
MASON HOLMES,
Defendant-Appellant,

v.

AHMED SIDIK and CODY SCHNEIDER,
Plaintiffs-Appellees.

No. 16-2888.

Court of Appeals
for the Third District of South Texas.

Argued January 14, 2017.

Decided September 6, 2017.

David Polsinelli, River City, for Mason Holmes.

Evan Howze, River City, for Ahmed Sidik and Cody Schneider.

Before Chief Judge PROCTOR, Judges CICCONETTI and GLOVER.

Chief Judge PROCTOR delivered the opinion for the court.

In this personal injury case, the defendant Mason Holmes appeals the decision of the 33rd District Court of Capitol County to deny summary judgment and to give a permissive adverse inference instruction. On the parties'

motion, the trial court certified these issues for interlocutory appeal under South Texas Rule of Appellate Procedure 64.14(b). We affirm.

Background

Early in the evening of Saturday, October 8, 2011, Ahmed Sidik and Cody Schneider were riding a Vespa on Miller Road outside of River City, South Texas. As they came around a corner driving east, a pick-up truck being driven west by Blaise Williams crossed the double center line of the roadway. Sidik, who was driving the Vespa, swerved to avoid the pick-up truck but could not. The pick-up truck collided with the Vespa.

Williams stopped his truck, saw the severity of Sidik and Schneider's injuries and called 911. Williams aided them until police and emergency medical responders arrived. Sidik and Schneider were severely injured and spent months recuperating from shattered legs.

During discovery, Sidik and Schneider's attorneys developed evidence that Holmes and Williams regularly texted one another. In fact, they texted each other 71 times on the day of the accident—both before and after it occurred.

The summary judgment evidence includes the following text-message exchange between Holmes and Williams:

Holmes:	Blaze of Glory.
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Holmes:	Blaze of Glory.
Williams:	What? I'm driving. Leave me alone.
Holmes:	We gots to talk.
Williams:	I said I'm driving. Leave me alone.
Holmes:	C'mon, Grandma.
Holmes:	Will just take a minute. The big game is about to start and I need to put my bets in.
Holmes:	And you told me you were staying home. Wassup? Where you headed?
Williams:	To the store. Out of adult beverages. In a hurry so I don't miss kickoff.
Holmes:	The games. What do you think?
Williams:	Can't you make up your own mind?
Holmes:	Naw. I keep going back and forth. What do you think?
Williams:	If you're talking a lot of money, you can't go wrong with the Horny Toads.
Holmes:	What about the late game?
Holmes:	U there?
Holmes:	C'mon.
Holmes:	Seriously!
Williams:	You are such an impatient jackass. Your damn texting just caused me to plow into two dudes on a Vespa. And now I'm going to miss kickoff. It's all your fault.

Holmes: Seriously? There were two dudes on a Vespa?

Williams: I'm not kidding. They're hurt. The po-po is on the scene. What should I do now?

Holmes: Stop with the texts. Use Facebook and crank up those privacy settings as high as they go.

Williams: K, Holmie.

Holmes: This could get UGLIER than your old girlfriend. And you don't want the Vespa dudes or their lawyers to see what you're saying.

Williams: Gotcha.

Sidik and Schneider obtained the text shown above and others when they gained access to Williams' cell phone records. After learning of Holmes' involvement, they added him to the lawsuit. Sidik and Schneider then sent additional discovery requests to Williams and Holmes regarding their Facebook pages and any communications between the two of them. Williams and Holmes responded that, at all relevant times, the privacy settings on both pages were such that no visitor to the Facebook pages could view any postings. Both produced documents showing the Facebook wall. But neither had any other responsive documents because they said they deleted all posts after reading them. And both claimed to have no recollection of specific communications that may have been contained on the Facebook pages.

Holmes moved for summary judgment. His attorney argued to the trial court that Holmes had no liability for the accident because he was not present at the scene and, thus, had no legal duty to avoid sending a text to Williams when he was driving. The trial judge denied the summary judgment motion, holding that Holmes had a legal duty to avoid sending a text message to Williams because he knew Williams was driving at the time.

