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Hot Cases and Emerging Law: Spoliation in Texas

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I. Introduction

On July 3, 2014, the Texas Supreme Court issued its opinion addressing spoliation in the long awaited case of *Brookshire Brothers, Ltd. v. Aldridge*, __S.W.3d ___, 2014 WL 2994435 (Tex. July 3, 2014).¹ In *Brookshire Brothers* the supreme court enunciated standards governing spoliation and the parameters of the trial court's discretion to impose a remedy for spoliation.² The supreme court had last addressed spoliation before the explosion of digital evidence and electronically stored information (ESI),³ and frustration over the increasing problems with producing and storing ESI was mounting in both state and federal courts.⁴ The supreme court thus set to work to "bring much needed clarity to our state's spoliation jurisprudence".⁵

Ironically, although claims of spoliation related to ESI often form the basis of federal district and appellate opinions, spoliation of videotape footage was at issue in *Brookshire Brothers*. The Tyler Court of Appeals had upheld a spoliation instruction against Brookshire based on the prejudice plaintiff suffered by the destruction of video footage that might have some bearing on how long grease

1 The case was argued before the supreme court in September of 2012. The trial court's final judgment was signed in June 2008 and the Court of Appeals issued its opinion in July 2010. *Brookshire Brothers v. Aldridge*, No 12-08-00368-CV, 2010 WL 2982902 rev'd *Brookshire Brothers, Ltd. v. Aldridge*, __S.W.3d ___, 2014 WL 2994435 (Tex. July 3, 2014).

2 *Brookshire Brothers, Ltd.* at *1.

3 *Cire v. Cummings*, 134 S.W.3d 835 (Tex. 2004); *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W. 3d 718, 721 (Tex. 2003).

4. *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 214 (S.D.N.Y. 2003) (recognizing the increased difficulties in the area of spoliation due to the rise in the use of electronic information); Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683, 696-98 (2009) (listing the challenging features of electronic evidence, including "electronic evidence is more voluminous and easier to duplicate, is more difficult to delete, constantly changes formats, contains hidden metadata, can be dependent on a particular computer system, and is dispersed across different file formats and storage devices"); see Bennett B. Borden et al., *Four Years Later: How the 2006 Amendments to the Federal Rules Have Reshaped the E-Discovery Landscape and are Revitalizing the Civil Justice System*, 17 RICH. J.L. & TECH. 10, ¶ 3 (2011) ("The immense volume of potentially relevant evidence has driven the cost of finding, reviewing, and producing that information to unprecedented heights, threatening the very purposes of our civil justice system."); Damian Vargas, Note, *Electronic Discovery: 2006 Amendments to the Federal Rules of Civil Procedure*, 34 RUTGERS COMPUTER & TECH. L.J. 396, 398 (2008) (citing a 2006 survey that noted "a company of 100,000 employees may store an average of 1.5 billion emails annually"); THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 1 (Jonathan Redgrave et al. eds., 2005), available at http://www.thesedonaconference.org/dltForm?did=7_05TSP.pdf (estimating that in 2005, more than 90% of all information was created electronically).

⁵ *Brookshire Brothers, Ltd.* at *1.

may have been on the floor.⁶ In *Brookshire* the supreme court took the opportunity to reconfirm certain spoliation principles derived from the analytical framework suggested by Justice Baker in his seminal concurrence in *Trevino v. Ortega*.⁷ Recognizing the trial court's discretion to remedy spoliation, the Court imported principles from *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2nd 913 (Tex. 1991) in analyzing the appropriateness of the sanctions imposed for spoliation. Although *Brookshire Brothers* confirmed much of current appellate court analysis of spoliation, the supreme court's direction to limit the evidence of spoliation during trial will create much uncertainty for both trial courts and practitioners. This paper will focus on an analysis of *Brookshire Brothers* and *Petroleum Solutions, Inc. v. Head*, --- S.W. 3d---,2014 WL 3511509 (Tex. July 11, 2014) in the context of existing spoliation law and the questions raised by these opinions. It will also offer suggestions for a spoliation instruction under the new framework outlined in *Brookshire Brothers*.

II. *Brookshire Brothers* Facts

Because the application of the supreme court's spoliation framework is fact specific a detailed review of the facts underlying the *Brookshire Brothers* case is necessary. Plaintiff Jerry Aldridge slipped and fell on grease near a display that featured packaged rotisserie chickens referred to as the Grab-N-Go display. At the time Aldridge did not claim he was injured and the store conducted no investigation. A few hours later, however, Aldridge experienced severe pain and went to an emergency room. A few days after the fall Aldridge returned to the store and reported his injuries and an incident report was prepared.

The store's video camera captured the fall but because of the camera's placement by a display table, the floor where Aldridge fell was obscured. After the incident was reported, Brookshire Brothers retained an eight-minute segment of the entire day's video beginning just before Aldridge entered the store and concluding just after his fall.⁸ Although not discussed in the majority opinion the dissent points out Aldridge requested a copy of the video footage of his fall less than one week after reporting his injuries.⁹ Brookshire Brothers denied Aldridge's request for the video approximately two weeks later and subsequently allowed the automatic erasure of the entire day's footage less the eight-minute segment.¹⁰ Thus, when Aldridge's attorney requested copies of the additional footage beyond the eight minutes, Brookshire

6. *Brookshire Brothers v. Aldridge*, No 12-08-00368-CV, 2010 WL 2982902 (Tex. App. Tyler July 30 2010, rev'

7. 969 S.W.2d 950 (Tex. 1998)(Baker J. concurring)

8. *Brookshire Brothers, Ltd. v. Aldridge*, --- S.W.3d ---, 2014 WL 2994435 (Tex. July 3, 2014) at *2.

9 Id. At *17

10 Id.

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