ORAL ARGUMENT — 12/3/97
97-0280
TREVINO V. ORTEGA
AND
MALONE, ET AL. V. FOSTER, ET AL.

LAWYER: The issue in this case is whether or not Texas should recognize an independent tort for spoliation of evidence or whether or not, the remedies that we have had in place traditionally are adequate to protect the rights of litigants in our courts?

No Texas court before this case, the *Ortega* case, has recognized such a duty. In fact, while the one or two cases before albeit dicta had declined to recognize an independent tort for relying in fact upon the presumptions in other common law and statutory precautions that were in place Texas in the past has followed in the majority of jurisdictions across the states which refused to recognize the independent tort spoliation. And we are urging this court to continue to follow the majority of the courts across the country.

My client was originally sued for medical malpractice. After the malpractice suit was brought it was discovered that the records, which had been put in a warehouse some 12-14 years earlier, were missing. Thereafter, the spoliation suit was filed, and one of the primary causes or the primary cause in this action against my client is for spoliation.

Now it's our position that there is no need for this court to create a new tort where you have adequate remedies already in place. This court last October in the case of *Maryland Insurance Co. v. Head* was urged to expand the remedies available against third-party liability insureds. And this court looked at the existing law and said that there were safeguards already that were in place to protect the rights of the litigants and refused to expand and create new causes of action where none were needed. We believe the same situation exist in this case.

We believe there are at least three safeguards that are already in place that more that an adequately protect the rights of litigants even with spoliation. First, and foremost, is the presumption that this court has recognized and that other courts have recognized for a party who destroys or conceals evidence. And basically if it is shown, then a party is entitled to instruction to the jury, that the evidence which has been destroyed would have been unfavorable to the spoliator and would have aided the plaintiff, assuming the plaintiff was not spoliated. Furthermore, the courts have said that where there is spoliation, that the presumption when unrebutted establishes a fact, that is, it creates what is known as artificial evidence: enough evidence to survive a summary judgment; evidence to survive a motion for directed verdict; evidence to survive a motion for new trial; and evidence to sustain a sufficiency either legal or factual sufficiency challenge on appeal. So you have all of this evidence of these presumptions that exist whether it's spoliation.

You look at the evidence in this case in what we have. If you look at page 16

of the plaintiff's brief lists what evidence they have: They knew that the child was born; they knew that at the time of the child was born, the child weighed 5,060 grams; they knew they were going to say that by some methods of delivery babies weighing greater than 4,000 grams sustained showed a dystocia in 23% of the cases. They also knew the baby was not delivered by cesarian, but was a vaginal delivery.

You have this evidence. You have the presumption that whatever was in the medical records would favor the plaintiffs in this case. We believe that this is adequate to protect the plaintiffs, and that creating of some additional independent tort is not needed.

OWEN: In this case, what instruction should be given to the jury?

LAWYER: If the court found that there was intentional destruction, which again is an issue which has not been addressed yet, which we don't believe is the case, we believe that it will show that it was put in a warehouse and the warehouse simply misplaced or lost them, but, if it is shown that it is an intentional destruction, then the jury is to be instructed that there is a presumption that the evidence which was lost, which was destroyed was unfavorable to the cause of the spoliator and would aide the case of the plaintiff.

OWEN: What if it wasn't intentional? You've got a statutory duty to maintain the records - you don't - they weren't intentionally destroyed, then what do you do? What instruction does a jury receive in that instance?

LAWYER: Of course in the *Dowling* case, the court said that the spoliation instruction only went to cases where there was intentional spoliation, that if it was accidental, if they were merely lost through no culpability on the part of the defendant, in that case the hospital, then there would be no instruction.

ABBOTT: What happens when the records are lost due to the negligence of other parties?

LAWYER: Well, of course, that's one of the issues that this court is going to have to address. It was not addressed by the CA and that is, whether or not negligence in losing a record will give rise to this presumption as opposed to intentional. We believe again if there has been good faith effort to comply with the statute and there has been no negligence, then an instruction clearly should not be given.

PHILLIPS: If the question was negligence?

LAWYER: Assuming there was a duty then, I, think the position would be that probably there should be some instruction.

OWEN: And what would the instruction be?

LAWYER: The instruction again would be I think to a lesser standard, but would say that there is some presumption that the evidence that would have been contained in the record, again if the presumption is not rebutted, would be favorable to the cause of the spoliator.

We believe also that in addition to presumptions this court is well familiar that there are pretrial sanctions that are available if a party destroys a document during the pretrial process, after litigation or after there has been for example, in medical malpractice case after a 4590i letter has been sent. In fact there are cases we've cited in our brief *San Antonio Express v. Custom Built Machinery* case, where pretrial sanctions were utilized as an alternative to the evidentiary presumption given by the trial court.

It's been pointed out by at least two CAs, the *Malone* court in Dallas and the *Ortega* court that you have penal statutes. Section 37.02 of the Penal Code specifically makes it a crime if you commit an offense if they alter or destroy a document in connection with an official proceeding. And both of those courts held that a civil trial was an official proceeding such that if there was a destruction of evidence it would give rise to a violation of §37.

ABBOTT: What you're saying it could be a crime?

LAWYER: It could be a crime. That's why you have the presumption to aide the person whether it be the plaintiff or the defendant who is the victim of the spoliation by the other side.

