.[23]

These new thresholds have made roughly 1.3 million American workers newly eligible for overtime pay.[24] It is important for employers to make sure that their pay practices are in line with these new regulations. 2020 is a great time to conduct an audit of the workforce to ensure that all employees are not only meeting the new salary threshold, but all exempt employees meet the more rigorous duties test.

III. Hours Worked in the Trucking Industry

In a July 22, 2019 Opinion Letter, the Wage and Hour Division laid out a common sense approach to hours worked and compensable time as applied to drivers and helpers for time spent sleeping and free from all on-duty work responsibility.[25] The WHD's interpretation of employers' responsibilities under the FLSA does not consider time spent in a truck's sleeper berth to be "hours worked" or "compensable time."[26] In order for time spent in the sleeper berth of a truck to be considered non-compensable, the driver or helper must be generally free from all work duties, allowed to sleep or engage in other personal non-work activity, and not on call.[27]

Although DOL opinion letters do carry some weight, employers must know that opinion letters do not bind courts to follow them because the letters are often very fact specific. However, opinion letters do serve as the enforcement position of the U.S. government and can be used as a good faith defense if ever sued for violating the FLSA.[28]

IV. Employee Volunteer Hours

The DOL issued an opinion letter on March 14, 2019, which addressed whether hours worked by an employee as part of an employer's optional volunteer community service program is considered "hours worked" under the FLSA.[29] The DOL's stance on volunteer work is that "Congress did not intend for the FLSA to 'discourage or impede volunteer activities,' but rather to 'prevent manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to "volunteer" their services.'"[30] Therefore, while the DOL encourages volunteer work, it will make sure that employers are not trying to manipulate employees to skirt the law.

In the opinion letter, the DOL states that time spent by employees volunteering is

not considered compensable time if the following criteria are met:

- Participation is charitable and voluntary;
- Employer does not compel or "unduly pressure" employees to participate;
- Employer does not control or direct the volunteer work;
- There is no adverse effect on an employee who does not participate; and
- There is no guarantee that the employee will receive a bonus for participating in the program.[31]

The point of emphasis here should be placed on the third factor. In short, if an employer instructs employees on what they should do or how to do the work, then that time should be considered hours worked for purposes of the FLSA.[32] The letter also stated that simply keeping track of time worked by employees is not considered controlling or directing employees' work even if they use an app to keep track of employee's hours worked.[33]

This DOL letter regarding the compensability of employee volunteer hours should be read in conjunction with previous DOL letters on the subject. For example, in a letter issued in 2005, the DOL stated that volunteer time would not qualify as compensable time when:

- The volunteer activities were not similar to the employee's regular duties;
- Participation was entirely voluntary, with no ramifications if an employee decided not to participate; and
- The volunteer activities occurred outside of the employee's normal working hours.[34]

Before allowing employees to partake in volunteer activities, employers should assess whether the volunteer's activities are similar to his/her regular duties.

More and more companies are encouraging their employees to volunteer their time. Consequently, employers should take note of these rules and opinions explaining when employee volunteer time will be compensable work time.

V. Joint Employment

On April 1, 2019, the DOL proposed new rules to govern the definition of joint employment as regulated under the FLSA.[35] On January 12, 2020, the DOL announced its final rules and those rules went into effect on March 16, 2020.[36]

The proposed rules include a four-factor test to determine whether an entity would be considered a "joint employer" under the FLSA, and therefore subject to its rules. In order to be considered a "joint employer" the entity would have to actually exercise the power to:

- Hire or fire employees;
- Supervise and control the employee's work schedule or conditions of employment;
- Determine the employee's rate and method of payment; and
- Maintain the employee's employment records.[37]

The rules emphasize that the right to hire or fire employees must be an exercised right and not a reserved right.

The joint employment rules are important for employers because if an employee is found to be working for joint employers, then both employers can be found guilty of violating the FLSA. Employees that work for joint employers are entitled to receive pay for all hours worked for both employers, which makes it more likely that the employee must receive overtime pay. These new rules have aligned the DOL's interpretation of joint employers with that of the National Labor Relations Board.

VI. Conclusion

In an ever-changing regulatory landscape, it is difficult for employers to keep track of changes to rules and regulations regarding wage and hour issues. However, it is important that they know when major changes have taken place, so that they are not taken by surprise by a lawsuit or an audit by the DOL. With these changes to FLSA regulations, now may be a good time for employers to consider conducting a wage and hour audit to make sure they are in compliance with the new regulations.

---

[1] *Fair Labor Standards Act*, U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, https://www.dol.gov/agencies/whd/data/charts/fair-labor-standards-act.

[2] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51230, 51231 (Sept. 27, 2019) (to be codified at 29 C.F.R. pt. 541).

[3] Cheryl M. Stanton, *FLSA 2019-10*, U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, (Jul. 22, 2019), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_07_22_10_FLSA.pdf.

[4] Keith E. Sonderling, *FLSA 2019-2*, U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, (Mar. 14, 2019), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_03_14_02_FLSA.pdf.

[5] Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (January 16, 2020) (to be codified at 29 C.F.R. pt. 791).

[6] *Wages and the Fair Labor Standards Act*, U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, dol.gov/agencies/whd/flsa.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] 29 C.F.R. §§ 541.602, 541.600, 541.700 (2020).

[11] *See* Baden-Winterwood v. Life Time Fitness, Inc., 566 F.3d 618, 626–27 (6th Cir. 2009).

[12] *U.S. Department of Labor Issues Final Overtime Rule*, U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION (Sep. 24, 2019), dol.gov/newsroom/releases/whd/whd20190924.

[13] Id.

[14] Id.

[15] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51230, 51306 (Sept. 27, 2019) (to be codified at 29 C.F.R. pt. 541).

[16] U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, *supra* note 13.

[17] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. at 51230, 51307 (Sept. 27, 2019).

[18] *Id.*

[19] *Id.*

[20] U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, *supra* note 13.

[21] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. at 51230, 51306 (Sept. 27, 2019).

[22] *Id.*

[23] *Id.* at 51308.

[24] U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, *supra* note 13.

[25] Stanton, *supra* note 3.

[26] *Id.*

[27] *Id.*

[28] *Final Rulings and Opinion Letters*, U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION https://www.dol.gov/agencies/whd/opinion-letters/request/existing-guidance.

[29] *Sonderling*, *supra* note 4.

[30] *Id.* (citing 29 C.F.R. § 553.101 (2020)).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. at 2820 (January 16, 2020).
[36] *Id.*
[37] *Id.*