

982 S.W.2d 468
(Cite as: 982 S.W.2d 468)



Court of Appeals of Texas,
San Antonio.
WAL-MART STORES, INC., Appellant,
v.
Eileen S. MIDDLETON, Appellee.

No. 04-96-01017-CV.
Aug. 12, 1998.
Rehearing Overruled Oct. 26, 1998.

Customer filed premises' liability action against store, seeking damages for personal injuries suffered in fall on alleged defect in floor. The 150th Judicial District Court, Bexar County, Janet P. Littlejohn, J., entered judgment on jury verdict in customer's favor. Store appealed. The Court of Appeals, Green, J., held that: (1) manager's reasonable explanation concerning absence of photographs taken of scene of customer's fall, and manager's testimony about their contents, rebutted spoliation presumption, and (2) erroneous jury instruction on spoliation presumption required reversal.

Reversed and remanded.

Stone, J., filed a dissenting opinion.

West Headnotes

[1] Appeal and Error 30 ⚙️969

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k969 k. Conduct of Trial or Hearing in General. [Most Cited Cases](#)

Error in the jury charge is reviewed under the abuse of discretion standard.

[2] Appeal and Error 30 ⚙️946

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k944 Power to Review

30k946 k. Abuse of Discretion. [Most](#)

[Cited Cases](#)

Trial court abuses its discretion by acting arbitrarily, unreasonably, or without consideration of guiding principles.

[3] Trial 388 ⚙️182

388 Trial

388VII Instructions to Jury

388VII(A) Province of Court and Jury in General

388k182 k. Authority to Instruct Jury in General. [Most Cited Cases](#)

When submitting the jury charge, a trial court is afforded more discretion when submitting instructions than when submitting questions, although the discretion afforded during the submission of instructions is not absolute and the trial court must submit instructions as shall be proper to enable the jury to render a verdict. [Vernon's Ann.Texas Rules Civ.Proc., Rule 277.](#)

[4] Trial 388 ⚙️182

388 Trial

388VII Instructions to Jury

388VII(A) Province of Court and Jury in General

388k182 k. Authority to Instruct Jury in General. [Most Cited Cases](#)

If a jury instruction correctly states the law, but does not assist the jury, it is improper. [Vernon's Ann.Texas Rules Civ.Proc., Rules 277, 278.](#)

[5] Appeal and Error 30 ⚙️1064.1(1)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)18 Instructions

30k1064 Prejudicial Effect

30k1064.1 In General

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30k1064.1(1) k. In General.

Most Cited Cases

Trial 388 ⚔242

388 Trial

388VII Instructions to Jury

388VII(C) Form, Requisites, and Sufficiency

388k242 k. Confused or Misleading Instructions. [Most Cited Cases](#)

Instruction that misleads the jury is improper, and submitting an unnecessary instruction will require reversal if the instruction is harmful.

[6] Evidence 157 ⚔89

157 Evidence

157II Presumptions

157k89 k. Rebuttal of Presumptions of Fact.

Most Cited Cases

Trial 388 ⚔211

388 Trial

388VII Instructions to Jury

388VII(B) Necessity and Subject-Matter

388k211 k. Failure of Party to Testify or to Call Witness or Produce Evidence. [Most Cited Cases](#)

Store manager's reasonable explanation concerning absence of photographs taken of scene of customer's fall, and manager's testimony about what she remembered to be depicted in them, rebutted spoliation presumption and thus precluded instruction that missing photographs could be presumed to have been unfavorable to store for purposes of customer's premises liability action.

[7] Evidence 157 ⚔78

157 Evidence

157II Presumptions

157k74 Evidence Withheld or Falsified

157k78 k. Suppression or Spoliation of Evidence. [Most Cited Cases](#)

Deliberate spoliation of evidence relevant to a case raises a presumption that the evidence would

have been unfavorable to the cause of the spoliator.

[8] Evidence 157 ⚔75

157 Evidence

157II Presumptions

157k74 Evidence Withheld or Falsified

157k75 k. In General. [Most Cited Cases](#)

Evidence 157 ⚔76

157 Evidence

157II Presumptions

157k74 Evidence Withheld or Falsified

157k76 k. Failure of Party to Testify or Giving Evasive Answers. [Most Cited Cases](#)

Party's failure to produce evidence within party's possession or to testify about it creates a rebuttable presumption unfavorable to that party, which of itself has probative value.

[9] Appeal and Error 30 ⚔1064.1(9)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)18 Instructions

30k1064 Prejudicial Effect

30k1064.1 In General

30k1064.1(9) k. Evidence and Witnesses, Instructions Relating To. [Most Cited Cases](#)

Reversible error occurred from jury instruction on spoliation presumption after store had explained its failure to produce photographs of scene of customer's fall and offered testimony on contents of photographs; instruction had effect of partially shifting burden of proof to store and allowed customer to avoid having to prove essential elements of her premises liability cause of action.

[10] Appeal and Error 30 ⚔1026

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)1 In General

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[30k1025](#) Prejudice to Rights of Party
as Ground of Review

[30k1026](#) k. In General. [Most Cited Cases](#)

For harmful error to occur, the error must amount to a denial of a party's rights that probably caused rendition of an improper judgment.

