

CAUSE NO. 18-c-3491

STREETSTOSHEETS ANIMAL RESCUE	§	IN THE COUNTY COURT AT LAW
Plaintiff	§	
	§	
vs	§	
	§	NO. 1
MUTTS & MAYHEM ANIMAL RESCUE	§	
and SELENA SCHMIDT,	§	
Defendants	§	ELLIS COUNTY, TEXAS

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**DEFENDANTS' MOTION FOR ADVERSE INSTRUCTION ON -  
SPOILIATION OF EVIDENCE**

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**TO THE HONORABLE JUDGE MOORE:**

Defendants Mutts & Mayhem Emergency Search and Rescue f/k/a Mutts & Mayhem Animal Rescue ("M&M") and Selena Schmidt seek the Court's protection from the irreparable damage caused by the plaintiff's spoliation of evidence.

**I.**  
**BACKGROUND**

This case involves a claim for ownership of a dog. It is undisputed that defendants provided the kennel and the skills necessary to capture a stray dog. Plaintiff, however, contends that it had "captured" the dog earlier, and therefore the dog already belonged to it and M&M's capture and possession did not change that. However, evidence to refute this contention, including a video regarding their efforts to capture him, and comments that he was a no-show has been deleted. This was a blog concerning the efforts to capture the dog, a video posted on Facebook and comments from followers that discredit this contention. Plaintiff clearly had a duty to preserve this evidence and intentionally deleted it or allowed it to be spoliated.

Evidence of the dog's alleged capture has been altered and/or destroyed by plaintiff.

Defendants are entitled to a spoliation instruction because the video, the blog, the Facebook page and various deleted posts would show that the plaintiffs did not, in fact, ever capture the dog.

Streets to Sheets and Mysti Boehler created a public Facebook page named “Hobo” sometime prior to Mutts and Mayhem getting involved in Hobo’s capture case (<https://www.facebook.com/Hobo-815768511966630/>). This page contained a very detailed account of Streets to Sheets activities regarding their attempts to capture Hobo.

On 6/13/2018, a volunteer with Streets to Sheets, Bonnie Agee, who was involved in Streets to Sheets’ efforts to capture Hobo made a public Facebook post on behalf of Streets to Sheets outlining that particular weeks’ timeline of capture updates for the public (<https://m.facebook.com/groups/232399093573483?view=permalink&id=1475883059225074>).

On 6/16/2018, Streets to Sheets posted a video to Facebook (<https://www.facebook.com/streetstosheets/posts/1316510348482273>) showing volunteers installing chicken wire or other type of wire fencing to the bottom of a building located on private property in downtown Waxahachie. Within the post body, there is never any mention of a temporary or momentary capture.

Numerous comments were made to the video, but one post was made and has since been deleted from plaintiff’s Facebook page. It had been posted on 6/16/2018 at 11:30pm and stated:

**Update 6-16-18 1130 PM Did not surface tonight...will be at it at 7AM again...hope this is Hobos first Father Day in comfort.**

This public post is still live on Facebook, but not on plaintiffs’ pages and discredits the contention that STS captured the dog on 6/16/2018. The video has been deleted from Facebook.

On 6/21/2018, Richard Gagnon, who watched such video prior to Streets to Sheets deleting it, posted a public comment that reads:

**Any updates as of 6-21-18. I watched this video yesterday. It stops short of an**

**rescue. What happened. Wish I could help but I'm on the other side of the country.**

Streets to Sheets deleted this video just before they filed the amended petition claiming they captured Hobo on 6/16/2018 in order to destroy the evidence of the non-capture and to create an illusion that a capture video once existed. They also altered an affidavit of Andreas Dupal<sup>1</sup> to manufacture evidence of a capture on 6/16/2018. (See attached).

On June 28, 2018, 2 days after MMESAR's successful capture, out of nowhere Streets to Sheets launched an online public attack on Mutts and Mayhem, and completely deleted the entire Hobo Facebook page destroying all the evidence that would have discredited their new claims against MMESAR.

On July 2, 2018 Mysti Boehler created a new page named "Waxahachie Hobo" and began posting new content to that page. Many of the posts to the new page were untruthful and disparaging towards Mutts and Mayhem as well as MMESAR's Team Veterinarian Dr. Kathy Rayner and MMESAR's President Selena Schmidt. Many of the posts to the new "Waxahachie Hobo" page have since been deleted by Mysti Boehler. Those comments likely still exist, however, but have not been produced by plaintiff.

