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Sauce for the Goose: Turning Plaintiffs' Spoliation of Evidence Against Them

By Wayne S. Melnick

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I. Introduction – The Defense Is Always Under Fire

Part of the challenge of being defense counsel is that your involvement begins long after major events have already occurred. Much evidence is long gone before you ever receive the call to defend the suit. Missing evidence can include physical evidence, video footage, photographs, and written statements, and recorded interviews, for example. If the evidence is not gone, often it has been changed, moved, or otherwise altered. Vehicles have been repaired and put back in service. Video footage has been recorded over. Locations have been rebuilt.

Defense attorneys need to learn to recognize the opportunities to be on offense as to such issues, instead of always on the receiving end. This can provide the defense with the leverage to allow for a resolution of the case, rather than having the leverage applied only by plaintiffs.

II. Spoliation Sanctions Are Not Only for Plaintiffs.

Generally, spoliation refers to *any* party's destruction or alteration of evidence. Although plaintiffs more frequently seek sanctions for spoliation, sanctions are available to either party. In fact, the plaintiff often is the party in the best position, and with the most knowledge, to preserve evidence. As a result, a plaintiff's failure to take such steps can be used to the defendant's benefit. When determining sanctions against a plaintiff who is alleged to have spoliated evidence, the court will apply the same standards that are used to decide whether sanctions are appropriate as to a defendant who has been alleged to have destroyed or altered evidence.

In Georgia, spoliation means the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation.[1] In determining if there has been spoliation of evidence, Georgia trial courts are required to make a two-part inquiry. First, there is a threshold determination that must be made before the court can consider the "*Bridgestone* factors" [2] discussed in more detail below. Because sanctions for spoliation of evidence are available only if

the court has determined that evidence has been spoliated, it is axiomatic that the *Bridgestone* factors, which are weighed when a trial court is considering whether to impose sanctions, are not even considered if the court makes the threshold determination that no spoliation of evidence has occurred.

At the outset, when there is an allegation of spoliation of evidence, the initial threshold determination itself consists of a two-part test: (1) is the evidence at issue "necessary" to the litigation; and (2) was there "contemplated or pending litigation" at the time of the alleged spoliation.[3] If both prongs not met, then there is no "spoliation" and by definition no sanctions can be applied.[4]

What is "necessary to the litigation" is fact-specific to each case. The attorney seeking to take advantage of an opportunity presented by spoliation needs to look for and identify that evidence that is critical to the case. In products liability cases, that could be the product at issue, or in automobile accident cases, the vehicle. In a premises liability case, the critical evidence could be an item taken from the scene, and in subrogation or other negligence cases, the critical evidence might address the issue of causation.

Determining whether the spoliation occurred while there was "contemplated or pending litigation" is a little more difficult to establish. Pending litigation is easy – either the case was filed or it was not. Whether litigation was contemplated requires more specific examination of the facts and the parties. Courts have looked to various factors including the obviousness of the need to retain evidence, the litigation savvy and experience of the party accused of destroying/altering the evidence at issue (inclusive of whether the party is an individual or corporation), and at what point the evidence was destroyed or changed.[5]

Because a plaintiff is the person who eventually could pursue litigation, it might be easier for a defendant than for a plaintiff to meet this prong. A plaintiff who is pursuing a spoliation claim must show that the tortfeasor should have *predicted* that a plaintiff would pursue a claim, whereas a defendant who wants to seek spoliation sanctions can meet the prong if he can show that the plaintiff actually had contemplated making a claim.[6]

Once the trial court has made the initial determination that spoliation of evidence has occurred, then it moves to the next inquiry: the weighing of the *Bridgestone* factors. Those factors are: (1) whether the defendant was prejudiced as a result of the destruction of the evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the plaintiff acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded.[7] Necessarily, how these factors are weighed is determined on a case-by-case basis, because each spoliation scenario is fact-specific.

Georgia's analysis is similar to the approach taken in many other states. Factors that sister jurisdictions generally consider include: (1) the degree of fault and responsibility of the offending party (2) the amount of prejudice suffered by the innocent party; (3) whether the prejudice can be cured; and (4) the importance of the evidence.[8] Similar factors also are weighed by federal courts considering spoliation sanctions.[9]

So, what can the defense practitioner do if it is determined that important evidence has already been (or is anticipated will be) destroyed or altered? As discussed herein, there are several options available, depending on the phase of the claim/litigation and whether the evidence is already changed or destroyed. In the process, the attorney should everything possible to appear reasonable, active, and involved. Put the plaintiff on notice to retain and preserve the evidence, and put it in writing with a confirmation of receipt of the notice. Equally important is to request to inspect the evidence and all footage of the evidence including video, photographic and digital representations, or related information.

Reasonableness is critical. When trial courts evaluate the five *Bridgestone* factors, it is readily apparent that the issue underlying all of those factors is whether the party who claims to have been wronged by the change in the evidence did what it could and should have done to obtain access to it or to ensure that is gets preserved.

III. What the Court Can Do When Evidence Has Been Spoliated

If and when you get to the point of the court imposing sanctions, the obvious question is, "What can the court do about it?" In Georgia, "[t]rial courts have the power to control the behavior of litigants before them to maintain the integrity of the judicial process, and this power includes the discretion to fashion appropriate remedies for the spoliation of evidence."[10] Where a party has destroyed or significantly altered evidence that is material to the litigation, the trial court has wide discretion to fashion sanctions on a case-by-case basis.[11] Georgia's approach is consistent with the rules applicable in federal courts, because the United States Supreme Court has held that the right to impose sanctions for spoliation arises from a court's inherent power to control the judicial process and litigation, but that the power is limited to the level which is necessary to redress conduct "which abuses the judicial process.[12] A trial court's imposition of sanctions for evidence spoliation will not be reversed on appeal unless the court abused its discretion.[13]

Thus, what is sauce for the goose is certainly sauce for the gander. The remedies available for spoliation of evidence are not for application only against defendants. There are many examples in Georgia law, both state and federal, where the trial courts have sanctioned a plaintiff for spoliation of evidence and have been affirmed by the appellate courts. There are even a few cases where the trial court did not properly apply spoliation sanctions or did not apply harsh enough sanctions to the plaintiff, and the appellate court reversed the trial court so that the trial court could try again and get it right.