[11] Appeal and Error 30 1064.1(1)

[30](#) Appeal and Error

[30XVI](#) Review

[30XVI\(J\)](#) Harmless Error

[30XVI\(J\)18](#) Instructions

[30k1064](#) Prejudicial Effect

[30k1064.1](#) In General

[30k1064.1\(1\)](#) k. In General.

[Most Cited Cases](#)

Reversible error can result from unnecessary jury instructions that focus the jury's attention on issues that do not belong in the case, because the court's instructions become the law of the case and are to be accepted by the jury as the guide on which they must rely.

***469** [J. Preston Wrotenbery](#), [Kevin D. Jewell](#), [Charles T. Jeremiah](#), Magenheim, Bateman, Robinson, Wrotenbery & Helfand, Houston, for Appellant.

[Franklin Y. Wright](#), Law Offices of Franklin Y. Wright, San Antonio, [Robert M. Stone](#), Law Offices of Robert M. Stone, San Antonio, for Appellee.

Before [STONE](#), [GREEN](#) and [ANGELINI](#), JJ.

OPINION

[GREEN](#), Justice.

Eileen Middleton was injured in a Wal-Mart store when she tripped on an alleged defect in the floor. Middleton brought a personal injury cause of action against Wal-Mart and a jury found in her favor. Wal-Mart appeals the judgment complaining, among other things, that the jury charge was erro-

neous. Finding harmful error in the jury charge, we reverse and remand.

Background

On December 6, 1993, Middleton, her mother, Evelyn LeMaire, and her daughter, Kathy Jordan, were shopping at the Wal-Mart in Nederland, Texas. After entering the store, Middleton went to the restroom while her mother and daughter began shopping. Middleton then met back up with her mother and began pushing their shopping cart. While rounding the corner of an aisle, Middleton's heel "caught on something," and she fell. After temporarily losing consciousness, Middleton was aroused by smelling salts and was taken to a hospital by emergency personnel.

While on the floor, Middleton heard someone say, "Look, that's what you probably fell on." In addition, she also heard a Wal-Mart employee say the floor needed to be repaired immediately. It was not until Middleton was lifted from the floor after her fall that she noticed the hole in the floor. Inconsistent testimony from both parties described the hole as a break in the floor ranging from one-eighth of an inch to three inches deep. Middleton, her mother, and her daughter also stated they saw a metal object, like a pipe, embedded in the floor with its top portion protruding.

After Middleton was taken to the hospital, Lisa Canales, a Wal-Mart department manager, took two Polaroid photographs of the area involved in the accident. The photos were then attached to an accident report and sent to Wal-Mart's corporate headquarters in Arkansas. At the time of trial, however, the photos could not be located. As a result of Wal-Mart's failure to produce the photos, the trial court submitted the following spoliation instruction to the jury over Wal-Mart's objection:

You are instructed that w[h]ere evidence, such as photographs of the accident scene, was peculiarly within the control of Wal-Mart and Wal-Mart fails to produce that evidence, you must presume that the missing evidence, if offered, would have

been unfavorable to Wal-Mart. You are further instructed that such presumption may be rebutted by Wal-Mart.

Discussion

In its first point of error, Wal-Mart argues that the jury instruction on spoliation was improper and resulted in harmful error. We agree.

1. Standard and Scope of Review

[1][2] We review error in the jury charge with the abuse of discretion standard of review. See *Texas Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex.1990); *H.E. Butt Grocery Co. v. Bilotto*, 928 S.W.2d 197, 199 (Tex.App.—San Antonio 1996), *aff'd*, 41 TEX. SUP. CT. J. 1213, 1998 WL 388586, — S.W.2d — (July 14, 1998). A trial court *470 abuses its discretion by acting arbitrarily, unreasonably, or without consideration of guiding principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–242 (Tex.1985).

[3] When submitting the jury charge, a trial court is afforded more discretion when submitting instructions than when submitting questions. *Perez v. Weingarten Realty Investors*, 881 S.W.2d 490, 496 (Tex.App.—San Antonio 1994, writ denied). However, the discretion afforded during the submission of instructions is not absolute. See TEX. R. CIV. P. 277. According to Rule 277, a trial court must submit instructions “as shall be proper to enable the jury to render a verdict.” *Id.*

[4][5] For an instruction to be proper, it must: (1) assist the jury, (2) accurately state the law, and (3) find support in the pleadings and evidence. TEX. R. CIV. P. 277, 278. All three requirements must be met for the instruction to be proper; therefore, if an instruction correctly states the law, but does not assist the jury, it is improper. *Riggs v. Sentry Ins.*, 821 S.W.2d 701, 704–05 (Tex.App.—Houston [14th Dist.] 1991, writ denied). An instruction that misleads the jury is improper, and submitting an unnecessary instruction will require reversal if the instruction is harmful. See *Boaz v. White's Auto Stores*, 141 Tex. 366, 172

S.W.2d 481, 484 (1943); *European Crossroads' Shopping Ctr., Ltd. v. Criswell*, 910 S.W.2d 45, 53–54 (Tex.App.—Dallas 1995, writ denied).