The plaintiff's proposal, and I think it is very important for the court to focus on, the CA announced a totally different rule or standard than the plaintiffs are proposing before this court. What the CA said was: That if we're going to recognize this independent tort, that you're going to have to show that but for the loss of the evidence, the plaintiff would have prevailed. Sort of like a legal malpractice case, a suit within a suit. In fact, the CA said: The opportunity to prevail in the civil action is what is being _________. If you look however at what the plaintiffs are asking this court to do on page 17 of their reply brief, they are not asking the court to adopt that standard. What they're asking this court to do is to hold that if 4 things are shown they are entitled to recover: 1) that there was a duty to maintain the records, and there was a breach; 2) there's an absence of the records which has impaired their ability to present their case (if you can show that the absence of the records has impaired their ability to present their case, they are asking this court then to say: if there is a presumption they would have won. The jury is not asked: Would they have won but for the absence of the records? They are asking this court to say: If the absence of the records impairs their ability to present their case, then presumption they would have prevailed in the underlying case and then damages.

ABBOTT: Let's say, we don't find that, we don't create that cause of action. What would then happen is, that you would have a trial on the merits of the underlying matter, and there would be this instruction that would go to the jury that submits to the jury that same presumption?

LAWYER: Correct. If the presumption is unrebuttable. It's a rebuttable presumption which the courts if you look at the *H.E.Butt v. Bruner* case, if you look at the *Brewer v. Dowling* case, talk about the fact in certain cases if the defendant, for example in the *Dowling* case it was a lost fetal monitoring strip. And the hospital came back and showed two things: 1) they showed that it was not intentionally destroyed, that it was an accident; 2) they showed through the doctors and the nurses' testimony that the information on the monitoring strip in fact would have been favorable to the hospital and not contrary to their interest. And the Ft. Worth CA in that case, which was appealed here and writ was denied in 1993, held that in that case that the parties had rebutted the inference, and in fact there was no entitlement on the part of the plaintiff to that instruction, and the instruction was refused. In fact, that was one of the holdings of the court and that was brought to this court through applications for writ of error, and was denied.

The concern we have is whether or not if you adopt something like this, we're going to be back to not trying cases on the merits, but trying cases through discovery, trying to find a document is lost. So then you can get this presumption they're asking for - they would have won, you have weak cases. And instead again trying them on the merits, you're trying them on discovery. We all know in the late 1980s we had all the discovery rules and discovery battles and death penalty sanctions, and a lot of cases were not tried on the merits, but were tried on discovery.

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LAWYER: I do represent Drs. Foster and Christanson, and Baylor University Medical Center. This case is a little different from the *Ortega* case. It is a medical malpractice case against the doctors and the nurses for which they sought to hold Baylor vicariously libel and it included a spoliation claim; however, on appeal we are limited to looking at the intentional tort of spoliation.

This case doesn't involve medical records, it involves an incident report. And it's about an intentional destruction based on a business decision, but not a destruction with the intent to disrupt or destroy plaintiff's ability to prove a case.

Moreover, it involves a destruction by a party against whom a claim was not being tried to the jury. In other words, the issue that the jury was deciding was whether the doctors or nurses were negligent, and they did not it is undisputed have anything to do with the destruction of the incident report, that was pursuant to Baylor's policy.

ABBOTT: Tell me why that doesn't make your case in fact a little bit more difficult? Let me just kind of use this scenario, which is almost the one you painted, and that is, you have a case where the plaintiff sues defendant. And defendant doesn't have any control over documents that are key to the case. We have a third party who let's say is in lead with the defendant in one way or another, no type of conspiracy or anything like that, but this third party wouldn't mind at all making sure that the defendant is exonerated. And for whatever reason it's this third party that's responsible for maintaining documents, they are going to be absolutely essential for the prosecution of the case,

and that third-party just decides that they are going to go ahead and intentionally destroy those documents, and that totally undermines the case of the plaintiff. Now in that particular case a spoliation charge it seems to me would not be acceptable, because there was no destruction of the documents by the defendant. So, what remedy does the plaintiff have?

LAWYER: From your question and the facts that you stated, the third-party that spoliated them was aware of the claim that was going to be made. And you have a criminal statute that addresses that, although, there's not any case I could find that applies it to civil actions. I think that it is appropriate to be considered because when there is an investigation, it doesn't have to be a proceeding going on, then it can be a crime to destroy evidence with the intent to hinder that. And I think that addresses that particular scenario.

ABBOTT: Well that addresses the crime side, but again does nothing for the tort victim.

LAWYER: I think you will have to fashion a remedy in that kind of situation keeping in mind, however, that not every harm or alleged harm deserves redress or can actually be redressed. Because there isn't a common law duty to preserve records. And, indeed, the third- party undeniably has a right to deal with its own records as it sees fit when there's not a duty. In fact, this court in the *Texas Beef Cattle* case said it would be a strange doctrine indeed if one with a right to deal with the property could be held libel for doing that.

ABBOTT: Are you then implying that if there were a statutory duty to maintain those records, then an independent cause of action in tort would lie against the party responsible for maintaining those records for their destruction of those records?

