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SPOLIATION AND *CAHOON VS. CUMMINGS*

By R. Thomas Bodkin

Cahoon v. Cummings, 734 N.E..2d 535 (Ind. 2000), 2000 IND. LEXIS 710, caught the eye of many lawyers because of its holding relating to how a jury should be instructed on the issue of the value of a "loss of chance" case under either the Indiana Medical Malpractice Act or the Indiana Wrongful Death Act. Still other lawyers were interested in its holding on the issue of how prejudgment interest is to be treated in a medial malpractice case under the Act. While major points of the case they were not, however, the only ones. With regard to claims involving documentary evidence *Cahoon* may ultimately prove to be of greater interest to Indiana lawyers because of its discussion of an evidentiary issue involving the concept of spoilation.

While *Cahoon* involved an issue of modification of medical records, and the potential basis for admission of evidence of such modification, it far transcended medical malpractice cases. The Supreme Court in *Cahoon* has now defined "spoilation" in such a way so as to broaden its potential applicability in civil cases. The Court did so by reference to Black's Law Dictionary.

Spoliation, as now defined by *Cahoon,* is "...the intentional destruction, mutilation, alteration, or concealment of evidence, usually a document...." *2000 IND. LEXIS *16; Black's Law Dictionary 1409* (7th Ed. 1999) The Court went on to quote from Black's to the effect that if spoilation is proven the fact of spoilation may be placed in evidence to establish that the evidence so "spoiled" was unfavorable to the party responsible for spoiling it. The court further relied on the evidentiary doctrine that an adverse inference may be drawn against a party who has

exclusive possession of facts, or evidence, and the facts or evidence is not produced. *Porter V. Irvin's International Brick and Block Co.,* 691 N.E.. 2d 1363 (Ind. Ct. App. 1988).

The Court also made it clear that, while the issue may more often arise in criminal matters, the doctrine is equally applicable to civil cases, and, while "spoilation evidence" is normally admissible as evidence of "consciousness of guilt" such conduct does not yet arise as an independent issue.

Cahoon specifically involved an issue of notations made by one of the defendant physicians on an x-ray report, and additional notations made by that physician in his office record, that could be read to indicate an attempt to exculpate himself. It appears that all such notations occurred after litigation was begun as Plaintiff had copies of the records without the notations. What is instructive, however, is that the rule will not be limited to medical records and how important it may now become on how counsel advises clients on record destruction and retention policies.

Businesses operate on a sea of information, documented either on paper or electronic mediums. Yet, whether the record is paper or electronic would make no difference to the application of the spoilation rule announced in *Cahoon.* One can "spoil" the record either way, and in fact, may do so more easily if the record is electronic. What the rule may do, however, is complicate the issue of what are the real record and result in a burden shift to establish whether relevant "spoilation" really did occur.

In the medical environment it is very common for physicians to dictate about a patient and have that dictation typed later. In the setting of a hospital the typing is done by someone who is probably not the physician's employee. It is also very common for physicians to read and "correct" the dictation before signing it, but it is usually not retyped. Such corrections could be

now labeled "spoilation" under the technical definition adopted by *Cahoon*. So, too, the myriad records that are circulated for comment and correction in the day to day operation of business.

Traditionally, spoilation claims were limited to those cases where a document, or other evidence was either hidden by a party or intentionally destroyed to keep it out the hands of an opponent. The new Indiana doctrine announced in *Cahoon* is potentially far different.

\ The Court *Cahoon* recognized that it was broadening the spoilation doctrine. It wrote in a footnote that while the older Indiana cases had required either a destruction of evidence or a suppression of it, while all that occurred in *Cahoon* was the addition of information to records, not the elimination or destruction of the record itself, such action by the physician qualified under the new spoilation rule for an evidentiary instruction. Thus, less conduct may now result in an assertion of spoilation than was necessary under previous cases.

Yet even under *Cahoon's* new expansion of the spoilation doctrine, spoilation which would support an evidentiary instruction still must include an element not only of an intent to change a document, but some relevance to the issue being tried. There appeared to be no question that the alleged changes made to the records in *Cahoon* were relevant to the issue of causation even though the doctor had admitted a violation of the standard of care. The court noted that the trail court had made that determination to support admissibility and that to do so was not an abuse.

Counsel must be more aware of the new expansion of the spoilation doctrine and be prepared to explain why a change to a document, or other evidence, does not rise to the level of admissibility so as to support an instruction on the inference to be drawn from that change. Counsel must also now factor in the new doctrine as clients are advised about record retention and destruction policies. In fact, the very presence of a policy may now be more important than

ever as basis to defeat an assertion of an admissible spoilation event in civil litigation.

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