2. Spoliation

[6][7] Generally, two rules apply to presumptions that arise from the nonproduction of evidence. One rule is that the deliberate spoliation of evidence relevant to a case raises a presumption that the evidence would have been unfavorable to the cause of the spoliator. *H.E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340, 344 (Tex.Civ.App.—Waco 1975, writ dismissed). Middleton acknowledges there is no evidence of deliberate destruction of the photographs; thus, the first rule is inapplicable in this case.

[8] The second rule comes into play when the party controlling the evidence does not produce it and **does not testify**. *Id.* at 343–44. The party's failure to produce evidence within his possession or to testify about it creates a rebuttable presumption unfavorable to that party, which of itself has probative value. *Id.* Focusing on the second rule, Wal-Mart relies on *Brewer v. Dowling*, 862 S.W.2d 156 (Tex.App.—Fort Worth 1993, writ denied) to argue that the instruction was unwarranted because Wal-Mart employees testified about the floor. See *id.* at 159 (evidence did not entitle plaintiff to spoliation instruction because defendant presented evidence to rebut plaintiff's harmful evidence). Wal-Mart points to the testimony of its employees, Canales and Ross, who said there was only a broken tile in the floor. Canales explained that the missing tile did not create a hole; the break in the floor surface was no deeper than an inch; and there was not a protruding screw or metal rod. She further did not observe any broken tile pieces surrounding the area.

Middleton relies instead on *Watson v. Brazos Elec. Power Co-op., Inc.*, 918 S.W.2d 639 (Tex.App.—Waco 1996, writ denied) (per curiam) to argue that the trial court did not abuse its discretion in submitting the instruction. *Id.* at 643–44. In *Watson*, the missing evidence was a cross-bar of a

utility pole which, due to its allegedly poor condition, started a fire that destroyed plaintiff's property. *Id.* at 642. The plaintiff offered testimony that the cross-bar had been compromised by woodpecker holes; the defendant countered with testimony that it found no woodpecker holes. *Id.* at 642–43. Reversing the trial court on the failure to submit a spoliation instruction, the Waco court distinguished its case from *Brewer* on the basis of the “type of rebuttal evidence which precludes the application of the spoliation presumption.” *Id.* at 643. The *Watson* court noted that the defendants in *Brewer* came forward with evidence which was made contemporaneously with the missing evidence, therefore rendering their rebuttal evidence trustworthy. *Id.* Finding that the defendant's testimony lacked the same trustworthiness, the *Watson* court held that *Watson* was entitled to an instruction. Although the *Watson* court did not expressly rest its decision on intentional destruction, the opinion suggests the cross-arm was intentionally destroyed,*471 bringing the case closer to the first rule for allowing a spoliation instruction, rather than the second rule. Further, the *Watson* court may have been overreaching in its attempt to distinguish *Brewer*. The *Brewer* court correctly noted that the second rule regarding spoliation instruction comes into play when there is no evidence or offer of evidence to rebut the opponent's harmful evidence; the *Brewer* court did not base its decision on the “type” of evidence the defendants brought forward. As both *Bruner* and *Brewer* suggest, the second rule should be implicated only when a party is in control of relevant evidence and he fails to produce it or offer testimony explaining its non-production to rebut his opponent's harmful evidence. Here, Canales provided a reasonable explanation concerning the absence of the photographs, and testified about what she remembered to be depicted in them, thereby eliminating Middleton's entitlement to the instruction. For this reason, the spoliation instruction should not have been given.

3. Harm Analysis

[9][10] Because we hold the trial court's in-

struction was improper, we now determine whether the submission of the spoliation instruction resulted in harmful error. See TEX.R.APP. P. 44.1(a)(1). For harmful error to occur, the error must amount to a denial of a party's rights that it probably caused rendition of an improper judgment. *Id.*

[11] Reversible error can result from unnecessary jury instructions that focus the jury's attention on issues that do not belong in the case. See *Lemos v. Montez*, 680 S.W.2d 798, 799 (Tex.1984); *Accord v. General Motors Corp.*, 669 S.W.2d 111, 114 (Tex.1984). The error becomes harmful because “[t]he court's instructions become the law of the case and are to be accepted by the jury as the guide on which they must rely.” *Texas Power & Light Co. v. Lovinggood*, 389 S.W.2d 712, 717 (Tex.Civ.App.—Dallas 1965, writ ref'd n.r.e.); *accord Watson*, 918 S.W.2d at 643.

Here, a spoliation instruction was submitted to the jury even though any presumption operating against Wal-Mart concerning the photographic evidence had been legally rebutted. The result was that the jury's attention was erroneously focused on the failure to produce the photographs as some evidence of Wal-Mart's negligence. Middleton's attorney compounded the harmful effect of the instruction by referring to it in closing argument:

[Wal-Mart] knew the day after the accident after talking with this lady that she said there was a hole in there, they have had those pictures—if Wal-Mart fails to produce the evidence you must presume that the missing evidence if offered would have been unfavorable to Wal-Mart. Folks, if those pictures were any good for Wal-Mart, every single one of us here knows that they would have had them down here blown up as big as Dallas for you to look at them to show that the floor was okay. But they are not here.

