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**The Dog Ate My Evidence: Spoliation Under the  
New Texas Framework**

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## BACKGROUND, EDUCATION AND PRACTICE

Rebecca Simmons is Associate General Counsel of Acelity in San Antonio, Texas responsible for Acelity's global litigation. She is the former judge of the 408<sup>th</sup> district court in Bexar County and former justice of the Fourth Court of Appeals. Justice Simmons continues her judicial service by special assignment at both the trial court and appellate level.

Justice Simmons attended Baylor Law School where she served as a notes and comments editor on the Baylor Law Review. Following law school she served as a briefing attorney for the Texas Supreme Court and then began her practice in San Antonio. Prior to going on the bench in 2003, Rebecca practiced at the firm of Akin, Gump, Strauss, Hauer & Feld LLP where she focused on complex litigation.

Having a great interest in technology Rebecca chairs the Judicial Committee on Information Technology which is focused on implementing e-filing in Texas. She is an adjunct professor of law at St. Mary's School of Law, and the author of numerous articles on topics ranging from Cloud Technology and Apps for Judges to Pleas to the Jurisdiction and Spoliation. She is a member of the Pattern Jury Charge Committee and the Litigation Council; is a Director of the State Bar of Texas, and was recently selected as one of twenty 2014 Texas Lawyer Winning Women of Texas.

# The Dog Ate My Evidence: Spoliation Under the New Texas Framework

## 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*, 438 S.W.3d 9 (Tex. 2014).<sup>1</sup> 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.<sup>2</sup> It had been ten years since the supreme court had last addressed spoliation, and frustration over the increasing problems with producing and storing ESI was mounting in both state and federal courts.<sup>3</sup> The supreme court thus applied itself work to "bring much needed clarity to our state's spoliation jurisprudence."<sup>4</sup> Not everyone agrees, however, that clarity has emerged from *Brookshire Brothers*.<sup>5</sup>

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 may have been on the floor.<sup>6</sup> 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*.<sup>7</sup> Recognizing the trial court's discretion to remedy spoliation, the Court imported principles from *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991) in analyzing the

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<sup>1</sup> 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 Bros. v. Aldridge*, No 12-08-00368-CV, 2010 WL 2982902, rev'd *Brookshire Brothers, Ltd. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014).

<sup>2</sup> *Brookshire Bros.*, 438 S.W.3d at 14.

<sup>3</sup> *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](http://www.thesedonaconference.org/dltForm?did=7_05TSP.pdf) (estimating that in 2005, more than 90% of all information was created electronically).

<sup>4</sup> *Brookshire Bros.*, 438 S.W.3d at 14.

<sup>5</sup> Hon. X. Rodriguez, *Brookshire Bros: Clean Up on Aisle 9. The Current Messy State of Spoliation Law*, 46 S. Mary's L.J. 477 (2015).

<sup>6</sup> *Brookshire Bros. v. Aldridge*, No 12-08-00368-CV, 2010 WL 2982902 (Tex. App. –Tyler).

<sup>7</sup> *Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 1998)(Baker J. concurring)

appropriateness of the sanctions imposed for spoliation. Although *Brookshire Brothers* confirmed much of current appellate court analysis of spoliation, the supreme court's move to limit the availability of a spoliation instruction as well as 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* subsequent cases in the context of existing spoliation law and the challenges 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.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> Thus, when Aldridge's attorney requested copies of the additional footage beyond the eight minutes, Brookshire Brothers was unable to produce the video. The dissent also notes that Brookshire Brothers continued to cover Aldridge's medical expenses for nearly a year before denying responsibility for the incident.<sup>12</sup>

Aldridge argued in the trial court that the destruction of the extra footage after he had requested the video tape amounted to spoliation and that he was entitled to a spoliation instruction. The trial court permitted the introduction of evidence regarding the destruction of the video tape and through its instruction permitted the jury to decide whether spoliation had occurred and the inference to be derived therefrom.<sup>13</sup> The trial court submitted the following instruction:

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

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<sup>8</sup> *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014) at \*2.

<sup>9</sup> *Id.* at 15.

<sup>10</sup> *Id.* at 31.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Brookshire Bros., No. 12-08-00368-CV*, 2010 WL 2982902, at \*9 (Tex. App.—Tyler July 30, 2010), rev'd *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014).

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