



The New Texas Two-Step: Texas Supreme Court Articulates Evidence Spoliation Framework

Spoliation of evidence has, for some time, remained an important topic relating to the discovery of electronically stored information. Many companies continue to struggle with the burden and expense of various retention requirements in the era of “big data.” However, a recent Texas Supreme Court decision may bring clarity to companies concerned about their preservation obligations. On July 3, the Texas Supreme Court articulated a complete analytical framework to guide Texas courts in evaluating arguments regarding the spoliation of evidence. *Brookshire Brothers, Ltd. v. Aldridge*, No. 10-0846, 2014 Tex. LEXIS 562, 2014 WL 2994435 (Tex. July 3, 2014). The decision brings clarity to Texas law, though not without a few points of uncertainty.

Case Background

The Texas Supreme Court’s 6–3 holding in *Brookshire Brothers* arises in the context of a routine slip-and-fall premises liability case. Plaintiff Jerry Aldridge slipped and fell on a liquid substance at a Brookshire Brothers grocery store. Aldridge notified Brookshire Brothers immediately after his fall, but he did not know the full extent of his injuries until days later. Upon Aldridge’s return to the store, he complained of increased pain,

so Brookshire Brothers documented the incident and preserved an eight-minute segment of video tape recorded on store security cameras at the time of the fall. The video clip began just before Aldridge entered the store and concluded shortly after he fell and left. Because the store’s cameras recorded video in a continuous loop, footage from the remainder of the day was automatically recorded over, approximately 30 days after the incident. Aldridge argued that the unpreserved portion of the video could have shown the source of the substance on the floor, whether additional employees may have seen the substance, or the effort necessary to clean up the substance following the incident.

Along with allowing the jury to hear evidence bearing on whether Brookshire Brothers spoliated the video, the trial court submitted a spoliation instruction to the jury and also permitted the jury to decide whether spoliation occurred during its deliberations on the merits of the lawsuit.

Ultimately, the jury found for Aldridge and awarded more than \$1 million in damages. The court of appeals affirmed the trial court’s judgment on the verdict,

holding that the trial court did not abuse its discretion in admitting evidence of spoliation or allowing the spoliation instruction. However, the Texas Supreme Court ultimately reversed the court of appeals' judgment and remanded the case for a new trial, holding that the trial court abused its discretion in allowing the jury to hear evidence regarding spoliation and in submitting a spoliation instruction.

The New Texas Framework

The Texas Supreme Court set out to clarify the common law rules that govern spoliation of evidence in Texas and held that spoliation analysis involves a two-step judicial process:

1. The trial court—rather than the jury—must determine, as a question of law, whether the party spoliated evidence.
2. If spoliation occurred, the court must then assess an appropriate remedy.

Under step one, the Texas Supreme Court found that in order to avoid unfair prejudice, and in a substantial departure from prior practice, the trial judge, outside the presence of the jury, must determine whether spoliation has occurred. And, if spoliation is found, the trial judge must decide the appropriate sanction. The court reasoned that spoliation is an evidentiary issue and not a separate cause of action, and because evidentiary issues are resolved by the trial court and not the jury, it is inappropriate to present spoliation issues to the jury for resolution. *Brookshire Bros.* 2014 Tex. LEXIS 562, *20-21 (citing *Trevino v. Ortega*, 969 S.W.2d 950, 954 (Tex. 1998)). The court also noted that while a trial court may hold an evidentiary hearing to assist the court in resolving spoliation issues, such a hearing may not take place in the presence of the jury. The court emphasized that the jury should focus on the merits of a case rather than on evidentiary issues. *Id.* at *22.

