

IN THE SUPREME COURT OF TEXAS

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No. 97-0280
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JORGE H. TREVIÑO, M.D., INDIVIDUALLY AND D/B/A MCALLEN MATERNITY
CLINIC, PETITIONER

v.

GENARO ORTEGA, INDIVIDUALLY AND A/N/F OF LINDA ORTEGA, A MINOR,
RESPONDENT

=====
ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS
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Argued on December 3, 1997

JUSTICE ENOCH delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE GONZALEZ, JUSTICE HECHT, JUSTICE SPECTOR, JUSTICE OWEN, JUSTICE ABBOTT, and JUSTICE HANKINSON join.

JUSTICE BAKER filed a concurring opinion.

The issue in this case is whether this Court should recognize an independent cause of action for intentional or negligent spoliation of evidence by parties to litigation.¹ The court of appeals held that Texas recognizes a cause of action for evidence spoliation. 938 S.W.2d 219, 223. Because we determine that spoliation does not give rise to independent damages, and because it is better remedied within the lawsuit affected by spoliation, we decline to recognize spoliation as a tort cause of action. Therefore, we reverse the court of appeals' judgment and render judgment that Ortega take nothing.

In 1988, Genaro Ortega, individually and as next friend of his daughter, Linda Ortega, sued Drs. Michael Aleman and Jorge Treviño and McAllen Maternity Clinic for medical malpractice. Ortega alleged that the defendants were negligent in providing care and treatment during Linda's birth in 1974.² Discovering that Linda's medical records from the birth had been destroyed, Ortega then sued Dr. Treviño in a separate suit for intentionally, recklessly, or negligently destroying Linda

¹ Whether we recognize a cause of action for spoliation of evidence by persons who are not parties to the underlying lawsuit is not before the Court, and therefore we do not consider it.

² At the time of submission, this case was still pending in district court.

Ortega's medical records from the birth.

It is the appeal from this latter action that is before us. Here, Ortega claims that Treviño had a duty to preserve Linda's medical records and that destroying the records materially interferes with Ortega's ability to prepare his medical malpractice suit. Ortega explains that Aleman, the attending physician, testified that he has no specific recollection of the delivery and, therefore, the missing medical records are the only way to determine the procedures used to deliver Linda. Because the medical records are missing, Ortega's expert cannot render an opinion about Aleman's, the Clinic's, or Treviño's negligence.

Responding to Ortega's spoliation suit, Treviño specially excepted and asserted that Ortega failed to state a cause of action. The trial court sustained Treviño's special exception and gave Ortega an opportunity to amend. But Ortega declined to amend and the trial court dismissed the case. Ortega appealed. The court of appeals reversed the trial court's dismissal order and held that Texas recognizes an independent cause of action for evidence spoliation. 938 S.W.2d at 223.

This Court treads cautiously when deciding whether to recognize a new tort. *See generally Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 404-06 (Tex. 1993); *Graff v. Beard*, 858 S.W.2d 918, 920 (Tex. 1993); *Boyles v. Kerr*, 855 S.W.2d 593, 600 (Tex. 1993). While the law must adjust to meet society's changing needs, we must balance that adjustment against boundless claims in an already crowded judicial system. We are especially averse to creating a tort that would only lead to duplicative litigation, encouraging inefficient relitigation of issues better handled within the context of the core cause of action. We thus decline to recognize evidence spoliation as an independent tort.

A number of jurisdictions that have considered the issue have been hesitant to recognize an independent tort for evidence spoliation for a variety of different reasons. *See, e.g., Wilson v. Beloit Corp.*, 921 F.2d 765, 767 (8th Cir. 1990) (no spoliation tort under Arkansas law); *Edwards v. Louisville Ladder Co.*, 796 F. Supp. 966, 970 (W.D. La. 1992) (existence of adequate remedies); *Christian v. Kenneth Chandler Constr. Co.*, 658 So. 2d 408, 412-13 (Ala. 1995) (no cause of action under facts of case but noting previous cases allowing jury instruction on the spoliation presumption); *La Raia v. Superior Court*, 722 P.2d 286, 289 (Ariz. 1986) (existence of adequate

remedies); *Gardner v. Blackston*, 365 S.E.2d 545, 546 (Ga. Ct. App. 1988) (no spoliation tort under Georgia law); *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 270 (Ill. 1995) (traditional negligence remedies sufficiently address the issue and remove the need to create an independent cause of action); *Murphy v. Target Prods.*, 580 N.E.2d 687, 690 (Ind. Ct. App. 1991) (no common-law duty for employer to preserve potential evidence for employee's benefit); *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997) (existence of adequate remedies); *Miller v. Montgomery County*, 494 A.2d 761, 767-68 (Md. Ct. Spec. App. 1985) (existence of adequate remedies); *Panich v. Iron Wood Prods. Corp.*, 445 N.W.2d 795, 797 (Mich. Ct. App. 1989) (no cause of action under facts of case); *Brown v. Hamid*, 856 S.W.2d 51, 56-57 (Mo. 1993) (existence of adequate remedies and not appropriate on facts of case).³

Evidence spoliation is not a new concept. For years courts have struggled with the problem and devised possible solutions. Probably the earliest and most enduring solution was the spoliation inference or *omnia praesumuntur contra spoliatores*: all things are presumed against a wrongdoer. See, e.g. *Rex v. Arundel*, 1 Hob. 109, 80 Eng. Rep. 258 (K.B. 1617) (applying the spoliation inference); *The Pizarro*, 15 U.S. (2 Wheat.) 227 (1817) (declining to apply the spoliation inference); *Brown*, 856 S.W.2d at 56 (noting that Missouri has recognized a spoliation inference for over a century). In other words, within the context of the original lawsuit, the factfinder deduces guilt from the destruction of presumably incriminating evidence.

