

INSIGHTS

Texas Supreme Court Clarifies Spoliation Under Texas Law

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After years of awaiting clarity from the Supreme Court of Texas regarding spoliation under Texas law, the Supreme Court issued a significant decision that will shift how Texas state courts handle civil jury instructions regarding “spoliation” of evidence – the withholding, alteration, or destruction of evidence relevant to a legal proceeding. Allegations of spoliation have increased as litigating parties and courts increasingly deal with massive electronic data requests during the course of discovery. A spoliation jury instruction typically informs the jury that it may consider that missing evidence was unfavorable to the spoliating party, an act that can often tilt the case—if not harm the spoliating party—in favor of the opposing party, regardless of whether or not there was an intent to destroy evidence. In *Brookshire Brothers, Ltd. v. Aldridge*, No. 10-0846, ___ S.W. 3d ___ (2014), the Court addressed this issue by holding that:

- A party must intentionally spoliating evidence in order for a spoliation instruction to constitute an appropriate remedy.
- A party’s negligent spoliation of evidence is no longer sufficient grounds for a jury instruction on spoliation except in the limited situation where the non-spoliating party has been irreparably deprived of any meaningful ability to present a claim or defense.

Factual Background

Jerry Aldridge slipped and fell on grease that had leaked out of a container at a Brookshire Brothers grocery store but did not inform Brookshire Brothers of his injury until several days later. In response, a Brookshire Brothers’ executive retained a copy of approximately eight minutes of surveillance video footage that began before Aldridge entered the store and ended after his fall. The remainder of the video from the day of the accident was deleted and reused after thirty days, which was the company’s practice at the time. Almost a year later, Aldridge’s attorney requested two-and-a-half-hours of additional footage from store cameras, but the video footage had already been recorded over. No footage, therefore, existed that might show whether Brookshire Brothers was aware of the spilled grease, a critical issue in the case.

The Trial Court: Spoliating Instruction Leads to Jury Verdict Against Spoliating Party

At trial, a Brookshire Brothers’ executive testified that he had saved a portion of the video showing Aldridge’s fall only to verify that he had actually fallen, but did not save additional footage because he did not believe it was relevant, and because he did not know there would be litigation based on the incident. The trial court submitted the following spoliation instruction to the jury that included the following language:

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.

The jury awarded Aldridge \$1.06 million in damages.

The *Aldridge* Holding: the Texas Supreme Court Clarifies Spoliation Under Texas Law

Later on appeal, noting the lack of clarity on spoliation standards in Texas, the Supreme Court began by formalizing a two-step process for handling an allegation of spoliation by the trial court. First, a court – not a jury – must determine whether a party spoliated evidence, and, second, the court must assess an appropriate remedy if spoliation occurred. Regarding the former point, the Court further clarified that to support a finding of spoliation, a court must find that: (1) the party had a duty to reasonably preserve evidence, and (2) the party intentionally or negligently breached the duty by failing to do so. This process does not risk unfairly prejudicing a jury because it is handled entirely by the judge.

Stressing that the remedy for spoliation must be proportionate, the Court focused on two factors – the level of culpability of the spoliating party and the degree of prejudice suffered by the nonspoliating party. Because instructing the jury that the missing evidence would have been unfavorable is “among the harshest sanctions a trial court may utilize” and can itself tilt a trial in favor of the nonspoliating party, the Court determined that it should only be used where the spoliation was an intentional act. This approach takes into account that a party that spoliated evidence through negligence only does not have the state of mind of a “wrongdoer” and, therefore, it does not follow that the missing evidence would likely be unfavorable to that party’s case. The “narrow caveat” to this rule carved out by the Court is that even where spoliation occurred as a result of negligence, if the destruction of the evidence irreparably prevents the nonspoliating party from having a meaningful chance to present a claim or defense, the spoliation instruction is appropriate. This satisfies the proportionality requirement because, even though no culpability is present, the effect of the spoliation is extraordinary, thus requiring an extraordinary remedy.

Implications for Discovery After *Aldridge*

In considering implications for businesses, a primary concern of *Aldridge* is the rampant rise in electronic discovery. The Court specifically mentioned that the responsibility to preserve and produce electronic data has become more difficult and expensive, resulting in an all-time high in spoliation instructions. Noting that many federal courts take a more measured approach with regard to spoliation and electronic discovery, the Court reached a result that makes the culpability (or lack thereof) of the spoliating party of paramount importance in determining a remedy. Therefore, companies can breathe easier in knowing that diligent efforts to retain information will likely negate the need for a spoliation instruction to the jury – without evidence of intentional or deliberate destruction of evidence. But remember, the Court noted that in rare situations, a party’s negligent breach of its duty to reasonably preserve evidence will irreparably prevent the nonspoliating party from having any meaningful opportunity.

Therefore to be clear, *Aldridge* does not prevent the need for reasonable document retention policies that are effectively communicated to personnel in a position to implement and enforce those policies. Additionally, *Aldridge* only implicates civil cases under Texas law; the destruction of documents and evidence can lead to a criminal conviction. Further, if a case is in federal court, the standards for spoliation would be governed by federal rules and not under Texas law.

But *Aldridge* signals a measured approach by the Court, acknowledging the inherent issues with handling voluminous electronic records retention and attempts to make remedies for failure to keep those records proportionate to any mistakes made with the preservation. If you have any questions about this case or how it impacts your business, please contact any of the authors or the Bracewell & Giuliani attorney with whom you usually work.