The next question, then, is, "What remedies are available?" To cure or diminish the prejudice resulting from the spoliation of evidence, a trial court may: (1) charge the jury that spoliation of evidence creates the rebuttable presumption that the evidence would have been harmful to the spoliator; (2) dismiss the case; or (3) exclude testimony about the evidence.[14] Each of those options will be addressed below.

A. Evidence and Testimony Exclusion

One available sanction available to the Court is to exclude evidence and/or testimony. For example, in *AMLI Residential Properties, Inc. v. Georgia Power Co.*,[15] a plaintiff was precluded

from introducing or conveying to the jury, through expert witnesses or otherwise, any evidence whatsoever relating to the ground rod which the plaintiff alleged had caused the fire at issue. Other jurisdictions throughout the United States also recognize evidence and/or testimony exclusion as being a proper remedy to rectify spoliation.[16]

B. Jury Instructions

Another available sanction is for the court to instruct the jury in a way favorable to the defendant and/or contrary to the plaintiff. *Wright v. VIF/Valentine Farms Building One, LLC*,[17] was a trespass case involving ownership of a disputed portion of property. After the *Bridgestone* factors were found to weigh in the favor of spoliation sanctions, the court determined that the appropriate sanction was for the jury to be instructed as to a rebuttable presumption that the existence of the spoliated evidence would have been harmful to the plaintiff as to one of the defendant's defenses. Jury instructions allowing adverse inference and/or presumptions against the spoliator are not unique to Georgia, and other jurisdictions have affirmed the use of this remedy to cure spoliation of evidence.[18]

In Georgia, remedies of evidence exclusion and jury instructions are not mutually exclusive. In the *Bridgestone* case, the court determined that the application of *both* sanctions was appropriate, due to the spoliation of evidence for which the plaintiff was responsible. The *Bridgestone* court, in affirming the trial court's spoliation sanction order, determined that, "[g]iven the evidence presented, the trial court would have been authorized to dismiss [plaintiff's] complaint or, in the alternative, to exclude the photographs of the destroyed evidence."[19] In doing so, the appellate court affirmed the trial court's sanction excluding inspection notes or other examination materials, as well as testimony by consulting experts or any witness based on the inspection of the vehicle or tires, *and* giving a jury instruction that spoliation of evidence raised a presumption against the spoliator.[20]

C. Dismissal of Plaintiff's Claims

The "home run ball" of spoliation sanctions is the dismissal of the plaintiff's Complaint or a specific theory of recovery. While this ultimate sanction is not used often in Georgia, it is available to a court which wishes to sanction a plaintiff who has been found to be responsible for spoliation of evidence.

Chapman v. Auto Owners Ins. Co.[21] was the first Georgia case recognizing dismissal as a valid spoliation sanction. In considering the motion, the trial court did not believe that it had to power to dismiss the suit as an appropriate sanction. In this case of first impression, the appellate court determined that the harsh sanction of dismissal is available to a trial court. The court's rationale was that, if a dismissal were not allowed, such a circumstance could result in trial by ambush which could not be cured by a jury instruction. The case was remanded to the trial court to determine whether that sanction was appropriate under the facts of that particular case.

Dismissal is reserved for the most egregious instances of spoliation. *Chapman* held that "'dismissal should be reserved for cases where a party has maliciously destroyed relevant evidence with the sole purpose of precluding an adversary from examining that relevant evidence.'"[22] However, malice is not always required before a trial court determines that dismissal is appropriate.

Even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend the case.[23] Other jurisdictions also recognize that some instances of spoliation require dismissal of or summary judgment as to a plaintiff's claims and can be looked to for guidance.[24]

Georgia's *Wright v. VIF/Valentine Farms Bldg. One, LLC*[25] involved not only favorable jury instructions for one co-defendant as sanctions for the plaintiff's spoliation of evidence but also the outright dismissal of all claims against another co-defendant. In *Wright*, the dismissed co-defendant was not placed on notice of suit until five days after the spoliation events, whereas the remaining co-defendants had previously been involved with the litigation. In choosing a different remedy for each of the defendants based on the same behavior of the plaintiff, the court found the remaining co-defendants "had more of an opportunity to develop their case" because they had been involved in discovery for some time prior to the spoliation occurring. This sanction order was affirmed on appeal.[26]

Federal courts in Georgia are not hesitant to dismiss a plaintiff's case if the *Bridgestone* factors show that the sanction is appropriate. *Flury v. Daimler Chrysler Corp*.[27] presents an excellent example.

Flury involved a federal appellate court looking to the law of the forum state (Georgia) for guidance on the issue of whether spoliation sanctions were appropriate and, if so, which sanction was applicable. The plaintiff had alleged that a malfunction in his vehicle's airbag system had caused his injuries. The plaintiff's attorney sent a letter to the defendant, notifying it of the airbag's failure to deploy. The defendant replied to the letter, requesting the location of the vehicle so that it could be inspected. The plaintiff's attorney did not respond to the defendant's letter, disclose the vehicle's location, or notify the defendant that the plaintiff's insurer had scheduled the vehicle for removal. Subsequently, the plaintiff's insurer sold the vehicle for salvage.

The trial court did not review the *Bridgestone* factors and instead allowed the jury to determine which party was responsible for the spoliation of the evidence. The plaintiff's accident reconstruction expert testified at trial as to various issues, including the speed of the plaintiff's vehicle at the time of impact and as to the plaintiff's claim for airbag deployment malfunction. Although some of the expert's opinions were excluded by the trial court, the expert was allowed to testify as to the critical speed issue. Following a jury trial, the plaintiff was awarded $250,000.00.