Sidik and Schneider moved to compel discovery and a motion for sanctions. The trial court heard the issue at the same time it heard the summary judgment motion. While the plaintiffs had no proof[1] that any specific communications existed, they argued that the text message on the day of the accident strongly suggested that they existed and Holmes destroyed the posts in anticipation of litigation. Holmes argued that no messages currently existed as he always deleted a message after he read it. He complained that any spoliation instruction is a harsh remedy that, without specific proof that he had done anything wrong, would be wholly inappropriate.

Without explanation, the trial court issued an order the following instruction would be given to the jury:

> In this case, the plaintiff contends that the defendant destroyed Facebook posts or messages between the defendant and the driver, Blaise Williams, because, despite them receiving proper discovery requests, no such communications have been produced. The plaintiffs base

[1] Sidik and Schneider could not obtain the documents from Williams, the telephone company or Facebook. The record contains no explanation of why the information could not be obtained from any of these sources.

their allegations on the content of the text message between the defendant and Blaise Williams on the day of the accident. If these messages existed and the defendant deleted them with the intent to thwart your consideration of the plaintiffs' claim, that would constitute the spoliation of evidence.

If you find that the plaintiffs have proven by a preponderance of the evidence (1) that communications existed, (2) that the communications were in the defendant's possession, and (3) that the non-production of the communications has not been satisfactorily explained, then you may infer that if the communications had been produced in court, it would have been unfavorable to the defendant. You may give any such inference whatever force or effect as you think is appropriate under the circumstances.

Holmes filed a motion for reconsideration, asking the trial court to explain its rationale but the request was summarily denied. Afterwards, the parties filed an agreed motion to certify the issue for interlocutory appeal under South Texas law, which the trial court granted. The case was abated pending resolution of this appeal.

Potential Tort Liability

We first consider if the trial court properly denied Holmes's summary judgment motion.[2] He contended summary judgment was proper on the negligence claim—the only one remaining—because he owed no duty of care to Sidik and Schneider and because his conduct could not be the proximate cause of their injuries. We disagree.

Sidik and Schneider were seriously injured by Blaise Williams, a driver who was texting while driving and crossed the center-line of the road. Their claims for compensation from the driver have been settled are are no longer part of this lawsuit.[3] This appeal deals with Sidik and Schneider's claims against the driver's friend who was texting the driver immediately before the accident.

The issue before us is an issue of first impression not addressed by any South Texas statute or case law. Thus, we must

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[2] Summary judgment allows a court to efficiently dispose of a case without the need of a full trial. South Texas Rule of Civil Procedure 56(c) governs the grant of summary judgment and provides that summary judgment is proper when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. So. Tex. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (interpreting similar Federal Rule of Civil Procedure 56(c)). A reviewing court should consider the entire record in assessing whether summary judgment is proper. See Fed. R. Civ. P. 56(c). Genuine issues of material fact exist only when a "fair-minded jury could return a verdict for the [non-moving party] on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A reviewing court examines the trial court's grant of summary judgment de novo, applying the same standards as the trial court. *Young v. Mem'l Hermann Hosp. Sys.*, 573 F.3d 233, 235 (5th Cir. 2009). On review, the court determines whether genuine issues of material fact exist by viewing the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences from the evidence. *Anderson*, 477 U.S. at 255. The moving party "must identify specific facts to establish that there is a genuine triable issue." *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1992).

[3] South Texas prohibits texting while driving. A statute under our motor vehicle laws makes it illegal to use a cell phone that is not "hands-free" while driving, except in certain specifically described emergency situations. So. Tex. Rev. Stat. § 42.55. An offender is subject to a $100 fine. *Id.* at § 42.58(a).

determine as a matter of civil common law whether one who is texting from a location remote from the driver of a motor vehicle can be liable to persons injured because the driver was distracted by the text. We hold that the sender of a text message can potentially be liable if the accident is caused by texting, but only if the sender knew that the recipient would view the text while driving and thus be distracted.

