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Supreme Court of Texas.
WAL-MART STORES, INC., Petitioner,
v.
Monroe JOHNSON and Brandy Johnson, Respondents.
No. 01-0441.

March 20, 2002.

Appearances:
Douglas W. Alexander (argued), Scott Douglass & McConnico, L.L.P., Austin, for Petitioner.
Mark C. Sparks (argued), Provost Umphrey Law Firm L.L.P., Beaumont, TX, for Respondent.

Before:

James A. Baker, Craig Enoch, Thomas R. Phillips, Priscilla Owen, Harriet O'Neill, Wallace Jefferson, Xavier Rodriguez, Nathan L. Hecht, Deborah Hankinson.

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JUDGE: Thank you. Please be seated.
The Court is ready for your argument from petitioner in Wal-Mart v. Johnson.
SPEAKER: May it please the Court. Mr. Douglas Alexander will present argument for the petitioner. Mr. Alexander has reserved five minutes for rebuttal.

ORAL ARGUMENT OF DOUGLAS ALEXANDER ON BEHALF OF THE PETITIONER

MR. ALEXANDER: May it please the Court. I'll then state first that under any of the three spoliation presumption rules, you can argue the [inaudible] of this case. The Vermont Court of Appeals and Authority erroneously concluded that it was proper to submit spoliation presumption here. Second, I will go ahead and address Justice Baker's concurring opinion in the tribunal case.
JUDGE: Dangerous territory.
MR. ALEXANDER: What's that?
JUDGE: Dangerous territory.
MR. ALEXANDER: Absolutely. I thought he was going to argue this to an empty chair today. I [inaudible] that I'm not so this is good.
JUDGE: We welcome --
MR. ALEXANDER: But I will --

JUDGE: We welcome Justice Baker back to the Wal-Mart case.

MR. ALEXANDER: Right. And what -- what I will suggest delicately is that --

JUDGE: In your usual inevitable way.

MR. ALEXANDER: Yeah. -- is that the traditional approach provides adequate safeguard so that there's no compelling reason to go to -- to that approach, the duty breach approach. However, I will then go on and add that should this Court elect to go that route, and there's -- there's plenty of sound authority for doing that that must be set, that -- that there's compelling need to provide adequate limits, particularly in cases like this one in which the alleged spoliation arises before a lawsuit has been filed or there has even been a threat of a lawsuit. So, those are the two areas I'm going to go now. I prepared --

JUDGE: It sounds like your argument is gonna be somewhat different than -- than what's presented in the brief, isn't it?

MR. ALEXANDER: I think so, a little bit. I mean, I think that -- I think that -- I think that it'll probably a little bit more prearranged particularly on the second point with respect to the discussion as to which way *CHECK* this Court ought to go.

JUDGE: Some questions that --

MR. ALEXANDER: Yeah.

JUDGE: Just e-mail that if you wanna submit it before submission.

MR. ALEXANDER: I may -- I may want to do that and -- and we'll just see how it goes.

JUDGE: Would you mind [inaudible].

MR. ALEXANDER: Right, not a problem.

I've gone ahead and prepared a handout to -- to assist me with the first task, which is suggesting that under any approach that you take, under the circumstances that this case spoliation, presumption was not called, I just want to quick into lead through that if I can. The first two tasks present what I would refer to as a traditional to spoliation presumption rules that applied in Texas. The first one under tab one is the deliberate spoliation of evidence rule, it's -- it's straightforward. The deliberate spoliation of evidence relevant to a case raises a presumption that the evidence would have been unfavorable. It can be rebutted by evidence that -- that it proved without fraudulent intent or purpose. We don't need to spend too much time on this one in this case because there's been a concession by the plaintiffs in this case that this particular one does not apply. And I've quoted that down here below. Application here --

JUDGE: To -- to meet this presumption you say that it has to be a direct evidence of what -- it would be destruction.

MR. ALEXANDER: There has to be --

JUDGE: How do you -- how do you get entitled to this? [inaudible] minutes about there.

MR. ALEXANDER: I beg your pardon.

JUDGE: There's evidence and then there's no evidence. How do you get a deliberate spoliation fact? How do you get entitled to that presumption under your view?

MR. ALEXANDER: I -- I think it would be, and again in this case, fortunately we have a concession that it doesn't apply, but let me try to address it. These questions end of being -- and Justice Baker is correct on this point. These are legal determinations for the trial court. The trial court hears the evidence with respect to it. That is the determination as to whether to submit the -- the instruction at all. And -- and what we have is a situation that to the trial court if

there's enough of an indicia, I would say some evidence that the -- the spoliation has been deliberate that shifts then the burden to the party who's been accused of deliberate spoliation to bring forth evidence back. In fact, occur without fraudulent intent or purpose.

JUDGE: Mr. Alexander, I have a basic question I think all apply to each of your -- of your theories. This is a question for the trial court to answer. At each phase, is it a -- is it a matter of the party which has the [inaudible] producing evidence or a persuading?

MR. ALEXANDER: Producing evidence. Producing evidence. --

JUDGE: So once -- so once there -- if a presumption stage once there is some evidence of a deliberate spoliation then the burden shifts.

MR. ALEXANDER: Correct.

JUDGE: And if there is some evidence that there was no fraudulent intent or purpose, then it's a matter of law the trial court must decide that there was no spoliation and no instruction is possible or is the trial court wants we hit the rebuttal stage, free to make the determination that it is not persuaded by the rebuttal evidence and could in fact then go forward with determining that the spoliation has occurred and the instruction is appropriate?

MR. ALEXANDER: Let me -- let me answer that question this way. In one context, none is hardly clear; in another context, it is clear. And let me -- let me through --

JUDGE: It seems to me that's critical.

MR. ALEXANDER: I agree. I agree that is critical. Let me -- and that's why I want to give you a very precise answer on it. I think that the easier answer is number 2. Turn to Tab 2 and then we'll come back to Tab 1. Again, I will tackle well more on 1. But as to Tab 2, the case law on this is that where -- where you have a failure to produce. If there is, we didn't produce it. That -- that the rebuttal is --

JUDGE: And that seems to be an easy burden.

MR. ALEXANDER: Definitely easy burden.

JUDGE: It's not fair.

MR. ALEXANDER: That's not fair.

JUDGE: Right.

MR. ALEXANDER: And the rebuttal -- the approach that the Courts have taken -- and I'll give you some cites on this -- the Texas Courts have taken is that it is a burden of production, not persuasion. And the three cases that sample that proposition are Brewer, that's 862 Southwest II at 159, and it says, "All these cases we have examined that apply that's non-production assumption rule involve trial situations in which the party opposing the harmful evidence presented no evidence at all to rebut it."

JUDGE: Well, the [inaudible] problem I have with that is to just bring the issue to burden of producing evidence.

MR. ALEXANDER: Right.

JUDGE: You have an interested witness who [inaudible] on the witness stand and just says, "Here's what happened" --

MR. ALEXANDER: "My dog ate it."