The instruction essentially required the jury to consider Wal-Mart's failure to produce the photographs as probative evidence of its liability, thus forcing Wal-Mart to overcome an evidentiary pre-

sumption that did not exist in this case. The proper question for the jury was whether Wal-Mart breached its duty of care to Middleton, not whether Wal-Mart failed to produce photographs from its file.

The dissent argues that, regardless of the instruction, based on the evidence presented at trial the jury could itself determine that Wal-Mart had rebutted the spoliation presumption. This argument overlooks the fact that whether the spoliation presumption had been rebutted is an evidentiary ruling to be made by the trial judge—it is not a fact question for the jury. To ask the jury to decide when to apply the presumption is to ask them to rule on a legal question.

We have determined as a matter of law that the spoliation presumption should not apply against Wal-Mart. However, the jury was instructed to the contrary—that the presumption *did* apply unless the jury determined it had been rebutted. Wal-Mart was harmed because the instruction had the effect of partially shifting the burden of proof. To successfully defend the case, Wal-Mart was required to persuade the jury that it had rebutted the spoliation presumption. The *472 consequence of its failure to carry this burden was to award Middleton the benefit of not having to prove essential elements of her premises liability cause of action. Wal-Mart should not have had this burden of persuasion at trial.

Conclusion

The trial court's erroneous spoliation instruction was unduly confusing and misleading. We conclude that it caused the jury to reach an improper verdict, which ultimately led to the rendition of an improper judgment. Accordingly, we sustain Wal-Mart's first point of error.

Because Wal-Mart's first point of error is dispositive, we need not address its remaining points of error. The judgment of the trial court is reversed and the cause is remanded for a new trial.

Dissenting opinion by [STONE](#), J.

[STONE](#), Justice, dissenting.

Although the majority has correctly determined the trial court erred in submitting the spoliation instruction, I believe the majority has erred in its harm analysis. I therefore dissent.

Even assuming the spoliation instruction was wrongfully submitted, Wal-Mart has failed to show that the instruction caused or likely caused the rendition of an improper verdict. See [TEX.R.APP. P. 44.1\(a\)\(1\)](#). Contrary to the majority's conclusion that “[t]he instruction essentially required the jury to consider Wal-Mart's failure to produce the pictures as probative evidence of its liability,” the instruction merely set forth a rebuttable presumption. As briefly, but correctly, noted by Middleton's counsel during closing argument, the jury was to presume the missing photographs were unfavorable to Wal-Mart only if Wal-Mart failed to produce evidence about the hole in the floor. Wal-Mart did produce evidence about why the photographs were not introduced (they were sent to Wal-Mart's headquarters and at the time of trial were inexplicably missing), and it produced evidence about the hole in the floor. Regardless, from both party's accounts, the jury learned that something was wrong with the floor. Based on the evidence presented at trial, the jury could have reasonably: (a) believed Wal-Mart's explanation regarding the absence of the pictures; (b) determined that Wal-Mart's evidence rebutted any spoliation presumption; and (c) concluded that Middleton's evidence regarding the condition of the floor outweighed Wal-Mart's evidence. In any event, the jury could reasonably have determined that Wal-Mart had rebutted the spoliation presumption. There is absolutely nothing in this record to support the majority's holding that the spoliation instruction was “unduly confusing and misleading....”

The majority concludes that submission of the spoliation instruction effectively asked the jury to rule on a legal question—whether the spoliation presumption had been rebutted. While this may be

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the effect of the erroneous submission of the instruction, it is not evidence of harm. Under the record before us, we cannot conclude that harm occurred.

The conflicting testimony regarding the depth of the hole and whether a metal object was protruding from the hole was for the jury to resolve. The jury had sufficient evidence before it to conclude either that the hole did or did not constitute a negligent condition for which Wal-Mart was liable. The jury decided that Wal-Mart was seventy per cent negligent, and we should not disturb their finding. Accordingly, I dissent.

Tex.App.–San Antonio,1998.
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History**Direct History**

=> **1 Wal-Mart Stores, Inc. v. Middleton**, 982 S.W.2d 468 (Tex.App.-San Antonio Aug 12, 1998) (NO. 04-96-01017-CV), rehearing overruled (Oct 26, 1998), review denied (Jun 10, 1999)

Negative Citing References (U.S.A.)*Distinguished by*

▶ **2 Wal-Mart Stores, Inc. v. Johnson**, 39 S.W.3d 729 (Tex.App.-Beaumont Apr 05, 2001) (NO. 09-00-067 CV), review granted (Dec 13, 2001) ★ ★ **HN: 6 (S.W.2d)**

H **3 Conditt v. Morato**, 2007 WL 2693968 (Tex.App.-Fort Worth Sep 13, 2007) (NO. 2-06-214-CV), review denied (Dec 14, 2007) ★ ★ **HN: 6,9 (S.W.2d)**

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- H** 1 Conditt v. Morato, 2007 WL 2693968, *4+ (Tex.App.-Fort Worth Sep 13, 2007) (NO. 2-06-214-CV) ★★ **HN: 6,9 (S.W.2d)**
- ▶ 2 Wal-Mart Stores, Inc. v. Johnson, 39 S.W.3d 729, 731 (Tex.App.-Beaumont Apr 05, 2001) (NO. 09-00-067 CV) ★★ **HN: 6 (S.W.2d)**

Positive Cases (U.S.A.)

