



Premises Liability and Spoliation Claims - Episode #118

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Guest Attorney: George Hall of Hull Barrett, PC

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John Czuba: Welcome to the "Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Directory of Recommended Insurance Attorneys*.

We're pleased to have with us today attorney George Hall with the law firm of Hull Barrett, PC in Augusta, Georgia. George has an active trial practice with a concentration in personal injury defense and commercial matters. He has tried over a 110 cases in his career. He has also served as a mediator and arbitrator in over 225 cases since 1997.

George has represented clients and has tried cases in a variety of areas encompassing all types of tort claims, product liability claims, FELA claims, truth in lending claims, professional malpractice claims, and contract disputes. He is a member of the American Board of Trial Advocates and serves on the Board of Directors for the GDLA.

George, we're very pleased to have you with us today.

George Hall: Thanks for having me here today, John.

John: Today's topic is on premises liability cases and spoliation claims. George, can you define a spoliation claim, and how do spoliation claims come up in premises liability cases?

George: Certainly, John. Spoliation is defined in Georgia, where I practice, as the destruction or failure to preserve evidence that is relevant to contemplated or impending litigation. It comes up quite often now in premises liability cases.

There are two primary types of premises liability cases that I deal with. One is your traditional trip and fall, slip and fall claims which occur on a business owner's property. The more prevalent one you're seeing now are attacks by a third party, criminals, patrons or visitors on an owner's property.

They typically, spoliation claims, come up in these two premises cases when you get a letter from the attorney for the opposing side saying, "I represent the plaintiff," or "the potential plaintiff, and we're asking

you to preserve all evidence, video tapes, photographs, or other documents which could be relevant to the claims."

Quite often, you'll get a long laundry list. This spoliation claim comes up when the party who received the letter or the notice fails to keep those documents. Traditionally, that is the way you hear about the claim, and then also, it can be the trigger for the spoliation claim, if you're not careful.

John: George, how do you go about avoiding a spoliation claim?

George: To avoid a spoliation claim, is as soon as you get that letter, you need to preserve the things that are still available that are outlined in the letter. In both of these types of premises cases, they're going to ask you to preserve video tapes, typically from surveillance cameras.

Also, if there were any photographs taken of the area, if it was a trip and fall, slip and fall, if there were photographs taken of the hole in the sidewalk, or the area where the plaintiff allegedly fell, or if you're in the grocery store, the water on the floor, the grapes on the floor.

It's also very important, and I see this as a problem sometimes, is if you take photographs, it's really important to time stamp them so you can give a point of reference when the photographs were taken.

Another way to avoid a spoliation claim is a litigation hold on emails. It's common that they ask for emails, and if it's a big enough incident, it's a smart and best practice to advise everybody in the organization to keep their emails concerning these kinds of events.

A very disturbing trend you're seeing now is that the courts are starting to take the position if you should reasonably expect litigation is coming, then you have a proactive duty to preserve.

Many years ago, it was the notice from the other side that triggered it. But there are cases now in Georgia, where I practice, I read one last night even, in the advance sheets, where the court said, "If you should reasonably contemplate litigation is coming, you have a duty to preserve."

John: Can you tell us about the sanctions for a spoliation claim?

George: Sure, and there are a wide range of sanctions that come up in these type of claims, John. The most typical one is that if the evidence is not preserved, then that the other side can get a jury charge, and the jury charge will tell the jury that there's a presumption that the evidence that was not preserved would have been harmful to the spoliator.

As an example, I had a case many years ago where I defended a local restaurant where a lady said she broke her tooth on a foreign item in a chicken sandwich, and my client kept the sandwich in a refrigerator at the restaurant for almost two years.

Right before the statute ran, a new manager came on board, and they said, "Well, we're not keeping this," and they threw it away. A lawsuit, of course, was filed. We couldn't produce the sandwich, and they got a jury charge on spoliation in the case.

That's the most typical sanction that comes about. You can also receive a monetary fine. The more common one, also, is striking an affirmative defense. You may have filed in the case, and the ultimate sanction is that your answer as the defendant can be struck and put you in default, and then the trial is simply on damages.

The sanctions are wide ranging and can be very detrimental to a defendant or an insured in a case.

John: George, if someone is attacked on an insured's property, how should they deal with law enforcement?

George: Good question, John. When this happens, my advice is always, "It's your civic duty, and it's the right thing to do to always cooperate with authority."

One thing you need to be careful of, and I've had this come up before, is if you give the law enforcement the video tapes – I had that come up in a very big case one time – make sure you have a chain of evidence of where it is going, so you know how to find it years down the road if there's a claim.

The law enforcement generally will be very supportive of you in a civil case if it's filed, especially when you've helped them out. My advice is very simply to cooperate fully with law enforcement in these type of situations. But do, if you turn over evidence to them for a criminal prosecution, it's very important that you know where the evidence you pulled went so you can establish a chain of custody if maybe they displace the evidence.

John: If an insured wants to repair or renovate the property after someone is injured, what should they do?

George: What I advise people – this comes up a lot in the trip and fall, slip and fall case – maybe there is a hole in the sidewalk, and you want to repair it. I had a case recently, a few years ago, for a local landowner, and they wanted to renovate the area where this incident occurred. It was just on their normal, routine maintenance schedule.

What I always advise clients to do is to notify the other side in writing, and say, "We are going to renovate, repair, this property on x date," and give them a reasonable amount of time, and put in the correspondence, "If you would like to come inspect, photograph, the property, even have an expert come look at it, we ask that you do it by this date."

It is, as I said, very important to obviously put it in writing, so there's a record you made that offer to them. You also need to give them a reasonable amount of time. If you're going to do it, you don't need to tell them the day before you're going to do it, "You need to get out here this afternoon." You need to give them 7 to 10 days' notice, at least, to do it.

If you do that, and it's all documented, they should not be able to make any spoliation claim over that.

John: Can you tell us how an insurance carrier is potentially impacted?

George: Spoliation claims obviously can have huge impacts on the insurance carriers in the case, John. They can lead to big verdicts or settlements. The problem I think you have from the insurer's standpoint is often spoliation, the loss of evidence, occurred before they get involved.

You're seeing more and more spoliation claims now in weaker premises liability cases, where liability is very questionable, to try and get the carriers to the table.

It's important that the insurers advise their insureds about the duty to preserve evidence when they have notice of a claim. Quite often the insurers are talking to the bigger insureds about best practices. One is to make sure there is no spoliation. You don't want to give the other side the potential to make this argument.

Talk to them about it if you have these premises liabilities cases, the duty to preserve things such as surveillance tapes, log books. Keep the important items you can use.



Another thing that I think insurers can be aware of is, as an insurance claims person, you can also use spoliation to your advantage. If you ask the plaintiff to preserve certain evidence, and if they fail to preserve it, all of those potential sanctions that we discussed that are available for the plaintiff against the defendant, the defendant can potentially make against the plaintiff.

If you say, "Please preserve this item," and the plaintiff throws it away knowing you've asked for it, then those presumptions and possible sanctions can be made against them. It's not a one way street, if the plaintiffs are put on notice.

I have one client who, quite frankly, whenever there's a big incident, they write the plaintiff and/or their attorney, and tell them, "We want you to preserve all of these items," for that very reason.

John: George, thank you so much for joining us today.

George: Thank you.

John: That was attorney George Hall from the law firm of Hull Barrett, PC in Augusta, Georgia. A special thanks to today's producer, John Weber.

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I'm John Czuba, and now this message.

Transcription by CastingWords

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