JUDGE: Yeah. And the judge --

MR. ALEXANDER: "Reindeer flew away."

JUDGE: Exactly right. And the judge doesn't believe that.

MR. ALEXANDER: Right.

JUDGE: Now, if it's just a burden to produce evidence, at that point in time that's enough to eliminate spoliation and say to the trial judge, "You, as a matter of law, cannot give an instruction to the jury." And yet, I'm sitting here as a trial judge and I no more

believe that the reindeer flew away, then the dog ate it.

MR. ALEXANDER: And this is -- this is where -- this is what I think it gets -- you get them a problem. Okay. This is where -- go back to Tab 1, which is the intentional. I have not seen cases that have addressed Tab 1 in intentional with a rebuttal being merely production, not persuasion. Okay. It wouldn't shock my sensibilities for that one to be a persuasion element.

And let's go back to your hypothetical Tab 2. This is why -- this is why I think the traditional scheme works now. If someone transports to say no reindeer, they go away. There it is. I produce. That's it. The judge, listening to that -- those -- well, that's very interesting under Tab 2, you survived Tab 2.

But, Counsel, let's go back to Tab 1. Why do -- why would I not surmise that that explanation is so, so far appeal of anything persuasive that, my god, this is deliberate. They didn't fly away. You've got rid of them.

JUDGE: Then I wouldn't give the presumption under Tab 1 unless there was some evidence of deliberate spoliation which was the Chief's question.

MR. ALEXANDER: Well, I have to think --

JUDGE: What is that -- why do I have to have there?

MR. ALEXANDER: I think that, once again, that's -- I mean, you're down to -- you're down to the interesting question on intentional. I think that at some point, we have to allow the trial court in that situation. When faced with the extreme circumstance you're talking about, which again we don't have here, unfortunately, but in those circumstances, let's say presumption, rebuttal presumption --

JUDGE: Well, it seems to -- it seems to me that this presents a mixed question of law in fact to the trial court. Because there really is an underlying fact of determination about what happened.

MR. ALEXANDER: There is.

JUDGE: And if we say that there's only a burden of production and not burden of persuasion, under Tab 2 -- and under Tab 1, I guess. Well, Tab 2 is the one that we're focusing on -- if that ends up happening, we've completely eliminated that fact-finding function.

MR. ALEXANDER: We -- we have --

JUDGE: And we --

MR. ALEXANDER: Okay.

JUDGE: We said at the trial judge, you have no discretion on this matter. You're observing a witness on a witness stand. You got to make a call on whether to believe a witness or not about what happened. Similarly, under Tab 1, with respect to whether there was no fraudulent intent or purpose --

MR. ALEXANDER: Well --

JUDGE: -- seems to me we have credibility in determinations issue here. And I'm certain how we can eliminate including a burden to persuade at least at on or more of the stages.

MR. ALEXANDER: Okay. I think -- and again, I think that the appropriate way to handle this -- and let me give you those another two cites, by the way, being production or persuasion and the other one is Brunner, it's 530 Southwest II of 344; and the Middleton case, 982 Southwest II of 471. All of those cases, I think read firmly indicate that under a Tab 2 situation, it is -- it's production of persuasion.

JUDGE: I -- I -- agree --

MR. ALEXANDER: Now that -- okay. Back to your point.

JUDGE: Yeah.

MR. ALEXANDER: I think that what you would have to say is under

Tab 1 -- in other words -- okay. You -- you provided Tab 2, but now we -- if -- if in the circumstance where -- where -- where the explanation is so far afield that it becomes truly evident to the trial judge sitting there, my god, this is intention. Now -- and -- and again -- and I'm not going to say it anymore, in this case, we don't have a [inaudible]. But I think, you know, since you are writing on the paper canvas, I think that in the Tab 1 situation, whether it's intentional, we have to give -- if -- if -- if the trial judge is being the gatekeeper which is -- which is, what, even in Justice Baker's analysis that -- that the trial judge is doing, the trial judge has to be given some line of attention, has to be given some line [inaudible] to take away the credibility.

JUDGE: But why doesn't the -- but why doesn't the trial judge need to have some latitude under your Tab 2 analysis as well? For example, if we look -- look -- look at the totality of the circumstances here, Wal-Mart is taking witness' statements, photographs --

MR. ALEXANDER: Right.

JUDGE: -- doing all kinds of things at the same time, and yet, no [inaudible]. And it is a $6.00 reindeer. So taking one off the shelf and taking it away is no big deal.

MR. ALEXANDER: Okay.

JUDGE: And so the -- the judge looks at this and here is the explanation. Well, I'm not really sure it might have been sold whatever into that packet. We -- we -- logically, we think it was sold or whatever, but the trial judge, is -- is that what it spills back over to deliberate because the trial judge looks at the facts and circumstances and says that you are collecting evidence, but you chose not to keep the one piece that was the most critical; therefore, I'm going to decide this is evidence of deliberate? I mean --

MR. ALEXANDER: Yeah.

JUDGE: -- or is it better to stay over in this circumstance where the trial judge has the ability to look at all of the facts and circumstances and decide whether or not he or she is persuaded by the rebuttal evidence?

MR. ALEXANDER: Personally --

JUDGE: We need to go either [inaudible].

MR. ALEXANDER: I -- I agree. Personally, I believe -- and again, maybe this has just been the traditionalist's work, fine, etc., etc., I would argue in favor of now we are tripping back over into the intention. I mean -- at some point, I mean, you are right, the -- the persuasive element has to come in for it to have any means.

JUDGE: What if there's -- what if the trial judge thinks Wal-Mart could have done more here? They have this huge store centers --

MR. ALEXANDER: Right.

JUDGE: -- where they borrow their product. And every time you buy something at Wal-Mart, you have linked computer list on what you have bought. But there has to be some marker back somewhere of the [inaudible] they bought. Wal-Mart -- local Wal-Mart stores don't just go ahead and buy Christmas ornaments off the streets and a [inaudible] man put them up there and they disappear and there is no record?

MR. ALEXANDER: Well -- and -- and apparently in the record on this, frankly, is somewhat thin. Apparently, there -- the only discussion you'll find in the record of that is that there were some effort to try to trace it in terms of whether they'll be in a sale etc., etc., and that the -- and that it couldn't be traced. You know why is that? You tell me.

JUDGE: But if they have inventory records where they could track

the [inaudible] the company [inaudible] reindeer from --

MR. ALEXANDER: I understand and what I'm saying is -- right -- what I am saying is that in -- in this case the record of evidence -- the record suggest that that broke down somehow some way.

JUDGE: But -- at what stage does the trial does think about that? And --

MR. ALEXANDER: Okay. Well, this -- well, this -- maybe -- maybe -- maybe the best thing to do now is to go on to Tab 3.

JUDGE: Tab 2?