★★★ Discussed

- H** 3 Service Corp. Intern. v. Guerra, --- S.W.3d ----+, 2011 WL 2420208, *6+, 54 Tex. Sup. Ct. J. 1191, 1191+ (Tex. Jun 17, 2011) (NO. 09-0941) " **HN: 7 (S.W.2d)**
- H** 4 Albertson's, Inc. v. Arriaga, 2004 WL 2045389, *3+ (Tex.App.-San Antonio Sep 15, 2004) (NO. 04-03-00697-CV) **HN: 6,8 (S.W.2d)**
- ▶ 5 County of Bexar v. Santikos, 107 S.W.3d 677, 681+ (Tex.App.-San Antonio Apr 09, 2003) (NO. 04-02-00101-CV) " **HN: 3,4 (S.W.2d)**

★★★ Cited

- C** 6 Perez v. DNT Global Star, L.L.C., 339 S.W.3d 692, 698 (Tex.App.-Hous. (1 Dist.) Mar 17, 2011) (NO. 01-09-00913-CV) " **HN: 3,4,5 (S.W.2d)**
- C** 7 Dyer v. Cotton, 333 S.W.3d 703, 710 (Tex.App.-Hous. (1 Dist.) Nov 18, 2010) (NO. 01-09-00228-CV) " **HN: 3 (S.W.2d)**
- ▶ 8 Crenshaw v. Kennedy Wire Rope & Sling Co., 327 S.W.3d 216, 221+ (Tex.App.-San Antonio Jun 30, 2010) (NO. 04-09-00410-CV) **HN: 2,3 (S.W.2d)**
- C** 9 Walker & Associates Surveying, Inc. v. Roberts, 306 S.W.3d 839, 857+ (Tex.App.-Texarkana Feb 26, 2010) (NO. 06-09-00009-CV) **HN: 3 (S.W.2d)**
- H** 10 Towers of Town Lake Condominium Ass'n, Inc. v. Rouhani, 296 S.W.3d 290, 295+ (Tex.App.-Austin Aug 31, 2009) (NO. 03-07-00034-CV) **HN: 3 (S.W.2d)**
- H** 11 Thomas v. Uzoka, 290 S.W.3d 437, 444 (Tex.App.-Hous. (14 Dist.) May 28, 2009) (NO. 14-08-00182-CV) **HN: 3 (S.W.2d)**
- H** 12 City of The Colony v. North Texas Mun. Water Dist., 272 S.W.3d 699, 746 (Tex.App.-Fort Worth Nov 26, 2008) (NO. 2-07-128-CV) **HN: 3 (S.W.2d)**

