THE NEW SPOLIATION

How the Texas Supreme Court clarified and redefined the law.

BY NEAL A. HOFFMAN

On July 3, 2014, the Texas Supreme Court handed down its opinion in *Brookshire Bros. v. Aldridge*.[1] From the moment the court granted the petition for review and identified the issues for consideration, *Aldridge* promised to be a landmark decision; it was the first time that the court would significantly address the substantive requirements of seeking and obtaining a spoliation instruction in almost a decade. While the opinion still leaves several issues unresolved, there can be little doubt that *Aldridge* is one of the most important opinions handed down by the Texas Supreme Court on the issue of evidence preservation and spoliation. *Aldridge* should become the go-to source for any attorney seeking or defending against a requested spoliation instruction.

THE *ALDRIDGE* CASE AND TRIAL

On Sept. 2, 2004, Jerry Aldridge slipped and fell at a Brookshire Brothers grocery store.[2] Aldridge did not advise Brookshire employees that he was hurt, although he did notify them of his fall.[3] Aldridge returned to the store on Sept. 7 and prepared a formal incident report[4] stating that he fell on chicken grease; the store's Grab-N-Go, which contained rotisserie chicken packaged in containers, was located about 15 feet from the incident location.[5]

After Aldridge made his incident report, Brookshire retained about eight minutes of surveillance video, beginning shortly before Aldridge entered the store and ending about a minute after his fall.[6] According to Brookshire, their purpose was to verify that Aldridge had been in the store and that his incident had occurred.[7] The retained video showed Aldridge's incident; however, the area of the floor at issue was blocked from view by a display table.[8]

On Sept. 13, 2004, Aldridge asked to view Brookshire's video so that he could see his fall[9] but Brookshire declined.[10] Although Brookshire initially paid Aldridge's medical bills, they ceased doing so in June of 2005 and subsequently denied responsibility for the incident.[11] In August 2005, Aldridge's attorney sent Brookshire a letter requesting preservation of two-and-a-half hours of additional video footage.[12] By this time, the surveillance video from the date of Aldridge's incident had been overwritten.[13] Brookshire's camera system digitally preserved video

for a period of 30 days,[14] after which point the video system would loop back and record over the existing video.[15]

As in every slip-and-fall case, Aldridge was required to prove that Brookshire had actual or constructive knowledge of an unreasonably dangerous condition on the premises.[16] Because he did not have evidence that Brookshire actually placed the liquid onto the floor, Aldridge had to establish Brookshire's constructive knowledge of the spill, which in Texas is a very difficult standard for plaintiffs; they must put forth temporal evidence as to some length of time that the substance was present in order to impose liability on a premises owner.[17]

Aldridge argued that Brookshire's failure to preserve additional video beyond the eight minutes amounted to spoliation of evidence.[18] The trial court issued the following instruction to the jury:

> In this case, Brookshire Brothers permitted its video surveillance system to record over certain portions of the store surveillance video of the day of the occurrence in question. If you find that Brookshire Brothers knew or reasonably should have known that such portions of the store video not preserved contained relevant evidence to the issues in this case, and its non-preservation has not been satisfactorily explained, then you are instructed that you may consider such evidence would have been unfavorable to Brookshire Brothers.[19]

The jury found that Brookshire was negligent and awarded Aldridge more than a million dollars in damages.[20] The appellate court affirmed the trial court's verdict and held that the court did not abuse its discretion in admitting evidence of spoliation or instructing the jury on spoliation.[21]

SPOLIATION INSTRUCTIONS PRE-*ALDRIDGE*

As the *Aldridge* majority noted, courts of appeals in Texas had been applying two basic frameworks in evaluating the propriety of spoliation remedies: the *Johnson* rules[22] and former Texas Supreme Court Justice James A. Baker's *Trevino* test.[23]

In *Johnson*, the Texas Supreme Court noted that appellate courts had been giving spoliation instructions for either: (1) a party's deliberate destruction of relevant evidence; or (2) a party's failure to produce relevant evidence or explain its nonproduction.[24] Despite recognizing these two circumstances, the *Johnson* court did not formally endorse or reject those instructions because the opinion was decided solely on the issue of whether a duty existed to preserve evidence.[25]

By comparison, the *Trevino* test was set forth by Justice Baker in his concurring opinion in *Trevino v. Ortega*.[26] He concluded that before a spoliation instruction could be submitted to the jury, the trial court must first determine: (1) whether there existed a duty to preserve evidence; (2) whether the alleged spoliator breached that duty, either negligently or intentionally; and (3) whether spoliation prejudiced the nonspoliator's ability to present its case or defense.[27] Additionally, in evaluating prejudice, Justice Baker felt that courts should consider the evidence's relevancy, whether other cumulative evidence existed to take the place of the spoliated evidence, and whether the evidence supported key issues in the case.[28]