MR. ALEXANDER: That's duty breach. That's duty breach. This is -- this is Justice -- Justice Baker's approach. The -- the -- the -- the debate and -- and let's talk about Tab 3 because I think this is critical. Once again, we want under Tab 3. I mean, we are not going to argue that. I mean -- unless you want -- but -- but I lay it out here, I think, very clearly. And we probably -- we'll come and argue with it later, you know, here. But the major debate, the split among the jurisdictions that -- that we find is -- is those jurisdictions. And Justice Baker's analysis lays it out. There are some jurisdictions that say, look, in order for the spoliation presumption to apply, there has to be a deliberate intentional bad faith. You call it what you want but essentially an intentional spoliation. Other jurisdiction that has taken approach that negligence is enough. Okay? There are -- and -- and let me try to give you the rationale of both sides because, I mean, I think that this court -- this is a court- made rule. You are free to abandon Tabs 1 and 2. You're -- you know, and -- and to basically adopt this approach, although I think it's important right now is it really is different. I mean, that when you are doing it if you if you -- if you're conscious to go that way and say that's what we're doing, I think, is really the -- the intellectually fair way to do it. The -- this is how it breaks down. There is two competing rationale. That 5th Circuit, the 11th Circuit, the 3rd Circuit, the 4th Circuit, the 7th Circuit, and primarily the 5th and the 11th has specifically followed the McCormick approach which is -- McCormick non-evidence approach. And let me just briefly give you that because I see you only got red light.

JUDGE: Please finish the --

MR. ALEXANDER: -- the thought. Okay. Here it is. This is -- this is -- the -- the McCormick approach -- is -- is it's got to be intentional. Negligence is not enough. It's essentially what I would call a quasi-admission approach. This is what it says. Mere negligence is not enough or does not sustain the inference of consciousness of a weak case. In other words, that, in -- in -- in McCormick's mind, is where that the rationale presents it. It must be intentional [inaudible]. Now, the rationale for -- for the Justice Baker approach -- and he cites this case in [inaudible] opinion is -- and I think -- I mean, I think this is the best statement of it, is the Turner case. It's 142 Federal Rules Decision 6875 Southern District of New York case, and its -- it puts it this way. It's -- it's basically a remedial let's-level-the-playing-field approach. "It makes little difference for the party victimized by the destruction of evidence whether the act is done willfully or negligently. The adverse inference provides a necessary mechanism for restoring the evidentiary balance. The inference is adverse to the destroyer not because of any moral palpability --" and here's the key part, "-- but because the risk of the evidence would have been detrimental rather than favorable, should fall on the party responsible for the loss." Ok. Both competing rationale are legitimate, that's why there's a legitimate course, you know -- choice for this Court. Let me -- let me say this though. If you

choose to Justice Baker route, turn goes on the same. I think this is correct and this one point on which I really do disagree with some of the analysis that appear in Justice Baker's decision. A matter that is essentially the limitation and I'm talking about prelitigation, like prelitigation spoliation. The -- the proposal that appears in -- in -- in Justice Baker's incurrence that we go the National Tank route, where there's reasonable anticipation for litigation. I would submit that in this context, that's a little bit too loose. If you look at the turner case, it really does provide a good rationale. This is what it says, "Finally --" it says, look, you have to have notice. The party being chaged of spoliation has to have notice as to its potential relavance. You see, now that's --

JUDGE: Well, bout what your talking about --

MR. ALEXANDER: Yes indeed --

JUDGE: I think it's clear we got two times where you can exfoliate evidence.

MR. ALEXANDER: Right.

JUDGE: But we don't know about litigation or maybe -- we can anticipate it or its actually going on.

MR. ALEXANDER: Right.

JUDGE: And so you're talking about prelitigation or spoliation of employees at work.

MR. ALEXANDER: Right.

JUDGE: And whether or not litigation would really anticipate about the party [inaudible]. Sold it, give it away, lost it, or whatever.

MR. ALEXANDER: Right. Right.

JUDGE: Is that right?

MR. ALEXANDER: That's right.

JUDGE: And so you have to make that determination of about what is right [inaudible]. Agree in that?

MR. ALEXANDER: I -- I -- I agree but -- but the only point on what I'm disagreeing on is whether the standard should be reasonable anticipation. Were getting that new a real nuance here. Or in the Turner case this is the standard they used. They say you know, the notice of the relevance can arise from the clean complaining file or discovery. And then they talk about prelitigation, this is the standard they used. "Finally, the obligation to preserve evidence even arises prior to fiiling of the complain where a party is on --" here's key words, "-- notice that litigation is likely to be commenced."

JUDGE: And so --

MR. ALEXANDER: I think likely is a little bit understandable.

JUDGE: So we said that in my concurrence and you agreed that that's the proper rule.

MR. ALEXANDER: Okay.

JUDGE: Well, did you notice?

MR. ALEXANDER: Well, I -- I am back to -- I am back to -- respectfully, you Honor. [inaudible]

JUDGE: Well, you could disagree, that's okay.

MR. ALEXANDER: I -- I know -- I know wait. I -- I think that the traditional approach, have one and two accomplishes what need to be accomplished.

JUDGE: Well, with all due respect to that, the two arguments that you have, one and two are basically the Milton argument.

MR. ALEXANDER: Correct.

JUDGE: And would you agree or disagree that basically Milton is way past what you're arguing about -- about that incurrence has some difference in the whole traditional view. Because the only discussion

in Milton is, should they have submitted the instruction or not, there's not discussion whatsoever about a duty or breed. Its all presumed that yes, you have agreed to maintain evidence under circumstances of whether you reasonably anticipate litigation or what is going on. And then, it just starts form there.

It doesn't go through what the concurrence talks about. So I frankly think that in case you've allowed him, which is Milton assumes everything that the concurrence says and goes from there. Because all it talks about is what kind of evidence was there put on to show that it wasn't either negligence or what was recently anticipated or not. And one of the things that talks about is that they didn't testify about which is [inaudible] this issue. I granted this evidence in this record shows there was testimony about the ranger by both sides and there was sharp disagreement. But some of the things you've left out, for instance, if we won't stay the issue is whether Wal-Mart can reasonably anticipate there is no real claim, thus the man says he was hurt. The other side is that when Wal-Mart was asked about where are the yellow pad records that the manager took down that very day and talked to the injured party, where are they, Wal- Mart objected on the grounds that you're not going to get them because they were made in anticipation on litigation. It seems to me that there is a reasonable presumptions about the facts or you say they plea so that the document that you made on the same date that the person was injured is -- cannot be produced because it was made in anticipation litigation. A trial Court should have been just about and say well, if you they don't have the rangers for the same purpose and so I think they're entitled to it. So the whole argument is, should they have given that instruction under the record of this case as opposed to the dichotomy between they traditionally reviewed and whatever occurrences. That's what my view is.

MR. ALEXANDER: Okay. I think that --

JUDGE: You know [inaudible] will come out [inaudible] by that.

