"My Dog Ate It"

Spoliation of Evidence and the Texas Supreme Court's *Ortega* Decision

You represent the plaintiff in a manufacturing defect case involving an oil field drilling platform. After the platform fails, it is stored in a shipyard. During the course of discovery, you learn that a shipyard employee mistakenly sold as scrap a key part of the platform. Are you going to file a separate lawsuit against the shipyard, asserting a cause of action for spoliation of evidence?

BY STEVEN R. SELSBERG AND MAELISSA BRAUER LIPMAN

You are drafting a "Document Retention Policy" for a manufacturer of pharmaceutical products. One of the key issues is how long the client must retain files regarding the research and testing of a new product. Your client wants to know whether a duty to retain the files exists under Texas law and, if so, what the consequences are if the duty is breached.

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You represent the defendant in a medical malpractice case. The plaintiff, who brought your client the only copy of her medical records, claims that the records specifically noted the plaintiff's allergy to a dye. Your client remembers reviewing the records, but denies that any such allergy was noted. Unfortunately, her ex-spouse maliciously burned the files in the heat of a post-divorce argument. Your client loses the malpractice case at trial. Can your client sue the ex-spouse for spoliation?

Spoliation of evidence is the destruction or alteration of evidence.[1] A few states recognize spoliation as an independent cause of action; Texas has not. Recently, in *Trevino v. Ortega*, the Texas Supreme Court held that Texas does not recognize spoliation of evidence as an independent cause of action between parties to litigation.[2] The court did not consider, however, whether spoliation victims have a cause of action against non-party spoliators.[3]

This article first reviews the two *Ortega* appellate decisions. Next, it addresses both sides of the spoliation debate, concluding that, even with *Ortega* as the law, Texas should adopt a tort of spoliation of evidence against non-party spoliators who have acted intentionally. While, as *Ortega* held, traditional remedies such as pretrial sanctions or a jury instruction may adequately punish party spoliators, these remedies may not be available against non-party spoliators and therefore may leave spoliation victims remediless. For policy reasons detailed herein, an independent tort against non-party spoliators should be limited to spoliators who have acted intentionally. Finally, this article proposes elements of a spoliation cause of action against a non-party who has acted intentionally.

ORTEGA'S FACTS AND PROCEDURAL HISTORY

The Corpus Christi Court Of Appeals Breaks New Ground

In 1988, Genaro Ortega, on behalf of his minor daughter Linda, brought a medical malpractice suit ("*Ortega* I") against Dr. Jorge Trevino, owner of the McAllen Maternity Clinic, and Dr. Miguel Aleman. Ortega alleged that as a result of the doctors' negligence Linda was injured at birth. Eleven years later, *Ortega* I was still pending.

In 1994, Ortega, again on Linda's behalf, brought a second suit ("*Ortega* II") against Drs. Trevino and Aleman, alleging that Dr. Trevino, as the custodian of medical records for McAllen Maternity Clinic, intentionally, recklessly, or negligently lost or destroyed Linda's medical records.[4] Ortega contended that Trevino had a duty to preserve and maintain Linda's medical records.[5] Ortega asserted that Drs. Trevino and Aleman breached this duty by losing or destroying records.[6] Ortega claimed that without these records he suffered an "insurmountable hardship in the preparation of" *Ortega* I.[7] Ortega requested damages in the amount that he would have recovered in *Ortega* I but for the loss or destruction of the medical records.[8]

In response, Trevino filed an answer and special exceptions, arguing that Ortega's petition failed to state a cause of action because Texas does not recognize the tort of spoliation of evidence.[9] The trial court sustained the special exceptions and dismissed the case.[10] Ortega appealed, arguing that he pled a cognizable cause of action for either intentional or negligent spoliation of evidence, or for common-law negligent destruction of evidence.

The appellate court held, for the first time in Texas, that in an appropriate factual situation, policy reasons dictate that Texas should recognize an independent tort for spoliation of evidence.[11] The court, however, neither differentiated between claims of "intentional" or "negligent" spoliation of evidence, nor set forth elements of a spoliation claim.

