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# PRESERVATION OF EVIDENCE

BY JUDON FAMBROUGH

In May 2003, the Texas Supreme Court rendered a decision concerning liability that affects all landowners, commercial and non-commercial alike. The decision concerns preservation of evidence.

While Christmas shopping at a Wal-Mart store, Mr. Johnson was injured by a falling reindeer. The Christmas decoration, knocked off an upper shelf by an employee, hit Johnson's head and arm. He was dazed and cut but otherwise seemed unhurt. He left the store after a Wal-Mart employee cleaned and bandaged a cut on his arm. He indicated no ill will toward Wal-Mart and did not threaten to sue.

All the store's documentation procedures were followed. The Wal-Mart supervisor took notes, photographed the reindeer and obtained a written statement from the employee who caused the accident. Subsequently, the reindeer was sold.

Seventeen months later, Johnson underwent serious neck surgery, allegedly to repair injury stemming from the incident. He sued Wal-Mart. His attorney asked Wal-Mart to produce the reindeer that fell on Johnson. Wal-Mart could not comply but offered to produce a "reasonable facsimile." This response was unacceptable to the attorney and later to the trial court.

During the trial, the parties presented sharply contrasting evidence regarding the composition and eight of the reindeer. Johnson testified it was made of wood and weighed as much as ten pounds. Wal-Mart countered that it was made of papier-mâché and weighed five to eight ounces. The photographs of the reindeer could not refute either contention because they were such poor quality.

Because Wal-Mart had disposed of the "carcass," the trial court issued a "spoilage" instruction that required the jury to presume the missing reindeer would have harmed Wal-Mart's case.

The jurors were instructed that, "when a party has possession of a piece of evidence at a time he knows or should have

known it will be evidence in a controversy, and thereafter he disposes of it, makes it unavailable, or fails to produce it, there is a presumption in law that the piece of evidence, had it been produced, would have been unfavorable to the party who did not produce it."

Spoilage instructions are generally limited to circumstances in which the party in possession deliberately destroys relevant evidence or cannot explain its nonproduction.

On appeal, Wal-Mart argued that because neither of these circumstances applied in this case, the judgment for \$76,000 should be reversed and the case remanded to trial court for further proceedings. The appellate court disagreed and affirmed the judgment against Wal-Mart.

The Texas Supreme Court, however, ruled in favor of Wal-Mart. The Supreme Court did not focus on when spoilage instructions may be imposed. Instead, it examined when a potential defendant has a duty to preserve the evidence.

This duty, the court ruled, "arises only when a party knows or reasonably should have known there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim."

Wal-Mart had no notice that the reindeer would be relevant to a future claim at the time of the accident. It did not learn of Johnson's claim until all the reindeer had been

disposed of. Even after Johnson learned that he had injured his neck, nothing in the record suggests that he informed Wal-Mart of his claim prior to filing suit.

To avoid imposition of spoilage instructions, landowners should refrain from disposing of any property that causes an injury to a guest until after the statute of limitations expires. ♣

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