MR. ALEXANDER: I'm guessing. I'm just guessing -- I think that there is --

JUDGE: I have concern about the fact that when you relied on Milton it was decided about three months after we issued Turvino, and so maybe the court that handled that based -- I forgotten what it was now.

MR. ALEXANDER: I think it was San Antonio --

JUDGE: The San Antonio Court [inaudible] but it never even says anything about --

MR. ALEXANDER: Well -- an it's interesting -- I mean what has happened in the way that Turvino is that we've got some courts -- and we may be in disagreement on this, I think that there is really a distinction between what I would call the traditional approach and what appears to be concurrence. I think that both approaches are legitimate. I think they're different and I think it [inaudible] --

JUDGE: [inaudible] trial court besides when this issue comes up well, did that party have in duty [inaudible] to keep this piece of evidence. And if so, what does that arise of? Well we got clearly background in our juris prudence that yes, parties do have a duty to maintain every evidence that may be pertinent to future litigation but only under limited circumstance. And I'm not saying when your people say, well, we sold them all, is a legitimate mistake but also I can say to them that the whole record is the trial court discretion and then to determine whether to submit an instruction or not, whether it helps the jury under the circumstances. And that's the approach of the Milton

that took place and this went back in court. And so I suggest that we go back in court on the record of this case or tell [inaudible] that there was an abuse of discretion.

MR. ALEXANDER: Okay. Well, I mean I can answer back and again I think that -- I mean if the Court -- whichever way the Court goes, and there's legitimate grounds to go either way -- i mean one the things that would tackle would be the intentional versus negligence where there really is [inaudible] I mean are we going to go to this circuit rather we are going to go in what Turner was saying. You can go to the other way but I think that there needs to be limits. And one of them I suggested that "likely" versus "reasonably anticipated." And now getting back to your question, let's takes a snapshot -- and I will get to the facts on this one. Let's take a snapshot on what occurred when we talk about duty on the day of this accident. And the majority does not recognize this. Reindeer falls off shelf, Wal-Mart people come up and say, what do we have here? And they do this in any case even if there is a remote possibility of any complaint on extreme as well they should. Not a reasonable anticipation, I mean, just remote possibility; this is what they did. Fellow says, I got a cut on my arm. Okay. Clean with peroxide and a band-aid, no stitches. Now, what we are talking about here, you had to be on notice of the relevance of the reindeer. Now, that's all he complaints about on the day of the incident. Now, what is ultimately recovered? He recovers a jury award -- awarding $45,000 in hard medicals. What the heck were those? Is that to sew off the arm? No. It was because he had a preexisting neck condition --

JUDGE: I can understand you can argue that to the jury.

MR. ALEXANDER: Well, what I'm saying is -- I mean, this is the key, this is the -- okay, and this is where we may have a disagreement. What I suggest is, because -- and you get this on the cases where you weight into them. Because the instruction itself is so inflammatory, in marginal cases of dubious merits, what ends up happening, and this is the concern as to why you shouldn't just merely submit. The case turns from being the case on the merits to be in case on, yes, Wal-Mart or K-Mart or whoever it is, because we don't have K-Mart anymore. They've gone south. We drove them to the ground. But the -- for which I feel bad. But the, you know -- what -- in -- in that circumstance, what -- what ends up happening is that's where the trial comes, becomes all about that. And that's -- and that is why it is critical, I believe, for the gatekeeper role of the trial judge to declaratory decline. I don't think it's easy to just say, "Let's just get that to the jury." Because the problem is --

JUDGE: Well --

MR. ALEXANDER: -- it's so not --

JUDGE: -- we've already stated we're not really going back to the jury.

MR. ALEXANDER: Okay. Well, I thought I heard you differently.

JUDGE: So --

MR. ALEXANDER: Okay.

JUDGE: -- we all agree that it's a question of law whether --

MR. ALEXANDER: Okay. Okay.

JUDGE: -- whether there's gonna be --

MR. ALEXANDER: Okay. Okay. Then I misheard. Then I misheard.

JUDGE: -- obstruction at all.

MR. ALEXANDER: Okay. But getting back to the facts, okay, you know -- in the circumstance, what we have is -- what we were supposed to anticipate was -- but I think it was --

JUDGE: You still haven't answered our question.

MR. ALEXANDER: Okay.

JUDGE: How can we know the trial court abused its discretion under this record in submitting that instruction?

MR. ALEXANDER: We can hold it because under -- under the undisputed facts in this case whether we go -- whether -- whether we go to your standard of reasonable anticipation or fall short on that with litigation --

JUDGE: Well, what [inaudible] do you wanna have?

MR. ALEXANDER: I wanna have -- well, I -- I want to have the traditional approach. But let's say we don't have that, let's go with what you're saying --

JUDGE: Well, here's the standard to decide if this Court will do this in the first place.

MR. ALEXANDER: Well, then -- well, let me answer this one. Let's assume that we take your approach. Under your approach --

JUDGE: Well, answer my question first. What is the premise that you take in the first place to assume the problem exist?

MR. ALEXANDER: The -- the premise you take is, the evidence -- the evidence, which has now years later suddenly become relevant even though it wasn't at the time of the accident is gone; that's the premise. That's the problem. But what you have to use is you have to go back and take us naturally on the date. Here, we got --

JUDGE: Well --

MR. ALEXANDER: -- let's assume that he'd sued for his arm --

JUDGE: -- he's already dispute by Wal- Mart that this man was hit by one or more reindeers.

MR. ALEXANDER: No. There is no dispute. And the [inaudible] is this --

JUDGE: And there is no dispute that when it comes time for discovery, there's no reindeer to be found.

MR. ALEXANDER: No dispute.

JUDGE: And the other side says, we think that's bad business, Judge, because that's what it is. That's what caused our injury. And we think they did it on purpose.

MR. ALEXANDER: And this is -- let me -- let me answer this one. If the man comes back and sues for the only thing he complains about on the day of the incident that is fell on the arm, we don't have a reindeer but he does, there is no dispute. He was hit by the reindeer, he got the cut, was given his $10 damage. When he comes back years later and says, I want $45,000 for --

JUDGE: What's the chance of complaining about that?

MR. ALEXANDER: What's that?

JUDGE: You have to complain about an excess [inaudible].

MR. ALEXANDER: No. I'm -- I'm not. I'm just talking -- what I'm talking about is relevance. I'm complaining about the relevance. You know, [inaudible] goes and anticipate is that this guy was gonna come in to the court years later and say, "You know, the problem isn't the cut on my arm, but you know about, it is that I've gone and seen this doctor in Louisiana that's done all the surgery on my neck and -- and -- and so now there's an issue as to what the composition of the reindeer was." That's the relevance. Well, did we know -- were we on notice on what the term; on noticed of the relevance on the day of the incident, no way. No way. We -- there's no way going back to that day and go, "Oh, my God. We should have anticipated. What he'll be complaining about his neck."