THE TEXAS SUPREME COURT REVERSES, HOLDING THAT TEXAS DOES NOT RECOGNIZE AS AN INDEPENDENT CAUSE OF ACTION SPOLIATION OF EVIDENCE BY PARTY SPOLIATORS.

The Texas Supreme Court's Eight-Justice Majority Opinion — The *Orte-*

ga majority rejected, as between parties, an independent tort of spoliation of evidence. The court found that spoliation does not give rise to independent damages and therefore is best remedied within the lawsuit affected by the spoliation.[12] The court noted the number of other jurisdictions declining to recognize a spoliation cause of action.[13]

In rejecting a spoliation tort, the court compared causes of action for spoliation to one for embracery[14] or perjury.[15] The supreme court explained that civil perjury or civil embracery is like spoliation of evidence because both involve improper conduct by a party or a witness within the context of an underlying lawsuit.[16] The court noted that many other jurisdictions do not recognize a cause of action for civil crimes. Jurisdictions rejecting civil perjury or civil embracery as an independent claim rely on public policy concerns of (i) ensuring finality of judgments, (ii) avoiding duplicative litigation, and (iii) the difficulty in calculating damages.[17] Adoption of a spoliation of evidence tort, the court found, would trigger these same public policy concerns.[18]

The *Ortega* court also relied upon the remedies party spoliation victims currently possess. In particular, the court cited the availability of a jury instruction (*see infra*) and discovery sanctions, including "death penalty" sanctions.[19]

Justice Baker's Detailed Concurrence — Justice Baker, in his concurring opinion, also rejected an independent spoliation tort but addressed in detail Ortega's claim that existing remedies for spoliation of evidence are inadequate.[20] Ortega contended that: (i) Texas' remedies only address intentional destruction of evidence, (ii) the spoliation presumption and jury instruction are inadequate, and (iii) Texas has no method to remedy prelitigation spoliation.[21]

In response, Justice Baker examined the duty to preserve evidence, breach of that duty, and prejudice to the spoliation victim's ability to present a case.[22] First, Justice Baker noted that parties may have a statutory, regulatory, or ethical duty to preserve evidence.[23] He opined that a duty to preserve arises before litigation begins, when a party is "on notice" of litigation. Under *National Tank Co. v. Brotherton*,[24] Justice Baker noted, a party is on notice of potential litigation when, after viewing the totality of the circumstances, the party either actually anticipated litigation or a reasonable person in the party's position would have anticipated litigation.[25] With respect to the scope of the duty to preserve once it arises, Justice Baker concluded that the only evidence that a party must preserve is that which is relevant to the litigation.[26] Regarding breach of duty, Justice Baker maintained that parties should be responsible for both negligent and intentional spoliation.[27]

Justice Baker found that the spoliation victim should be entitled to a remedy only *if* spoliation has prejudiced its case.[28] In that regard, a spoliation victim need only demonstrate that the destroyed evidence was relevant, with the court "deferring" to the spoliation victim's assertions of relevance.[29] If the spoliator acted negligently, the spoliation victim must prove what the evidence would have shown.[30] Moreover, Justice Baker noted that a spoliator may defend against an assertion of spoliation by arguing that the spoliation was either beyond the spoliator's control or was done in the "ordinary course of business."[31]

Justice Baker noted that courts must make sanctions decisions on a case-by-case basis, with the court choosing from a number of options.[32] He cited dismissal or default judgment, and exclusion of evidence or testimony,[33] as two of those options.[34] Justice Baker further noted that courts can submit one of two spoliation jury instructions allowing the jury to make a "presumption."[35] The first, a rebuttable presumption, permits the trial court to first instruct the jury that the spoliating party has either negligently or intentionally destroyed evidence and the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue the destroyed evidence may have supported.[36] Then, the court should instruct the jury that the spoliating party has the burden to disprove the presumed fact or issue.[37] The second, an "adverse presumption," allows the jury to simply assume the evidence would have been unfavorable to the spoliating party.[38]

EVEN WHEN USED IN COMBINATION, TRADITIONAL SPOLIATION REMEDIES MAY NOT COMPENSATE VICTIMS OF SPOLIATION, ESPECIALLY WHEN THE SPOLIATOR IS NOT A PARTY.