- H** 13 Rigdon Marine Corp. v. Roberts, 270 S.W.3d 220, 228+ (Tex.App.-Texarkana Oct 07, 2008) (NO. 06-08-00008-CV) **HN: 2,3 (S.W.2d)**
- H** 14 GuideOne Lloyds Ins. Co. v. First Baptist Church of Bedford, 268 S.W.3d 822, 836 (Tex.App.-Fort Worth Oct 02, 2008) (NO. 2-07-176-CV) **HN: 3 (S.W.2d)**
- ▶** 15 Jelinek v. Casas, 2008 WL 2894889, *7 (Tex.App.-Corpus Christi Jul 29, 2008) (NO. 13-06-00088-CV) **HN: 3 (S.W.2d)**
- H** 16 I.E. Miller Fowler Trucking, LLC v. B-C Equipment Sales, Inc., 2008 WL 2292636, *4 (Tex.App.-Corpus Christi Jun 05, 2008) (NO. 13-06-00580-CV) **HN: 3 (S.W.2d)**
- C** 17 Brock Independent School Dist. v. Briones, 2008 WL 704174, *5 (Tex.App.-Fort Worth Mar 13, 2008) (NO. 2-07-002-CV) **HN: 3 (S.W.2d)**
- ▶** 18 TXI Transp. Co. v. Hughes, 224 S.W.3d 870, 900+ (Tex.App.-Fort Worth May 24, 2007) (NO. 2-04-242-CV) **HN: 3 (S.W.2d)**
- ▶** 19 Escoto v. Estate of Ambriz, 200 S.W.3d 716, 731 (Tex.App.-Corpus Christi Jun 08, 2006) (NO. 13-02-171-CV) **HN: 3,5 (S.W.2d)**
- H** 20 Hallmark v. Wetz, 2005 WL 763264, *2+ (Tex.App.-San Antonio Apr 06, 2005) (NO. 04-04-00430-CV) **HN: 3 (S.W.2d)**
- ▶** 21 United Services Auto. Ass'n v. Brite, 161 S.W.3d 566, 577+ (Tex.App.-San Antonio Jan 19, 2005) (NO. 04-04-00164-CV) **HN: 4 (S.W.2d)**
- ▶** 22 Lingafelter v. Shupe, 2004 WL 2610515, *1 (Tex.App.-Waco Nov 17, 2004) (NO. 10-03-00113-CV) **HN: 3 (S.W.2d)**
- ▶** 23 In re M.P., 126 S.W.3d 228, 232 (Tex.App.-San Antonio Nov 05, 2003) (NO. 04-02-00921-CV) "**HN: 10 (S.W.2d)**"
- ▶** 24 Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214, 227 (Tex.App.-Amarillo Feb 05, 2003) (NO. 07-02-0011-CV) **HN: 6,7 (S.W.2d)**
- H** 25 Rosell v. Central West Motor Stages, Inc., 89 S.W.3d 643, 653 (Tex.App.-Dallas Aug 22, 2002) (NO. 05-01-00198-CV) **HN: 3 (S.W.2d)**
- H** 26 Felix v. Gonzalez, 87 S.W.3d 574, 580+ (Tex.App.-San Antonio May 01, 2002) (NO. 04-01-00108-CV) **HN: 6 (S.W.2d)**
- ▶** 27 Brumfield v. Exxon Corp., 63 S.W.3d 912, 920 (Tex.App.-Hous. (14 Dist.) Jan 10, 2002) (NO. 14-00-00439-CV) **HN: 6,7 (S.W.2d)**
- H** 28 Steak & Ale of Texas, Inc. v. Borneman, 62 S.W.3d 898, 904+ (Tex.App.-Fort Worth Dec 06, 2001) (NO. 2-97-046-CV) **HN: 3 (S.W.2d)**
- C** 29 Katsen v. Rubenfield, 2001 WL 923132, *1 (Tex.App.-Dallas Aug 16, 2001) (NO. 05-98-02018-CV) **HN: 6,7 (S.W.2d)**
- ▶** 30 Lively v. Blackwell, 51 S.W.3d 637, 643+ (Tex.App.-Tyler Jan 31, 2001) (NO. 12-00-00004-CV) **HN: 6,7 (S.W.2d)**
- ▶** 31 Whiteside v. Watson, 12 S.W.3d 614, 621+ (Tex.App.-Eastland Feb 16, 2000) (NO. 11-98-00237-CV) **HN: 3,4 (S.W.2d)**
- ▶** 32 Anderson v. Taylor Pub. Co., 13 S.W.3d 56, 61 (Tex.App.-Dallas Jan 04, 2000) (NO. 05-99-00184-CV)
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- Appellants., 2001 WL 36155542, *36155542 (Appellate Brief) (Tex.App.-Hous. (1 Dist.) 2001) **Amps's Reply to the Corporate Defendants Ldngh and Lde** (NO. 01-99-00428-CV) ★ ★
- 128 Mark SWANK, Marvin Chudnoff, Jeffrey Sussman, Louis Dreyfus Natural Gas Holdings, L.D.E. Associates, L.L.C., and James Mccoy, Jr., Appellants/Appellees, v. Anatoly SVERDLIN, Individually and Derivatively On Behalf of Automated Marine Propulsion Systems, Inc., Appellees/Appellants., 2000 WL 35719417, *35719417+ (Appellate Brief) (Tex.App.-Hous. (1 Dist.) Oct 05, 2000) **Amps's Reply to the Individual Defendants Chudnoff, Sussman, Swank, and McCoy** (NO. 01-99-00428-CV) ★ ★
- 129 DECLARIS ASSOCIATES, Appellant, v. MCCOY WORKPLACE SOLUTIONS, L.P., Appellee., 2010 WL 1502543, *1502543+ (Appellate Brief) (Tex.App.-Hous. (14 Dist.) Mar 09, 2010) **Original Brief of the Appellant** (NO. 14-10-00051-CV) ★ ★
- 130 Larry KALINA, Diane Kalina, and Clint Kalina, Appellants, v. Cody Wills BURNS, Individually and as Administrator of the Estate of Karen Dean Burns, Appellee., 2008 WL 5183048, *5183048+ (Appellate Brief) (Tex.App.-Hous. (14 Dist.) Nov 10, 2008) **Brief of Appellee** (NO. 14-08-00589-CV) ★ ★
- 131 Lanna L. LEE, et al., Appellants, v. Theodore HASSON, et al., Appellees., 2005 WL 3660678, *3660678+ (Appellate Brief) (Tex.App.-Hous. (14 Dist.) Dec 15, 2005) **Brief for Appellees** (NO. 14-05-0004-CV) ★ ★ **HN: 3 (S.W.2d)**
- 132 Jerry W. BRUMFIELD, Appellant, v. EXXON CORPORATION, Appellee., 2000 WL 35721037, *35721037+ (Appellate Brief) (Tex.App.-Hous. (14 Dist.) Sep 29, 2000) **Brief of Appellee Exxon Corporation Oral Argument Requested** (NO. 14-00-00439-CV) ★ ★