LAWYER: If there is a statutory duty to maintain the records there is a duty and that is the basis for compensating a loss sustained by a wrongdoer. Before you can have a wrongdoer, you have to have a duty. If you have the duty, then there's no need to create another tort, because you already have those principles. Those are the rationales expressed by the courts that have addressed the tort of spoliation, the principles that are already in place. If there is a duty, in fact a breach of that duty may very well result in a remedy having to be fashioned for any harm that occurs.

But I think the court needs to keep in mind that a tort of spoliation is going to impose some burdens that have to be considered. As I said, you do have a right to deal with your own property as you see fit, but if a tort of spoliation is adopted, then you're going to be making decisions about what to do with your records based on somebody elses interest instead of your own. You're going to have to be making decisions about relevancy of these documents to some unknown claim. And most businesses and people are not going to try to do that. They are not going to keep everything. And that has a cost, too. And if they try to make a decision, what if they make a decision the plaintiff disagrees with. Are they then libel on that case?

And I think one of the biggest things the court needs to keep in mind is that

this tort is going to expose people to suits and liability for injuries that they didn't cause, and upon a lesser burden than the plaintiff had against the original tort feasor. You can be creating something that's going to be better than the real thing.

The *Malone* case is not even a case that's appropriate for consideration in whether there should be an intentional tort of spoliation. There's not a duty in this case. These are not medical records. So you can't make the argument that perhaps §241.103 of the Health & Safety Code creates some kind of duty. There's certainly no culpable intent in this case. I think that the other elements that have been recognized in that tort are equally lacking here such as the intent and causation. And certainly the court must keep in mind the relevancy of the document to the claims that are actually being tried.

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RESPONDENT

McGARY: First let it be perfectly clear that the State of Texas has an extremely strong public policy against the destruction of evidence. The destruction of evidence in a pending case is not only a crime, it's a third degree felony. It's not only subject to sanctions, but death penalty sanctions have been upheld. And also the Amarillo CA has previously written that one of the purposes of having statutes of limitations is to advise defendants how long they must preserve evidence.

The first question this court must address is: If there is in fact an extremely strong public policy against destroying evidence, when does the corresponding duty to preserve or not destroy that evidence arise?

HANKINSON: How would you specifically have us define the duty since you've acknowledged there must be a duty, and I presume that's because if there's going to be a tort it has to start with a duty?

McGARY: It has to start with a duty.

HANKINSON: And how would you have us define the duty?

McGARY: Duty not to destroy evidence. Duty to preserve, take reasonable steps to preserve evidence.

HECHT: Does that presume the pendency of a cause of action?

McGARY: I suggest that that duty arises whenever litigation is reasonably anticipated. You can adopt the full line of cases from *National Tank v. Brotherton*, when privileges are created in anticipation of litigation. If you can anticipate that a lawsuit's going to be filed, you should not

be allowed to destroy evidence that's going to be relevant to that litigation.

HANKINSON: Well then why would there be a duty in the *Trevino* case, Mr. McGary?

McGARY: The statutory duty arises in the *Trevino* case because there is a statute that requires medical records to be preserved from their inception.

HANKINSON: So if in the absence of a statute a party has no reason to anticipate litigation, then there would be no duty and no tort of spoliation?

McGARY: I would agree. I think the duty arises once a person may reasonably anticipate that there will be litigation.

ABBOTT: Do they also have to reasonably anticipate what may be evidence?

McGARY: I think it is a reasonable person standard. If it's a highly debatable relevancy, the spoliation tort is going to have problems and causation. But in the two cases before this court, the documents were essential and any reasonable person would have known that they were essential.

OWEN: You've just given us a list of the consequences of spoliation of evidence in opinion case, including, death penalty sanctions. Why aren't those adequate?

McGARY: There's lots of reasons. One, because they only protect against destruction of evidence in a pending case, and not somebody who destroys evidence knowing that a case is going to be filed next week.

ABBOTT: For the case that is filed next week, where the records are already destroyed, they could still have an instruction given to the jury in that case could they not?

McGARY: The instruction is an inadequate remedy for several reasons. One, first and foremost, because it's a largely unenforceable remedy. Trial courts have very broad discretion not to submit instructions. And in fact, the trial judge in this case refused to submit a spoliation instruction; refused to even allow the jury to hear the fact that documents were intentionally destroyed.

OWEN: Why wouldn't that be abuse of discretion that can be corrected on appeal?

McGARY: Several CAs, including Dallas, and both Houston courts have held that the TC's discretion to refuse an instruction is even broader than the TC's discretion in how to formulate a jury question. Several courts have also relied upon the language of Rule 277 to say that TCs have discretion to refuse a jury instruction whenever that trial judge is of the opinion that the jury is capable of rendering a proper verdict without the instruction. One cite of the case that holds that is

Thomas v. St. Joseph Hospital, out of the Houston First, 618 S.W.2d 791.

If a party intentionally destroys evidence knowing that a lawsuit is going to be filed, I, think, and argued to the CA and argued in my brief in this court, that even without an instruction a lot of juries are going to make a negative inference: He destroyed documents, he must be hiding something. That is an argument that can be made that even without the instruction some type of negative inference is going to be drawn. And if that argument can be made, I think it can be made in favor of not submitting the instruction. The jury doesn't need to know that destroying evidence is trying to hide something. They are going to infer that naturally. So I think that in cases of intentional destruction of evidence there's a ready-made argument in each and every case to justify not submitting an instruction. And the TCs have discretion not to submit it.