On appeal, *Flury* first determined that the trial court had erred because it should have applied the *Bridgestone* factors. However, rather than remanding the case back for consideration of the issue, the Eleventh Circuit determined that there was only one, inescapable conclusion when those factors were weighed: that the plaintiff was responsible for the spoliation, and all the factors weighed in favor of sanctions. *Flury* went even further and determined:

> Plaintiff failed to preserve an allegedly defective vehicle in a crashworthiness case. The vehicle was, in effect, the most crucial and reliable evidence available to the parties at the time plaintiff secured representation and

> notified defendant of the accident. By the time plaintiff filed suit, years after the accident had taken place, plaintiff had allowed the vehicle to be sold for salvage despite a request from defendant for the vehicle's location. For these reasons, we believe the resulting prejudice to the defendant incurable, and dismissal necessary.[28]

In explaining its rationale for the application of the ultimate sanction, *Flury* further clarified:

> Even absent defendant's unambiguous request for its location, plaintiff should have known that the vehicle, which was the very subject of his lawsuit, needed to be preserved and examined as evidence central to his case. Plaintiff's failure to preserve the vehicle resulted in extreme prejudice to the defendant, and failure to respond to defendant's letter displayed a clear dereliction of duty.[29]

Related to the question of dismissal is whether a trial court can functionally accomplish such a result without actually dismissing the case. In other words, can the trial court so cripple the plaintiff's case that it results in summary judgment for the defense, even without formally "dismissing" the case as the sanction for spoliation? The answer to this question is clearly, "Yes."

As discussed above, in *AMLI Residential Properties, Inc. v. Georgia Power Co.*,[30] the plaintiff was precluded from introducing or conveying to the jury, through expert witnesses or otherwise, any evidence whatsoever relating to the spoliated ground rod. After the evidence and testimony were precluded, the trial court then granted summary judgment based on the absence of evidence of causation, and this ruling was affirmed on appeal.[31] Like Georgia, other jurisdictions have affirmed the use of a spoliation sanction less than dismissal which ultimately results in summary judgment for the defense when the sanction prevents the plaintiff from being able to prove an essential element of its case.[32]

IV. Strategy for Using Spoliation as a Sword

So, what can defense counsel do to get to the heart of the spoliation issue? Recently, the author has begun conducting more discovery which is aimed at determining the current whereabouts of evidence which may have been spoliated by the plaintiff. Discovery inquires include questions and requests designed to determine where the critical evidence is, what has happened to it since the incident, who had control of it, and what steps did the custodian take to protect it after the incident occurred. Additional requests seek an opportunity to inspect the critical evidence – even before it is directly identified. A simple example of this is to request to inspect the shoes that the plaintiff was wearing in slip/trip-and-fall cases. It is amazing what percentage of plaintiffs continue to wear their shoes for weeks to months following the subject incident, and how many of those plaintiffs do not even retain the shoes.

Outside of the formal discovery process, the defense practitioner should place plaintiffs and their counsel on notice of the need to preserve evidence in the

same status as it was at the time of accident.

V. Recent Success Stories

This author has had two recent significant successes involving the use of spoliation of evidence as a sword against plaintiffs: one resulting in favorable jury instructions, and the other involving the dismissal of the plaintiff's case with prejudice.

In the first suit, the plaintiff had alleged that her hair had fallen out as a result of the use of a hair product. The plaintiff had originally retained the hair, but she testified that she subsequently had offered to give it to her attorney, who told her to throw it away. There was, therefore, no way for the defense to demonstrate that she had used the product in violation of the warnings on the package. Fulton State Court Judge Dixon (also the trial court judge from *Bouve & Mohr, LLC*[33]) granted sanctions including instructing the jury that the defendant was entitled to an *irrebuttable presumption* that the product had been used in violation of written warnings. Near the time that the sanctions were granted, the case settled for nuisance value.

In 2012, the author succeeded in obtaining an outright dismissal of a plaintiff's case due to spoliation of evidence. In that case, *RV Motors, LLC v. Forthe Insurance Agency, Inc.*,[34] the plaintiff corporation owned four recreational vehicles ("RVs") that were vandalized. Following the vandalism, and while the plaintiff was pursuing a first-party claim through its property insurer, the plaintiff put a third-party's insurer on notice of a claim. The third-party's insurer made both oral and written requests to inspect the RVs and for documentation of damages, but the plaintiff refused to provide such. Fifteen months after giving notice of the third-party claim, the plaintiff informed the third-party's insurer that the RVs had been sold for salvage. When no resolution could be reached on the claims made against the third party, the plaintiff filed suit against the third party. In litigation, the plaintiff identified an expert who had inspected the RVs before they had been sold and who opined as to the inability to repair the RVs, as well as to the alleged loss of value.

In response to a motion for spoliation sanctions, Gwinnett State Court Judge Hamil dismissed the entire case, finding that the plaintiff's spoliation had deprived the defendant of the opportunity to put on a complete defense. The court determined that the defendant's repeated requests to the plaintiff to inspect the RVs after having been put on notice of the claim were inexplicably ignored, and as a result, the defendant had been unable to examine the vehicles' condition. The court also determined that the few photographs which existed were insufficient to substitute for a valid inspection. Judge Hamil then concluded that the resulting prejudice to the defendant was incurable by any sanction other than dismissal. His entire view of the case was summed up in one line of the Order, "This Court prefers cases to be tried on their merits whenever possible. Sometimes there just is no way to obtain that."[35]

VI. Conclusion

Based on a review of the case law, it is clear that as far as spoliation is concerned in Georgia, what is sauce for the goose is sauce for the gander. Trial courts will impose sanctions against plaintiffs when the *Bridgestone* factors are met. Defense

counsel should seek to identify critical evidence to determine if anything is missing. If it is, look to see how important it is to your case and whether the *Bridgestone* factors can be established.

If possible, counsel should not be afraid to ask the trial court for sanctions – even if it is something less than dismissal. The home run swing should be saved for those cases where the opportunity to provide a complete defense is lost due to a plaintiff's action.

But when the right pitch comes, swing away!

End Notes

[1] *Georgia Bd. of Dentistry v. Pence,* 223 Ga. App. 603, 608, 478 S.E. 2d 437 (1996).

[2] The *Bridgestone* factors are those factors discussed in *Bridgestone/Firestone N. Am. Tire, LLC v. Campbell*, 258 Ga. App. 767, 574 S.E.2d 923 (2002).

[3] *Compare Fire Ins. Exch. v. Zenith Radio Corp.*, 103 Nev. 648, 651, 747 P. 2d 911 (1987) ("Even where an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action," *citing Wm. T. Thompson Co. v. General Nutrition Corp.* 593 F. Supp. 1443, 1455 (1984); *United States v. ACB Sales & Services, Inc.,* 95 F.R.D. 316, 318 (1982); and *United Nuclear Corp. v. Gen. Atomic Co.,* 629 P. 2d 231, 309 (N.M. 1980)).

