St. Mary's Law Journal

Volume 46 | Number 4 Article 1

1-1-2015

Brookshire Bros.: Cleanup on Aisle 9 - The Current Messy State of Spoliation Law.

Xavier Rodriguez

ARTICLE

BROOKSHIRE BROS.: CLEANUP ON AISLE 9. THE CURRENT MESSY STATE OF SPOLIATION LAW

JUDGE XAVIER RODRIGUEZ*

* U.S. District Judge, Western District of Texas, 2003–present; Justice, Supreme Court of Texas, 2001–2002; St. Mary's University School of Law, Adjunct Professor of Law, 2009–present.

I. INTRODUCTION

This Article examines the Texas Supreme Court's recent 6–3 decision in *Brookshire Bros. v. Aldridge*,[1] where it announced a new framework for addressing claims of spoliation at trial and new limits in presenting any such evidence to the jury.[2] Although the court stated it was bringing "clarity"[3] to this area of the law, in the process the court effectively undoes Justice James Baker's work in this area,[4] alters long-standing jurisprudence concerning the jury's ability to hear evidence of such claims,[5] creates confusion for companies by arguably giving them an expectation that their preservation obligations have been lowered,[6] and presents litigants with a number of challenges in seeking appropriate relief for the loss of relevant, material evidence.[7]

II. FACTUAL BACKGROUND

Jerry Aldridge, a former professional football player,[8] entered a Brookshire Brothers grocery store in Jacksonville, Texas, at 5:02 p.m. on

1. Brookshire Bros. v. Aldridge, 438 S.W.3d 9 (Tex. 2014).

2. *Id.* at 14 ("[W]e enunciate with greater clarity the standards governing whether an act of spoliation has occurred and the parameters of a trial court's discretion to impose a remedy upon a finding of spoliation, including submission of a spoliation instruction to the jury.").

3. *Id.*

4. Trevino v. Ortega, 969 S.W.2d 950, 954–58 (Tex. 1998) (Baker, J., concurring) (outlining when Texas courts should apply remedies for evidence spoliation).

5. *Brookshire Bros.*, 438 S.W.3d at 32–35 (Guzman, J., dissenting).

6. *Id.* at 36.

7. *Id.* at 39.

8. Petitioner's Brief on the Merits at 1, *Brookshire Bros.*, 438 S.W.3d 9 (No. 10-0846), 2011 WL 8597538, at *1. Mr. Aldridge played for the San Francisco 49ers in 1980. NFL PLAYER PROFILES, www.nfl.com/player/jerryaldridge/2508302/profile (last visited Apr. 14, 2015).

September 2, 2004.[9] At approximately 5:08 p.m., Aldridge fell in an area located near the "Grab-N-Go" counter, where the store displays rotisserie chickens.[10] On that day, Aldridge allegedly told a cashier and store manager Jimmy George he fell, but that he was not hurt.[11] Less than ninety minutes later, Aldridge went to an emergency room complaining of pain.[12] On September 7, 2004, Aldridge returned to the grocery store and informed store manager Jon Tyler of his hospitalization.[13] Tyler completed a Customer Incident Report that day.[14] Tyler wrote that "Aldridge slipped on grease that had leaked out of a container by the 'Grab-N-Go.'"[15] The report noted that Aldridge received medical attention at ETMC Rusk, that medical attention was authorized, that injuries were sustained to the left side of the neck and back, and that the probable length of disability was unknown.[16] On September 7, 2004, Tyler also completed a Customer Incident Investigative Report.[17] In that report, which a Store Director reviewed, Tyler noted that Aldridge suffered injuries to the left side of his neck and back.[18] The report mentioned that store management discussed the incident with employees, "including what happened, why it happened, and if anything could have been done to prevent its occurrence."[19] Tyler also attached three photos to the report.[20]

On September 29, 2004, Gina Sorrell, a representative of Brookshire Brothers, authorized Aldridge to see a neurosurgeon and he received several weeks of physical therapy paid for by Brookshire Brothers.[21]

The grocery store had sixteen surveillance cameras that recorded on a continuous loop, digitally preserving the data for approximately thirty days.[22] After Aldridge returned to the store on September 7, "the portions of the video that Brookshire Brothers" unilaterally "considered

9. Petitioner's Brief on the Merits, *supra* note 8, at 4.

10. *Id.* at 4–5.

11. *Brookshire Bros.*, 438 S.W.3d at 15; Petitioner's Brief on the Merits, *supra* note 8, at 1–3.

12. *Brookshire Bros.*, 438 S.W.3d at 15; Petitioner's Brief on the Merits, *supra* note 8, at 1.

13. *Brookshire Bros.*, 438 S.W.3d at 15; Petitioner's Brief on the Merits, *supra* note 8, at 1.

14. *Brookshire Bros.*, 438 S.W.3d at 15; Petitioner's Brief on the Merits, *supra* note 8, at 1–3.

15. *Brookshire Bros.*, 438 S.W.3d at 15; Jerry Aldridge's Brief on the Merits at exhibit 2, *Brookshire Bros.*, 438 S.W.3d 9 (No. 10-0846), 2010 WL 8786069.

16. Jerry Aldridge's Brief on the Merits, *supra* note 15, at exhibit 2.

17. *Id.* at exhibit 3.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 4–5.

22. Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 15 (Tex. 2014); Petitioner's Brief on the Merits, *supra* note 8, at 3.

relevant were copied onto a compact dis[c]."[23] Brookshire Brothers decided to retain only video from 5:01 p.m. to approximately 5:09 p.m.[24] The disc was admitted into evidence at trial, along with still-frame pictures taken from the disc.[25]

Numerous factual differences were highlighted at trial.[26] Aldridge testified that once he fell, another customer, Mr. Grimes, came up to him, asked him if he was alright, "and investigated what was on the floor."[27] Brookshire Brothers argued "[n]o such person appeared in the video."[28] Aldridge claimed he immediately told a cashier of his fall.[29] Brookshire Brothers argued that was not supported by the portions of the video it retained.[30] Aldridge testified that other store employees told him later that he had slipped on chicken grease.[31] Brookshire Brothers argued to the Texas Supreme Court that no one knows whether Aldridge slipped on chicken grease.[32] The "Grab-N-Go" display was "approximately fifteen feet away from the [area] of the fall," and Brookshire Brothers argued that it was "only a hypothesis" that a customer picked up a container of chicken which leaked grease onto the floor.[33]

Robert Gilmer, who was in charge of Brookshire Brothers' risk management program, made the decision to preserve only eight minutes of video.[34] According to Brookshire Brothers, "Gilmer's primary concern was to verify that the incident had, in fact, occurred, so there was no need to preserve any of the recording after the fall."[35] On September 13,

23. Petitioner's Brief on the Merits, *supra* note 8, at 3; *see also Brookshire Bros.*, 438 S.W.3d at 15 ("Brookshire Brothers' Vice President of Human Resources and Risk Management, decided to retain and copy approximately eight minutes of the video, starting just before Aldridge entered the store and concluding shortly after his fall.").

24. Jerry Aldridge's Brief on the Merits, *supra* note 15, at 6; Petitioner's Brief on the Merits, *supra* note 8, at 4–5.

25. Petitioner's Brief on the Merits, *supra* note 8, at 3.

26. *Id.* at 5.

27. *Id.* at 6 (internal quotation marks omitted).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 7.

33. *Id.*

34. Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 15 (Tex. 2014); Petitioner's Brief on the Merits, *supra* note 8, at 8. "Gilmer testified that he had worked in the grocery store business for forty-four years. As Vice President of Human Resources and Risk Management, Gilmer headed Brookshire Brothers' risk management department, which included managing the company's litigation." *Brookshire Bros.*, 438 S.W.3d at 16 n.2.

35. Petitioner's Brief on the Merits, *supra* note 8, at 8.

Aldridge requested to see "the fall" that was captured on the video.[36] On September 29, 2004, Brookshire Brothers declined his request.[37]

It is unclear from either the court of appeals' opinion or the Texas Supreme Court's opinion when exactly Brookshire allowed the original videotape to be over-written.[38] The court of appeals' opinion, however, noted that "Brookshire Brothers [had] paid for Aldridge to be treated by a neurosurgeon before it allowed the unpreserved portions of the video recording from the area of the store in question to be destroyed."[39]

"Aldridge did not threaten to sue Brookshire during the several months it was paying his medical expenses, but simply continued submitting his medical bills to Brookshire."[40] By June 2005, Brookshire Brothers had reviewed its position and ceased paying Aldridge's medical expenses.[41] On August 2, 2005, Brookshire Brothers received a letter from an attorney representing Aldridge requesting a copy of the video Gilmer referenced in his June 2005 letter that denied further reimbursement of medical expenses.[42] Gilmer provided a copy of the eight-minute video.[43] On August 23, 2005, Aldridge's lawyer wrote back requesting video of other camera angles and "video from 4:00 to 6:30 p.m."[44] Gilmer did not inform Aldridge's counsel that the requested video no longer existed and responded by stating:

> The video you have requested does not focus on the area where Mr. Aldridge "fell" .... It is a "slip & fall" case. Seems we know how these ultimately resolve. If you decide to pursue a legal action on behalf of your client, you are well aware that we would be obligated to furnish certain information at that time. We are not going to assist you further in helping you build your case.[45]

---

36. *Brookshire Bros.*, 438 S.W.3d at 15; Petitioner's Brief on the Merits, *supra* note 8, at 8.