This traditional response to the problem of evidence spoliation properly frames the alleged wrong as an evidentiary concept, not a separate cause of action. Spoliation causes no injury independent from the cause of action in which it arises. If, in the ordinary course of affairs, an individual destroys his or her own papers or objects, there is no independent injury to third parties. The destruction only becomes relevant when someone believes that those destroyed items are instrumental to his or her success in a lawsuit.

³ Courts in more than twenty states have considered the issue, but the courts of only six states have recognized a cause of action for negligent or intentional spoliation. See *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986) (intentional); *Velasco v. Commercial Bldg. Maintenance Co.*, 215 Cal. Rptr. 504, 506 (Cal. Ct. App. 1985) (negligent); *Smith v. Superior Court*, 198 Cal Rptr. 829, 832-33 (Cal. Ct. App. 1984) (intentional); *Bondu v. Gurvich*, 473 So. 2d 1307, 1312-13 (Fla. Dist. Ct. App. 1984) (negligent); *Callahan v. Stanley Works*, 703 A.2d 1014, 1017-19 (N.J. Super. Ct. Law Div. 1997) (negligent); *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185, 189 (N.M. 1995) (intentional); *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993) (intentional).

Even those courts that have recognized an evidence spoliation tort note that damages are speculative. *See, e.g., Smith v. Superior Court*, 198 Cal. Rptr. 829, 835 (Ct. App. 1984); *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312, 1320 (Ill. App. Ct. 1986). The reason that the damages inquiry is difficult is because evidence spoliation tips the balance in a lawsuit; it does not create damages amenable to monetary compensation.

Our refusal to recognize spoliation as an independent tort is buttressed by an analogous line of cases refusing to recognize a separate cause of action for perjury or embracery.⁴ Like evidence spoliation, civil perjury and civil embracery involve improper conduct by a party or a witness within the context of an underlying lawsuit. A number of courts considering the issue have refused to allow the wronged party to bring a separate cause of action for either perjury or embracery. *See, e.g., Cooper v. Parker-Hughey*, 894 P.2d 1096, 1100 n.3 (Okla. 1995) (listing a number of jurisdictions that refuse to recognize a separate civil cause of action for perjury); *OMI Holdings, Inc. v. Howell*, 918 P.2d 1274, 1296 (Kan. 1996) (embracery); *Trudell v. Heilman*, 204 Cal. Rptr. 551, 553-54 (1984) (embracery disallowed unless plaintiff has no other means of redress); *Hoston v. Silbert*, 514 F. Supp. 1239, 1241 (D.D.C. 1981) (embracery), *rev'd on other grounds*, 681 F.2d 876 (D.C. Cir. 1982). These decisions rely on public policy concerns such as ensuring the finality of judgments, avoiding duplicative litigation, and recognizing the difficulty in calculating damages. *Kessler v. Townsley*, 182 So. 232, 232 (Fla. 1938) (*res judicata*); *OMI*, 918 P.2d at 1290, 1293 (duplicative litigation and speculative damages). Similarly, recognizing a cause of action for evidence spoliation would create an impermissible layering of liability and would allow a plaintiff to collaterally attack an unfavorable judgment with a different factfinder at a later time, in direct opposition to the sound policy of ensuring the finality of judgments.

We share Ortega's concern that, when spoliation occurs, there must be adequate measures to ensure that it does not improperly impair a litigant's rights, but we disagree that the creation of an independent tort is warranted. It is simpler, more practical, and more logical to rectify any improper conduct within the context of the lawsuit in which it is relevant. Indeed, evolving

⁴ Embracery is "[t]he crime of attempting to influence a jury corruptly to one side or the other." BLACK'S LAW DICTIONARY 522 (6th ed. 1990).

remedies, sanctions and procedures for evidence spoliation are available 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. *See, e.g., Watson v. Brazos Elec. Power Coop., Inc.*, 918 S.W.2d 639, 643 (Tex. App. — Waco 1996, writ denied) (holding that trial court erred when it failed to give a spoliation instruction); *Ramirez v. Otis Elevator Co.*, 837 S.W.2d 405, 412 (Tex. App. — Dallas 1992, writ denied) (noting that a trial court possesses wide discretion in awarding discovery sanctions); *see also* TEX. R. CIV. P. 215(b). As with any discovery abuse or evidentiary issue, the trial court must respond appropriately based upon the particular facts of each individual case.

Ortega also argues that the failure to maintain Linda's medical records violated a statutory duty to maintain such records as required by section 241.103(b) of the Texas Health and Safety Code. Assuming without deciding that such a duty exists and that there was a breach of that duty, it does not necessarily follow that an independent cause of action arises. Nor does a cause of action necessarily arise from a party's obligation to comply with the rules of discovery. As we indicated above, obligations not to destroy evidence arise in the context of particular lawsuits; consequently, spoliation is best remedied within the lawsuit itself, not as a separate tort.

We reverse the court of appeals' judgment and render judgment that Ortega take nothing.

Craig T. Enoch
Justice

Opinion delivered: June 5, 1998