[4] *See Padgett v. Kroger*, 311 Ga. App. 690, 692, 716 S.E. 32d 792 (2011); *Silman v. Associates Bellmeade*, 294 Ga. App. 764, 766-67, 669 S.E. 3d 663 (2008); *de Castro v. Durrell*, 295 Ga. 194, 204, 671 S.E. 2d 244 (2008).

[5] *See, e.g., Flury v. Daimler Chrysler Corp*., 427 F. 3d 939 (11th Cir. 2005); *Wal-Mart Stores, Inc. v. Lee*, 290 Ga. App. 541, 659 S.E. 2d 905 (2008); *Bagnell v. Ford Motor Co*., 297 Ga. App. 835, 678 S.E. 2d 489 (2009); *Wright v. VIF/Valentine Farms Bldg. One, LLC*, 308 Ga. App. 436, 708 S.E.2d 41 (2011).

[6] This is the inverse of the ease with which a plaintiff can invoke the trial preparation privilege under O.C.G.A. §9-11-26(b)(3). Some cases have indicated that, in order for a defendant to invoke the privilege, the defendant must show that the plaintiff had given the defendant some indication of anticipated litigation, *see*, *e.g*., *Lowe's, Inc. v. Webb*, 180 Ga. App. 755, 756-57, 350 S.E.2d 292, 293-94 (1986), whereas a plaintiff can always invoke the privilege simply by saying that he had been contemplating litigation. As to spoliation, if the defendant can somehow show that the plaintiff had *simply thought about* making a claim, then the "contemplated litigation" prong immediately should be satisfied.

[7] *Bridgestone/Firestone N. Am. Tire, LLC*, 258 Ga. App. at 768-69, 574 S.E. 2d 923. It is worth noting that some Georgia decisions refer to the factors to be considered as the "*Chapman* factors," because *Chapman v. Auto Owners Ins. Co.,* 220 Ga. App. 539, 469 S.E. 2d 783 (1996) was the first Georgia case actually to discuss them –albeit in the context of discussing a federal court case from Maine, *Northern Assurance Co. v. Ware,* 145 F.R.D. 281 (D. Me. 1993).

[8] *See*, *e.g*., *Patton v. Newmar Corp*., 538 N.W. 2d 116, 119 (Minn. 1995); *Fada Indus., Inc. v. Falchi Bldg. Co., L.P.*, 189 Misc. 2d 1, 7, 730 N.Y.S.2d 827, 834 (Sup. Ct. 2001); *Sebelin v. Yamaha Motor Corp., USA,* 705 A. 2d 904, 907–11 (Pa. Super. 1998).

[9] *See*, *e.g*., *Byrnie v. Town of Cromwell, Bd. of Educ.,* 243 F. 3d 93, 107-12 (2d Cir. 2001); *Schmid v. Milwaukee Electric Tool Corp.,*13 F. 3d 76, 79 (3d Cir. 1994); *Beaven v. U.S. Dep't of Justice*, 622 F. 3d 540, 553 (6th Cir. 2010); *Leon v. IDX Systems Corp.,* 464 F. 3d 951, 958 (9th Cir. 2006); *Flury v. Daimler Chrysler Corp.*, 427 F. 3d 939 (discussing in greater detail, *infra*).

[10] *Bridgestone/Firestone N. Am. Tire v. Campbell,* 258 Ga. App. 767, 768, 574 S.E. 2d 923 (2002); *R.A. Siegel Co. v. Bowen,* 246 Ga. App. 177, 179, 539 S.E. 2d 873 (2000).

[11] *Bouve & Mohr, LLC v. Banks*, 274 Ga. App. 758, 764, 618 S.E. 2d 650 (2005).

[12] *Chambers v. NASCO, Inc.,* 501 U.S. 32, 45-46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (recognizing the inherent power of the courts to fashion appropriate sanctions for conduct that disrupts the judicial process); *see also United States v. Shaffer Equip. Co.,* 11 F. 3d 450, 462 (4th Cir.1993) (recognizing "that when a party deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process, the court has the inherent power to dismiss the action"); *cf.* Fed. R. Civ. P. 37(b)(2) (authorizing sanctions for violations of discovery orders).

[13] *Bouve & Mohr, LLC*, 274 Ga. App. at 762 618 S.E. 2d 650. This is also consistent with the standard of review used by federal courts and other states' appellate courts. *See*, *e.g.*, *Chambers,* 501 U.S. 32, 55, 111 S. Ct. 2123, 115 L. Ed. 2d 27; *Harris v. Chapman,* 97 F. 3d 499, 506 (11th Cir. 1996); *Banks v. Jerome Taylor & Associates,* 700 A. 2d 1329, 1331 (Pa. Super. 1997).

[14] *Chapman,* 220 Ga. App. 539, 469 S.E. 2d 783.

[15] 293 Ga. App. 358, 361, 667 S.E. 2d 150 (2008)

[16] *See, e.g., Copenhagen Reins. Co. v. Champion Home Builders Co., Inc*., 872 So. 2d 848 (Ala. Civ. App. 2003); *Bolton v. Massachusetts Bay Transp. Auth.*, 32 Mass. App. Ct. 654, 593 N.E. 2d 248 (1992); *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995); *Fire Ins. Exch. v. Zenith Radio Corp*., 103 Nev. 648, 650, 747 P. 2d 911 (1987).

[17] 308 Ga. App. 436, 708 S.E.2d 41 (2011).

[18] *See, e.g., Pfantz v. Kmart Corp*., 85 P. 3d 564 (Colo. Ct. App. 2003); *Anderson v. Litzenberg*, 115 Md. App. 549, 694 A. 2d 150 (1997); *Wajda v. Kingsbury*, 652 N.W. 2d 856 (Minn. Ct. App. 2002). A recent federal court opinion sanctioned a plaintiff with adverse jury instructions where the plaintiff was found to have intentionally deleted a facebook ® account sought by the defense. *Gatto v. United Air Lines, Inc.*, 2013 WL 1285285 (Case No. 10-CV-1090-ES-SCM, D.N.J. Mar. 25, 2013).

[19] *Bridgestone/Firestone N. Am. Tire,* 258 Ga. App. at 771, 574 S.E. 2d 923.

[20] *Id*.

[21] 220 Ga. App. 539, 469 S.E. 2d 783.