37. *Brookshire Bros.*, 438 S.W.3d at 15; Petitioner's Brief on the Merits, *supra* note 8, at 8–9.

38. *Compare Brookshire Bros.*, 438 S.W.3d at 15 ("[T]he footage had been recorded over almost a year earlier."), *with* Brookshire Bros. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *1 (Tex. App.—Tyler July 30, 2010), *rev'd*, 438 S.W.3d 9 (Tex. 2014) (stating only the remainder of the video was allowed to be overwritten "later").

39. Brookshire Bros. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *6 (Tex. App.—Tyler July 30, 2010), *rev'd*, 438 S.W.3d 9 (Tex. 2014).

40. Jerry Aldridge's Brief on the Merits, *supra* note 15, at 5.

41. *Brookshire Bros.*, 438 S.W.3d at 15.

42. *Id.* at 32; Jerry Aldridge's Brief on the Merits, *supra* note 15, at 5.

43. *Brookshire Bros.*, 438 S.W.3d at 32 (Guzman, J., dissenting); Jerry Aldridge's Brief on the Merits, *supra* note 15, at 5.

44. *Brookshire Bros.*, 438 S.W.3d at 32 (Guzman, J., dissenting); Jerry Aldridge's Brief on the Merits, *supra* note 15, at 5.

45. *Brookshire Bros.*, 438 S.W.3d at 32 (Guzman, J., dissenting).

Aldridge filed his lawsuit on August 17, 2006.[46]

III. PRETRIAL SPOLIATION HEARING

Prior to trial, Aldridge asked for a spoliation instruction due to the failure to preserve more of the surveillance video. "Aldridge argued . . . that Brookshire Brothers' failure to preserve additional video footage amounted to spoliation of evidence that would have been helpful to the key issue of whether the spill was on the floor long enough to give Brookshire Brothers a reasonable opportunity to discover it."[47]

Specifically, Aldridge argued that the missing portions of the video may have provided evidence about the size of the grease spill that had to be mopped; how many employees it took to clean the spill; the camera angle used by Brookshire Brothers when it took certain photographs; whether and when Jimmy George, the store manager, or other employees walked by the area prior to the fall; and whether and when a customer "picked up a chicken from the Grab-N-Go" display.[48]

As the Texas Supreme Court recounted, either during the pretrial hearing or during the trial:

> Gilmer verified his understanding that a key legal issue in a slip-and-fall case is whether store employees knew or should have known there was something on the floor that caused the fall. However, he maintained that when the decision was made to preserve the video he "didn't know there was going to be a case." At that time, "[i]t was just a man who made a claim that he slipped and fell in the store," and the actions relating to the video

---

46. Petitioner's Brief on the Merits, *supra* note 8, at 9.

47. *Brookshire Bros.*, 438 S.W.3d at 16 (majority opinion). The Texas Supreme Court in *Brookshire Bros.*, held:

> To recover in a slip-and-fall case, a plaintiff must prove *inter alia* that the defendant had actual or constructive knowledge of a dangerous condition on the premises such as a slippery substance on the floor, which may be accomplished with a showing that "(1) the defendant placed the substance on the floor, (2) the defendant actually knew that the substance was on the floor, or (3) it is more likely than not that the condition existed long enough to give the premises owner a reasonable opportunity to discover it."

Id. (citation omitted) (quoting Wal-Mart Stores, Inc. v. Reece, 81 S.W.3d 812, 814 (Tex. 2002)). The court in *Wal-Mart Stores, Inc. v. Reece*, held:

> It was Reece's burden to establish that it was more likely than not that Wal-Mart should have been aware of the spill because it existed long enough to give Wal-Mart a reasonable opportunity to discover and rectify it, or to warn about it. Because Reece failed to meet that burden, we reverse the court of appeals' judgment and render judgment that she take nothing.

Wal-Mart Stores, Inc. v. Reece, 81 S.W.3d 812, 817 (Tex. 2002).

48. Jerry Aldridge's Brief on the Merits, *supra* note 15, at 7.

were not taken "in anticipation of this trial."[49]

At the pretrial hearing, the trial judge concluded "that he would allow the jury to hear evidence of spoliation, but he was uncertain whether he would . . . submit a spoliation instruction to the jury."[50] The trial court apparently did not enter any finding as to whether the failure to preserve additional portions of the surveillance video was intentional, negligent, grossly negligent, or done in bad faith.

IV. JURY TRIAL

At trial, "Aldridge presented seven witnesses and published to the jury the portion of the video recording preserved by Brookshire Brothers."[51] The "video showed a Brookshire Brothers employee walking very near the location where Aldridge fell almost three minutes beforehand."[52] "The video also showed another Brookshire Brothers employee passing nearby four times within five minutes before the fall."[53] Store manager Jonathan Tyler testified that "it was known that the containers for the chickens could leak when carried throughout the store by patrons."[54] "Tyler testified that employees [were] required to carry a paper towel with them to clean up small spills."[55] The video showed that after Aldridge's fall, an employee signaled for assistance to clean up the floor, providing "some evidence that the spill was too large to clean up with the towel each employee carrie[d]."[56]

During closing arguments, Brookshire Brothers' counsel argued that Aldridge failed to establish the elements of his claim, stating that "the video in this case is your best friend" because the "video doesn't lie. It's just credible."[57] The court's jury charge included a spoliation instruction. In part, the jury charge stated:

> 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

49. *Brookshire Bros.*, 438 S.W.3d at 16 (footnote omitted).

50. Petitioner's Brief on the Merits, *supra* note 8, at ix.

51. Brookshire Bros. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *3 (Tex. App.—Tyler July 30, 2010), *rev'd*, 438 S.W.3d 9 (Tex. 2014).

52. *Id.*

53. *Id.*

54. *Id.* at *4.

55. *Id.*

56. *Id.*

57. *Id.* at *8.

> 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.[58]

The jury returned a verdict of $1,063,644.99.[59]

V. COURT OF APPEALS

Addressing whether Brookshire Brothers had a duty to preserve additional portions of the videotape, the appellate court noted:

> By the time the unpreserved remainder was destroyed, Aldridge had notified Brookshire Brothers of his injury, a Brookshire Brothers manager had prepared a written incident report noting a neck and back injury, and Brookshire Brothers had begun paying for Aldridge to be treated by a neurosurgeon. Evidence showed that Brookshire Brothers routinely compensated injured customers for two initial doctor's visits. However, this treatment went beyond those two visits and involved a specialist. Indeed, Brookshire Brothers' own correspondence during the period in question referred to Aldridge as having a "claim." Finally, Aldridge had, by this time, requested to see a portion of the video recording from the day in question.[60]

Accordingly, the appellate court held that Brookshire Brothers should have concluded "from the severity of the accident and other circumstances surrounding it that there was a substantial chance for litigation."[61] The court also determined, "because of the nature of the video in question, it was reasonable to conclude that Brookshire Brothers was on notice of its potential relevance."[62]

With regard to the argument that Aldridge was not prejudiced by the failure to preserve any additional portions of the videotape, the court of appeals noted that the additional non-preserved portions of the video

---

58. *Id.* at *9.

59. Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 16 (Tex. 2014). The jury awarded past medical expenses of $162,469.96. Future medical expenses of $325,000 were awarded. The loss of past earning capacity was awarded at $75,000, and $594,000 was awarded for the loss of future earning capacity. No damages were awarded for physical pain or mental anguish. Final Judgment, Jerry Aldridge v. Brookshire Bros., No. 39829 (159th Dist. Ct., Angelina County, June 27, 2008). Aldridge settled his case for an undisclosed amount after the Texas Supreme Court reversed and remanded for a new trial.

60. Brookshire Bros. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *7 (Tex. App.—Tyler July 30, 2010), *rev'd*, 438 S.W.3d 9 (Tex. 2014).

61. *Id.*

62. *Id.*

> would have been some evidence of when a spill occurred or the length of time that the spill remained. That the video would probably have contained evidence of these facts is not speculation but is a reasonable inference from the portion of the video that was retained. In addition, the video would have shown the cleanup efforts and any immediate investigation, both demonstrating the size of the spill. And the video might have shown the manager's store inspection that was noted in the log book.[63]

The court of appeals affirmed the jury verdict in all respects.[64]

VI. PRE-*BROOKSHIRE BROS.* LAW

In *Trevino v. Ortega*,[65] the Texas Supreme Court specifically refused to recognize spoliation as an independent cause of action.[66] In 1988, Genaro Ortega, individually and on behalf of his daughter, Linda Ortega, filed suit against Drs. Michael Aleman and Jorge Trevino and the McAllen Maternity Clinic for medical malpractice. Ortega alleged the defendants negligently provided medical care during Linda's birth in 1974.[67] Ortega argued that Dr. Trevino "had a duty to preserve Linda's medical records and that destroying the records materially interfere[d] with Ortega's ability to prepare his medical malpractice suit."[68] Dr. Aleman, the attending physician, "testified that he ha[d] no specific recollection of the delivery."[69] Accordingly, Ortega argued that the missing medical records were "the only way to determine the procedures used to deliver Linda. Because the medical records [were] missing, Ortega's expert [could not] render an opinion about Aleman's, the clinic's, or Trevi[n]o's negligence."[70]

The court recognized that evidence spoliation was not a new issue and that courts have struggled with it for years.[71] In rejecting an independent cause of action for spoliation, the court stated:

> [R]emedies, sanctions and procedures for evidence spoliation are available

63. *Id.*
64. *Id.* at *10.
65. Trevino v. Ortega, 969 S.W.2d 950 (Tex. 1998).
66. *Id.* at 951.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 952 ("Probably the earliest ... solution was the spoliation inference or *omnia praesumuntur contra spoliatorem*: all things are presumed against a wrongdoer." (citing *Rex v. Arundel*, (1617) 80 Eng. Rep. 258 (K.B.))). The Texas Supreme Court recognized the concept as early as 1852, when it adopted the principle that all things are presumed against the wrongdoer. *See* Cheatham v. Riddle, 8 Tex. 162, 167 (1852) ("Everything is to be presumed *in odium spoliatoris*.").