To explain our conclusion, we first address the nature of a duty imposed by the common law.[4] In a lawsuit alleging that a defendant is liable to a plaintiff because of negligent conduct, the plaintiff must prove: (1) that the defendant owed a duty of care to the plaintiff, (2) that the defendant breached that duty, (3) that the breach was a proximate cause of the plaintiff's injuries, and (4) that the plaintiff suffered actual compensable injuries as a result. *Howze v. Wallace*, 633 So. Tex. 95, 111 (So. Tex. 2007).

Because Sidik and Schneider sued Williams and eventually settled the claims against him, it is important to note that the law recognizes that more than one defendant can be the proximate cause of and therefore liable for a causing injury. *Chen v. Bramanti*, 688 So. Tex. 345, 347 (So. Tex. 2010). Whether a duty exists to prevent harm is not controlled by whether another person also has a duty, even a greater duty, to prevent the same harm. If more than one defendant breached his or her duty and proximately caused the injuries, the jury at trial may determine relative fault and assign a percentage of responsibility to each under comparative negligence statutes.

"A duty is an obligation imposed by law requiring one party to conform to a particular standard of conduct toward another." Prosser & Keeton on Torts: Lawyer's Edition § 53, at 356 (5th ed. 1984); *see also* Restatement (Second) of Torts § 4 (1965) ("The word 'duty' . . . denote[s] the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is wed for any injuries sustained by such other, of which that actor's conduct is a legal cause.").

Whether a duty of care exists is generally a matter for a court to decide, not a jury. The fundamental question is whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.

Whether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of fairness under all the circumstances in light of considerations of public policy. That inquiry involves identifying, weighing, and balancing several factors—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution. The analysis is both very fact-specific and principled; it must lead to solutions that properly and fairly resolve the specific case and generate intelligible and sensible rules to govern future conduct.

Holmes had a duty not to send texts to a person who he knew was driving a vehicle. But to establish liability, a plaintiff must show more than that the sender directed a message to an identified recipient who was driving. The plaintiff

[4] Common law refers to judicial determination of the law where the Legislature has not enacted a directly applicable statute. Historically, the American system of justice was derived from the English common law. It has adhered to a long tradition of judicial determination of legal issues such as liability for negligence in civil lawsuits.

must make the specific showing that the sender *knew* that the driver would read the message while driving and would thus be distracted from attending to the road and the operation of the vehicle. In this case, Sidik and Schneider met that burden.

Williams has a responsibility to act reasonably when his conduct—driving and reading text messages—foreseeably creates a risk of harm to others, so he's liable for reading the message when he should have been paying attention. But Holmes also has a responsibility to act reasonably when his conduct (sending text messages) foreseeably creates a risk of harm to others, and that's so, even though the risk is produced only as a result of the combination of his conduct and Williams's conduct.

If Holmes were sitting in the passenger seat and doing things he knew would likely seriously distract Williams, and Williams got into an accident as a result, then no doubt exists that both he and Williams would be liable. That Holmes is distracting Williams remotely does not change the analysis.

The Restatement (Second) of Torts supports the duty we announce today. Section 303 provides:

> An act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect, the conduct of another, a third person, or an animal in such a manner as to create an unreasonable risk of harm to the other.

To illustrate this concept, the Restatement provides the following hypothetical example:

> A is driving through heavy traffic. B, a passenger in the back seat, suddenly and unnecessarily calls out to A, diverting his attention, thus causing him to run into the car of C. B is negligent toward C.

Id. at cmt. d, illustration 3.

Courts must be careful not to create a broadly worded duty and run the risk of unintentionally imposing liability in situations far beyond the parameters we now face. The scope of a duty is determined under the totality of the circumstances and must be reasonable under the circumstances.