JUDGE: Well, that's your act of damage [inaudible] there.

MR. ALEXANDER: Yes.

JUDGE: That there's no knowledge --
MR. ALEXANDER: Correct. There's no notice of the relevance.
JUDGE: No notice or knowledge of anticipation by --
MR. ALEXANDER: Correct.
JUDGE: -- Wal-Mart that this was gonna be an issue.
MR. ALEXANDER: That is correct. Okay. And then with respect to the anticipation of litigation admission thing that they wanna talk all about, I think it's laidy down in the brief adequately. I mean, essentially, unless you have a broad question, thay would create a continuing duty to produce any state or produced up until the time of trial for which a general objection is made that this is blah- blah -- what was the objection? -- okay, anticipation of litigation.
But -- but with respect to the [inaudible] on the date we produced it -- in other words, we -- you know, I don't think -- I think it's really inappropriate to try and extrapolate from -- from -- the answer to that interrogatory, an admission that on the day of the accident, there's an anticipation of litigation, looking at the [inaudible].
JUDGE: I understand your position.
JUDGE: Any other questions?
Thank you, Counsel.
JUDGE: The court is ready to hear argument from respondent.
SPEAKER: May it please the Court. Mr. Mark Sparks will present argument for the respondent.

ORAL ARGUMENT OF MARK SPARKS ON BAHALF OF THE RESPONDENT

MR. SPARKS: May it please the Court. Good morning.
What Wal-Mart is suggesting concerns me. They changed their arguments a bit today. But in their briefs to this court, they first say the trial court has no authority, none, to remedy prelitigations spoliation. That is devastating --
JUDGE: [inaudible] their arguments.
MR. SPARKS: Sir?
JUDGE: I don't read their arguments quite that [inaudible].
MR. SPARKS: That was in their appellate briefs to this court.
JUDGE: They concede that you can always remedy prelitigation intention spoliation --
MR. SPARKS: Your Honor --
JUDGE: And I think that -- I asked Mr. Alexander [inaudible] was a change in the argument and what the briefs were and he said he was, so --
MR. SPARKS: Okay. Okay. Well, let's then look at -- the second thing that concerns me next to that one is that what Justice Hankinson talked about, which was all of this is a burden of production, 'cause that all Wal-Mart has to do is to find the manager or an employee to come in, like they did in this case, and say -- here's what he said, "would" -- they would have been sold. He did not say they were sold, he did not say, "Here's the inventory documentation to show you where this reindeer are." He speculated.
JUDGE: And let's -- let's assume that's very troublesome. And it's equally troublesome to have the other side come in and say, "Well, they're gone. There must some be fault here." How do we resolve that? We don't -- it don't seem to me to be a good idea to do it either to way to say -- plaintiff shows up and says, Well, some of it is missing,

something must be at fault, charge the jury; the other side says, Oh no, no, no, it's bound to be an innocent mistake, don't charge the jury. How do we get [inaudible]?

MR. SPARKS: The trial court resolves that, your Honor.

JUDGE: But how?

MR. SPARKS: He looks at --

JUDGE: You can't just flip a coin. What does he do?

MR. SPARKS: Yes, sir, I understand. And, again, this -- again, we responded to -- in our brief, that Wal-Mart seems to think that there's some -- some rule of law that this court can write today or tomorrow, whenever you [inaudible], that will forever in the future tell trial courts how to handle spoliation. That's not what Travino says. Travino says it's an evolving remedy, evolving sanctions, issued under wide broad discretion.

So what you do is you entrusted to trial court --

JUDGE: They have to have a standard [inaudible]. Okay, Mr. Plaintiff, give me three reasons why I should charge the jury; Mr. Defendant, give me three reasons why I shouldn't.

How do we -- what are those reasons?

MR. SPARKS: The reasons that we submitted in this particular case is we pointed out the fact that on the day of this accident, they did -- they did considerable investigated activity. Those [inaudible] store manager. She interviewed the Johnsons and took down notes in a legal pad. We've already talked about what happened to those notes --

JUDGE: Why isn't that spoliation?

MR. SPARKS: Well, your Honor, the reason we didn't shoot after that is because the reindeer, to us, I mean, that was pretty simple to the case, because we're saying they're wood and they're saying they're paper maché. That's pretty damaging [inaudible] employees to come in -- and the string -- string of employees to come in and say these were just paper maché reindeer. So, obviously, the reindeer, to us, seem to -- seem to be where to go after on the spoliation charge.

JUDGE: Which you could claim [inaudible] away spoliation.

MR. SPARKS: Absolutely, your Honor.

JUDGE: And that's -- what's troublesome is, you know, sometimes you just throw things [inaudible] you don't keep anything [inaudible].

MR. SPARKS: That's right.

JUDGE: And how you do you distinguish those?

MR. SPARKS: Well, your Honor, you keep showing the facts and circumstances and you show that -- also, they photograph Mr. Johnson's bleeding arm --

JUDGE: But what -- but what standard is the trial court to measure this evidence against in order to determine whether or not a spoliation instruction is proper? Mr. Alexander says he recommends that we do the standards that are contained in Tabs 1 and 2 of his oral argument exhibit and -- then the other option is -- what is contained in Tab 3. [inaudible] got this whole record of evidence, but what standard should -- should the trial judge have measured that evidence against and then how then it should be reviewed on appeal?

MR. SPARKS: Your Honor, obviously, we're relying heavily on the second tab, which is the negligent spoliation evidence. The third tab -- or the failure -- he calls it the failure to produce --

JUDGE: Right

MR. SPARKS: And there's been a mix of semantics apparently, where at first their argument there is no such thing as negligent spoliation and now we're -- we're at, okay, now maybe there is negligent spoliation --

JUDGE: Well, tell us from what -- if you were writing this opinion and you had to start off by saying, Here's the standard that the trial court should follow in weighing all the facts and circumstances on the side, and what would the standard look like? How would you write the opinion?

MR. SPARKS: Yes, your Honor. The [inaudible] opinions offered that standard. Even the -- even the Middleton opinion offers that. It's the nonproduction of relevant evidence within a party's control raises the presumption that that evidence weren't produced would operate against that party and every intendment would be in favor of the opposite party.

JUDGE: It seems like this is going to have a very profound effect on all sides of all dockets, because there's going to be plenty of injury plaintiffs who throw away the clothing or the bandages or whatever. There are going to be businesses in fraud cases who threw away documents. And, whether you're plaintiff, defendant, intervenor, whoever you are, you're going to be faced with the accusation that if you didn't keep everything, there's a presumption that [inaudible].

MR. SPARKS: That may be the accusation, your Honor, but that's why there's abuse of discretion standard imposed upon the trial court.

JUDGE: But -- but from what you just -- but from what you -- if -- if the evidence is not produced, then must the trial court give the spoliation instruction?

MR. SPARKS: Oh, no. No, ma'am, not at all. The trial court is free to reject the suggestion --

JUDGE: On what basis? That's what we keep asking.