> under Texas jurisprudence. Trial judges have broad discretion to take measures ranging from a jury instruction on the spoliation presumption to, in the most egregious case, death penalty sanctions. As with any discovery abuse or evidentiary issue, there is no one remedy that is appropriate for every incidence of spoliation; the trial court must respond appropriately based upon the particular facts of each individual case.[72]

In *Wal-Mart Stores, Inc. v. Johnson*,[73] the court again revisited the issue of spoliation. In this case, a store employee injured a customer, named Johnson, by accidently dropping a Christmas reindeer decoration on his head.[74] When a Wal-Mart supervisor, named McClane, arrived at the scene to investigate the accident, Johnson stated he was not hurt. Another Wal-Mart employee cleaned and bandaged his cut, and Johnson left the store.[75] During McClane's investigation, she photographed the reindeer, took notes, and garnered a statement in writing from the employee who knocked the reindeer from the shelf.[76]

> She recorded the results of her investigation on a Wal-Mart form entitled "Report of Customer Incident." She attached the photo and the employee's statement, sending copies to the District Manager and claim management personnel. According to the incident report, Johnson neither threatened to sue nor indicated that Wal-Mart should pay any medical costs or other damages. After completing the report, McClane discarded her notes.[77]

Late that evening, Johnson's arm and neck began to hurt.[78] The next day, he obtained a prescription for muscle relaxers, pain killers, and physical therapy.[79] After six months of pain, Johnson and his wife filed suit.[80] A surgeon later "performed an anterior cervical discectomy and fusion on Johnson's neck."[81]

At trial, the parties offered differing opinions regarding the composition and weight of the reindeer in question. Wal-Mart argued that the reindeer could not have proximately caused Johnson's neck problems, which it claimed resulted from an automobile accident years earlier.[82] Only a

72. Trevino v. Ortega, 969 S.W.2d 950, 953 (Tex. 1998) (citations omitted).
73. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718 (Tex. 2003).
74. *Id.* at 720.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*

poor-quality photograph of the reindeer was introduced in evidence because Wal-Mart had either sold through its complete inventory of the product, or discarded the broken units.[83]

The trial court issued the following spoliation instruction based on Wal-Mart's failure to preserve the reindeer:

> You are instructed that, when a party has possession of a piece of evidence at a time he knows or should have known it will be evidence in a controversy, and thereafter he disposes of it, makes it unavailable, or fails to produce it, there is a presumption in law that the piece of evidence, had it been produced, would have been unfavorable to the party who did not produce it. If you find by a preponderance of the evidence that Wal-Mart had possession of the reindeer at a time it knew or should have known they would be evidence in this controversy, then there is a presumption that the reindeer, if produced, would be unfavorable to Wal-Mart.[84]

The jury found in favor of the Johnsons and rendered a verdict of $76,000 in damages against Wal-Mart for negligence.[85] The Supreme Court of Texas reversed the jury verdict, concluding that Wal-Mart had no duty to preserve any evidence because it could not have known:

> [O]n the day of the accident that there was a substantial chance that Johnson's injury would result in litigation. To the contrary, the evidence is undisputed that neither Wal-Mart nor Johnson knew on the day of the accident that his injury might be serious or that Johnson might pursue legal action. Even after Johnson learned that he had injured his neck, nothing in the record suggests that he informed Wal-Mart of his claim prior to filing suit or that Wal-Mart learned of his claim in any other way.[86]

In reaching its decision on the issue of whether a duty to preserve evidence was triggered, the court did not modify the existing spoliation instruction framework.[87] The court merely concluded that Wal-Mart did

---

83. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 720 (Tex. 2003).

84. *Id.* at 720–21.

85. *Id.* at 721.

86. *Id.* at 723.

87. In *Wal-Mart Stores, Inc. v. Johnson*, the court reasoned:

> Our courts of appeals have generally limited the use of the spoliation instruction to two circumstances: [1] the deliberate destruction of relevant evidence and [2] the failure of a party to produce relevant evidence or to explain its non-production. Under the first circumstance, a party who has deliberately destroyed evidence is presumed to have done so because the evidence was unfavorable to its case. Under the second, the presumption arises because the party controlling the missing evidence cannot explain its failure to produce it.

Id. at 721–22 (citations omitted).

not breach any duty to preserve.[88]

Prior to *Brookshire Bros.*, virtually all of the Texas courts of appeals relied on Justice Baker's concurrence in *Trevino* as the framework for analyzing spoliation.[89] In his concurring opinion, he outlined an analytical framework for resolving spoliation issues and applying spoliation remedies, including spoliation instructions.[90] The first inquiry in Justice Baker's analytical framework is whether a party has the duty to preserve evidence.[91] The duty to preserve evidence in one's possession arises when a person has notice of actual or reasonably foreseeable litigation.[92] An additional part of the duty inquiry is whether the allegedly spoliated evidence was likely to be relevant.[93]

The second inquiry in the framework, labeled "breach," concerns whether the alleged spoliating party destroyed the evidence or was otherwise responsible for rendering relevant evidence unavailable.[94] According to Justice Baker, a party breaches the duty to preserve relevant evidence if it fails to exercise reasonable care in preserving that evidence. Justice Baker considered a party's culpability—fault, recklessness, or fraudulent intent—relevant to the issue of breach. He believed that spoliation remedies should be available for either negligent or intentional destruction of evidence.[95]

---

88. *Id.*

89. Justice Baker's framework had been explicitly adopted by almost all courts of appeals. *See* Matlock Place Apartments, LP v. Druce, 369 S.W.3d 355, 381–82 (Tex. App.—Fort Worth 2012, pet. denied); Clark v. Randalls Food, 317 S.W.3d 351, 358 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (describing the standard for breach as one of reasonableness that places the risk of loss on the party in possession of the evidence); Buckeye Ret. Co. v. Bank of Am., N.A., 239 S.W.3d 394, 401 (Tex. App.—Dallas 2007, no pet.) (following Justice Baker's framework); McMillin v. State Farm Lloyds, 180 S.W.3d 183, 199 (Tex. App.—Austin 2005, pet. denied) ("A spoliation instruction tells the jury that, if a party has control over a piece of evidence and fails to retain or produce it, the jury should presume that the evidence would have been unfavorable to the party who controlled the evidence."); Offshore Pipelines, Inc. v. Schooley, 984 S.W.2d 654, 667–68 (Tex. App.—Houston [1st Dist.] 1998, no pet.). The court in *Offshore Pipelines* held:

> If the trial court, after hearing such testimony, determines that the accused party had a duty to preserve evidence, which it breached either negligently or intentionally, and that the loss of the evidence will prejudice the other party, the court then, in the exercise of its discretion, must decide whether the submission of a spoliation instruction is a proper remedy.

Offshore Pipelines, 984 S.W.2d at 667–68.

90. Trevino v. Ortega, 969 S.W.2d 950, 954–61 (Tex. 1998) (Baker, J., concurring).

91. *Id.* at 955.

92. *Id.* at 955–56.

93. *Id.* at 957.

94. *Id.*

95. In his *Trevino* concurring opinion, Justice Baker argued:

> Because parties have a duty to reasonably preserve evidence, it is only logical that they should

The third component of Justice Baker's analytical framework is prejudice to the nonspoliating party.[96] In determining the severity of prejudice, Justice Baker recommended that courts consider the destroyed evidence's degree of relevance and the availability of cumulative evidence.[97] The important considerations in determining prejudice include whether other cumulative, competent evidence exists to take the place of the spoliated evidence and "whether the destroyed evidence supports key issues in the case."[98] Justice Baker noted that "[o]bviously, the more evidence there is and the less important the issue involved is, the less prejudice the nonspoliating party will suffer."[99]

VII. PETITION TO THE TEXAS SUPREME COURT

Brookshire Brothers presented the following issues to the Texas Supreme Court:

> 1. Before the trial court (a) admits evidence of spoliation or (b) submits a spoliation instruction, must the party claiming spoliation first prove that he was prejudiced by the missing video recording?
> 2. Choosing what portion of a video recording to preserve means choosing another portion not to preserve. Is the failure to preserve all of the recording later demanded by the plaintiff an "intentional" spoliation of evidence that would excuse the plaintiff from proving prejudice?
> 3. When the trial court expressly finds that the party accused of spoliation did not act in bad faith, may the court of appeals nonetheless analyze the case as though there was intentional spoliation?
> 4. If a merchant in good faith selects a reasonable amount of a video recording to preserve, is that spoliation of the unpreserved video? Alternatively, is such a selection a reasonable explanation for the absence of more of the recording which will negate any claim of spoliation?[100]

---

be held accountable for either negligent or intentional spoliation. While allowing a court to hold a party accountable for negligent as well as intentional spoliation may appear inconsistent with the punitive purpose of remedying spoliation, it is clearly consistent with the evidentiary rationale supporting it because the remedies ameliorate the prejudicial effects resulting from the unavailability of evidence. In essence, it places the burden of the prejudicial effects upon the culpable spoliating party rather than the innocent nonspoliating party.