[22] *Id*., 220 Ga. App. at 542, 469 S.E. 2d at 785-86.

[23] *Bridgestone/Firestone N. Am. Tire*, 258 Ga. App. at 770, 574 S.E. 2d 923.

[24] *See, e.g.*, *Cincinnati Ins. Co. v. Synergy Gas, Inc*., 585 So. 2d 822 (Ala. 1991)(dismissal); *Stubli v. Big D Int'l Trucks, Inc.*, 107 Nev. 309, 810 P. 2d 785 (1991)(dismissal); *Lindquist v. Pillsbury Co*., 1 A.D. 3d 410, 766 N.Y.S. 2d 689 (2003)(dismissal); *Hawley v. Cash*, 155 N.C. App. 580, 574 S.E. 2d 684 (2002) (summary judgment); *Fines v. Ressler Enter., Inc.*, 2012 N.D. 175, 820 N.W. 2d 688 (dismissal).

[25] *Supra* note 17.

[26] In *Robertet Flavors, Inc. v. Tri-Form Constr., Inc.*, 203 N.J. 252, 285, 1 A. 3d 658, 678 (2010), the New Jersey Supreme Court reached a similar conclusion allowing limited claims to continue against one defendant (after applying spoliation sanctions relating to restricting evidence to be admitted) and dismissing the plaintiff's claims against the other co-defendants as sanctions for spoliation.

[27] 427 F. 3d 939 (11th Cir. 2005).

[28] *Id*. at 943 (footnote omitted).

[29] *Id*. at 945.

[30] *Supra* note 15.

[31] *See also R.A. Siegel Co.*, 246 Ga. App. at 182, 539 S.E. 2d at 878 ("We are mindful that the sanction imposed here, excluding expert testimony, is a harsh sanction as it can be the functional equivalent of striking the answer or dismissal.").

[32] *Fire Ins. Exch. v. Zenith Radio Corp.*, 103 Nev. 648, 651, 747 P. 2d 911 (1987).

[33] *Supra* note 11.

[34] Gwinnett State Court, Civil Action File No. 11A-01696-8. A copy of Order is provided as Appendix A to this article.

[35] *Id.* at 15

Appendix A: Order on Pending Motions

16000.0453
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IN THE SUPERIOR COURT FOR GWINNETT COUNTY

STATE OF GEORGIA

RV MOTORS, LLC	
Plaintiff,	**Civil Action File No.: 11A-01696-8**
v.	
FORTHE INSURANCE AGENCY, INC.	
Defendant.	

FILED IN OFFICE
CLERK SUPERIOR COURT
GWINNETT COUNTY, GA.
12 NOV 15 PM 2:50
RICHARD ALEXANDER, CLERK

ORDER ON PENDING MOTIONS

Pending before this Court are four motions, all filed by Defendant Forthe Insurance Agency, Inc. ("Defendant"). The four pending motions are:

1. Motion for Sanctions Based Upon Spoliation of Evidence;
2. Motion to Exclude Opinions and/or Testimony from V.I.P. Investigations and/or Richard Waite;
3. Motion to Strike; and
4. Motion for Leave of Court to File an Out-of-Time Motion for Partial Summary Judgment on Plaintiff's Claim for Stubborn Litigiousness.[1]

All of the above motions were fully briefed and the parties came before this Court on Monday, November 5, 2012 for oral argument.[2] Having read and heard all argument on the motions, the Court hereby determines as follows:

I. Statement of the Proceedings and Findings of Fact

This is a tort case brought as a result of the vandalism of four Western Recreational Vehicles (hereinafter referred to as "RVs") in October 2007. Complaint at ¶ 7. According to the Complaint, Plaintiff RV Motors, Inc. ("Plaintiff") was dealership that owned the four

[1] The Motion for Leave was filed with Plaintiff's consent.
[2] The Motion to Strike was unopposed as Plaintiff never filed an opposition to same. However, this Court considered the argument of Plaintiff made at the November 5, 2012 regarding this motion.

subject Western RVs. Complaint at ¶ 7. In June 2007, approximately four months prior to the subject incident, several Western RVs on the lot of Plaintiff's dealership were vandalized in a separate incident. Complaint at ¶ 5. As a result of that June 2007 vandalism, Plaintiff moved its remaining, un-vandalized Western RVs to the lot of a different dealership, Non-Party Turning Wheel RV (hereinafter referred to as "TWRV").

There is a dispute regarding several conversations that occurred at the time the Plaintiff's RVs were to be moved to TWRV.[3] Defendant was the insurance agency that brokered a policy of insurance for Plaintiff through Non-Party Auto-Owners Insurance Company that provided coverage for damage to Plaintiff's RVs in certain circumstances. However, Plaintiff alleges that its representative, Jimmy Doyle, contacted Defendant's representative, Jim Forthe, prior to moving the RVs to TWRV and obtained his "permission" to move them. Complaint at ¶ 6. Forthe denied any such permission was ever provided. Answer at ¶ 6. It is undisputed that the Auto-Owners policy contained an exclusion that removed coverage if the RVs were removed from Plaintiff's lot.

As noted above, in October 2007, the four Western RVs owned by Plaintiff were vandalized while on the TWRV lot. Complaint at ¶ 7. Although Plaintiff made a claim to Auto-Owners, the claim was eventually denied based on the exclusion described above.

On February 19, 2008, while Auto-Owners was still investigating Plaintiff's first-party property damage claim, Plaintiff first made an Errors and Omissions claim against Defendant. Deits Affidavit at ¶ 3. On April 2, 2008, the insurance adjuster assigned by Defendant's insurer to investigate Plaintiff's claim against Defendant, Frontier Adjusters Gwen Deits, contacted Plaintiff's then attorney, Greg Melton, and spoke with him regarding the loss. Deits Affidavit at

[3] Although the Court finds there is a dispute in the evidence, because this is not a summary judgment ruling, the dispute is immaterial to the issues decided herein.

¶ 4. Melton advised that although there were "repair estimates and opinions" that were done, the RVs had not yet been repaired. Deits Affidavit at ¶ 5. Melton also told Deits that he would not allow the defense to speak directly with Doyle. Deits Affidavit at ¶ 6. That same day, Deits sent Melton a letter requesting documentation supporting the claim for loss. Deits Affidavit at ¶ 7. When no response was received to that letter, Deits followed-up with Melton requesting the same information via a letter dated April 28, 2008. Deits Affidavit at ¶ 8.

