

PUBLICATION

Court Aims to "Fill in the Gaps" of Texas Spoliation Law

July 23, 2014

Acknowledging increasing difficulties associated with maintaining large volumes of electronic information in today's digital age, the Texas Supreme Court recently issued its opinion in *Brookshire Bros. v. Aldridge*. The decision places with trial courts exclusive responsibility for determining whether spoliation — or "the intentional destruction, mutilation, alteration, or concealment of evidence" — has occurred in a given matter, and specifies the limited circumstances in which juries may be informed of such conduct. In doing so, the Court aims to "fill in the gaps" of Texas spoliation law, and to prevent trials from being about allegedly spoliating conduct rather than the merits of a dispute.

On September 2, 2004, Jerry Aldridge was injured after slipping on grease that had leaked onto the floor of a Brookshire Brothers grocery store. Upon learning that the store possessed surveillance video of the incident, Aldridge requested a copy of the video so he could see footage of his fall. Brookshire Brothers, however, refused Aldridge's request. The video from the day of the incident was subsequently erased in accordance with Brookshire Brothers' standard practice of recording over surveillance video approximately every 30 days. The store did, however, preserve eight minutes of the video, which included footage of Aldridge's fall, after learning that Aldridge had been injured as a result of the incident.

Aldridge eventually sued Brookshire Brothers for his injuries. A key element of Aldridge's case was proving that the store had a reasonable opportunity to discover the grease on the floor prior to his fall. According to Aldridge, the store's failure to preserve more than an eight-minute clip of surveillance video amounted to spoliation of evidence that was relevant to the issue of how long the grease had been on the floor, and was therefore relevant to whether the store had a reasonable opportunity to discover the grease prior to the incident.

At trial, the jury was allowed to hear evidence bearing on the issue of whether Brookshire Brothers failed to preserve video surveillance footage relevant to the store's liability. In permitting this evidence to be presented to the jury, the trial court left it to the jury to decide whether spoliation had occurred, and instructed the jury that if it found spoliation to have occurred it could conclude that the erased surveillance footage would have been unfavorable to Brookshire Brothers. The jury ultimately found in favor of Aldridge and awarded \$1,063,664.99 in damages.

By a 6 — 3 majority, the Court held that the trial court abused its discretion by allowing the jury to hear evidence regarding the alleged spoliation and by instructing the jury as it did with respect to the spoliation issue. Expressing concern over shifting a jury's focus away from the merits of a case, the Court held that the responsibility for determining whether spoliation has occurred rests exclusively with a trial court. The trial court may make a spoliation finding when the offending party breaches a duty to preserve relevant and material evidence, which, as noted by the Court, arises when a party "knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim." The Court also clarified that evidence of spoliation cannot even be presented to a jury unless the evidence is also related to the merits of the case.

Additionally, the Court cited "well-settled precedent [that a] remedy must have a direct relationship to the act of spoliation and may not be excessive," that when a trial court has concluded that spoliation has occurred, a

spoliation instruction to the jury is appropriate only when the offending party has either (a) intentionally spoliated evidence, and a lesser remedy is inadequate to remedy the harm caused, or (b) negligently breached its duty to preserve evidence in a way that prevents the non-spoliating party from having a meaningful opportunity to present its claim or defense.

Applying these rules in *Brookshire Bros.*, the Court held that the spoliation instruction given by the trial court was improper because there was no evidence that the store had intentionally destroyed surveillance footage from the day of the incident or that Aldridge was otherwise denied a meaningful opportunity to present his claim. The Court noted that an eight-minute clip of the video was preserved after Brookshire Brothers learned of Aldridge's injuries, and further noted that, even if Brookshire Brothers breached a duty to reasonably preserve evidence, there was no evidence that the store's decision to allow the remainder of the video to be erased was based on what this remaining footage may have shown. Moreover, Aldridge did not request any footage other than that of his fall until almost a year after the remaining footage had been erased in accordance with store policy. For these reasons, the Court held there was no evidence of intentional spoliation on the part of Brookshire Brothers, and remanded the case back to the trial court for a new trial in light of the improper admission of evidence.

Notably, the Court indicated that its notion of "intentional spoliation" includes "willful blindness" where a party does not directly destroy relevant and discoverable evidence but nevertheless allows for its destruction. Given the Court's holding that Brookshire Brothers did not intentionally destroy relevant evidence under the circumstances of this case, however, the dissenting justices expressed concern that the Court's framework will not only allow but will in fact encourage "willful blindness" in the form of limited-duration document retention policies that, while seeming innocuous, allow for the destruction of relevant evidence despite notice of circumstances likely to give rise to litigation. Whether the concerns expressed by the dissent are well-founded will only be answered as Texas's spoliation jurisprudence continues to develop.

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