Furthermore, by punishing negligent conduct, courts will deter future spoliation. The theory of deterrence is not merely limited to deterring intentional conduct. It applies equally to negligent conduct.

Id. at 957 & n.1 (citations omitted).

96. *Id.* at 957–58.

97. *Id.* at 958.

98. *Id.*

99. *Id.*

100. Petitioner's Brief on the Merits, *supra* note 8, at x–xi.

Before the Texas Supreme Court, Brookshire Brothers argued: (1) "[t]here was no intentional spoliation";[101] (2) Aldridge failed to establish that he was prejudiced by the loss of the additional surveillance video;[102] (3) Aldridge failed to locate and depose Jimmy George or any other employees on duty the day of his fall and could have avoided any prejudice;[103] (4) if the verdict was allowed to stand it would be required to store an "enormous volume of video";[104] and (5) considering "the exact spot of Aldridge's fall is screened from the camera view by a skirted display table . . . any inference that more video would have helped Aldridge prove his case is simply irrational."[105] Brookshire Brothers concluded its argument by stating that the trial court's rulings and jury instruction "shift[ed] the emphasis of the trial away from the weak evidence supporting [Aldridge's] claim and onto Brookshire Brothers' investigation procedures and its decisions about preserving surveillance video."[106]

VIII. TEXAS SUPREME COURT OPINION

Approximately ten years after Aldridge's fall, and four years after the petition for review was filed, the Texas Supreme Court held "that the trial court abused its discretion in submitting a spoliation instruction because there is no evidence that Brookshire Brothers intentionally concealed or destroyed the video in question or that Aldridge was deprived of any meaningful ability to present his claim to the jury at trial."[107] The court remanded "the case to the trial court for a new trial."[108] The *Brookshire Bros.* court recognized that "[t]he spoliation of evidence is a serious issue. A party's failure to reasonably preserve discoverable evidence may significantly hamper the nonspoliating party's ability to present its claims or defenses, and can undermine the truth-seeking function of the judicial system and the adjudicatory process."[109] The court went on to state that:

> In some circumstances, a missing piece of evidence like a photograph or video can be irreplaceable. Testimony as to what the lost or destroyed

101. *Id.* at 10.
102. *Id.* at 20.
103. *Id.* at 7.
104. *Id.* at 24.
105. *Id.* at 10.
106. *Id.* at 11.
107. Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 30 (Tex. 2014).
108. *Id.*
109. *Id.* at 16–17 (citation omitted).

> evidence might have shown will not always restore the nonspoliating party to an approximation of its position if the evidence were available; sometimes a picture is indeed worth a thousand words.[110]

Yet, notwithstanding its previous refusals to re-visit Justice Baker's framework, the *Brookshire Bros.* court announced a new, two-step judicial process: First, "the trial court must determine, as a question of law, whether a party spoliated evidence"; second, "if spoliation occurred, the court must assess an appropriate remedy."[111] In order to determine if a party spoliated evidence, the trial court must find that:

> (1) [T]he spoliating party had a duty to reasonably preserve evidence, and (2) the party intentionally or negligently breached that duty by failing to do so. Spoliation findings—and their related sanctions—are to be determined by the trial judge, outside the presence of the jury, in order to avoid unfairly prejudicing the jury by the presentation of evidence that is unrelated to the facts underlying the lawsuit. Accordingly, evidence bearing directly upon whether a party has spoliated evidence is not to be presented to the jury except insofar as it relates to the substance of the lawsuit.[112]

The court concluded that a spoliation instruction to the jury was a severe sanction that:

> shift[s] the focus of the case from the merits of the lawsuit to the improper conduct that was allegedly committed by one of the parties during the course of the litigation process. The problem is magnified when evidence regarding the spoliating conduct is presented to a jury. Like the spoliating conduct itself, this shift can unfairly skew a jury verdict, resulting in a judgment that is based not on the facts of the case, but on the conduct of the parties during or in anticipation of litigation.[113]

The court went on to express concerns regarding "the exponential increase in the volume of electronic data being generated and stored" and "the burdens associated" with preserving such data,[114] despite no evidence in the record to validate these concerns.[115] *Brookshire Bros.* is a

---

110. *Id.* at 17.

111. *Id.* at 14.

112. *Id.*

113. *Id.* at 13–14.

114. *Id.* at 14.

115. As an aside, given the amount of data that businesses are required to maintain pursuant to various governmental regulations, and the amount of data that is voluntarily kept for business purposes, it is an open question how much data preservation is done because of any litigation-related hold. Further, the failure of businesses to implement and enforce information governance protocols to overcome the preservation of ROT (redundant, obsolete, or trivial) data is a major contributor to excessive data accumulation. It also appears that some large corporations are voluntarily assuming

broadly written opinion and the court elaborates on numerous issues but fails to provide much clarity on a number of basic points.

IX. ANALYSIS

A. *The Duty to Preserve Evidence*

First, did Brookshire Brothers have a duty to preserve any evidence? "Upon a spoliation complaint, the threshold question should be whether the alleged spoliator was under any obligation to preserve evidence. A party may have a statutory, regulatory, or ethical duty to preserve evidence."[116] The court did restate that the duty to preserve evidence "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."[117] Citing to *National Tank Co. v. Brotherton*,[118] a case that addressed when a substantial chance of litigation ensued to trigger the invocation of work-product privilege, the *Brookshire Bros.* court stated that a "substantial chance of litigation" meant that "litigation is more than merely an abstract possibility or unwarranted fear."[119] Notwithstanding its restatement, the court never addressed whether Brookshire Brothers actually possessed a duty to preserve.[120]

Given the manner in which Brookshire Brothers stated the issues in its petition for review, it may be that Brookshire Brothers conceded it had a duty to preserve some amount of the video.[121] If that is the case, the Texas Supreme Court should have acknowledged that fact, rather than stating that it assumed, without deciding, that a duty to preserve existed.

---

greater "burdens" in the acquisition and storage of data in their desire to analyze "big data" for marketing, sales, and product development purposes.

116. Trevino v. Ortega, 969 S.W.2d 950, 955 (Tex. 1998).

117. Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 20 (Tex. 2014) (quoting Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 722 (Tex. 2003)).

118. Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193 (Tex. 1993).

119. *Brookshire Bros.*, 438 S.W.3d at 20 (citing *Nat'l Tank*, 851 S.W.2d at 204).

120. The court in *Brookshire Bros.* held:

> Assuming without deciding that Brookshire Brothers had and breached a duty to reasonably preserve evidence by saving an insufficient amount of video footage before allowing the additional footage to be erased, prejudicing Aldridge, there is no evidence that it did so with the requisite intent to conceal or destroy relevant evidence.

Id. at 27.

121. *See, e.g.*, Petitioner's Brief on the Merits, *supra* note 8, at ix ("Choosing what portion of a video recording to preserve means choosing another portion not to preserve.").

Inasmuch as there would be no need to address any other issues in the opinion if no duty existed, it must be assumed that the court agreed that given the report and extent of injury and the amount and duration of medical expenses, a duty to preserve existed. The court also did not address when the duty to preserve was triggered. Again, it is assumed the court agreed with the court of appeals' conclusion that the duty to preserve was triggered prior to the date the original videotape was overwritten.

Rather than leaving these issues incompletely addressed, the court should have answered these questions definitively and concluded that Brookshire Brothers had a duty to preserve evidence that may be relevant to future litigation given its knowledge of Aldridge's claim, the extent of his injuries, and its payment of various medical expenses. The court should have also concluded that the duty to preserve was triggered, at the latest, when Brookshire Brothers authorized the medical expenses to be paid, in an amount above and beyond its usual policy.[122]

B. *The Scope of the Duty to Preserve*

Second, once a duty to preserve is triggered, a party must determine what must be preserved and the scope of the evidence to be preserved.[123] In Texas state courts,

> [a] party that is on notice of either potential or pending litigation has an obligation to preserve evidence that is relevant to the litigation. "While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, [or] is the subject of a pending discovery sanction."[124]

In *Brookshire Bros.*, the court recognized "that the party seeking a remedy for spoliation must demonstrate that the other party breached its duty to

122. *See* Offshore Pipelines, Inc. v. Schooley, 984 S.W.2d 654, 666 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("[O]nce a party has notice of a potential claim, that party has a duty to exercise reasonable care to preserve information relevant to that claim."); *see also* Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598, 612–13 (S.D. Tex. 2010) (recognizing an obligation to preserve evidence arises when the party "has notice that the evidence is relevant to litigation," or when a party "should have known that the evidence may be relevant to future litigation").

123. *See* Trevino v. Ortega, 969 S.W.2d 950, 956–57 (Tex. 1998) (stating a party's obligation to preserve evidence exists once a trial court determines there is a duty to preserve).

124. *Id.* at 957 (quoting Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)).

preserve material and relevant evidence."[125] Again, although restating the relevant law, the court makes no conclusion as to whether the missing hours of videotape contained material and relevant evidence. Apparently, the court is only concluding that it was error for the trial court to defer that fact finding to the jury.[126] "If the trial court finds that a party has a duty to preserve evidence, it should then decide whether the party breached its duty."[127]

C. *Proportionality and the Duty to Preserve*

The court never addresses the issue of proportionality—an omission that may have been caused by Brookshire Brothers alluding to the topic in its briefing but never using the term or properly analyzing the concept to the facts of this case.