In determining whether spoliation occurred, the court found that the trial court must find that the spoliating party had a duty to reasonably preserve evidence and the party intentionally or negligently breached that duty by failing to do so. *Id.* at *22. In assessing whether a party had a duty to reasonably preserve evidence, the court pointed to the standard articulated in *Wal-Mart Stores v. Johnson*. In that case, the Texas Supreme Court noted that “[s]uch a duty arises only 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.” *Brookshire Bros.* 2014 Tex. LEXIS 562 at *22 (quoting *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003)). The “substantial chance of litigation” arises when “litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* (quoting *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 204 (Tex. 1993)). Once a duty is established, the party alleging spoliation must show that the other party breached that duty by failing to exercise reasonable care in preserving the evidence. *Id.* at *23.

If a trial court finds that a party did not spoliating evidence under this standard, the inquiry ends. Upon a finding of spoliation, however, the trial court must turn to step two. Under step two, the court concluded that “the trial court has broad discretion to impose a remedy.” *Brookshire Bros.*, 2014 Tex. LEXIS 562 at *24-25; see also Tex. R. Civ. P. 215.2 (permitting a variety of sanctions while an action is pending), 215.3. In addition to the remedies available in the Texas Rules of Civil Procedure, the trial court also has discretion to craft other remedies, including the submission of a spoliation instruction to the jury. *Id.* at *25. The Texas Supreme Court noted, however, that spoliation is essentially a particularized form of discovery abuse and that any remedy must have a direct relationship to the act of spoliation it is meant to cure. The court provided several key considerations for trial courts weighing the culpability of the spoliating party and the prejudice to the nonspoliating party:

- “[T]he relevance of the spoliated evidence to key issues in the case,”
- “[T]he harmful effect of the evidence on the spoliating party’s case (or, conversely, whether the evidence would have been helpful to the nonspoliating party’s case),” and
- “[W]hether the spoliated evidence was cumulative of other competent evidence that may be used instead of the spoliated evidence.”

Id. at *26 (citing *Trevino*, 969 S.W.2d at 958 (Baker, J., concurring)). In adopting the criteria, the court noted that these factors had proved workable and were aligned with tests used in federal courts. *Id.* at *27.

The court did note that the imposition of a spoliation instruction as a remedy, “among the harshest sanctions a trial court may utilize to remedy an act of spoliation,” should be taken cautiously. *Brookshire Bros.*, 2014 Tex. LEXIS 562 at *30. In general, “a party must intentionally spoliating evidence in order for a spoliation instruction to constitute an appropriate remedy.” *Id.* at *31. But, even when a party intentionally spoliates evidence, the spoliation instruction may be imposed only when a less severe remedy would be insufficient to reduce the prejudice caused by the spoliation. The court also carved out an exception for certain cases where only negligence is found. This negligence exception, which the court called a “narrow caveat,” allows a trial court to impose a spoliation instruction “in the rare circumstance” when the spoliating party’s negligence “irreparably prevents the nonspoliating party from having any meaningful opportunity to present a claim or defense.” *Id.* at *38 (citing *Wal-Mart Stores*, 106 S.W.3d at 721).

How Texas Law Differs from Fifth Circuit Jurisprudence and that of Other Circuits

Under the *Brookshire Brothers* framework, courts can provide a spoliation instruction: (i) when a spoliating party acted with the specific intent of concealing discoverable evidence, and (ii) when a party has negligently failed to preserve information and that negligent failure has irreparably deprived the non-spoliating party of any meaningful ability to present a claim or defense. An open question remains as to how trial courts and the courts of appeals will interpret and apply the language governing the latter circumstance, deemed the “negligence exception.” While the Texas Supreme Court’s opinion states that the exception applies only in certain “rare” situations, parties claiming that spoliation has occurred will most certainly point to the negligence exception as opening the door to a broader application of spoliation instructions. In any event, the negligence exception is generally a departure from prevailing federal law.