WHAT *ALDRIDGE* DID

The *Aldridge* court took a number of actions to clarify spoliation law in Texas. First, it made clear that it is the responsibility of the trial court, rather than the jury, to decide whether evidence was spoliated and to craft a proper remedy.[29] While the trial court could hold evidentiary hearings to assist in making spoliation findings, the court made clear that those hearings could not occur in the presence of the jury.[30]

Second, the court set forth elements that must be present to support a finding that spoliation occurred.[31] Initially, the party alleging spoliation must establish that the nonproducing party had a duty to preserve evidence under the *Johnson* test,[32] which 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."[33] A substantial chance of litigation arises when "litigation is more than merely an abstract possibility or unwarranted fear."[34] Next, the party alleging spoliation must demonstrate that the nonproducing party breached its duty to preserve material and relevant evidence,[35] which occurs if it failed to exercise reasonable care to preserve that evidence.[36]

Third, the court confirmed that the breach of duty to preserve evidence may be either intentional or negligent.[37] Fourth, it noted that while trial courts have discretion to craft remedies for discovery abuse, including circumstances of spoliation, there must be a direct relationship between the remedy and the act of spoliation.[38] The remedy may not be excessive[39] and "must be proportionate when weighing the culpability of the spoliating party and the prejudice to the nonspoliating party."[40] The court also adopted Justice Baker's factors for determining prejudice: (a) the relevance of the spoliated evidence to key issues in the case; (b) the harmful effect of the evidence on the spoliating party's case or the helpfulness of the evidence to the nonspoliating party's case; and (c) whether the spoliated evidence was cumulative of other competent evidence that may be used instead of the spoliated evidence.[41]

Fifth, the court held that a party's intentional destruc-

tion of evidence may, absent evidence to the contrary, be sufficient by itself to support a finding that the spoliated evidence is both relevant and harmful to the spoliating party.[42] In contrast, the court held that negligent spoliation could not be enough to support such a prejudice finding "without 'some proof about what the destroyed evidence would show,'"[43] which can be either conclusively shown or demonstrated through circumstantial evidence.[44]

Sixth, the court explained the circumstances that must exist in order for the remedy of a spoliation instruction to be properly given to the jury.[45] And finally, the court concluded that while a party may present indirect evidence to attempt to prove the contents of missing evidence that is otherwise relevant to a claim or defense, a jury cannot hear evidence unrelated to the merits of the case that "serves only to highlight the spoliating party's breach and culpability."[46]

SPOLIATION INSTRUCTIONS GIVEN AS A REMEDY

After examining the competing considerations present in giving a spoliation instruction, the court held that "a party must intentionally spoliate evidence in order for a spoliation instruction to constitute an appropriate remedy."[47] Intentional spoliation was defined to mean "that the party acted with the subjective purpose of concealing or destroying discoverable evidence."[48] The term has often been referenced as "bad faith" or "willful" spoliation[49] and includes instances of "willful blindness," encompassing the scenario "in which a party does not directly destroy evidence known to be relevant and discoverable, but nonetheless 'allows for its destruction.'"[50] Finally, the trial court must conclude that no lesser remedy would be sufficient to rectify the prejudice caused by the spoliating party's conduct.[51]

The court also rejected the imposition of a spoliation instruction for instances of negligent spoliation in all but one instance.[52] It held that on the rare occasion that "a party's negligent breach of its duty to reasonably preserve evidence irreparably prevents the nonspoliating party from having any meaningful opportunity to present a claim or defense," a spoliation instruction would not be excessive.[53] The sanction could be appropriate in those circumstances because the destruction or loss of the evidence "could completely subvert the factfinder's ability to ascertain the truth."[54]

REMAINING ISSUES

While the *Aldridge* court crafted a framework for spoliation claims moving forward, a number of issues have arisen in light of the opinion. One concern is the court's newly developed standard for negligence spoliation instructions, which is only properly given when the spoliating party's breach of duty "irreparably prevents" the nonspoliating party from having "any meaningful opportunity to present a claim or defense."[55] Unfortunately, the Texas Supreme Court provided only limited guidance as to what might constitute irreparable prevention or a "meaningful opportunity."[56] Since *Aldridge*, the Texas Supreme Court has already weighed in twice on the issue of negligent spoliation instructions, rejecting the instruction in both instances.[57] The court's case-by-case approach to negligent spoliation instructions will likely lead the appellate courts to craft their own standards for "irreparable prevention" and "meaningful opportunity," at least until a factual scenario resulting in a negligent spoliation instruction is affirmed or allowed to stand by the Texas Supreme Court.