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- 133 Daniel COWLES and Kandace Cowles, Plaintiffs, v. LOWE'S HOME CENTERS, INC., Defendant, v. James Hardie Bulding Products, Inc., Third-Party Defendant., 2004 WL 3360377, *3360377 (Trial Motion, Memorandum and Affidavit) (E.D.Tex. Mar 22, 2004) **Defendant/Third-Party Plaintiff Lowe's Home Centers, Inc.'s Trial Brief on Spoliation** (NO. 2-03CV-190-DJF) ★ ★
- 134 George COWART and Gayle Cowart, v. STATE FARM LLOYDS and Jennifer Joyner., 2008 WL 1880806, *1880806 (Trial Motion, Memorandum and Affidavit) (N.D.Tex. Mar 24, 2008) **Plaintiff's Supplemental Response to Defendant State Farm's Supplemental Motion for Summary Judgment and Jennifer Joyner's Amended Summary Judgment** (NO. 306-CV-1560-L) ★ ★
- 135 George COWART and Gayle Cowart, v. STATE FARM LLOYDS and Jennifer Joyner., 2008 WL 1880805, *1880805 (Trial Motion, Memorandum and Affidavit) (N.D.Tex. Mar 20, 2008) **Plaintiffs's Memorandum in Response to Defendant State Farm's Motion to Exclude Testimony of Plaintiff's Expert Ralph Mansour** (NO. 306CV-1560-L) ★ ★ **HN: 6 (S.W.2d)**
- 136 Robert PETERSON, Plaintiff, v. SAM'S EAST, INC. d/b/a Sam's Club, Cosco Home & Office Products and Dorel Juvenile Group, Inc., Defendants., 2008 WL 5375824, *5375824 (Trial Motion, Memorandum and Affidavit) (W.D.Tex. Oct 02, 2008) **Plaintiff Robert Peterson's Re-**

- sponse to Defendants' Motion to Bar Testimony of Plaintiff's Expert Michael Huerta or for Alternative Relief** (NO. EP-07-CV-258-PRM) ★ ★ HN: 6 (S.W.2d)
- 137 Robert PETERSON, Plaintiff, v. SAM'S EAST, INC. d/b/a Sam's Club, Cosco Home & Office Products and Dorel Juvenile Group, Inc., Defendants., 2008 WL 5375821, *5375821 (Trial Motion, Memorandum and Affidavit) (W.D.Tex. Sep 29, 2008) **Plaintiff Robert Peterson's Response to Defendants' Motion Regarding Plaintiff's Spoliation of Evidence** (NO. EP-07-CV-258-PRM) ★ ★ HN: 6 (S.W.2d)
- 138 Valerie Ann SKRINE, Plaintiff, v. VICTORY GYM & FITNESS, INC., Fit Addiction, Inc., Tony W. Hall, Bosu Fitness, L.L.C., David Weck, Individually and D/B/A D.W. Fitness, L.L.C., and Fitness Quest, Inc., Defendants., 2009 WL 5166778, *5166778 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Apr 29, 2009) **Defendants Bosu Fitness, L.L.C., David Weck, D.w. Fitness, L.L.C. and Fitness Quest, Inc.'s Response to Plaintiff's Motion to Exclude Evidence on the Basis of Spoliation** (NO. 06-02610) ★
- 139 Valerie Ann SKRINE, v. VICTORY GYM & FITNESS, INC. Fit Addiction, Inc., Tony W. Hall, Bosu Fitness, L.L.C., David Weck, Individually And D/B/A D.W. Fitness, L.L.C. and Fitness Quest, Inc., 2008 WL 7330938, *7330938 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Apr 29, 2008) **Defendants Victory Gym & Fitness, Inc. and Tony W. Hall's Response to Plaintiff's Motion to Exclude Evidence on the Basis of Spoliation "Spoliation" and Motion for Sanctions Under ...** (NO. 06-02610) ★ ★
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- 141 Janie LUNA, Individually, and as Representative of the Estate of Jacinto G. Luna, Deceased, and as Next Friend of Enrique Contreras Luna, (Minor) Child, Plaintiffs, v. ACME BRICK COMPANY, and Alpha Cargo Motor Express and Jerry Don Williams, Defendants., 2006 WL 4482457, *4482457+ (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Oct 27, 2006) **Defendant's Trial Brief on Spoliation** (NO. 2003-CI-14045) ★ ★
- 142 Robert Gene CUNNINGHAM, Individually and as Representative of the Estate of Patricia Maudine Cunningham, Deceased, v. PLAZA MEDICAL CENTER OF FORT WORTH, Krishnababu Chunduri, M.D., Lincoln Chin, M.D., Noble Ezukanmer, M.D., Ladio Haroona, M.D., and Mary Janet Koch, R.N., 2006 WL 6166454, *1 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Jun 07, 2006) **Defendants Plaza Medical Center of Fort Worth and Janet Koch, R.N.'s No-Evidence Motion for Partial Summary Judgment as to Gross Negligence, Ostensible Agency, and Spoliation of Evidence Claims** (NO. 141-201571-03) ★ HN: 7,8 (S.W.2d)
- 143 Cara Louise MOODY, Individually, as Personal Representative of the Estate of Monroe Jackson Moody, III, Deceased, and as Next Friend of her minor child, Moody Jackson Moody, IV, v. Estate of Robert DALPONT, Deceased, and Momentum Motor Cars, Ltd., 2004 WL 5011119, *5011119+ (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Sep 23, 2004) **Defendant Momentum Motor Cars, Ltd.'s Amended Trial Brief Concerning Spoliation** (NO. 2003-11972) ★ ★
- 144 Jeffery LENGEL, v. Ricky Gene LORENTZ, M.D., et al., 2004 WL 5920387, *5920387+ (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Jul 06, 2004) **Defendant, Ricky Gene Lorentz, M.D.'s Motion for Partial Summary Judgment** (NO. 2003-28717) ★ ★