Moreover, even if the instruction is given, what if the jury just simply decides to disregard it? How would the parties know? How would the judge know? How would a CA be able to review a jury's disregarding of an instruction?

OWEN: Why should we presume that a jury would disregard it?

McGARY: Well you can't presume one way or the other.

BAKER: But the law says we can presume that we follow it.

McGARY: They presume that they do follow it.

OWEN: I don't understand the distinction between submitting an issue to the jury on a spoliation cause of action verses an instruction. What if the jury disregards...

McGARY: Because there's going to be a well established standard of review based on evidence as to whether or not the evidence supported the jury's answer and finding whether or not the evidence was destroyed, whether or not the destruction of that evidence proximately caused the loss of a lawsuit.

HANKINSON: You've gone to the second element of what I presume would be your cause of action, and that's causation. And your proposal is that proximate cause would be the causation element in this cause of action, is that right?

McGARY: Yes.

HANKINSON: Alright. How in one of these cases would the proof of proximate cause ever rise beyond the level of speculation?

McGARY: Very easily. The quantum and manner of proof of a spoliation cause of action

is going to be identical to that in a legal malpractice case. The elements of the cause of action...

HANKINSON: But isn't the point Mr. McGary that the reason why you say we need this tort is because the plaintiff cannot prove his or her claim? Now spoliation could also cut against a plaintiff I take it as well? This could cut both ways. But in your scenario you're arguing on behalf of a plaintiff. Plaintiff can't prove the case, that's why we have to have the tort of spoliation; otherwise there's no remedy for the plaintiff. And now you're saying that we're going to be able to go into court and have proof by a preponderance of the evidence that this missing evidence is what caused me not to be able to prove my case.

McGARY: Let me first outline the elements of the cause of action, I propose. Very simply, the existence of a duty to preserve evidence, the intentional in the *Malone* case the negligent breach of that duty; in the *Trevino* case, proximate causation and damages, just like a legal malpractice case. I disagree with the *Ortega* court and any other suggestion that the quantum of proof necessary for causation and damages is going to be any lower in a spoliation case. I think you hold it to the full standard of evidence required to prove proximate causation and damages as you would in any other case.

HECHT: With out without a presumption of missing documents?

McGARY: With the presumption.

HECHT: Why should you presume that in a spoliation case?

McGARY: Because, and I think the *Trevino* case is a good example of this, in our case, in the *Malone* case, we have independent evidence sufficient to reach a jury as to what was in the destroyed document. The facts in our case were: Mr. Malone fell out of bed, he complained that he was paralyzed and could not get up, he told the nurse this fact. The nurse's testimony was: "I cannot recall what he told me, but whatever it was he told me, I put down in this record, that was subsequently destroyed." I think that's sufficient evidence of what was in the record. Sufficient to reach a jury. However, in many cases, and the *Trevino* case is an example of this, there is simply no way to infer the content of the document. Therefore, the presumption must still apply in those cases to shift the burden of proof not on causation, not on damages, we're not reducing the level of proof, not requiring those elements, but of the content of the destroyed document, that the presumption should be still that the person who destroyed it, destroyed it because it was adverse to that party.

HECHT: But that's what you have with the instruction?

McGARY: Correct.

HECHT: So have you changed anything accept an additional level of damage?

McGARY: Well because as I said, the instruction's not enforceable. It doesn't have to be given. Number 2, it doesn't have to be followed. And number 3), the instruction is not always required in every case. There are several cases that interpret *Brewer v. Dowling* to require that instruction only if there is independent adverse evidence, and the party who was in possession of the evidence fails to produce it in rebuttal. In other words, there's a corroboration requirement before you even get the instruction. Well how does that help someone if the defendant destroys all of the evidence on an issue? They destroy all of the evidence underlying issue, there's not going to be any corroborative evidence, you don't even get the instruction on the *Brewer v. Dowling*.

HANKINSON: Then do I understand you correctly, that your evidence of proximate cause is the presumption?

McGARY: No.

HANKINSON: Well what is the evidence? Presumption applies in a case like the *Trevino* case where we don't know what the records say?

McGARY: The presumption applies to determine what the record said. Given that presumption and given if it's not rebutted, it's still a rebuttable presumption, given that presumption of what the record says, the plaintiffs still must prove that if we had the record and if it did say this adverse stuff, we would have won the case. They still have to prove that causation, the same...let me draw the analogy again to a legal malpractice case. Suppose the legal malpractice is that the attorney failed to designate an expert witness. You're missing evidence, you're being deprived of evidence. The case against the lawyer, you have to prove the content of that missing evidence and if it's destroyed, obviously you need the presumption, but if it's not destroyed you have to prove the content. But you separately have to prove that the admission of that content would have made the difference in winning the underlying case. The causation element remains the same and a plaintiff retains the full burden of proof, that given adverse evidence was destroyed, does that adverse evidence make a difference?

BAKER: I'm still not sure you've answered Judge Hankinson's question, because items that you are compressing(?) it's assuming the proximate cause into the presumption?

McGARY: Well the content obviously is going to be relevant to proximate cause.

BAKER: If you say what you're saying that a proximate cause issue is the same as you even have to prove in a medical malpractice case, based on the type of claim we have here, how do you prove that under your theory?