MR. SPARKS: Okay. And it's under the -- the same standard that I -- I just showed your Honors. And it's what you talked about with Wal-Mart just a second ago, is -- what do they offer to rebut the presumption. And you look at that and you say is that a reasonable explanation? Even the Middleton case --

JUDGE: Okay. So -- so are -- are you then primarily looking on the failure to produce case like Tab No. 2 except you would impose a duty to -- a burden of persuasion as opposed to just production?

MR. SPARKS: Absolutely. That -- the burden of production frightens, me your Honor, because --

JUDGE: I know, but then is the test actually what's laid out in Tab 2 of the oral argument exhibit --

MR. SPARKS: Well, Tab 2 -- no, ma'am --

JUDGE: -- [inaudible] that you just would have to show the failure to produce, which is what you just said, and that would give rise to the presumption and then they would rebutt with a reasonable explanation but would have a burden to persuade the trial judge that that -- that explanation was acceptable?

MR. SPARKS: That's correct, your Honor.

JUDGE: So it basically is what's at Tab 2 except you would change it from a burden to produce to a burden to persuade?

MR. SPARKS: That's correct. And in the second box, if you insert "reasonable" in front of the word "offer" and before the word "testimony," and then at the end of that box, put "to the judge" -- "to the trial judge," then you would have what I consider to be the proper -- or [inaudible] that it's always [inaudible].

The --

JUDGE: What seemed to me -- that in any retail context where there is an inventory and display to the public, there's always the risk that the display will fall over an inch of somebody. And these were just products that are for display to be sold. It seems to me that if a

product -- if there was no threshold showing that the product was segregated, and put away, and were supposed to be in storage and -- and -- then, all of a sudden, it shows up missing, then it would seem to me the -- the evidence coming forward on what happened to it could be no better than what Wal-Mart has here. [inaudible] sold on the regular course of business. But your argument would be that this would not be sufficient to rebut the presumption such that the trial court could give -- could give a spoliation instruction here.

MR. SPARKS: We have no --

JUDGE: There's no indication that these reindeer were ever pulled off, ever segregated, or anything. I don't know how -- in every context, where materials falls off a shelf, somebody ultimately comes along and sues for injuries as a result of that, that any retail could ever avoid the spoliation instruction because they're only -- their evidence can always -- could never be better than it was sold on a regular course of business, as best we can tell. I mean --

MR. SPARKS: The rule exists, your Honor, to -- to level the evidentiary playing field. And what they came in the court with was a customer incident report where their employee broke down, customer says he wasn't hurt and [inaudible] photographs of the reindeer.

Now, what Wal-Mart is not -- or continues to say is irrelevant is they also lost their pictures of my client's bleeding arm. Those --

JUDGE: But the -- the instruction itself does put a bit of a thumb on the scale because it's something from the court that pretty much says, here's what you are to do. I mean, as a practical matter, without this instruction, it would have been the plaintiffs' word against the defendants' word and the complainant's lawyer is going to say, "And, the only person who could have brought them here was you, Wal-Mart, and you didn't." So as a practical matter, the jury is going to probably hold that against the person who didn't' produce the evidence in swearing match anyway. So, here spoliation instruction is not -- I mean, it really does put the thumb on the scale a bit so it's a pretty -- I mean, it's a pretty effective or overwhelming sort of remedy for a mere nonproduction.

MR. SPARKS: I would you say effective, your Honor, not necessarily overwhelming.

JUDGE: Well, again, it seems like effective to me would be how it's played down the trial court as a practical matter. It is a bit of an uphill battle if the court instructs the jury on a spoliation point.

MR. SPARKS: I -- I agree.

JUDGE: And because of that, then shouldn't we have a higher threshold at the beginning on deliberate conduct, that there must be some evidence of deliberate conduct as we start with under tab one?

MR. SPARKS: That -- and tab one [inaudible], your Honor. I don't know how, as plaintiffs' lawyer, I'm supposed to prove tab one.

JUDGE: Well, then, that's a good point.

MR. SPARKS: I mean, I -- I guess I have to take a six-hour deposition of a Wal-Mart manager and hope and pray that I get him to finally admit that he had spoliated those reindeer. And I'm -- I'm pretty young, but I doubt I'll ever do that in my lifetime.

JUDGE: Do you agree -- do you agree, don't you, that there are -- I mean that there are retailers who prepare incident reports when really there is no anticipation of litigation. For example, the customer bumps into a display, an incident report is prepared and the customers says, I'm fine, nothing -- you know, don't worry about it, thanks for all your help and leaves. In that scenario, would the retailer be required to preserve that evidence for a period of two

years whatever they bumped into?

MR. SPARKS: Wherever they bumped into, not in, in, an isolation, in that particular context, you could just get into -- no, sir. I don't think that it would be appropriate for a trial judge, just based up on that just say, "Okay now you get exfoliation instruction."

JUDGE: Well let's say, I mean, in this case if we hold the spoliation -- spoliation instruction was proper, won't -- don't you think that's what retailers would then do, I mean, in every case, it's going to be, there's going to be the Wal-Mart warehouse in 35 minutes and the other warehouse with all these, you know, manner of things that customers have bumped into over the years.

MR. SPARKS: Well there already is a warehouse. That's where they kept the pictures of the blurry reindeer and presumably that's where --

JUDGE: But there, would there be required preservation anytime there's an incident report for example?

MR. SPARKS: No sir, you have --

JUDGE: Why not?

MR. SPARKS: -- just-just for an incident report, no, sir.

JUDGE: Why not?

MR. SPARKS: Because that -- and those frequent facts and circumstances, in my opinion if it's just an incident report, customers not bleeding, there's no one out there taking down interviewed witnesses and photographing evidence. If all of that is not present and there's just an incident report for the customer bumping its head then frankly I -- I think it maybe -- it may be abusive discretion for a trial judge to say that that there [inaudible].

JUDGE: It doesn't sound to me to be very hard to argue. I would represent the complainant, I would say, She went down and broke down when it happened, she obviously talked to the manager after that. He said, don't put that in the report, put this, and this, and this in the report saying this happened, this happened. She did all of that, typed it up [inaudible] if we had had her notes, we could show but this accident report was not accurate, it was fabricated and we don't. And so please charge the jury of spoliation. It seems to me, that's a fairly logical argument that you could make in many cases. But if you -- if you could do that, you know, those arguments will cut all different directions and run the risk of turning the trial into a trial of who is the worst spoliator rather than who caused the accident.

MR. SPARKS: Well --

JUDGE: Go ahead answer this question. I thought you were going to pass on me.