Second, the opinion could raise questions regarding Brookshire's conduct and the concept of willful blindness. The court held that "intentional" spoliation included instances of "willful blindness," defined as those instances "in which a party does not directly destroy evidence known to be relevant and discoverable, but nonetheless 'allows for its destruction.'"[58] The court noted that the issue was most acute in the context of automated electronic deletion systems,[59] stating that a party "with control over one of these systems who intentionally allows relevant information to be erased can hardly be said to have only negligently destroyed evidence."[60]

Given the facts of the case, one might wonder—why did the court not find that Brookshire allowed for the destruction of video evidence?[61] The answer appears to be that a finding of "willful blindness" also requires a showing that the spoliating party had a "subjective purpose" to conceal or destroy relevant evidence.[62]

In discussing Brookshire's preservation, the court stated:

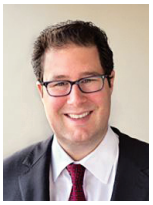
> [T]here is no indication that the decision regarding the amount of footage to save was based in any way on what the additional footage would have shown. Had Brookshire allowed *all* the footage of the incident to be destroyed, the outcome might be different. But there is simply no evidence that Brookshire Brothers saved the amount of footage that it did in a purposeful effort to conceal relevant evidence.[63]

Unfortunately, the "subjective purpose" interpretation raises its own concern: the opinion may encourage parties to conduct less diligent investigations of evidence. The court explained that because the Brookshire employee who copied the video only watched a specific portion of the video and did not watch any other video from that day,[64] he could not have acted with the subjective purpose to intentionally destroy that evidence through willful blindness.[65] Consequently, Brookshire's decision to perform a less thorough review of surveillance video actually helped it avoid a spoliation finding.

The court made a point to note that parties may not "immunize themselves from the consequences of evidence spoliation by hiding behind unreasonable limited-duration retention policies."[66] It did not, however, address the reasonableness of Brookshire's retention policy (or retention policies in general); the court merely concluded that Brookshire chose to preserve sufficient video for this incident.[67] Given that a number of businesses have enacted video-retention policies, appellate courts will likely have to evaluate the relative merits of these policies in the context of alleged spoliation in the near future. Appellate courts also will likely have to craft decisions analyzing alleged prejudice in the context of allegedly cumulative evidence and, regarding trial court decisions, to admit or exclude evidence dealing with the content of missing evidence. **TBJ**

NOTES

1. 438 S.W.3d 9 (Tex. 2014).
2. *Id.*, at *15.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*, at *16.
8. *Id.*, at *15.
9. *Id.*, at *15. (The record shows Aldridge testified that he stated, "I would like to see it. I want to see the fall.").
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992).
17. *Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 816 (Tex. 2002) ("there *must* be some proof of how long the hazard was there before liability can be imposed on the premises owner for failing to discover and rectify, or warn of, the dangerous condition").
18. 438 S.W.3d at *16.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721-22 (Tex. 2003).
23. *Trevino v. Ortega*, 969 S.W.2d 950, 955-58 (Tex. 1998) (Baker, J. concurring).
24. 106 S.W.3d at 721.
25. *Id.* at 722.
26. *Trevino*, 969 S.W.2d 950, 953-61 (Baker, J. concurring).
27. *Id.* at 954-55.
28. *Id.* at 958.
29. *Aldridge*, 438 S.W.3d at *20.
30. *Id.*
31. *Id.*
32. *Id.* (referencing *Johnson*, 106 S.W.3d at 721-22).
33. *Johnson* at 722.
34. *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 204 (Tex. 1993).
35. 438 S.W.3d at *20.
36. *Id.*
37. *Id.*, at *20-21.
38. *Id.*, at *21
39. *Id.*
40. *Id.*
41. *Id.*, at *21-22 (citing *Trevino*, 969 S.W.2d at 958 (Baker, J. concurring).
42. *Id.*, at *22.
43. *Id.* (citing *Trevino*, 969 S.W.2d at 958 (Baker, J. concurring).
44. *Id.*, at *22 n.12.
45. *Id.*, at *22-26.
46. *Id.*, at *26.
47. *Id.*, at *23.
48. *Id.*, at *24.
49. *Id.*
50. *Id.*, at *24-25 (internal citation omitted).
51. *Id.*, at *25.
52. *Id.*, at *23-26.
53. *Id.*, at *25-26.
54. *Id.*, at *25.
55. *Id.*, at *26.
56. *See id.*
57. *See Wackenhunt Corp. v. Gutierrez*, --- S.W.3d ----, 2015 WL 496301, at *4 (Tex. Feb. 6, 2015); *Petroleum Solutions, Inc. v. Head*, --- S.W.3d ----, 2014 WL 7204399, at *6 (Tex. Dec. 19, 2014).
58. *Id.*, at *24.
59. *Id.*, at *24 n.17.
60. *Id.*
61. The court even presumed breach of duty and prejudice. *Id.*, at *27.
62. *Id.*, at *24.
63. *Id.*, at *28 (emphasis in original).
64. *Id.*, at *27-28.
65. *See id.*
66. *Id.*, at *27 n.19.
67. *Id.*



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