McGARY: Let's suppose for example, you have in the *Trevino* case, the missing documents presumed to support the plaintiff's experts opinion. You still have to go through with the rest of the trial to prove that, "okay, I've got this expert opinion based on presumed adverse

evidence," is that enough to win the case? You still have to prove proximate causation, that you would have won the case.

BAKER: You have to prove the medical malpractice case?

McGARY: You have to prove the medical malpractice case.

BAKER: Within the framework of the spoliation tort cause of action?

McGARY: It's a case within a case just like the legal malpractice case.

BAKER: As I understand in *Trevino*, there's a separate lawsuit, which is the one that's here purely on spoliation as a tort, and there's a pending malpractice case that hasn't been tried yet?

HANKINSON: Does the expert witness then base his or her opinions on the presumption? So we would have a doctor get on the witness stand and say: I'm going to presume that these medical records show that the doctor was negligent, and they are also going to show that the doctor's negligence was the proximate cause of the harm to the plaintiff". Well what is the expert witness in this case within a case going to base his or her opinions on?

LAWYER: The only presumption is the content of the document. There's no presumption regarding negligence, no presumption regarding proximate causation or damages. Presumption is, here's a fetal monitor strip and it's going to show this data. That's the presumption. The experts coming in and saying, "Given that data, it's my opinion there's negligence," and then the plaintiff has to prove that given that opinion now that we have that presumed adverse evidence, that was proximate cause.

HANKINSON: The presumption is that the evidence is adverse not that the missing evidence contains particular information. For example, the expert's not going to get to say as part of the presumption: "I get to presume that this fetal heart monitor strip showed decelerations, that the staff at the hospital did not take care of."

LAWYER: That point is an equal argument against the instruction because the instruction is so vague. How adverse do we presume the evidence is and what manner do we presume it's adverse? However, in both the cases in front of this court today, the choice is A or B. It's either: He said that he was paralyzed, or he didn't say he was paralyzed. The fetal monitor showed distress, or it didn't show distress. It's going to be one of the other. And so by merely presuming adversity, you're going to be choosing choice B instead of choice A.

BAKER: Earlier you answered Judge Hankinson that, yes, this tort if created would also cut and could cut against plaintiffs and can be raised by defendants. How does a defendant get the benefit of the tort if it's created?

LAWYER: Be a counterclaim. My defense of evidence has been destroyed by the plaintiff...

BAKER: For what?

LAWYER: Basically it would be an offset. It would be any liability I incur in this case is due to the fact that plaintiff destroyed my defensive evidence, and my damages are exactly equal to whatever he would be able to prove and would be an equal offset. It would be a defense.

BAKER: An affirmative defense?

LAWYER: Affirmative.

BAKER: But ______ meaning that the plaintiff wouldn't recover anything if its an affirmative defense?

LAWYER: Correct.

BAKER: Rather than an affirmative counterclaim for damages?

LAWYER: It's a counterclaim for exactly the offset most likely because the damages of the defendant would be whatever liability he incurred.

BAKER: So is it your view then that the damages in this type of tort is exactly the same damages that you would recover in the medical malpractice case?

LAWYER: In both of these cases, yes. The California courts have recognized that the spoliation tort might also be applicable in merely making a case more expensive to prove: we needed extra experts or we had to recreate this expensive evidence, etc. They go a little farther and say that the damages might not be the same, but in these cases largely they are going to be exactly the same. It's going to be just like a legal malpractice suit.

I do request leave of the court. I was just served with a response to my application this morning and I do request leave of the court to reply in a brief 2-3 page memorandum.

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LAWYER: Of one thing there can be no question in this case and, that is, without the existence of the independent cause of action there will be no remedy for Linda Ortega. She cannot get to the jury with a penal code provision, she cannot get to the jury with a presumption, and she cannot get to the jury with a pretrial sanction. That is because she was _____ by an honest expert, an expert that in all truth and honesty said: "I have no records to review. I know what happened to

the girl. I know she has an herb palsy as the result of a shoulder dystocia. I know that she was born weighing 11.2 pounds. I know how it happened. I can't tell you why it happened, because the entire medical chart is gone. All the prenatal record is gone. All the delivery record is gone." Without something to review, the honest expert who was honestly presented said: "I cannot tell you by a standard of reasonable medical probability what caused this injury."

And if this court reverses the Corpus Christi CA, this case will stand for the proposition that it is better to destroy all of the evidence rather than some of the evidence. This will stand for the proposition that you have a free license to destroy an entire medical...

HECHT: It's not totally free. It is a crime.

LAWYER: It is a crime if it's done after the case is filed and if they are caught. And in most hospital settings, the circumstances of the storage of the medical records are entirely in the hands of the hospital as was the case in this case.

BAKER: They do have an assertion that the doctor is not a hospital and bound by the retention statute. That's correct isn't it, is a contingent by them?

LAWYER: On the duty side?

BAKER: On the violation of the statute it doesn't apply to them so that they don't have a statutory duty.

LAWYER: I understand where the court's going. Hospitals have the statute: Health & Safety Code 241.103. Doctors have the Cannons of Medical Ethics. A court would be free to adopt the Cannons of Ethics as promulgated by the Texas Medical Association, and the Medical Association. And we have them reproduced in our brief. A court could adopt those as establishing duty.