MR. SPARKS: I -- the -- you know, the -- the risk of my clients you know spoliating and it's not so -- I don't think my clients drive around -- protect the [inaudible]. When they have a car accident, they don't have a Polaroid camera in the [inaudible] box where they custom it with an accident investigation report and three people in the backseat that are almost guaranteed to show up in trial court. So, in that instance, if they go and get their car fixed without taking a photograph, I would tell them, now, since the car is fixed and we have no evidence of your damages, the judge in his discretion maybe able to instruct that, hey, you fixed your bumper, you've gone and exfoliated the evidence but I will also advise them that I feel in my opinion that will be abuse to his discretion.

JUDGE: Why?

MR. SPARKS: Because in the facts particularly --

JUDGE: Because when he argues later, he argues nine months later, the reason I've got the bumper fixed was because I didn't think I was

hurt back then. But months later, weeks later, I realized oh I'm much more seriously hurt than that and -- but now you're facing trial objections, you're going to tell the jury, "Well if he fixed his bumper, he probably wasn't hurt."

MR. SPARKS: Let's see, and again you're, I disagree with that respectfully. I don't understand why Wal-Mart continues to pound my client's medical condition. That has nothing -- it's like what I said in the brief, I don't understand what that has to do with spoliation at all because spoliation is an evidentiary presumption. They level the same arguments to the jury and the jury rejected his medical causation arguments [inaudible].

JUDGE: I'm just, I'm just trying to think that brief [inaudible] to handle this involve cases come through there a week, a month -- where do you fit all that evidence and how long do you stay in that -- I mean, we don't think there's a serious injury or claims in it [inaudible] don't you think this very [inaudible] something to do with that?

MR. SPARKS: I, I do feel the severity of injury which is precisely why I keep pointing out that my client was believing in her story, photographing the bleeding arm. Yes, your honor?

JUDGE: There you are. I have a submission here, the trial judge's submission in this case has a factual element and therefore the Wal-Mart, New York should have known that this might be evidence in the courtroom. Do you think that part spoliation should be left as a [inaudible] question and the trial judge decided nothing else?

MR. SPARKS: I -- I feel like the -- yes, your Honor. I feel like the rebuttable or rebuttal should be left to trial court as a rule of law and merely shouldv'e known as a fact question for the jury.

JUDGE: If we disagree with you and determine that the trial court did abusie its discretions in submitting the instruction, was the submission of that instruction a harmful error?

MR. SPARKS: Again, and Wal-Mart does a good job of pointing out that that can be a bit of a loss. I will concede that the reindeer is critical evidence. I will not concede, as Wal-Mart suggest in their briefs, that our closing argument was -- [audio rewinds]

JUDGE: -- has something to do with it?

MR. SPARKS: I do feel that severe of injury this is precisely why I keep pointing out that my client is believing in your restoring and photographing the [inaudible]. Yes sir?

JUDGE: There are -- there's a submission here, the trial does a solution in this case has a factual element for the Wal-Mart New York should have known but this might be [inaudible] in the courtroom and do you think that part of exfoliation should be as I ask question and the trial judge decided unless --

MR. SPARKS: I -- I feel like the -- yes, your Honor, I feel like their rebuttable or rebuttal should be left to trial court as a rule of law and merely should have known as a fact question for the jury.

JUDGE: If we disagree with you and determine that the trial court did abusie its discretions in submitting the instruction, was the submission of that instruction a harmful error? [audio resumes]

MR. SPARKS: Again, and you know the Wal- Mart does a good job in pointing out that that [inaudible] a bit of a box. I would concede that the reindeer is critical evidence. I will not concede, as Wal-Mart suggest in the briefs, that our closing argument was all about exfoliation, our closing argument was a walk through the charge, a walk through the medical testimony and briefly about spoliation. And then that at the end of the closing argument we said the reindeer, not as

important as Wal-Mart's trying to make it.

JUDGE: Let me ask you a question on that, if -- I mean, the weight of that reindeer is critical to your client's recovery or the neck injury, isn't it?

MR. SPARKS: No --

JUDGE: No, it's not, I mean --

MR. SPARKS: No, sir. It's not.

JUDGE: And so your doctor could get up there and say well you know it was papier-mâché, that still caused this injury. So is that basically how the case goes even if it's -- even if it's made of papier-mâché, you still have your evidence of causation?

MR. SPARKS: And in our [inaudible] Dr. Gunderson did testify of that, that the reaction to the falling reindeer could have caused him to pop his neck.

JUDGE: So why do you need spoliation instruction?

MR. SPARKS: Because I had two employees coming in -- I think it's inflammatory to come in and say, "you know what this guy is faking it, it's papier-mâché reindeer" and that's what they did, they brought it, brought in the deposition testimony of the little employee who pushed him over. He admitted he never picked him up, he admitted he didn't know how much they weighed, but gosh, darn it, they were papier-mâché. Second they brought in the floor manager, who, based upon an interview with that gentlemen, one week later speculated and concluded on that speculation that, "oh yeah, those are papier- mâché." So when I -- when I'm faced with that, you know, I'm put at a disadvantage because I've got a jury back there saying these are papier-mâché reindeer. Despite Dr. Gunderson's testimony, who undoubtedly on very good cross examination, who admit he's being paid for his time. Despite Dr. Gunderson's testimony, guys, these were papier-mâché reindeer, they couldn't have caused his arm to bleed. So I need help in that situation.

JUDGE: But there -- but what you say, [inaudible] to believe, but that really wasn't what this case is about, is it?

MR. SPARKS: Well, I think -- no, sir, it's not, actually --

JUDGE: It was about the arm bled, you were having to convince the jury that -- that -- these deer -- it was the weight of these -- that these deer was heavier than what -- Wal-Mart -- Wal-Mart said that they were. You -- You felt that [inaudible] to convince them of that because they were saying they were made out of papier-mâché. Your Doctor said that papier-mâché reindeer can cause this injury. You were concerned that if the jury believed Wal-Mart that -- that they were papier-mâché, they would disbelieve the doctor's causation testimony and conclude that he was not injured like the doctor said he was.

MR. SPARKS: I feel like they would disbelieve anything once they were told that these are papier-mâché reindeer. I -- I can as a -- as a reasonable person say that a paper mosaic hitting me in the head is going to -- is going to cause me to have a neck injury because of this magnitude.

JUDGE: Oh really -- you saw that this case really wasn't going to come down to whether or not you can get a spoliation instruction?

MR. SPARKS: No, your Honor, no. I saw this case as a case for Wal-Mart came in with all the damaging evidence and none of the evidence that -- that -- excuse me, all the -- the evidence that helped them. And none of the damaging evidence. And I felt like I was at a disadvantage. And the trial court imposed the least -- the -- the least sanction it could, and gave the jury an instruction spoliation that they could have freely rejected.

JUDGE: Any other questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF DOUGLAS ALEXANDER ON BEHALF OF THE PETITIONER

MR. ALEXANDER: May it please the court. I have five points for rebuttal -- the [inaudible].