Under Fifth Circuit jurisprudence, “the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of ‘bad faith.’” *Rimkus Consulting Grp., Inc. v. Camarata*, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010). Mere

negligence is not enough to warrant an instruction on spoliation. *Id.* Other circuits employ similar approaches and have held that negligence is insufficient for an adverse inference instruction. The Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits have held that bad faith is required for an adverse inference instruction. *Rimkus*, 688 F. Supp. 2d at 614. The Third Circuit balances the degree of fault and prejudice. *Id.* at 615. In contrast, the First, Second, Fourth, Sixth, and Ninth Circuits have adopted an approach similar to the *Brookshire Brothers* framework and have held that bad faith is not essential to imposing severe sanctions if there is severe prejudice, although the cases often emphasize the presence of bad faith. *Id.* at 614; see also *Brookshire Bros.*, 2014 Tex. LEXIS 562 at *38 (citing *Silvestri v. General Motors Corp.*, 271 F.3d 583, 594 (4th Cir. 2001) in support of the newly articulated negligence exception); *Beaven v. U.S. Dept. of Justice*, 622 F.3d 540, 553-54 (6th Cir. 2010) (noting that negligent destruction of evidence can satisfy the requirements for the imposition of a spoliation instruction); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (same).

Upcoming Changes to the Federal Rules

The varying approaches of the federal circuit courts of appeals will more than likely be replaced by a revision to the Federal Rules of Civil Procedure, at least insofar as electronically stored information is concerned. In May 2014, the Committee on Rules of Practice and Procedure approved changes to Federal Rule of Civil Procedure 37(e). See Judicial Conference Committee on Rules of Practice and Procedure Agenda Book for May 29–30, 2014 Meeting, at 318 (2014). Proposed Rule 37(e) states:

Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court may:

- (1) upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; or

- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:
- (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.

Id. This new rule, which must still be approved by the Judicial Conference, the U.S. Supreme Court, and Congress, supplants the existing Rule 37(e). In promulgating proposed Rule 37(e), the Committee noted that the federal circuits “have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.” *Id.*

Proposed Rule 37(e) limits the trial court's ability to impose severe sanctions on a party to only those circumstances in which the court finds that the party “acted with the intent to deprive another party of the information's use in the litigation.” This standard is akin to the bad faith approach employed in the Fifth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits. Notably, the proposed rule recognizes that “reasonable steps” to preserve electronically stored information suffice to satisfy a party's preservation obligations. Indeed, the rule does not require perfection. Rather, the Committee Note that accompanies the rule states that “the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation.” *Id.* at 320.

Under the proposed Rule 37(e), a court may instruct the jury that it may or must presume the information was unfavorable to a spoliating party only if the party acted with the intent to

deprive another party of the information's use in the litigation. This standard could differ from the *Brookshire Brothers* approach, which allows a spoliation instruction to be given both if the spoliating party acted intentionally or if the spoliating party's negligence irreparably prevents the nonspoliating party from having any meaningful opportunity to present a claim or defense.

Practical Implications and Takeaways

There are several important practice points that litigants and their attorneys should consider in light of the Texas Supreme Court's ruling. While the *Brookshire Brothers* decision has brought substantial clarity to Texas law, a business operating both in Texas and other states should be cognizant that the law of those other states as well as federal law may govern a subsequent dispute. It is, therefore, not sufficient to look solely to the *Brookshire Brothers* opinion for guidance on the consequences of evidence spoliation.

Moreover, taking steps to preserve data and articulating those steps in the form of a retention policy and litigation hold program will help a company argue that a spoliation instruction is unwarranted. Companies should take care to issue litigation hold notices when appropriate, and companies should formulate reasonable policies to facilitate the preservation of evidence. While the negligent failure to preserve data can still subject a party to court-ordered penalties, reasonable data preservation procedures can help protect a company from more severe sanctions. However, under the *Brookshire Brothers* decision, a Texas trial court may impose a spoliation instruction when a nonspoliating party has been “irreparably deprived of any meaningful ability to present a claim or defense” under the negligence exception. It is difficult to predict whether a court will find the lost or destroyed evidence so crucial to the other parties' case that a severe sanction, such as a spoliation instruction, is justified. Only time will tell how Texas trial courts will interpret the breadth of the negligence exception under the court's new framework.

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