Foreseeability of the risk of harm is the foundational element in the determination of whether a duty exists. And foreseeability is based on the defendant's knowledge of the risk of injury.

It is foreseeable that a driver who is actually distracted by a text message might cause an accident and serious injuries or death, but it is not generally foreseeable that every recipient of a text message who is driving will neglect his obligation to obey the law and will be distracted by the text. Like a call to voicemail or an answering machine, the sending of a text message by itself does not demand that the recipient take any action. The sender should be able to assume that the recipient will read a text message only when it is safe and legal to do so—that is, when not operating a vehicle. However, if the sender knows that the recipient is both driving and will read the text immediately, then the sender has taken a foreseeable risk in sending a text at that time. The sender has knowingly engaged in distracting conduct, and it is not unfair also to hold the sender responsible for the distraction.

With respect to the sender's opportunity to exercise care, a corresponding consideration is the practicality of preventing the risk. In this

circumstance, it is easy for the sender of a text message to avoid texting a driver who the sender knows will immediately view the text and thus be distracted from driving safely. When the defendant's actions are relatively easily corrected and the harm sought to be presented is serious, it is fair to impose a duty.

Considerations of fairness not only implicate the existence of a duty but also the scope of that duty. Limiting the duty to persons who have such knowledge will force the sender of a text to predict in every instance how a recipient will act. It will not interfere with the use of text messaging to drivers that one expects will obey the law. The limited duty we impose will not hold texters liable for the unlawful conduct of others, but it will hold them liable for their own negligence when they have knowingly disregarded a foreseeable risk of serious injury to others.

Even though it has been proved time and again that texting while driving can result in a disaster, as it did here, few of us are ready to mend our ways. Using a cell phone while driving has been controversial for a long time. As cell phones became affordable, their use increased greatly. With time, people have become so obsessed with these gadgets, that talking or texting suddenly has become irresistible. The inticement of cell phones is such that people are just not able to stop using a cell phone, even while driving. Unfortunately, juggling between driving and conversing causes distraction, which in turn results in many accidents. The craving to reply to a text message always gets the better of the person, causing distractions from texting to become one of the main causes of motor vehicle accidents in the United States, almost on par with drinking while driving. We must do all that we can to address this pervasive problem.

Our dissenting colleague mentions all of the distractions motorists encounter. But items that are seen by many people, including nondrivers, are valuable to many people, and aren't typically distracting in the way that specific things aimed at you personally are distracting. A typical text, which most recipients will not view when driving, is not the same as a text sent deliberately by someone who knows or has special reason to know that you'll view it while driving.

We believe it is fundamentally fair to impose the duty we announce today. But the duty we create is limited. To be clear, we do not hold that someone who sends texts to a person driving is liable for that person's negligent actions. The driver bears responsibility for obeying the law and maintaining safe control of the vehicle. Instead, we hold that, when a texter knows that the intended recipient is driving and is likely to read the text message while driving, the texter has a duty to users of the public roads to refrain from sending the driver a text at that time.

Because Sidik and Schneider raised a genuine issue of material fact on their negligence claim, a jury must resolve this matter. We affirm the trial court's denial of Holmes's summary judgment motion.

Jury Instruction

We next consider whether the trial court has the discretion to give the proposed jury instruction.[5] Holmes argues that the instruction—regardless of what it is called—is a sanction that is improper

[5] A trial court's decision on a motion for discovery sanctions is reviewed for abuse of discretion on appeal. *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 107 (2d Cir. 2002) (addressing an adverse inference instruction). An order granting a sanction will be considered an abuse of discretion only if it is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Id.*

without a specific finding that the communications existed in the first place and, if so, that they were somehow relevant to the pending litigation. Again, we agree with the trial court and find that the trial court has the discretion to give the jury instruction.

We tend to think of sanctions as remedies for litigation misconduct. They certainly sometimes play that role. Sometimes they are imposed to punish misconduct and to deter future misconduct. Sometimes the court isn't punishing a party so much as just "leveling the playing field," and may even be addressing conduct that isn't even really misconduct.