Neither the Federal nor Texas Rules of Civil Procedure directly apply to actions that occur before a lawsuit is commenced.[128] "Nevertheless, courts are often presented with sanctions motions based on pre-litigation conduct."[129] That is the case presented in *Brookshire Bros.* It has long been recognized that courts "may sanction parties for failure to preserve potentially responsive information, even if that failure to preserve pre-dates the filing of the complaint. The court's inherent power is the source of the power to sanction violations of the pre-litigation duty."[130] Although "the duty to preserve often arises before litigation is commenced, the cost-benefit factors in Federal Rule of Civil Procedure 26(b)(2)(C)[131] do not directly apply before a complaint is filed."[132] The

125. Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 20 (Tex. 2014).

126. *Id.* at 28.

127. *Trevino*, 969 S.W.2d at 957.

128. Paul W. Grimm et al., *Proportionality in the Post-hoc Analysis of Pre-litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 386 (2008).

129. *Id.*

130. *Id.* (citing Zubulake v. UBS Warburge, LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)).

131. The Federal Rules of Civil Procedure provides:

> *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2)(C).

same dilemma applies to Texas Rule of Civil Procedure 192.4.[133]

Brookshire Brothers argued it would be required to store an "enormous volume of video" if it had a duty to preserve in this and similar cases.[134] Despite this blanket assertion, it does not appear that Brookshire Brothers tendered to the trial court any evidence supporting its position. Indeed, Brookshire Brothers encountered no difficulty in retrieving the video for the day at issue, copying eight minutes of the video, and preserving that portion for the duration of the litigation.

The Texas Supreme Court obviously struggled with the difficult balance that needs to be struck in addressing modern discovery disputes. The court could have used this case to address the issue of proportionality in the preservation obligations incurred prior to litigation being filed. As discussed below in greater detail, this approach would have been preferable to the framework the *Brookshire Bros.* majority adopted. In this case, however, the court should have rejected any argument by Brookshire Brothers that the burden or expense of maintaining longer portions of the video outweighed its likely benefit. The court could have easily adopted this position based upon Brookshire Brothers' failure to tender any evidence to support this argument.[135] More importantly, the court could

---

132. Grimm et al., *supra* note 128, at 385.

133. The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that:

> (a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or
>
> (b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

TEX. R. CIV. P. 192.4.

134. Petitioner's Brief on the Merits, *supra* note 8, at 24.

135. In a recent spoliation case with similar facts, the trial court was not swayed by the Arizona Department of Corrections (ADC) argument:

> [T]hat requiring ADC to retain videos of inmate escorts would be unduly burdensome. Defendants contend that "an inordinate amount of space would be required to preserve the voluminous and sizeable videos of inmate escorts conducted on a daily basis." But nobody has suggested that ADC must preserve every video of every escort. The common law duty to preserve arises only when a party reasonably anticipates litigation. The vast majority of escorts at ADC undoubtedly are unremarkable events that give no reason to anticipate litigation. No duty to preserve would apply to the recordings of such escorts.
>
> But when an incident does occur on an escort that is sufficiently concerning for the officer in charge to take the video to her commanding officer and write a PACE report about the unprofessional conduct of her co-worker on the escort, and when the inmate that very evening writes a grievance alleging excessive force on the escort, litigation over the escort can reasonably be anticipated and a duty to preserve arises. The video of such a transport should

have provided greater clarity to future litigants by stating that the proportionality factors of Texas Rule of Civil Procedure 192.4 apply to the pre-litigation duty to preserve.[136]

D. *Scope of Remedies*

The *Brookshire Bros.* court repeated that:

> After a court determines that a party has spoliated evidence by breaching its duty to preserve such evidence, it may impose an appropriate remedy. Rule 215.2 of the Texas Rules of Civil Procedure enumerates a wide array of remedies available to a trial court in addressing discovery abuse, such as an award of attorney's fees or costs to the harmed party, exclusion of evidence, striking a party's pleadings, or even dismissing a party's claims. These remedies are available in the spoliation context. The trial court also has discretion to craft other remedies it deems appropriate in light of the particular facts of an individual case, including the submission of a spoliation instruction to the jury.[137]

According to the court:

> [T]he remedy must have a direct relationship to the act of spoliation and may not be excessive. In other words, the remedy crafted by the trial court must be proportionate when weighing the culpability of the spoliating party and the prejudice to the nonspoliating party. This logically follows from the remedial purpose undergirding the imposition of a spoliation remedy under Texas law, which is to restore the parties to a rough approximation of their positions if all evidence were available.[138]

Despite this broad language, it has become quite apparent that the trial court's discretion to remedy an act of spoliation is not limitless.[139]

First, a direct relationship must exist between the offensive conduct, the

---

> be retained. Defendants have provided no evidence regarding the cost or burden that would be imposed by retaining videos in such unusual circumstances, and the Court therefore has no reason to conclude that retaining them would be so burdensome or disruptive to a state agency that an exception must be made to the common law duty to preserve.

Pettit v. Smith, No. CV-11-02139, 2014 WL 4425779, at *5 (D. Ariz. Sept. 9, 2014) (citations omitted).

136. *See* Grimm et al., *supra* note 128, at 411–12 ("[A]pplication by analogy of Federal Rules of Civil Procedure 26(b)(2)(C) and 37(e), to the pre-litigation duty to preserve provides the best mechanism for defining the limits of the duty to preserve and providing litigants with practical guidelines . . . .").

137. Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 21 (Tex. 2014) (citations omitted).

138. *Id.* (citations omitted).

139. *See* Petrol. Solutions, Inc. v. Head, No. 11-0425, 2014 WL 7204399, at *5 (Tex. Dec. 19, 2014) ("While the trial court's discretion to remedy an act of spoliation is broad, it is not limitless.").

> offender, and the sanction imposed. To meet this requirement, a sanction must be directed against the wrongful conduct and toward remedying the prejudice suffered by the innocent party. Second, a sanction must not be excessive, which means it should be no more severe than necessary to satisfy its legitimate purpose. This prong requires the trial court to consider the availability of lesser sanctions and, "in all but the most exceptional cases, actually test the lesser sanctions."[140]

E. *Level of Culpability Required for a Spoliation Instruction or "Death-Penalty Sanctions," Such as Striking a Party's Claims or Defenses*[141]

Despite the Texas Supreme Court's previous endorsement of jury spoliation instructions, its previous statement that existing "remedies, sanctions and procedures for evidence spoliation are available under Texas jurisprudence"[142] and that trial judges have broad discretion, the *Brookshire Bros.* court concluded "that a party must intentionally spoliate evidence in order for a spoliation instruction to constitute an appropriate remedy."[143]

1. Distinction Between Intentional and Negligent Conduct

Although recognizing that in the past various Texas courts of appeals have approved spoliation instructions on the basis of negligent spoliation, the court first concluded:

> [A] person who merely negligently destroys evidence lacks the state of mind of a "wrongdoer," and it makes little sense to infer that a party who only negligently lost or destroyed evidence did so because it was unfavorable to the party's case. Courts that allow a negligent state of mind to warrant the submission of a spoliation instruction tend to reason that the need to deter and punish spoliation is a sufficient basis for the instruction. However, in Texas, the instruction is based on the presumption of wrongdoing, so it follows that the more appropriate requirement is intent to conceal or destroy discoverable evidence.[144]

The court found that "[t]o allow such a severe sanction [such as a permissive adverse inference instruction] as a matter of course when a party has only negligently destroyed evidence is neither just nor

---

140. *Id.* (citations omitted).

141. The court in *Petroleum Solutions, Inc. v. Head* has extended "the restrictions articulated in *Brookshire Brothers* with regard to spoliation instructions [to] also limit a trial court's discretion to issue other remedies akin to death-penalty sanctions, such as striking a party's claims or defenses." *Id.*

142. Trevino v. Ortega, 969 S.W.2d 950, 953 (Tex. 1998).

143. Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 23 (Tex. 2014).

144. *Id.* at 23–24 (citation omitted).

proportionate."[145] The court asserted that this "approach align[ed] with a majority of the federal courts of appeals."[146] The court defined intentional spoliation or "willful" or "bad faith" spoliation as meaning "that the party acted with the subjective purpose of concealing or destroying discoverable evidence."[147] Applying this definition, the court held that there was no evidence that Brookshire Brothers allowed the remaining portions of video to be written over "with the requisite intent to conceal or destroy relevant evidence."[148]

2. The Court Misconstrues the Evidence of Intent

In reviewing the evidence of intent, the court states that "Tyler, the employee who copied the video, testified that he began watching the footage at the 5:00 p.m. time stamp, which corresponded with the approximate time of the incident, and 'played it from there.'"[149] According to the court:

> There is no evidence that a Brookshire Brothers employee viewed any additional footage from that day other than the eight preserved minutes. In turn, there 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 Brothers allowed *all* 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. To the contrary, it is undisputed that Brookshire Brothers preserved exactly what it was asked to preserve—footage of the fall.[150]

Respectfully, the court begins its analysis at the wrong spot. The decision to preserve only eight minutes of video was made by Robert Gilmer, who was in charge of Brookshire Brothers' risk management program. Gilmer was aware that an injured customer was required to prove that "store employees knew or should have known there was something on the floor that caused the fall."[151] Brookshire Brothers had paid for Aldridge to be treated by a neurosurgeon before the remaining portions of the video were written over. After August 23, 2005, when

145. *Id.* at 24.
146. *Id.*
147. *Id.*
148. *Id.* at 27.
149. *Id.* at 27–28.
150. *Id.* at 28.
151. *Id.* at 16.