I think it would be preposterous among the medical community if you lined up 100 doctors and say: "Doctor, does or does not a doctor have a duty to maintain medical records to care for your patients?"

OWEN: This is essentially a strict liability cause of action. If you lose the records, you are libel, isn't that essentially what this boils down to?

LAWYER: Yes.

HANKINSON: Then you disagree with Mr. McGary that you would have to prove the medical malpractice case within the spoliation claim in order to prevail?

LAWYER: I am saying that you would have to have enough proof by expert testimony as we do in this case to say: I know what happened. I, the expert, testifying to the jury, I know what the injury is. I know what caused it. What I can't tell you is by a standard of reasonable medical probability exactly how it happened.

HANKINSON: But Mr. McGary says that you have to prove the medical malpractice case within the spoliation case, which I presume would require those same opinions to be offered, the opinions based on reasonable medical probability, do you agree with that?

LAWYER: I do not agree entirely with Mr. McGary's presentation of the *Ortega* case. I believe that through expert medical testimony, you would have to establish the circumstances of an injury. You would have to establish the cause of the injury. The question in the *Ortega* case is what of a number of factors gave rise to the causation of the injury?

HANKINSON: And we don't know that because we don't have the records?

LAWYER: We can never know that because we don't have the records.

HANKINSON: Let me ask you the same question I asked Mr. McGary: Why would your proof of causation in the spoliation case amount to nothing more than speculation?

LAWYER: Because you will be establishing these. I'm not going to ask an expert witness to make up facts, which could or could not have been contained in the medical record.

HANKINSON: Are you going to have to prove causation in this tort? Are you saying that that's the element of the tort, causation?

LAWYER: In two ways: the loss of the medical records was a proximate cause of the loss of the cause of action. The second issue of causation, the medical expert will say: This injury was caused by this mechanism. And then if called upon to do so, in the guidance of the trial court, the medical expert could in order to assist the client say: These are the range of things which can cause this result.

HANKINSON: So we're not rising to the level of proximate cause?

LAWYER: On one level we are. Yes. Because the loss of the medical record was a proximate cause of the loss of medical negligence cause of action.

HANKINSON: And that's based on the expert's testimony: "I can't offer an opinion without the records?"

LAWYER: Yes.

BAKER: Does that mean that you have _________ that there's a protected property interest in filing of suit in the State of Texas based on your viewpoint of what the proximate cause of the issue is in the spoliation tort?

LAWYER: I believe that in this state there has long been recognized a property interest in a present or perspective cause of action.

OWEN: In this case did the expert say: "I can say it was caused at birth," or did he say: "It could have been caused at any point in the life," or could you even pinpoint it to a point in time?

LAWYER: We can absolutely pinpoint it because the child was carried across the street from McAllen Maternity Center, and taken to the emergency room at the real hospital on the other side of the road where a chart resulted. At that chart it was identified by the attending ER physician as an herbs palsy induced birth injury. So we can establish with absolute precision when it happened.

OWEN: What if you sued the hospital, the doctors and the nurses, and the records are gone are each of them strictly libel for that injury?

LAWYER: It depends on whose record it is, the hospital who had the duty to maintain the chart would be responsible. And if it was a doctor's chart that was lost, then the doctor would be responsible. But, no, not everybody in the chain is responsible.

BAKER: So that makes the hospital the insurer of the nurse or doctor's negligence?

LAWYER: It makes the hospital charged with the duty, which it has under statute to maintain the records and responsible for the consequences if they breach their statutory duty.

BAKER: But there's no consequence under the statute of what happens to you if you breach that?

LAWYER: Therefore, it's an empty statute and, therefore, this court needs to afford some enforcement mechanism by recognition of this cause of action.

OWEN: What if there's some injury that manifests itself later in a child's life, and there are various things that could have caused it, and you go back to 2-3 treating physicians none of whom have records. Do you presume that each of them was negligent in treating the child?

LAWYER: Over an extended period of time measured in years?

OWEN: Let's say a child was given some sort of drug that manifest some adverse reaction a couple of years later, and you go back to 3 different physicians who treated the child, none

of whom have records. You presume that each of them gave the child the drug.

LAWYER: I would not.

OWEN: How do you pick?

LAWYER: The court has cast it in terms of a drug was administered. Somebody knows that the drug was administered, that exist in a record some place. And you know who administered it by virtue of the pharmacy records.

OWEN: Let's say it wasn't a drug. It was some treatment. It could have been one of three different physicians. And none of the records 15 years later are available.

LAWYER: It's sort of a *Summers v. Tise* crossed with a spoliation claim. In all honesty, I believe that would be stretching the cause of action a bit too far. And I think that that would be a situation in which it would be subject to summary judgment by virtue of a defendant expert saying: "We can't tell, nobody can tell."

OWEN: Why would that case be different than if a child's birth where it could have been the nurse, it could have been the _______, it could have been the physician?

LAWYER: It doesn't matter. All three of them were working for McAllen Maternity Clinic.

OWEN: Or the hospital? Well the doctor?

LAWYER: The doctor was an employee of McAllen Maternity.

OWEN: That's a whole different issue we will have to address. But why pick, and you picked just the hospital and say: Well it was their records, so they're the ones that....