The instruction proposed in this case is a permissive adverse inference instruction. This instruction permitted, but did not require, that the jury draw an adverse inference if it found that the defendant had failed to produce the Facebook communications without adequate instruction.

As the Second Circuit Court of Appeals recently explained in approving the language of a similar instruction:

> The court did not direct the jury to accept any fact as true. Nor did it instruct the jury to draw any inference against the defendant. The court left the jury in full control of all fact finding. It did no more than explain to the jury that in the event it found one fact to be true, it was free, but not required, to infer another fact from the first. While such an instruction is indeed an "adverse inference instruction," in that it explains to the jury that it is at liberty to draw an adverse inference, it is not [a] . . . punitive adverse inference instruction. . . . It is not a sanction It is no more than an explanation of the jury's fact-finding powers.

Mali v. Federal Ins. Co., 720 F.3d 387, 392 (2d Cir. 2013).

South Texas has long adhered to the broad discovery rule that discovery may be obtained about any matter relevant to the subject matter of the case. So. Tex. R. Civ. P. 193.2(a). Information is discoverable so long as it appears "reasonably calculated to lead to the discovery of admissible evidence." *Id.*

The principle of spoliation of evidence gives rise to a permissive adverse inference as opposed to a presumption. Because the inference is permissive and not mandatory, if the fact-finder believes that the evidence was destroyed accidentally or for an innocent reason, then the fact-finder is free to reject the inference.

People delete Facebook posts and messages every day. And they do so for a variety of reasons. If Holmes can convince the jury that the deletions were innocent, then the jury will not hold it against him. But if the jury determines that Holmes deleted the communications to prevent Sidik and Schneider from having them, then it is appropriate for the jury to take that fact into account. This instruction merely informs the jury of its right to do so.

Because the trial court has the discretion to give the proposed instruction, Holmes has not met his burden of showing error. We affirm the trial court's order regarding the proposed jury instruction.

Conclusion

The trial court's order denying summary judgment is affirmed. The trial court's order allowing a permissive

adverse inference instruction is affirmed. The case is remanded for a trial on the merits.

Judge GLOVER, dissenting.

I disagree with both aspects of the majority's decision.

Extending Tort Liability

Every first-year law student learns in Torts I about liability for negligence that is the proximate cause of an injury. They learn about it from *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928), in which poor Mrs. Palsgraf lost her negligence action against the railroad company. Two railroad employees tried to help a passenger carrying a package on to the train while it was moving. The package fell, and just happened to contain fireworks, which fell on to the track, ignited, and scared Mrs. Palsgraf at the other end of the platform. Putting aside her lack of physical injury, the issue decided was that it was not "reasonably foreseeable" for the railroad employees to know that their action might trigger the fireworks, which they had no reason to know was being carried by the passenger. Now, fast forward to the Internet age, in which a driver texting while driving receives texts from a friend safely ensconced on his living room sofa watching football. Is it reasonably foreseeable to the couch potato that sending a text to the driving friend might cause an accident, making the couch potato jointly liable in negligence for an automobile collision? Today, the majority concludes that the answer is yes.

We have all heard the mantra, "Don't text and drive." Now the majority has an addendum: "Don't knowingly text a driver . . . or you could be held liable if he causes a crash." This goes too far.

The majority imposes tort liability when the conduct of a person, not in an automobile, interferes with the driver's operation of the vehicle. I believe that the driver should be liable in tort under these circumstances. But I do not believe liability should extend to someone who simply sends the driver a text message.

There must be limits on liability for distracting drivers. We are constantly surrounded by distractions—billboards, landing helicopters, football games, bungee jumpers and even attractive people on the roadside. By and large, drivers can avoid getting unduly distracted by them, and imposing liability for any such distraction of drivers would interfere too much with legitimate activity by others within sight of the roads. As a result, courts have generally concluded that one's duty to act reasonably when one's conduct foreseeably creates a risk of harm to others should not apply when the risk is solely a risk of distracting drivers through one's interesting conduct.