Not having received a response, Deits contacted Auto-Owners in an attempt to obtain a copy of their damage documentation and requested that she be notified if and when an inspection of the RVs at issue in this matter was to occur so that the defense could be present for it. Deits Affidavit at ¶ 9. In response, Deits received a letter from counsel for Auto-Owners, Mark Dietrichs, dated May 29, 2008. Deits Affidavit at ¶ 10. In this letter, Dietrichs told Deits that he contacted Melton to see if Plaintiff had any objection to releasing the Auto-Owners claim file to Deits, and that Melton had specifically instructed Dietrichs not to release any file or claims material to Deits. Deits Affidavit at Exhibit 3.

As a result of this denial of permission, Deits sent another letter to Melton on June 10, 2008. Deits Affidavit at ¶ 12. In this letter, Deits not only again asked for the previously requested documents, but also made a specific request to allow for an inspection of the RVs at issue. Deits Affidavit at Exhibit 4.

On June 18, 2008, Diets spoke with Dietrichs. Deits Affidavit at ¶ 13. During that call, Deits again requested that she be notified if and when an inspection of the RVs at issue in this matter was to occur so that the defense team for the Errors and Omission claim could be present for it. Deits Affidavit at ¶ 13.

Having received no response from Melton to the June 10, 2008 letter, Deits again contacted Melton on August 26, 2008 via telephone. Deits Affidavit at ¶ 14. As soon as she identified herself in the call, Melton immediately stated that he was only going to deal with the auto carrier and not the insurers or the defense of the Errors and Omission claim that had been made. Deits Affidavit at ¶ 15. Melton then hung up the phone without giving Deits a chance to respond or further discuss the matter. Deits Affidavit at ¶ 16. Diets documented this conversation in a letter to Melton that same day. Deits Affidavit at ¶ 16.

Also on August 26, 2008, Deits spoke with Dietrichs via telephone and at that time learned that although there had been an "inspection" of the RVs "several weeks ago," it was of the RVs vandalized in June 2007 and not the RVs vandalized in the October 2007 incident at issue in this case. Deits Affidavit at ¶ 17. Dietrichs informed Deits that because of Melton's objection, no one from the defense of the Errors and Omissions claim was invited to or would have been allowed to attend that inspection. Deits Affidavit at ¶ 18. Deits reminded Dietrichs that she had previously requested that she be notified if and when an inspection of the RVs at issue in this matter was to take place so that the defense would have the opportunity to be present and documented same in a letter to Dietrichs that same day. Deits Affidavit at ¶ 19.

As of January 19, 2009, there still was no return contact from Melton. As a result of there being no contact by Melton and at least partially based on his refusal to grant any access to the RVs at issue, Deits closed her file. Deits Affidavit at ¶ 20. The file remained closed for the next 15 months and there was no activity during that over one-year period. Deits Affidavit at ¶ 21.

The file was finally re-opened on March 8, 2010, after Deits received a letter from Plaintiff's new attorney, Rick Brown, dated March 3, 2010 making a demand for payment for

$627,509.00. Deits Affidavit at ¶ 22. Deits attempted to contact Brown via telephone, but when she was unable to do so, she sent him a letter dated March 8, 2010 in which she again requested documentation related to the damages claimed. Deits Affidavit at ¶ 23. Over the next month, when Brown did not provide any of the requested information, Deits left him weekly telephone messages, none of which he returned. Deits Affidavit at ¶ 24. Deits also sent Brown a follow-up letter dated April 20, 2010 continuing to request the damage documentation and memorializing the fact that multiple telephone messages had been left and not returned. Deits Affidavit at ¶ 25.

Brown finally responded to Deits on May 19, 2010. Deits Affidavit at ¶ 26. In that letter, Brown informs anyone connected with the adjusting of the Errors and Omission claim for the first time that the RVs at issue had been sold. Deits Affidavit at Exhibit 10. At his deposition, Doyle stated that three of the RVs had been sold for salvage and that he had no idea where they were. Doyle Depo. at 153-54, 168-69. Doyle testified that the other RV at issue was sold to a private individual about whom he had no identifying or contact information. Doyle Depo. at 170-71.[4] This occurred despite the fact that Plaintiff had made an Errors and Omission claim against Defendant, that Plaintiff's counsel was aware that the defense was actively investigating the claim, and that a specific request to inspect the RVs had been made as early as June 10, 2008. Prior to the RVs at issue being sold, no one ever informed Deits or anyone else associated with adjusting the Errors and Omissions claim that the RVs at issue were to be sold. Deits Affidavit at ¶ 26. This is true despite Deits' explicit written request to Plaintiff's counsel on June 10, 2008 that the defense be provided the opportunity to inspect the RVs at issue. Deits Affidavit at ¶¶ 13, 26, Exhibit 4.

[4] Doyle also testified that Plaintiff had no document retention policy and did not have any documentation related to any of those sales. Doyle Depo. at 37-38, 153-54, 168-71.

Plaintiff filed the above-styled law suit against Defendant on February 23, 2011. In response to written discovery, Plaintiffs disclosed a February 20, 2008 report from V.I.P. Investigations written by Richard Waite. In this February 20, 2008 report, Waite provides his opinion that the "Actual Case Value of this loss [is] $615,151.00." VIP Report at 2. Waite offers the additional opinion that "[t]he results of our inspection revealed that all four of the [RVs] have various hidden defects that will require extensive wiring and repairs." VIP Report at 2.

In support of the motions presently before the Court, Defendant filed the affidavit of Michael Ethridge, a licensed Georgia adjuster who, prior to the above-referenced litigation, had completed Damage Appraisals on motor homes and recreational vehicles with the type of damage alleged to have occurred in this case. Ethridge Affidavit at ¶¶ 3-4. Ethridge testified that he was not able to personally inspect the RVs because they were sold and disposed of prior to the law suit being filed and that a personal inspection of an RV is necessary in order to complete a Damage Appraisal. Ethridge Affidavit at ¶¶ 5-6.