Aldridge's lawyer wrote back requesting additional video, Gilmer did not inform Aldridge's counsel that the requested video no longer existed, but instead responded by stating: "We are not going to assist you further in helping you build your case."[152] The above testimony constituted at least some evidence that Brookshire Brothers allowed the remaining video footage to be written over in a deliberate effort to hide relevant evidence.[153] In addition, Aldridge asked Brookshire Brothers to see the video of his "fall" and later requested a copy of the video. This request by an unrepresented individual did not define the scope of the preservation duty. The scope of the preservation duty was a legal obligation.[154]

3. "Willful Blindness"

The *Brookshire Bros.* court included in its definition of intentional spoliation the concept of "willful blindness," which covers the scenario in where "a party does not directly destroy evidence known to be relevant and discoverable, but nonetheless 'allows for its destruction.'"[155] Indeed, the court specifically recognized that "[t]he issue of willful blindness is especially acute in the context of automatic electronic deletion systems. 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."[156]

Assuming for argument's sake that there was insufficient evidence of intentional spoliation, the court fails to explain how the remaining portions of the video could not be relevant and discoverable, and accordingly how Brookshire Brothers was not willfully blind in allowing the remaining portions of the videotape to be lost.[157] "It generally is recognized that

152. Jerry Aldridge's Brief on the Merits, *supra* note 15, at 5; *see also* Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 15 (Tex. 2014) (discussing the defendant's initial payment of plaintiff's medical bills after a slip-and-fall incident at one of defendant's stores).

153. Jerry Aldridge's Brief on the Merits, *supra* note 15, at 5–6.

154. *Id.* at 4.

155. *Brookshire Bros.*, 438 S.W.3d at 24.

156. *Id.* at 24 n.17.

157. As stated in the dissent, the Texas Supreme Court has rendered the notion of "willful blindness" ineffective:

> It was Gilmer's conscious and intentional choice not to review or retain any more than the eight minutes of surveillance footage capturing the fall, a choice he made despite his admitted awareness that a key issue in a slip and fall case is whether employees had actual or constructive notice that there was a substance on the floor. And this choice inevitably resulted in the destruction of relevant evidence approximately thirty days after the fall occurred. If the concept of "willful blindness" is to have any meaning, these circumstances must give rise to at least some evidence of "willful blindness," and therefore at least some

when a company or organization has a document retention or destruction policy, it 'is obligated to suspend' that policy and 'implement a 'litigation hold' to ensure the preservation of relevant documents' once the preservation duty has been triggered."[158]

In addition, the court's use of the phrases "willful" and "willfully blind" is problematic. In *Safeco Insurance Co. of America v. Burr*,[159] the United States Supreme Court, addressing the term "willful" in the context of the Fair Credit Reporting Act noted, "'willfully' is a 'word of many meanings whose construction is often dependent on the context in which it appears.'"[160] In *Safeco*, the United States Supreme Court applied the common-law civil liability meaning of willful, holding: "where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well."[161] Given the Texas Supreme Court's emphasis on a party's intentional spoliation of evidence, it is very unlikely that the court meant to include reckless conduct as well, but that is an open question.

4. Prejudice

The court also concluded that "any prejudice to Aldridge resulting from Brookshire Brothers' failure to preserve additional video footage did not rise to the rare level required to justify an instruction in the absence of intentional spoliation."[162] The court stated:

[The] narrow exception to the intent requirement is meant to address

---

evidence that Brookshire Brothers acted with the requisite intent. But as it stands, the Court's assurances that its spoliation framework encompasses instances of "willful blindness" ring hollow given the Court's application of the concept to the facts of this case.

. . . .

. . . The proliferation of electronically stored information and the resulting increasing reliance on retention policies make the concept of "willful blindness" all the more acute. Now more than ever, courts must ensure that companies cannot "blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy." But the Court's application of its spoliation framework opens the door for corporations to do just that. A party may allow for the destruction of relevant evidence, despite notice of circumstances likely to give rise to future litigation, and come away unscathed—an "advantage" of document retention policies already recognized in the document management services industry.

Id. at 37–38 (Guzman, J., dissenting) (citations omitted).

158. Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 524 (D. Md. 2010); Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

159. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 (2007).

160. *Id.*

161. *Id.*

162. Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 28 (Tex. 2014).

> situations akin to those presented in *Silvestri*, in which the only available evidence from which General Motors could develop its defenses—the car in which an air bag allegedly failed to deploy—was irreparably altered before General Motors even had a chance to examine it.[163]

The court erred in evaluating the prejudice component. The court states that "even without the missing video footage, other evidence was available to Aldridge to prove the elements of his slip-and-fall claim."[164] The court stated:

> [T]he portion of the video showing the fall, several minutes before the fall, and one minute after the fall was preserved and shown to the jury at trial. The video showed the activity around the area of the fall, including the actions of various store employees, during this period of time. Aldridge also presented Brookshire Brothers' incident report confirming its conclusion that Aldridge had slipped in grease that leaked out of a container by the Grab-N-Go, which was located near the area of the fall. Finally, Aldridge himself testified at length about the circumstances surrounding his fall. Based on all the available evidence, we hold that Brookshire Brothers' failure to preserve additional video footage did not irreparably deprive Aldridge of any meaningful ability to present his claim.[165]

The court also noted: "Aldridge had to prove that 'it is more likely than not that the condition existed long enough to give the premises owner a reasonable opportunity to discover it.' Temporal evidence is the best indicator of whether the owner could have discovered and remedied the condition."[166]

Although the court rejected Brookshire Brothers' argument that there was legally insufficient evidence to support the constructive notice element of Aldridge's claim, it is difficult to understand how the court offhandedly rejects the importance of such video evidence in a jury trial. The court stated:

> [T]he video does not appear to show a spill or leak occurring during the seven minutes before the fall. Tyler testified that substances reasonably should not remain on the floor of the store for longer than five minutes without being noticed and cleaned up. The video showed store employees walking past the area approximately three minutes and five minutes before Aldridge fell. It also showed an employee signaling for help to clean up the spill right before the video ended, suggesting the spill was too large to be

163. *Id.* (citing Silvestri v. Gen. Motors Corp., 271 F.3d 583, 594 (4th Cir. 2001)).
164. *Id.*
165. *Id.*
166. *Id.* at 30 (citation omitted).

cleaned by paper towels.[167]

Although this additional evidence supports Aldridge's claim, it does not alleviate the fact that a jury may demand more exacting evidence that demonstrates how the spill occurred and whether the condition existed long enough to give the premises owner a reasonable opportunity to discover it. Indeed, Brookshire Brothers' trial counsel argued that the eight-minute video supported the store's position of no liability. With regard to the Brookshire Brothers' incident report supposedly "confirming its conclusion that Aldridge had slipped in grease that leaked out of a container by the Grab-N-Go, which was located near the area of the fall[,]"[168] the court simply ignores the fact that Brookshire Brothers argued "the hypothesis is that a customer picked up a chicken, and grease leaked out of the wrapping onto the floor as the customer walked by . . . [b]ut it is only a hypothesis." [169]

In conducting its prejudice analysis, the court contradicts earlier portions of its opinion.[170] In addition, although the court cites to Justice Baker's analysis in *Trevino* on a number of occasions, *Brookshire Bros.* is a departure from Justice Baker's concurring opinion. He evaluated prejudice by looking at three factors: (1) the relevance of the spoliated evidence to key issues in the case; (2) the harmful effect of the evidence on the spoliating party's case or whether the evidence "would have been helpful

---

167. *Id.*

168. *Id.* at 28.

169. Petitioner's Brief on the Merits, *supra* note 8, at 7.

170. "The spoliation of evidence is a serious issue. A party's failure to reasonably preserve discoverable evidence may significantly hamper the nonspoliating party's ability to present its claims or defenses . . . and can 'undermine the truth-seeking function of the judicial system and the adjudicatory process . . . .'" Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 16–17 (Tex. 2014). "A fundamental tenet of our legal system is that each and every trial is decided on the merits of the lawsuit being tried. After all, reaching the correct verdict is the goal of a fair and impartial judiciary." *Id.* at 13.

> To recover in a slip-and-fall case, a plaintiff must prove . . . that the defendant had actual or constructive knowledge of a dangerous condition on the premises such as a slippery substance on the floor, . . . which may be accomplished with a showing that "(1) the defendant placed the substance on the floor, (2) the defendant actually knew that the substance was on the floor, or (3) it is more likely than not that the condition existed long enough to give the premises owner a reasonable opportunity to discover it[.]"