As one such case explained,

> Motorists are routinely exposed to a melange of off-road distractions which may include sporting events, low-flying aircraft, billboards, Christmas displays, rock concerts, brush fires, or unusually or scantily attaired pedestrians. Travelers who, in the manner of Homer's ancient Argonauts, must sail past Sirens, are obliged to exercise reasonable care in the navigation of their craft and resist being seduced by sights and sounds.

Lompoc Unified Sch. Dist. v. Superior Ct.,

26 Cal. Rptr. 122, 128 (Cal. Ct. App. 1993) (refusing to find that school district owed passing motorists a duty not to distract them with football games in stadiums visible to the street).

The driver carries the personal responsibility to obey traffic laws and exercise appropriate care for the safety of others. This responsibility includes the obligation to avoid or ignore distractions created by others, whether in the automobile or at a remote location, that impair the driver's ability to exercise appropriate care for the safety of others. Text messages received while driving plainly constitute a distraction that the driver must ignore.

The dangers associated with text messaging while driving, and the devastating consequences in this case and others, are well known to the Legislature. But the Legislature has not passed any laws imposing either civil liability or criminal penalties for a remote texter who sends a distracting text message to a driver. I do not think it is appropriate for this court to take that step when the Legislature has not done so. Sidik and Schneider should take their cause up with the Legislature—not the courts.

The Spoliation Sanction

The majority characterizes the trial court's proposed jury instruction as an innocous, permissive adverse inference instruction. It is not. The instruction will be devastating. With it, the trial court is branding Holmes as a bad actor, guilty of destroying evidence that he should have retained for use by the jury, and it is doing so based on nothing but skepticism about his discovery responses and rank speculation.

An adverse inference instruction is a sanction, regardless of the form the instruction takes. After all, much of the damage is done the moment the court invites the jury to make the relevant findings and to draw the adverse inference. "When a jury is instructed that it may infer that the party who destroyed potentially relevant evidence did so out of a realization that the evidence was unfavorable, the party suffering this instruction will be hard-pressed to prevail on the merits." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y 2003).

Spoliation is the "destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). A party who spoliates evidence and, as a result, fails to comply with an order compelling discovery of that evidence is subject to sanctions under South Texas Rule of Civil Procedure 37(b). Appropriate sanctions for this violation is "any order that is just." *Societe Internationale Pour Industrielles Et Commericales S. v. Rogers*, 357 U.S. 197, 207 (1958).

But to warrant the imposition of sanctions against a spoliator, the moving party must satisfy three elements: (1) that the party accused of the spoliation had a duty to preserve evidence at the time it was destroyed; (2) that the evidence was destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant in such a way that a reasonable trier of fact could determine that it would support a party's claim or defense. *Zubulake*, 220 F.R.D. at 220. In this case, Sidik and Schneider have not made any of these required showings.

The trial court intends to give an instruction inviting the jury to infer that Holmes had destroyed communications that no one has testified that they ever existed, that they were destroyed with a culpable state of mind or that they were relevant to the dispute. He does not remember any of the communications. Nor does Blaise Williams. To give such an instruction without any of the required findings for a spoliation sanction goes way too far.

Even if *some* instruction could be justified in *some* circumstance, this one isn't it. The trial court makes the plaintiffs' argument for them by pointing to the text message on the day of the accident. The instruction uses words like "spoliation" and "destroyed." It includes the phrase "thwart your consideration of the plaintiffs' claim." You cannot unring these bells. If this is meant to be a neutral instruction on circumstantial evidence as has been suggested, then the trial court should have used completely different language.

I recognize the trial court has discretion to admit evidence and charge the jury, but that discretion is not unfettered. To suggest to the jury that Holmes destroyed evidence with no evidence that he did and no suggestion that what he destroyed would be relevant to the issues in this case crosses the line in my opinion.

For these reasons, I respectfully dissent.