While an independent spoliation cause of action may not always be necessary to compensate victims of spoliation, the traditional spoliation remedies that Justice Baker discussed may not make whole the spoliation victim or may operate unfairly when the spoliator is a non-party. The *Ortega* court did not examine non-party spoliation — it was not an issue in *Ortega*; however, non-party spoliation presents more difficult spoliation issues.

Jury Instructions

First, an instruction allowing the jury to presume that destroyed evidence favored the non-destroying party may be inadequate, particularly when the spoliator is a non-party. The spoliation inference may not be used directly against a non-party spoliator. The jury thus may be precluded from holding, or may not want to hold, the party against whom the inference is drawn directly responsible for another's spoliation act (and therefore ignore the instruction). More importantly, with non-party spoliation, if the jury makes the presumption, the victim of the spoliation instruction is punished for the spoliator's act and left without a remedy against the truly culpable party. Moreover, even when the spoliator is a party, an instruction may not have the same impact or chance of success as compelling the jury to make actual findings on a spoliation claim.[39] Simply put, the jury may not heed the instruction.

Criminal Penalties

The imposition of a criminal penalty for destruction of evidence under section 37.09 of the Texas Penal Code does not provide relief to a spoliation

victim.[40] Section 37.09 provides that one commits the offense of tampering with physical evidence if, knowing that an investigation or official proceeding is pending or in progress, one alters, destroys, or conceals any record, document, or other thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding.[41] Even if the victim of spoliation can convince a district attorney to prosecute a spoliation case, which is unlikely because section 37.09 has rarely, if ever, been applied in a civil case,[42] a conviction only punishes the spoliator. It does not compensate the victim.

Pretrial Sanctions

Pretrial sanctions for "discovery abuse" frequently do not remedy spoliation problems for a number of reasons. First, discovery sanctions may not be available if the spoliator is not a party to the underlying lawsuit. Second, even if discovery sanctions are available, courts traditionally have been reluctant to impose sanctions, particularly when a significant amount of money is at stake. Third, because sanctions represent a court-ordered punishment, there is more discretion than simply having the aggrieved party select a fact finder to apply the evidence to a spoliation cause of action. Finally, sanctions may not adequately compensate the victim when the destroyed evidence is critical to the case.

ISSUES RAISED BY ESTABLISHING A NON-PARTY SPOLIATION TORT

Although it fills a gap in the law, an independent tort of spoliation against non-party spoliators raises several complex issues. First, imposing a duty upon an owner or handler of evidence to retain or protect the evidence and developing the scope, timing, and application of the duty may lead to uncertainty and conflicting results. Second, an independent spoliation tort is not warranted unless the spoliation causes outcome-determinative damage in an underlying lawsuit; the existence of spoilation, alone, should not lead to recovery. Last, there are compelling policy reasons for limiting an independent spoliation cause of action to non-party spoliators who have acted intentionally, and not expanding it to apply to non-party spoliators who have acted negligently.

Defining the Duty To Retain Evidence.

As Justice Baker alluded to in *Ortega*, there are at least two problems with imposing a duty upon an owner to retain or protect personal property for the use of another in a lawsuit. First, there is uncertainty. Unless there is an agreement[43] or contract between the parties,[44] a state statute or regulation,[45] or other clearly defined circumstance, there will be confusion as to when a duty exists, who owes the duty, and the scope of the duty. As with the development of any new area of common law, courts may interpret the "duty question" differently. Second, it is possible that individuals and entities may retain too much in an attempt to avoid litigation, prompting public policy concern. As one court has stated:

> Since every accident causing personal injury and/or property damage involves the probability of a lawsuit, including numerous foreseeable and unforeseeable defendants, the owner of all wrecked cars will now be forced to store the wreck (or drive the partially damaged car without repair) for an indefinite period of time. The absurdity of this scenario is self-evident considering the logistical problems of keeping track of tens of thousands of piled up vehicles, the vast expense of storage fees, the hardship worked upon the owners and their families by not being able to get reimbursement for their damaged cars, and the safety problems created by driving unrepaired, inherently dangerous automobiles on the public roadways. What little landscape our ever encroaching "civilization" has left will hence forward be transformed into one giant junk yard.[46]

While this tongue-in-cheek example obviously overstates the point, it would be critical for the Texas Legislature or the Texas Supreme Court to attempt to define when a duty exists. Albeit only applied to party spoliators, the concurrence in the *Ortega* opinion makes a compelling argument that the duty exists before a case is filed.