LAWYER: Because they're the ones charged with the statutory duty to keep them. If it was a physician, it would be a physician that I would urge charged with an ethical duty to keep the records, and if he did not reasonably do so, then in that event, he would be libel. Remember what I'm asking the court. I am asking the court to approve a cause of action whereby the jury would be asked: Did the loss of the records materially impair the plaintiff's ability to bring the cause of action? It's not a strict liability concept in all due respect. It is a reasonable statute. And if the jury says: Yes, losing these documents, losing these records, whatever they are, was such a blow to the plaintiff's ability to bring the cause of action, that they effectively couldn't do it...

GONZALEZ: Why wouldn't that be a ______ every time - slam dunk?

LAWYER: For example, in *Brewer v. Dowling*, the mere loss of the fetal monitor strip, I think the CA was probably correct in that case. I think there was enough other evidence of what the fetal monitor strip showed, that it was immaterial.

ABBOTT: Does that put the defendant in the position though of having to come up and present to the jury a whole bunch of evidence of why you could otherwise win the case?

LAWYER: It could do but it's not significantly different from what we have now. It merely makes it a different claim.

OWEN: But in the *Dowling* case, it was a question of law for the court about materiality. And you're saying now we submit it to a jury on this theory?

LAWYER: In a spoliation cause of action, yes.

OWEN: So the *Dowling* court might not have been able to reach the issue you _____ in under the spoliation cause of action?

LAWYER: The jury would have been asked in the *Dowling* case: Do you find by a preponderance of the evidence that the fetal monitoring strip was material and that the loss of this material evidence was such that it rendered the plaintiff incapable of presenting his cause of action?

OWEN: They said yes, but the CA would say no.

LAWYER: Then that's what our courts are for and that's what juries are for.

OWEN: If we presume the fetal monitor is adverse, even though there's a lot of evidence that it wouldn't be under your theory, the jury still gets to say, yes it was adverse?

LAWYER: I'm not heaping a presumption on top of a cause of action. I think it is implicit in the concept of a spoliation cause of action, that you are saying the material would be adverse. I think that's inherent. You're not then again telling the jury: You are to presume it was adverse. You're asking the jury...

OWEN: My point is, that under the *Dowling* case, the CA could look at all of the evidence, and say: We will not presume it was adverse because all of the other evidence says it's not. Under your theory, you automatically in a spoliation case assume the jury is entitled to draw the conclusion that it was adverse even if all the other evidence says no it wasn't.

LAWYER: I would not give that charge. I would not instruct the jury: You are to presume the evidence would be adverse.

OWEN: My point is, wouldn't you ask the question it wasn't material? If they find it was material, even though there's no other evidence other than the fact that it was lost, that finding would stand under your theory would it not?

LAWYER: But it's going to be a fact sensitive inquiry in each case. The jury would be told the importance of the fetal monitoring strip, that there is a dispute regarding its contents, that two doctors and a nurse will testify to what they saw on it, that there was other evidence correlating in the case that the infant was not in fetal distress at the relevant time and, then the jury would be asked: Was it material and did it destroy the plaintiff's ability to bring a cause of action? I think obviously not in the *Brewer v. Dowling* case because they succeeded in bringing the cause of action, and they succeeded in getting to the jury with other testimony.

BAKER: How long does the duty to maintain the record under a spoliation tort?

LAWYER: In the case of 241.103, the Texas Health & Safety Code for the period of time charged - 2 years or majority plus two years. In the case of physicians, the AMA and the Texas Medical Association say: Look to the statute of limitations; maintain the records for 2 years or in the case of minors beyond that time. For other types of records, financial records, I think it would be a reasonable person standard. It would depend upon the standards in the industry. And you would then get into issues such as Mr. McGary's case, where this court made a determination that incident reports aren't medical records, and the hospital immediately formulated a standard that: Oh, well we are going to destroy them after 6 months. That would go into the inquiry.

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REBUTTAL

LAWYER: Three or four points I would like to cover. One, from Mrs. Wilkins concerning whether or not the incident reports were medical records. She has, I believe, attached to the appendix of her brief, the Texas Administrative Code which defines what is a medical record for the purposes of the statute, and does not include these incident reports. Secondly, as far as Mr. McGary's argument that: well the courts don't have to give these instructions; well if it's raised by the evidence, the courts are required to give instructions. If they don't, they can be reversed. The problem we have in the *Malone* case was, that there was no objection to the charge for the failure to give the presumptive instruction and, therefore, it wasn't raised on appeal. In fact, there's evidence that Ms. Wilkins pointed out in her brief that the jury heard that what was on this incident report was transposed or taken and put on the medical records themselves. So what was on the incident report was on the medical record.

Another thing Mr. McGary said was: Well the jury can ignore these instructions. Well if that is a basis for rejecting instruction and going through an independent tort, then the whole charge system is going to have to be revamped by this court, because that could be the case where any instruction given by the court, and know on any of these instructions we don't

necessarily have the mechanism to find out if the jury is going to follow. We assume they do. We assume they follow their civic duty and follow the instructions that are given by the court.

Now one point that was raised by Justice Hecht, I think is important particulary with respect to the scenario that Mr. McGary is arguing, that is, you have to prove a case in the case. And that is, most of these cases you try the medical malpractice case first and then you go and show that you lost the case because you didn't have these records. Well if you think about it in the medial malpractice case if you have the presumption, you're going to go to the jury with the presumption that whatever there was bad for the defendant and was good for the plaintiff. And the jury will have rejected that presumption. If you then go to a second case where there's an independent tort what different evidence do you have? How does it get any better? Why isn't the first case, if you have this presumption, why isn't that collateral estoppel?