- 145 Carole E. RICHARDSON, Plaintiff, v. THE UNIVERSITY OF THE INCARNATE WORD, Defendant., 2004 WL 3395743, *3395743 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Jun 21, 2004) **Defendant University of the Incarnate Word's Trial Brief in Support of Denying a Spoliation Instruction** (NO. 2003-CI-02063) ★ ★
- 146 Jared WILSON, v. Douglas Lloyd BULLOCK and Rockin' Thunderbird., 2003 WL 24110625, *24110625+ (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Sep 08, 2003) **Defendants' Trial Brief on Spoliation** (NO. 366-02300-01) ★ ★ ★
- 147 Jared WILSON, v. Douglas Lloyd BULLOCK and Rockin' Thunderbird., 2003 WL 24175895, *24175895+ (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Sep 08, 2003) **Defendants' Trial Brief on Spoliation** (NO. 366-02300-01) ★ ★ ★
- 148 Debbie LOVE, Plaintiff, v. CASH AMERICA INTERNATIONAL, INC., Defendant., 2003 WL 24140139, *24140139+ (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Jan 09, 2003) **Defendant's Motion in Limine Regarding Spoliation of Evidence** (NO. CAUSE67-183693-00) ★ ★
- 149 Christine TRIPP, Individually and as Personal Representative of the Estate of Terry Tripp, Deceased, and as Next Friend of Thomas L. Tripp, A Minor and Leland Tripp and Bernadine Tripp, Intervenor, Plaintiffs, v. SEARS, ROEBUCK AND CO., Defendant., 2002 WL 34096662, *34096662+ (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Aug 14, 2002) **Defendant's Motion for New Trial and, Alternatively, for Remittitur, for Modification and Correction of the Judgment, and to Disregard Jury Findings and for Jnov** (NO. A-000482-C) ★ ★ ★
- 150 Pamela S. JACOBSON, Plaintiff, v. GTE SERVICE CORPORATION and GET Corporation, Defendants., 2001 WL 34852147, *34852147 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Oct 12, 2001) **Defendants' First Amended Motion in Limine** (NO. 00-02105-B) ★
- 151 Pamela S. JACOBSON, Plaintiff, v. GTE SERVICE CORPORATION and GET Corporation, Defendants., 2001 WL 34852150, *34852150 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. May 09, 2001) **Defendants' Motion in Limine** (NO. 00-02105-B) ★
- 152 William STEPHENS, and Ray Jordan, Plaintiff, v. Wayne DOLCEFINO, ABC, Inc., KTRK Television, Inc., Steve Bivens, and Henry Florsheim, Defendants., 2000 WL 35715619, *35715619 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Feb 22, 2000) **Defendants' Response to Plaintiffs' Motion for Sanctions and Brief in Support** (NO. 1999-43183) ★ ★
- 153 Belinda HENRY, Plaintiff, v. TARRANT COUNTY HOSPITAL DISTRICT d/b/a JPS Institute for Health Career Development, Defendant., 2000 WL 35731050, *35731050+ (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Feb 19, 2000) **Defendant Tarrant County Hospital District's Supplemental Response and Motion for Protection to Plaintiff's Third and Supplemental Motion for Sanctions** (NO. 141-173479-98) ★ ★ HN: 6,7 (S.W.2d)
- 154 William STEPHENS and Ray Jordan, v. Wayne DOLCEFINO, et al., 2000 WL 35715618, *35715618 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Feb 14, 2000) **Plaintiffs' Motion for Sanctions and Brief in Support: Omnia Praesumuntur Contra Spoliatores** (NO. 1999-43183) ★ ★ HN: 6,8 (S.W.2d)
- 155 Monroe JOHNSON and Brandy Johnson, v. WAL-MART STORES, INC. and Ronnie (Ron) Louis Wheeler, Individually., 1999 WL 34746937, *34746937 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Dec 14, 1999) **Defendant's Motion for Judgment Notwithstanding the Verdict or Alternatively, Motion for New Trial or Remittitur** (NO. CAUSEE156929) ★ ★

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2004 WL 3770350, *3770350+ (Trial Motion, Memorandum and Affidavit) (Tex.Co.Ct. at Law
2004) **Plaintiff's Bench Brief in Opposition of a Jury Instruction Regarding Spoliation** (NO.
CAUSE264564) ★★