Establishing that Spoliation Caused Failure of the Claim or Defense

Opponents of an independent spoliation tort argue that establishing causation is too complex.[47] The spoliation victim must prove that destruction of evidence caused it to lose its original lawsuit. In essence, a jury is asked to determine what the destroyed evidence would have contributed to the plaintiff's success (or the defendant's defense).[48] Forcing the jury to focus on one piece of missing evidence and speculate whether it was outcome-determinative may be more difficult in practice than it is in theory.[49]

The Tort Would Be Too Harsh On Negligent, Non-Party Spoliators

Opponents of the tort also argue that subjecting a non-party, negligent spoliator to liability may be overly harsh. One that does not cause the original injury could end up paying for it. An example illustrates the point.[50] An individual has a one-car automobile accident, and the vehicle is towed to a junkyard from the accident scene. Assume there was a manufacturing defect in the vehicle that caused the accident. The employees of the junkyard mistakenly sell the vehicle's parts. The owner of the vehicle files suit against the manufacturer, and fails because she is unable to establish a defect. The car owner then brings suit against the junkyard. Is it fair for the junkyard, when found liable for spoliation of evidence, to pay the personal injury damages caused by the manufacturer's defect? Possibly not. The "punishment may not fit the crime."[51]

With *Ortega* as the law, an independent cause of action against negligent, non-party spoliators would cause an additional problem. It would be inherently unfair if the law punished a party spoliator with only a jury instruction or sanctions but punished a non-party spoliator, regardless of culpability, with the more severe punishment of an independent cause of action.

Proposed Elements of a Claim for Spoliation of Evidence

Although an independent spoliation tort against a non-party who acts intentionally is not without problems, on balance it is better than leaving a spoliation victim remediless. If the Texas Legislature or Texas Supreme Court were to adopt such an independent spoliation tort, the spoliation victim should have to prove the following elements to prevail on a claim for intentional spoliation of evidence:

(1) the existence of, and failure in, the underlying lawsuit;
(2) the non-party spoliator's knowledge that the plaintiff's claim involved the evidence at issue;
(3) the destruction, mutilation, or significant alteration of the evidence;
(4) intent on part of the non-party spoliator to disrupt or defeat the plaintiff's claim or lawsuit;
(5) a causal relationship between the act of spoliation and the inability to prove the lawsuit (in other words, the underlying cause of action was meritorious); and
(6) damages.[52]

Likewise, a spoliation victim who claims that a non-party spoliator acted intentionally and who lost as a defendant as a result should have to prove the following:

(1) the existence of, and failure in, the underlying lawsuit;
(2) the non-party spoliator's awareness that the defendant's defense involved the evidence at issue;
(3) the destruction, mutilation, or significant alteration of the evidence;
(4) intent on part of the non-party spoliator to disrupt or defeat the defendant's defense;
(5) a causal relationship between the act of spoliation and the inability to defend the claim or lawsuit (in other words, the underlying defense was meritorious); and
(6) damages.

Because it is an intentional tort, punitive damages should be available to punish the non-party spoliator when the spoliation victim proves by clear and convincing evidence that the non-party spoliator acted with intent or malice.[53] Moreover, as with any cause of action, the Texas Supreme Court or the Texas Legislature must define or craft a test as to when a legal duty to preserve evidence exists or courts will have insufficient guidance as to the duty element.

CONCLUSION

In reaching its decision in *Ortega*, the Texas Supreme Court skirted a more complex issue: what to do about non-party spoliation. Traditional remedies that may or may not compensate victims of party spoliation clearly fail to address non-party spoliation. Therefore, eventually the legislature or Texas courts will have to revisit this issue and hopefully fill this gap in the law by adopting a narrowly crafted, independent cause of action for intentional spoliation of evidence against non-parties.