ABBOTT: What about in a situation, as I understand it in Mr. McGary's case, where because of the absence of the records cannot obtain the necessary expert testimony to get past a directed verdict?

LAWYER: First off, I disagree. All the medical records in Mr. McGary's case were present. In fact there was testimony that whatever was on the sensor report was taken by the nurse and put into the medical records. Second, as far as getting past a directed verdict and I believe that was raised also, with this presumption if you look at the *H.E. Butt* case, the way I read the case it says: That this presumption if it's unrebutted by the defendant will get a plaintiff past a summary judgment, past a directed verdict, past the motion for new trial, and will again be artificial evidence to survive a sufficiency challenge on appeal in this court or the courts below.

ABBOTT: Did the *H.E.B* case involve expert testimony?

LAWYER: It actually involved an onion that was lost. They lost the onion, they stored the onion afterwards, and it did not involve Justice Abbott, expert testimony. But they talked about how that this presumption if it is unrebutted would again get them in that case past the pleaded privilege that we had at that particular time. Again, we think that a presumption is all that's needed. We don't think it ever gets any better than a presumption.

HECHT: But if a third-party destroys them, then what?

LAWYER: If the third-party destroys it, someone who is not the tort feasor, obviously, you have a different situation. And I think again you have to look at first off: Was there any duty on the part of the third-party?

HECHT: And if there was?

LAWYER: And if there was a duty, then I think you get to the second point was: Well did

the destructions of the record prevent the plaintiff from prevailing in the case? And again, you get back to the same argument regarding speculative nature. How do you ever get past that?

HECHT: But if it's a third-party you wouldn't get an instruction in the case.

LAWYER: No, but we still have the question of whether or not it prevented the plaintiff from prevailing against the other person who's not a party.

PHILLIPS: Assume it did in the very best case scenario?

LAWYER: In the very best case scenario, assuming that the third-party spoliator owed a duty to the plaintiff...

PHILLIPS: Well, no. There is a requirement for records somewhere that that record has to be kept.

LAWYER: The other thing, as far as the state statute and the hospital, one of the things that hadn't been pointed out is that statute was enacted in 1989, the underlying medical malpractice case was filed in 1988. The ABA Cannons that you're talking about, the version I saw was 1991 - 3 years after the underlying lawsuit had been filed.

PHILLIPS: I'm just interested in when, if ever, in a third-party falls accident, how would your presumption system ever benefit...

LAWYER: A presumption system would not work with respect to a third-party. I agree with the court on that. But you still have the problem even going against a third-party as far as the speculative nature and whether or not this court is going to allow those types of suits as recorded in the *Kramer* case and other cases have said: that if it's too speculative we're not going to allow it to proceed.

OWEN: In the case about the child that was allegedly injured at birth, and let's assume that there's intentional destruction, there's was a statutory duty to keep the documents, what is the presumption then, such that the expert can make an opinion? What do you presume that the doctor did what?

LAWYER; You presume, and again, in the *Brewer v. Dowling* case, you presume that the evidence that had been reflected on the medical records would have been detrimental to the part of the defendant.

OWEN: But it has to be more specific for an expert to then come in and say...

LAWYER: Well, I'm not so sure an expert has to necessarily rely on the presumption

because I think that's stretching it. What I think it allows, if you look at these presumption cases, it allows again it creates this artificial evidence and allows the attorneys to argue that in fact it would have shown that...

OWEN: You don't understand my question. The expert can't get up and testify: In my opinion this doctor breached the duty of care because he or she failed to do X. Now unless you presume that he or she failed to do X, the expert has nothing on which to base their opinion of negligence. How do you get over that hurdle in the presumption cases?

LAWYER: Well, again, going back to the *HEB* case, the courts have said that it will create the necessary evidence, this presumption will, to get a party to a jury.

OWEN: So the trial court can tell the expert: You may assume that the doctor used tongs, you may assume...what facts are given to the expert such that they can formulate an opinion that breach of duty by the doctor?

LAWYER: First off, I'm not so sure, I don't think it's my opinion that the expert necessarily opines on the presumption. Because if you have the expert opining on the presumption, then I think we get into a mired of other problems as in *Robinson* and *Daubert* and all these things as far as what an expert may base his or her opinions on, you know how reliable is things like that, and I don't think you can do that.

OWEN: Was the presumption that the record would show the doctor breached his ethic standard of care and that that was a proximate cause of the injury?

LAWYER: I think there is a presumption that is negative, and that's a presumption that can be argued by counsel to the jury. I don't think it's something that the expert can necessarily base his opinion on, because I don't think it meets the other bases that experts can rely upon...

OWEN: Let me ask it another way. In a case where you've got intentional spoliation, and you've got an instruction to the jury, do you need expert testimony to support the jury's verdict finding there was negligence of proximate cause, and damage?

LAWYER: I would think under the *HEB* case you would probably not...

OWEN: In a malpractice case?

LAWYER: In a malpractice case it says: It suffices as evidence that gets you to the jury.

OWEN: You wouldn't even need an expert?

LAWYER: No.