In response to the motions, Plaintiffs produced an affidavit from Waite stating in part that

> [m]y opinion was contributed to by the assertion of Richard Fish, CEO of Western RV who stated that the Company declined to repair or have repaired the affected coaches. The Company declared, and I concurred, that the damage to the vandalized unites was so extensive and adequate repair so uncertain that Western RV would not warrant any items, parts or systems of the units that were damaged and it would not warrant any repairs thereto or replacements thereof. Due to the extensive impact on the electrical systems of the involved units, the complexity of the system's interfaces that the same would basically have to be sold as "salvaged."

Waite Affidavit at ¶ 8.

In Defendant's Motion for Sanctions, Defendant seeks sanctions for the spoliation of the RVs by Plaintiff. In this motion, Defendant requests this Court dismiss Plaintiff's Complaint or alternatively impose lesser sanctions such as exclusion of evidence and jury instructions.

II. Conclusions of the Court

Trial courts have the power to control the behavior of litigants before them to maintain the integrity of the judicial process, and this power includes the discretion to fashion appropriate remedies for the spoliation of evidence. Bridgestone/Firestone N. Am. Tire v. Campbell, 258 Ga. App. 767, 768, 574 S.E. 2d 923 (2992); R.A. Siegel Co. v. Bowen, 246 Ga. App. 177, 179, 539 S.E. 2d 873 (2000). Where a party has destroyed or significantly altered evidence that is material to the litigation, the trial court has wide discretion to fashion sanctions on a case-by-case basis. Bouve & Mohr, LLC v. Banks, 274 Ga. App. 758, 764, 618 S.E.2d 650 (2005).

Spoliation refers to the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation. Georgia Bd. of Dentistry v. Pence, 223 Ga. App. 603, 608, 478 S.E. 2d 437 (1996). Therefore, the initial analysis consists of a two-part test: (1) is the evidence at issue "necessary" to the litigation; and (2) was there "contemplated or pending litigation" at the time of the alleged spoliation.

In this case, there Court finds that both tiers are met. The RVs are the central focus of this litigation and Plaintiff's claims regarding their post-vandalism valuation (or loss of value) and the lack of ability to repair the RVs are the entire basis for its claimed damages. As such, they are necessary to this litigation. Likewise, there is no doubt that Plaintiffs were "contemplating litigation" as they made a claim against Defendant's Errors and Omissions policy. Regardless, Plaintiff and not Defendant was the one that was in possession of the evidence at issue. This is "spoliation" within the meaning of that phrase under Georgia law.

When key evidence has been destroyed, exclusion of evidence or dismissal of a case may be warranted. Chapman v. Auto Owners Ins. Co., 220 Ga. App. 539, 542-43, 469 S.E. 2d 783

(1996). In determining whether such a severe sanction is warranted the trial court must look to the following factors:

(1) whether the Defendant was prejudiced as a result of the destruction of the evidence;
(2) whether the prejudice could be cured;
(3) the practical importance of the evidence;
(4) whether the Plaintiff acted in good or bad faith; and
(5) the potential for abuse if expert testimony about the evidence was not excluded.

Bridgestone/Firestone N. Am. Tire, LLC v. Campbell, 258 Ga. App. 767, 768-69, 574 S.E. 2d 923 (2003). *Accord*, Flury v. Daimler Chrysler Corp., 427 F. 3d 939 (11th Cir. 2005).

In this case, all the factors above are impacted. The Court finds that Defendant has been prejudiced as a result of Plaintiff's spoliation of the RVs. In order for Plaintiff to prove its claim, it has to demonstrate the amount alleged to be lost. Because part of Plaintiff's claim is that the RVs could not be repaired and were "salvage," it is critical to the defense to be able to make its own determination regarding same. Yet, Plaintiff, through its counsel, blocked every attempt by the defense to obtain the documents it needed and to more importantly, inspect the RVs at issue prior to their being sold.

The Court further finds that the prejudice cannot be cured. The RVs are destroyed, forever lost to the defense for any inspection, examination or testing. It can never be known whether the RVs at issue were damaged to the extent that Plaintiff claims they were or whether they could not be repaired as Plaintiff claims. Without the RVs to inspect, such claims can never be corroborated independently and Doyle must otherwise be taken at his word. *See* AMLI Residential Properties, Inc. v. Georgia Power, Co., 293 Ga. App. 358, 362, 667 S.E. 2d 150 (2008) (affirming the finding of the trial court that "because the opportunity to examine and test the [evidence at issue] in its unaltered state has been forever disclosed, [Defendant] has been

prejudiced by [Plaintiff's] failure to provide notice to [Defendant] prior to the removal and destructive testing…" and that the destruction of this evidence rendered "a full defense impossible." (*citing* Bridgestone, supra, 258 Ga. App. at 769)). The parties agree that there is no video footage of the damaged RVs or the inspection performed by Waite and the Court finds the few pictures attached to his report are not a substitute that would take the place of a personal inspection.

The import of this evidence cannot be understated. As Ethridge stated in his affidavit, a personal inspection of a motor home is necessary in order to complete a Damage Appraisal. Without the RVs, that personal inspection cannot be done.

This Court further finds that Plaintiff acted in bad faith. Under Georgia law, malice is not required to find bad faith and is not always required to be found before a trial court determines that dismissal is appropriate. Bridgestone, *supra*, 258 Ga. App. at 770. Deits, acting on behalf of the defense, specifically requested an opportunity to have the RVs at issue inspected. She was affirmatively denied this request by Plaintiff's counsel and Plaintiff sold the RVs at issue despite its counsel knowing about this request.[5] It is unconscionable to think that Plaintiff could not comprehend that the RVs at issue would need to be inspected and appraised by the defense when claims of over $600,000.00 were being made.

This case presents facts analogous to those in Flury v. Daimler Chrysler Corp., 427 F. 3d 939 (11th Cir. 2005), a diversity suit brought in Southern District of Georgia. In Flury, the Plaintiff alleged a malfunction in his vehicle's airbag system caused his injuries. Plaintiff's counsel sent a letter to the Defendant notifying it of the airbag's failure to deploy. Defendant replied to Plaintiff's counsel's letter requesting, among other things, the location of the vehicle

[5] Additionally, even requests to obtain documentation through non-parties, i.e. the Auto-Owners claim file, were objected to by Plaintiff's counsel who affirmatively refused to allow for such documents to be transmitted. Deits Affidavit at ¶¶ 10-11, 15.

so that it could be inspected. By this time, the vehicle had apparently been removed to the residence of Plaintiff's parents. Plaintiff's counsel never responded to the defendant's letter. The vehicle was eventually removed from Plaintiff's parents' residence and sold for salvage by his insurer. Plaintiff's counsel did not disclose the vehicle's location to Defendant prior to its removal by the insurer, nor did he notify Defendant of the planned removal. Id. at 941-42.