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1. Black's Law Dictionary 1401 (6th ed. 1990).
2. *Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 1998).
3. *Id.* at 951, n.1.
4. *Ortega v. Trevino*, 938 S.W.2d 219, 220 (Tex. App. — Corpus Christi 1997, writ granted).
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 223.
12. *Ortega*, 969 S.W.2d at 951.
13. *Id.* at 952.
14. Embracery is the crime of attempting to influence a jury corruptly to one side or the other. Black's Law Dictionary 552 (6th ed. 1990).
15. *Ortega,* 969 S.W.2d at 953.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 954.
21. *Id.*
22. *Id.*
23. *Id.* at 955.
24. 851 S.W.2d 193 (Tex. 1993).
25. *Ortega,* 969 S.W.2d at 956.
26. *Id.* at 957.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 959.
33. Only a few states exclude evidence as a sanction for spoliation of evidence. *See, e.g., Kippenham v. Chaulk Servs., Inc.,* 697 N.E.2d 527, 531 (Mass. 1998).
34. *Ortega*, 969 S.W.2d at 959.
35. *Id.* at 960.
36. *Id.*
37. *Id.*
38. *Id.*
39. *See* Comment, *Interference with Prospective Civil Litigation by Spoliation of Evidence: Should Texas Adopt a New Tort?*, 21 St. Mary's L.J. 209, 229 (1989).
40. *Id.* at 226.
41. Tex. Penal Code Ann. § 37.09(a)(1) (Vernon 1997). This offense is a third degree felony which carries a punishment of imprisonment of not more than 10 years or less than two years, and a fine not to exceed $10,000. Tex. Penal Code Ann. § 12.34 (Vernon 1997).
42. *See Carrion v. State*, 926 S.W.2d 625 (Tex. App. — Eastland 1996, pet. ref'd); *Brosky v. State*, 915 S.W.2d 120 (Tex. App. — Fort Worth 1996, pet. ref'd), *cert. denied*, 117 S. Ct. 537 (1996); *Spector v. State*, 746 S.W.2d 945 (Tex. App. — Austin 1988, no pet.); *Cuadra v. State*, 715 S.W.2d 723 (Tex. App — Houston [14th Dist.] 1986, pet. ref'd).
43. *Continental Ins. Co. v. Herman*, 576 So.2d 313 (Fla. Dist. Ct. App. 1990).
44. *Miller v. Allstate Ins. Co.*, 573 So.2d 24 (Fla. Dist. Ct. App. 1990).
45. *Rodgers v. St. Mary's Hosp.*, 149 Ill.2d 302, 597 N.E.2d 616 (1992); *Bondu v. Gurvich*, 473 So.2d 1307 (Fla. Dist. Ct. App. 1984).
46. *County of Solano v. Delancy*, 264 Cal. Rptr. 721, 736 (Ct. App. 1989) (Anderson, J., dissenting).
47. *Smith v. Superior Court*, 151 Cal. App. 3d 491, 500, 198 Cal. Rptr. 829, 835 (1984).
48. *See* Note, *Should Iowa Adopt the Tort of Intentional Spoliation of Evidence in Civil Litigation?* 41 Drake L. Rev. 179, 192 (1992).
49. Could this be fixed by submitting an issue to the fact finder in the original lawsuit inquiring whether the evidence was outcome-determinative? Perhaps, but it may cause confusion, prejudice, or undue complexity in the original lawsuit.
50. *See Reid v. State Farm Mut. Ins. Co.*, 173 Cal. App. 3d 557, 218 Cal. Rptr. 913 (Ct. App. 1985).
51. Naturally, the counterargument is that the injured vehicle owner should not be left remediless because the junkyard owner made a mistake.
52. *Cf. Coleman v. Eddy Potash, Inc.*, 120 N.M. 645, 649, 905 P.2d 185 (1995); Nolte, *The Spoliation Tort: An Approach to Underlying Principles,* 26 St. Mary's L.J. 351, 361 (1995); Comment, *Interference with Prospective Civil Litigation by Spoliation of Evidence; Should Texas Adopt a New Tort?*, 21 St. Mary's L.J. 209, 223-224 (1989).
53. *See* Tex. Civ. Prac. & Rem. Code Ann. § 41.001 (Vernon 1997) for definitions of malice.

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