Id. at 15–16. (citation omitted) (quoting Wal-Mart Stores, Inc. v. Reece, 81 S.W.3d 812, 814 (Tex. 2002)). The Texas Supreme Court has recognized the concept of spoliation "as early as 1852, when we adopted the principle that all things are presumed against the wrongdoer; this is known as the spoliation presumption." *Id.* at 18. "Testimony as to what the lost or destroyed evidence might have shown will not always restore the nonspoliating party to an approximation of its position if the evidence were available; sometimes a picture is indeed worth a thousand words." *Id.* at 17.

to the nonspoliating party's case"; and (3) whether the spoliated evidence "was cumulative of other competent evidence that" may be used instead of the spoliated evidence.[171]

There is little argument that can be made that the missing portions of the video did not contain relevant evidence. Indeed in a remarkably similar set of facts, in *Riley v. Marriott International, Inc.*,[172] the court found that the hotel should have preserved more than seven minutes of video in a slip-and-fall case because "no genuine question exists that video footage depicting the scene of an accident and sweep logs reflecting maintenance performed at the scene of an accident is likely to contain relevant information."[173]

> I agree with the Rileys that the video footage both prior and subsequent to Linda's accident would be relevant to demonstrate the conditions of the floor, how long those conditions persisted and whether Marriott employees had actual or constructive notice of the conditions. Similarly, the sweep logs could demonstrate whether and when Marriott employees had been in the vicinity of the accident on the day in question, which would also be relevant to the issues of actual or constructive notice. Of course, the precise contents of the destroyed evidence will never be known to the Rileys or the Court. Under such circumstances, a finding of prejudice is warranted.[174]

The *Riley* court found the hotel "grossly negligent" in failing to preserve

---

171. Trevino v. Ortega, 969 S.W.2d 950, 958 (Tex. 1998) (Baker, J., concurring).

172. Riley v. Marriott Int'l, Inc., No. 12-CV-6242P, 2014 WL 4794657 (W.D.N.Y. Sept. 25, 2014).

173. *Id.* at *3.

174. *Id.* at *6 (citing Rodgers v. Rose Party Functions Corp., No. 10-CV-4780, 2013 WL 6002375, at *4 (E.D.N.Y. Nov. 12, 2013)).

> [T]he destroyed video recording would likely have revealed whether the steps were wet, how they became wet, whether defendants' employees attempted to clean the steps, and precisely how plaintiff fell. . . . [B]earing in mind the concern expressed by the Second Circuit in *Kronisch* that plaintiffs not be held to too high a burden of proof, I conclude that the video recording destroyed by defendants would have been relevant, and that sanctions are therefore warranted.

Rodgers v. Rose Party Functions Corp., No. 10-CV-4780, 2013 WL 6002375, at *4 (E.D.N.Y. Nov. 12, 2013); *see also* Essenter v. Cumberland Farms, Inc., No. 1:09-CV-0539, 2011 WL 124505, at *5 (N.D.N.Y. Jan. 14, 2011) (providing evidence of weather conditions on the day of the accident that tended to show that the video footage would have been favorable; "it is clear that a video showing the time before, during, and after an incident is relevant to determine what actually happened at the moment the injury occurred"); Klezmer *ex rel.* Desyatnik v. Buynak, 227 F.R.D. 43, 50–51 (E.D.N.Y. Jan. 21, 2005) (maintenance log for day of accident was relevant to the condition of the vehicle on the day of the accident and defendant's knowledge of the condition, and plaintiff was prejudiced by its destruction); Disler v. Target Corp., No. 3:04-CV-191, 2005 WL 2127813, at *27 (E.D. Tenn. Aug. 31, 2005) (holding the contents of destroyed footage, although unknown, were relevant to plaintiff's claims and could have supported her version of events; plaintiff was thus prejudiced by its destruction).

additional portions of videotape and cleaning logs, but nevertheless concluded:

> [T]he striking of Marriott's answer is too drastic a remedy under the circumstances of this case and . . . that an adverse inference instruction is both appropriate and sufficient to deter Marriott from similar future conduct, to shift the risk of an erroneous judgment to Marriott and to restore the Rileys' position in this litigation.[175]

In the absence of the remaining portions of the Brookshire Brothers video, it is uncertain whether the remaining evidence would have been "harmful" to Brookshire Brothers or "helpful" to Aldridge. In all likelihood, the spoliated evidence was not cumulative of the other evidence in the case. Brookshire Brothers denied that any spill was on the premises for any length of time and argued that it was just a hypothesis that chicken grease spilled from a container.[176] The finding of whether evidence is cumulative will be difficult in some cases because testimony regarding what the spoliated evidence might have shown will not be as persuasive as the absent evidence. As the court states, "sometimes a picture is indeed worth a thousand words."[177]

In announcing its new framework of spoliation analysis for bench consideration, the Texas Supreme Court urges the trial court to exercise caution in evaluating the cumulative nature of the evidence because the spoliating party can often argue that the destruction of video, emails, or photographs results in no prejudice where there is witness testimony concerning the substance of the missing evidence.[178] However, the court points out the inherent problems with such testimony when there is inaccurate memory, poor eyesight, and bias.[179]

---

175. *Riley*, 2014 WL 4794657, at *7.

176. *See* Petitioner's Brief on the Merits, *supra* note 8, at 7 ("[T]he hypothesis is that a customer picked up a chicken, and grease leaked . . . onto the floor[, and] . . . there is no evidence of how long the grease may have been on the floor.").

177. Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 17 (Tex. 2014).

178. *See id.* at 22 (cautioning trial courts to evaluate prejudice and to recognize that "a spoliating party might argue that no prejudice resulted from spoliation of a video of an incident because there is also eyewitness testimony regarding the incident").

179. In *Wackenhut Corp. v. Gutierrez*, a case involving the loss of video in an automobile accident case, the Texas Supreme Court reiterated that a trial court may submit a jury "instruction only if it finds that (1) the spoliating party acted with intent to conceal discoverable evidence, or (2) the spoliating party acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense." Wackenhut Corp. v. Gutierrez, 453 S.W.3d 917, 918 (Tex. 2015). In *Wackenhut*, the Texas Supreme Court concluded there was no irreparable injury or prejudice because both drivers, a responding police officer, and an eyewitness testified at trial. Witness statements were made by the drivers and the witness at the time of the accident. Also,

F. *When Can Spoliation-Related Evidence Be Heard by a Jury?*

The Texas Supreme Court's restriction on the admission of evidence regarding spoliation is a surprising departure from existing law. Because the trial court determines whether spoliation occurred and the remedy, the supreme court holds that evidence bearing solely on whether a party spoliated evidence or the degree of culpability is irrelevant to the merits of the case and should not be admitted.[180] The court explains the necessity of this departure is because of the tendency of spoliation evidence to skew the focus of the trial from the merits to the conduct of the spoliating party.[181] The court does recognize that evidence regarding the content of the spoliated evidence that is relevant to a claim or defense would be admissible.[182] This evidence would be absolutely critical in assisting the jury in understanding the nature of the spoliated evidence and the inference to be drawn from its destruction. But the Texas Supreme Court is clear that evidence unrelated to the merits of the case that "serves only to highlight the spoliating party's breach and culpability" should not be heard by the jury.[183]

The court appears to acknowledge that evidence regarding what the missing video would have shown, including testimony about the cleanup, is admissible.[184] Likewise some testimony regarding the creation of the video was appropriate as background.[185] But testimony relevant to whether Brookshire Brothers intentionally breached its duty to preserve evidence was improperly admitted.[186] According to the court, substantial focus at trial was on the spoliation in this case and accusations that Brookshire Brothers hid evidence and acted deceptively.[187]

---

photos of the vehicles and the accident scene were introduced, as well as extensive medical records. *Id.*

180. *See Brookshire Bros.*, 438 S.W.3d at 28 (finding the trial court erred when it admitted evidence to highlight the Brookshire Brothers' culpability).

181. *See id.* at 29 ("[T]his case typifies the manner in which the focus of the trial can impermissibly shift from the merits of the case to the spoliating conduct when [guidelines and clarity are] missing.").

182. *See id.* at 28–29 (explaining that evidence regarding the content of the spoliated evidence is not problematic).

183. *Id.* at 26.

184. *See id.* at 28 (acknowledging evidence "relating to what the missing video would have shown" is admissible).

185. *See id.* at 28–29 (finding that information about the creation of the video is relevant to build a background of information for the jury).

186. *See id.* at 29 ("[T]estimony that is relevant only to the issues of whether Brookshire Brothers breached a duty to preserve evidence or acted with requisite intent was improperly admitted.").

187. *See id.* (referencing the record and highlighting the incidents related to accusations and

Unfortunately, many questions will arise over the parameters of the evidence that should be admitted.

G. *In the Exceptional Case Where Intentional Destruction of Evidence Is Found by the Trial Court, What Would Any Jury Instruction Look Like?*

Given the importation of the *TransAmerican Natural Gas Corp. v. Powell*[188] sanction analysis and the Texas Supreme Court's reference to a spoliation instruction as equal to a death-penalty sanction, it is likely that few cases will warrant the submission of an instruction.[189] Although the Texas Supreme Court determined when such an instruction may be given, it failed to provide guidance on the content of such an instruction. Theoretically because the trial court makes the determination of duty and breach, the jury is being instructed about how to consider the lack of evidence. In federal courts, the instruction is normally submitted and referred to as an adverse inference instruction.[190]

To assist the jury in federal court in applying such an instruction, sufficient evidence of the nature of the evidence that was spoliated must be introduced. In *Rimkus Consulting Group, Inc. v. Cammarata*,[191] a case referenced in the *Brookshire Bros.* decision, the court submitted an adverse inference instruction to the jury concerning the destruction of emails by the defendant.[192] The *Rimkus* court noted: "[S]ome extrinsic evidence of the content of the emails is necessary for the trier of fact to be able to determine in what respect and to what extent the emails would have been detrimental."[193]

In the Texas courts, historically, if a party deliberately destroyed relevant evidence it raised "a presumption that the evidence would have been

---

allegations of deceptive behavior and finding this substantially affected the focus of the case).