At trial, the Flury plaintiff presented an accident reconstruction expert who testified as to various issues in the case inclusive of the speed at which the vehicle was traveling at the time of the subject accident which directly addressed the airbag deployment malfunction claim. Id. at 941. Although some of the expert's opinions were excluded, the expert was allowed to testify as to the critical speed issue. Id. at 942. Following a jury trial, the Plaintiff was awarded $250,000.00. Id. at 940.

On appeal, the Eleventh Circuit reversed the trial court finding that when the Bridgestone factors were applied there was no sanction other than dismissal that was appropriate:

> Plaintiff failed to preserve an allegedly defective vehicle in a crashworthiness case. The vehicle was, in effect, the most crucial and reliable evidence available to the parties at the time plaintiff secured representation and notified defendant of the accident. By the time plaintiff filed suit, years after the accident had taken place, plaintiff had allowed the vehicle to be sold for salvage despite a request from defendant for the vehicle's location. For these reasons, we believe the resulting prejudice to the defendant incurable, and dismissal necessary.

Id. at 943 (footnote omitted).

Flury and the instant case are almost identical. As was true in Flury, Plaintiff's counsel knew the location and condition of the subject vehicle for a considerable amount of time following the accident and was fully aware that Defendant wished to examine the vehicle. Knowing this, both the Plaintiff in Flury and the Plaintiff in the above-styled case ignored Defendant's request and allowed the vehicle to be sold for salvage without notification to

defendant of its planned removal. In fact, in this case it is even worse because in Flury it was the Plaintiff's insurer that sold the vehicle for storage and Flury was merely guilty of "allowing" it to be sold. Here, Doyle himself testified that he was the one that decided to sell the RVs for salvage. Doyle Depo. II at 33.

As noted by Flury:

> Even absent defendant's unambiguous request for its location, plaintiff should have known that the vehicle, which was the very subject of his lawsuit, needed to be preserved and examined as evidence central to his case. Plaintiff's failure to preserve the vehicle resulted in extreme prejudice to the defendant, and failure to respond to defendant's letter displayed a clear dereliction of duty.

Id. at 945.

In the instant case, like in Flury, there was an unambiguous request to inspect the vehicles which are the very subject of the lawsuit. As was also true in Flury, the vehicles needed to be preserved and examined as evidence central to this case. Finally, in Flury as here, Plaintiff's failure to preserve the vehicle results in extreme prejudice to the Defendant and the failure to respond to Defendant's letters and calls requesting the opportunity to inspect the vehicles display a clear dereliction of duty. To quote Flury, Plaintiff "should have known that the vehicle[s], which [were] the very subject of his lawsuit, needed to be preserved and examined as evidence central to [its] case." Id.

Finally, the potential for abuse is also not only present but great. If this case is allowed to go to trial, Plaintiffs will present the testimony and opinions of Waite who had an opportunity to personally inspect the RVs at issue while the defense has absolutely no ability to counter his testimony effectively. Any expert that the defense would be comfortable using never had the chance to personally inspect the RVs and that alone could be enough to sway a jury. Likewise, even Doyle himself could not identify more than four of the twenty-eight pictures attached to the

V.I.P Investigations Report and even then, none of the pictures identified in any way provide any kind of a basis that would reliably allow an expert to opine on the critical issues of reparability and loss of value. As was true in Flury, this Court "[c]annot ignore the fact that defendant was precluded from obtaining much more reliable evidence tending to prove or disprove the validity of [Plaintiff's expert's] statements." Id. at 946.

Based on the above, this Court finds that all five of the Bridgestone factors are present and as such, this case is one where sanctions are appropriate.

Defendant has requested this Court dismiss Plaintiff's Complaint as the appropriate sanction. Georgia appellate courts have determined that the trial courts not only have the ability, but are well within their discretion to apply sanctions for spoliation of evidence up to and including dismissal. Chapman v. Auto Owners Ins. Co., 220 Ga. App. 539, 469 S.E. 2d 783 (1996). *See* Wright v. VIF/Valentine Farms Bldg. One, LLC, 308 Ga. App. 436, 444 708 S.E. 2d 41 (2011) (affirming trial court's dismissal of the plaintiff's claims against one defendant when the Court determined that the plaintiff was aware that the evidence at issue should not have been disturbed, but nevertheless disturbed the area in question making changes that "could not be cured.").

This Court is mindful of the concern in Chapman that that sanction of "dismissal should be reserved for cases where a party has maliciously destroyed relevant evidence with the sole purpose of precluding an adversary from examining that relevant evidence." Id. at 542. However, malice is not always required before a trial court determines that dismissal is appropriate. As was noted by in Bridgestone, "even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend the case." Bridgestone, 258 Ga. App. at 770.

In this matter, as was true in Flury, the prejudice to Defendant is extraordinary as it has been denied the ability to defend the case. Plaintiff's spoliation of the critical RV evidence in this case deprived Defendant of the opportunity to put on a complete defense. Defendant's repeated requests to inspect the RVs after being put on notice of the claim were inexplicably ignored, and as a result, Defendant was unable to examine the vehicles' condition. This Court cannot imagine a case in which the evidence destroyed would prove more critical. The resulting prejudice to defendant is incurable by any sanction other than dismissal.

This Court prefers cases to be tried on their merits whenever possible. Sometimes there just is no way to obtain that.

For the reasons provided, Defendant's Motion for Sanctions Based on Spoliation of Evidence is **GRANTED** and Plaintiff's Complaint is **DISMISSED WITH PREJUDICE**. In light of this ruling all other pending motions are determined to be **MOOT** and are therefore **DENIED WITHOUT PREJUDICE**.

IT IS SO ORDERED this 14 day of November, 2012.

THE HONORABLE R. TIMOHTY HAMIL
Gwinnett County Superior Court

Cc: Gregory Kinnamon, Esq. (counsel for Plaintiff)
Wayne Melnick, Esq. and Matthew Moffett, Esq. (counsel for Defendant)