We'll start with -- Justice Hankinson's point. Question about burden to persuade or burden to produce. One of the things I want to stress is -- that -- is -- that question is an important question but it is academic in terms of how this case comes out. In other words, when I said that it's produce not persuade, I'm saying that -- that is -- is what the precedent is in. I'm not saying it's outcome determinative. Now, should this Court decide that it is a burden to persuade, under that standard we've win, nonetheless, there should not have been spoliation and instruction, and I wanted to make that point. Now, should the Court elect to go to persuade rather -- and I can see the arguments in favor of that, I think it would be fair to go ahead and overrule these other cases; Midleton, Brunner- Brewer, because -- I mean, they really do made it clear it's produce, which this court is free to do. I mean, it's the court of appeals' decision. So, that is point one. Point two, where am I backpedaling from the brief of Justice Philips? I think that -- I -- I -- and this may be the point that you're getting at. I think in the brief, it was made very -- the argument made that you cannot have spoliation presumption arise from prelitigation conduct. The problem that I have when I started reading all the cases and inherited this file, very recently is when I read about the Brunner case, which concerns the onion. You know -- and -- and -- which case -- you know -- I remember, the smashed-on onion. Anyway which we need to do is look at Brunner --

JUDGE: [inaudible] if we also took Wal- Mart's version of the facts, which is pretty well -- pretty much established in such a manner of law [inaudible]

MR. ALEXANDER: Okay, well -- they -- okay then, I'm not aghast with where we were backpedaling from but anyway I'd rather want to make that point with respect to whether under the traditional rule it can relate to prelitigation and if you read the Brunner case, you almost have to conclude that it can. Point three is -- here, the reindeer are only critical if Wal-Mart on the day of the instance could have looked into a crystal ball and foreseen that they are going to be sued for this man coming at -- and saying, I have a pre existing neck condition. When you read the record that will come screaming through. And -- and that's a critical point here because I will submit to you that there was nothing that would give rise to -- to that sort of crystal ball foreseeing in the day of the accident. The only thing was a cut on the arm. Well, everyone agreed that the reindeer caused the cut on the arm and if there's a suit of $10 for the cut in the arm, you don't even need the reindeer. But is it the composition matter? Everyone agrees, there it is, they got a photograph of it. I mean, even the degree of the injury that is done. So, it's only pertinent with respect to the issue of should they have foreseen that there would be a suit for the injury to the neck and they answer the question has to be no on this record. And now this goes to -- the next point is -- is the [inaudible] --

JUDGE: [inaudible] -- and it's an abuse of discretion for

[inaudible] to think of --

MR. ALEXANDER: Correct. Correct. That's the standard.

JUDGE: But you -- it seems to be you -- you find that so narrowly, we talk in many court cases that -- that people don't notice when they're having an -- a legal injury although they may not know the extent of the injury --

MR. ALEXANDER: That says [inaudilbe] --

JUDGE: But you seemed to be [inaudible] to narrow and say because it was a cut on the arm and everybody could see it, that made the reindeer not relevant to the neck injury. But I could -- but I could see that some infection happens to the arms so that the obviousness of the -- it's not obvious how serious this injury is several days later after reindeer was sold -- I mean, you're trying to argue that the -- we have to be on notice of that particular injury in order to determine whether that's relevant and it doesn't count that we know the reindeer caused an injury, it's not. We don't have to keep it unless we know it. There is some serious injury that that caused, we don't know the real seriousness of an injury, we don't have to [inaudible] since we can not [inaudible]

MR. ALEXANDER: Well let me try to [inaudible] as close as we can because I think it's critical getting back to Justice Hex's point. We have to have very clear standards. And that's getting in to Justice O'Neill's point, the thumb on the scale. Let there be no doubt that the -- the submission of a spoliation presumption puts the thumbs on the scale. And for that reason it is critical that we define under what circumstances you can have that presumption particularly when there's been no suit filed and no threat of a suit.

JUDGE: So the [inaudible] does not find the Turvino majority would be helpful?

MR. ALEXANDER: I beg your pardon?

JUDGE: The [inaudible] does not find the majority of Turvino would be helpful?

MR. ALEXANDER: Well, the majority or Justice [inaudible]?

JUDGE: Well the eight -- the other eight.

MR. ALEXANDER: The other eight -- well -- I don't think that it provides us guidance in this issue. I mean -- and this is an important issue as to what -- what the standards should be. So, getting -- getting back to the point, what -- when you're talkiing about presuits -- that's why I'm saying that it is critical to define the standard --

JUDGE: Counsel your time is up and you're only at number four. Would you give us four and five real quick.

MR. ALEXANDER: I will. Well, five is not on the scale [inaudible] --

JUDGE: There was four.

MR. ALEXANDER: Four is -- is marked 11. Let's look at record volume 3 page 188. Plaintiff's counsel, the composition of the reindeer is the most critical quote/unqoute, piece of evidence in this trial, it's harmful. Let's see if I hit everything else. I did, I'm done.

JUDGE: Well -- when -- when you talked about -- when you talked about deciding on the scale --

MR. ALEXANDER: Yes.

JUDGE: -- that -- that -- that kind of idea tends to make one think that this kind of construction will always harmful error.

MR. ALEXANDER: Well -- I'd say that -- that and -- and I haven't thought about it. I'd say that in most cases it probably would, simply because it is so inflammatory. You could make a hypothicated case in which the evidence we're talking about is so marginal in case that it

doesn't matter. But the sense you get from reading the cases is, when the trial shifts from the [inaudible], where are these people hiding the ball? Don't you know that there is -- you know -- they would have kept those reindeers under circumstances blah-blah-blah, when it shifts to that, it is inflammatory.

JUDGE: Any other questions?

JUDGE: Can I add one more? But looking -- but looking at the harmful error point. Mr. Sparks says to us that the employees of Wal-Mart got on it and repeatedly said it was papier-mâché, its was papier-mâché, no big deal.

MR. ALEXANDER: And the incident report said that too.

JUDGE: And the incident report said that. And so, he finds himself in a position of having to deal with that evidence and rebutted at trial.

MR. ALEXANDER: Correct.

JUDGE: So, why does it is become a thumb on the scale if in fact in response to -- and it's just that -- it's -- it's -- it's the response to his papier-mâché, I can't answer it because I don't have the reindeer anymore because they did not preserve it?

MR. ALEXANDER: Well, I tell you why. Because it -- it turns from being a swearing match between -- and that's -- you know -- what we were left in this case was the classic swearing match and the circumstance where there is a reasonable explanation [inaudible] not being there as to what were they composed of, which was relevant because he had a neck injury and yes, I do have a camera on that. The -- the -- that was a swearing match between the plaintiff and -- as we all see in all cases. One party is saying that's wood and the other party is saying that it is papier-mâché. The way it tells us the tale is once you bring in the court and put in the jury charge, aha, look at this -- I mean read the closing arguments. They say they didn't a hammer on them.

JUDGE: Thank you --

MR. ALEXANDER: Decide for yourself.

JUDGE: As we close the argument of the day [inaudible].

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