

Labor & Delivery: Monitor Strips Gone, Court Rules Hospital Not Guilty Of Evidence Spoliation.

The family filed a lawsuit on their young son's behalf for alleged negligence committed by the hospital's labor and delivery nurses and physicians.

At or near the time of birth the child experienced oxygen deprivation resulting in severe neurological deficits including spastic quadriplegia, blindness and an inability to speak.

The Court of Appeals of Georgia threw out the verdict exonerating the caregivers, but only because the judge erred by holding a session with the jury without the lawyers present. A new trial is pending.

Missing Fetal Monitor Strips

The Court of Appeals assumed there would be further controversy in the new trial about the missing fetal monitor strips, and decided to give the trial judge advance guidance about the legal rule of spoliation of the evidence.

Spoliation of the Evidence - Definition

Spoliation of the evidence is intentional destruction or failure to preserve evidence that is advantageous to the other side in contemplated or pending litigation.

When spoliation of the evidence has occurred, the other side is entitled to a logical inference and a jury instruction to the effect that the unavailable evidence would have been damning to the party responsible for its unavailability.

Spoliation of the evidence can only occur after the party in possession or control of the evidence has been put on notice that the alleged injured party is contemplating litigation.

The simple fact that someone has been injured is not notice that the injured party is contemplating litigation and does not automatically trigger the legal rules on spoliation of the evidence.

Recognition of potential liability is not the same as notice of potential litigation.

The facility's sentinel events/medical errors policy did trigger an internal investigation and the facility's insurance carrier and legal counsel were notified, but the hospital's policy did not designate the monitor strips as part of the official record that needed to be preserved.

COURT OF APPEALS OF GEORGIA
July 15, 2014

The hospital uses electronic charting. The fetal monitors, however, print a paper strip on which the nurses often hand-write notes which the nurses use when typing their nursing notes into the computer.

Although the electronic charting stays around basically forever, the paper fetal monitor strips are routinely kept only for 30 days, then destroyed unless some good reason has surfaced for not doing so.

In this case the labor and delivery nurse testified she remembered penning a handwritten note on the strip as to the time when the ob/gyn actually appeared at the bedside in response to her page.

The time lag, or lack thereof, between abnormal data appearing on the monitor, the nurse paging the ob/gyn, and the ob/gyn actually arriving were critical facts.

The family's lawyers wanted evidence that the nurse's computer charting was not what really happened, but the paper monitor strip was gone, so a logical inference from the legal rule of spoliation of the evidence would be the next best thing.

No Spoliation of the Evidence

The Court of Appeals said there was no spoliation of the evidence. The monitor strips were discarded in the ordinary course of business according to hospital policy, while no litigation was pending, threatened or known to be contemplated.

An internal quality review investigation, in and of itself, does not amount to knowledge of future litigation, assuming the hospital has not yet been put on notice by the patient or a representative. ***Lee v. Harmon, __ S.E. 2d __, 2014 WL 3409215 (Ga. App., July 15, 2014).***

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