188. TransAm. Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991).

189. *Id.* at 919 ("There are cases, of course, when striking pleadings, dismissal, rendition of default and other such extreme sanctions are not only just but necessary . . . . [H]owever, the record before us establishes that the severe sanctions the district court imposed against TransAmerican were manifestly unjust in violation of Rule 215."). *TransAmerican* involved the failure of its president to appear for his deposition. Without hearing oral argument the trial court granted a motion for sanctions, struck TransAmerican's pleadings, and rendered a default judgment. *Id.* at 915–16.

190. *See* Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598, 615–16 (S.D. Tex. 2010) (discussing the elements that federal courts consider for establishing an adverse inference instruction).

191. Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598 (S.D. Tex. 2010).

192. *See id.* at 608 ("[T]he appropriate sanction is to allow the jury to hear evidence of the defendants' conduct-including deleting emails and attachments and providing inaccurate or inconsistent testimony about them—and to give the jury a form of adverse inference instruction.").

193. *Id.* at 617.

unfavorable to the cause of the spoliator."[194] The spoliator was then "required to rebut all inferences of fraudulent intent or purpose."[195] The presumption was not treated as "evidence, but rather a rule of procedure or an 'administrative assumption,'" which vanished when positive evidence was introduced.[196] If the presumption was not rebutted, the presumption could then "fully establish a fact in issue, not as evidence, but as an artificial legal equivalent."[197]

However, in light of the Texas Supreme Court's opinion, there is no opportunity for the jury to hear from the spoliator any evidence that may rebut any inference of fraudulent intent or purposes.[198] That evidence was all heard and considered by the trial court. As stated by the dissent:

> [T]he Court imposes new and significant restrictions on the trial court's discretion to submit a spoliation instruction to the jury. In essence, after today, trial courts may submit one, and only one spoliation instruction to the jury: an instruction that the trial court has found intentional spoliation has occurred, and therefore the jury must presume the evidence is harmful. All "milder" instructions, which permit the jury to exercise its judgment regarding the potential harm of the lost evidence to the spoliator's case, would require the jury to weigh the evidence of spoliation.[199]

Prior to *Brookshire Bros.*, in a hypothetical slip-and-fall case, if the trial court had made all the appropriate findings to support the submission of a spoliation instruction, at trial both parties would submit evidence regarding what the missing video would show.[200] To give the jury context, some evidence would be presented to the jury that the defendant store did not retain all the video. Armed with that evidence, the jury would be instructed that it may consider that the videotape would be harmful to the defendant store on the issue of notice. If the defendant store did not put on any evidence that the missing video would not have been harmful to its case, then the spoliation presumption is unrebutted and an instruction could be submitted that the jury may consider the

194. Wal-Mart Stores, Inc. v. Middleton, 982 S.W.2d 468, 470 (Tex. App.—San Antonio 1998, pet. denied); H.E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340, 344 (Tex. Civ. App.—Waco 1975, writ dism'd).

195. *Bruner*, 530 S.W.2d at 344.

196. *Id.*

197. *Id.*

198. *See* Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 28 (Tex. 2014) (holding the trial court erred because it permitted a presentation of evidence attempting to explain the circumstances around spoliation of a video).

199. *Id.* at 34 (Guzman, J., dissenting) (emphasis omitted).

200. *See id.* at 29 (majority opinion) (alluding to the past treatment of spoliation and asserting the current opinion is a development of common law).

evidence unfavorable on the issue of notice.

It remains an open question what the majority was concluding regarding the contents of any spoliation instruction. If the dissent is correct, the only instruction to be given to a jury is an instruction that the trial court has found intentional spoliation has occurred, and therefore the jury must presume the lost evidence would have been harmful to the spoliator.[201] But the majority opinion contains vague language that may suggest otherwise. The majority states:

> [T]o the extent permitted by the Texas Rules of Evidence, parties may present indirect evidence to attempt to prove the contents of missing evidence that is otherwise relevant to a claim or defense, such as a person's testimony about the content of a missing document, photo, or recording.[202]

The application of this language, however, is problematic in the context of intentional spoliation findings by the trial judge. If the trial court found intentional spoliation as a matter of law, it would appear that there is no question of fact that requires resolution by the jury.

X. *BROOKSHIRE BROS.* AND THE PROPOSED AMENDMENT TO FEDERAL RULE OF CIVIL PROCEDURE 37

Although the Texas Supreme Court does not explicitly state in its opinion that it was trying to mirror Proposed Federal Rule of Civil Procedure 37, that appears to be the attempt. The attempt, however, will not produce similar results. The Judicial Conference Committee on Rules of Practice and Procedure has proposed amending Federal Rule of Civil Procedure 37.[203] The proposal has been approved by the Judicial Conference and is pending review before the United States Supreme Court.[204] Assuming the Supreme Court approves the proposal and there is no congressional opposition, the rule would be effective December 1, 2015. Proposed Rule 37(e) provides:

> 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

201. *See id.* at 34 (Guzman, J., dissenting) (asserting that intentional spoliation is not provided a "lesser remedy" because a spoliation instruction must be given).

202. *Id.* at 26 (majority opinion) (citations omitted).

203. COMM. ON RULES OF PRACTICE AND PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 7 (Sept. 2014), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf.

204. *See id.* at 13 (reporting on the final approval by the Committee and the subsequent submission of the proposal to the Supreme Court).

> 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.[205]

At first blush the framework appears similar. The trial court determines whether the duty to preserve was violated and then decides the appropriate sanction.[206] The proposed Committee Note to Rule 37(e), however, states, in relevant part, the following with regard to subdivision (e)(1):

> In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.[207]

With regard to subdivision (e)(2), the proposed Note states, in relevant part, as follows:

> Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction that directs or permits the jury to

205. COMM. ON RULES OF PRACTICE AND PROCEDURE, PROPOSED RULE 37(E): FAILURE TO PRESERVE ESI 318 (May 29–30, 2014), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf.

206. *See id.* at 319 ("In applying the rule, a court may need to decide whether and when a duty to preserve arose.").

207. *Id.* at 321.

> infer from the loss of information that it was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.[208]

"Subdivision (e)(2) does not include an express requirement that the court find prejudice to the party deprived of the information."[209] This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

> Courts should exercise caution in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.[210]

The proposed Federal Rule 37 resolves the concern expressed by the dissent in *Brookshire Bros.* It provides the trial court the opportunity to fashion appropriate sanctions in an intentional spoliation case, providing more leeway than merely giving the jury a mandatory adverse inference instruction.[211] With regard to negligent spoliation cases, the trial court is again provided leeway in fashioning appropriate sanctions, and juries are allowed to hear evidence and argument regarding the loss of information, and juries may receive instructions—other than (e)(2) instructions—to

208. *Id.* at 322.
209. *Id.* at 323.
210. *Id.* at 322–23.
211. *Id.* at 324 (listing curative measures for failing to preserve discoverable information).

assist in their evaluation of such evidence or argument.[212]

XI. CONCLUSION

Spoliation in the context of electronically stored information remains a challenging area of the law. The spoliation of evidence raises competing concerns in any case. It can deny the fact finder relevant evidence to fairly decide a case. It can also shift the focus of a case away from the merits to the alleged bad conduct of the spoliator. There is, however, a large gray area that encompasses most cases, and it is necessary for the trial court to exercise its discretion in addressing the uniqueness of each case.

The facts of *Brookshire Bros.* support findings that the grocery store had a duty to preserve at least several hours of videotape, that the loss of video was done intentionally or at least with "willful blindness," and that Aldridge suffered prejudice from the loss of evidence. The vagueness of the opinion may unknowingly cause litigants to misconstrue their preservation obligations. The use of this case to re-craft years of precedent was inadvisable and the court would have been better served to refer the issues of appropriate sanctions and appropriate jury instructions to the court's Rules Advisory Committee. No doubt that if proposed Federal Rule of Civil Procedure 37 is enacted, there will be considerable discussion in the cases interpreting the new rule as to what ESI should have been preserved, what constituted reasonable steps to preserve, whether alternative information exists to adequately replace the lost information, and what evidence is required to determine that a party acted with the intent to deprive another party of the information's use in the litigation. Given the uniqueness of each individual case, this should not come as a surprise. A framework is necessary to help guide the judiciary, litigants, and juries in this area.

However, creating this framework in a case with quite shaky foundations was ill advised, even if well intended. Moreover, as noted by the dissent in *Brookshire Bros.*, by circumventing the rule-making process, "the [c]ourt severely restricts the input of the bench, academy, and bar on what the contours of the spoliation rule should be."[213]

A better result can and should be crafted with more input from more sources than the limited record before the court and the briefs of the parties and amicus participants in *Brookshire Bros.* Hopefully, the Texas

212. *See id.* at 325 (explaining that the amendment does not provide a "bright line" test for spoliation cases, but instead provides directives for the court to weigh in "calibrating its response").

213. Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 38 (Tex. 2014) (Guzman, J., dissenting).

Supreme Court will provide its Rules Advisory Committee an opportunity to re-visit this framework to provide broader and more explicit guidance. In the interim, individuals, companies, and counsel would be well advised not to read too much into the majority opinion regarding the appropriate scope of the preservation duty in light of the vagueness in key parts of the opinion.