Throughout this case, Streets to Sheets deleted multiple posts and likely hundreds of comments that pertained to Hobo's case, and Streets to Sheets blocked members of the public who questioned where their posts and comments had gone. Streets to Sheets not only deleted "their" comments to public posts but they deleted comments made by members of the public who mentioned anything contradictory to their fictitious capture. Those witnesses have been identified in response to persons with knowledge of relevant facts.

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<sup>1</sup> This date of "capture" is altered because Mutts & Mayhem was not involved in the efforts to capture the dog on 6/16/2018.

# What happens to content (posts, pictures) that I delete from Facebook?

[Computer Help](#) [Mobile Help](#) ▾

[Share Article](#)

When you choose to delete something you shared on Facebook, we remove it from the site. Some of this information is permanently deleted from our servers; however, some things can only be deleted when you [permanently delete your account](#).

Was this information helpful?

Yes  No

The only way to permanently delete the information is to permanently delete the account. Plaintiff contends that Facebook deleted a video that they uploaded. There is clear evidence that they have deleted individual posts and an entire Facebook page for this dog. She also claims that she did not solicit funds for Hobo, but she did. To claim that Facebook deleted the uploaded video, her posts soliciting donations, the blog and various posts is a false statement, but even if it were true, plaintiff should preserve the evidence, including the original video that she uploaded to Facebook. Plaintiff has refused to produce the video, deleted an entire Facebook page, a blog and various posts on their Hobo threads.

This is the last post made by Mysti Boehler to the original “Hobo” Facebook page before she deleted the page in its entirety. In this post, Boehler clearly explains that they simply changed their mind about the defendant organization, so *now* she is asking for Hobo to be transferred. Later in the post, she contradicted herself and stated that both organizations had agreed Hobo was owned by Streets to Sheets but there was never any such agreement. And, if there had been, this agreement is not enforceable.

The image shows a Facebook post from a page named 'Hobo', posted by 'Mysti Boehler' on June 28. The post text reads: 'URGENT HOBO UPDATE!!! As you all know, we have fought tooth and nail for Hobo since the day we learned he existed. And we will continue to fight for him, as we do every one of our rescues, until he achieves complete healing and finds his forever. Amidst our rescue efforts, we were contacted by another organization who deceived us into allowing them to involve themselves in Hobo's capture by making fraudulent claims and misleading promises. Unfortunately, as we learned more about their program behind the scenes, we no longer felt assured the organization had Hobo's best interests in mind, nor were they able to provide the most competent care possible for him. Today we attempted to transfer Hobo from the at-home clinic operated by the other organization's veterinarian to a renowned emergency and specialty center, but we were denied access to Hobo. To be clear: Hobo belongs to StreetsToSheets Animal Rescue, and this was something both organizations agreed upon from the moment they approached us with offers of help. Our team of volunteers has worked around the clock for several weeks to ensure Hobo's safety, and we will certainly not stop now. We are deeply sorry to any individuals who were involved in our efforts and are now being led to believe Hobo will not be...'. Below the post is a 'Page Transparency for Waxahachie Hobo' section with tabs for 'Summary' and 'Page History'. The 'Page History' tab is active, showing: 'Page created July 2, 2018 - Waxahachie Hobo', 'Page name has not changed', and 'Merged with 0 other Pages.' At the bottom of the post is a comment box with a plus icon and the text 'Write a comment...'.

## **II.** **MOTION FOR ENTRY OF SPOILIATION INSTRUCTION**

### **A. Analytical Framework – Standards for Relief.**

In 2014, the Texas Supreme Court established the framework for determining whether an act of spoliation has occurred. See *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 20 (Tex. 2014). In *Brookshire Bros.*, the Texas Supreme Court confirmed that the trial court must determine whether a party spoliated evidence pursuant to the analysis of two elements, and if spoliation is found, impose the appropriate remedy. *Id.* at 20.

First, the party alleging spoliation bears the burden of establishing that the nonproducing party had a duty to preserve the evidence and must demonstrate that the other party breached its duty to preserve material and relevant evidence. *Id.* Such a duty arises when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim. *Id.* A substantial chance of litigation arises when litigation is more than merely an abstract possibility or

unwarranted fear. *Id.* A party reasonably should know that a substantial chance of a claim against it exists if a reasonable person would conclude from the severity of the incident, and other circumstances surrounding it, that there was a substantial chance for litigation when the alleged spoliation occurred. *Id.* at 20 (*citing Wal-Mart*, 106 S.W.3d at 722). A court must examine the “totality of the circumstances” in making an objective determination of whether litigation was anticipated. See *Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 204 (Tex. 1993). Inconsistent and changing explanations in testimony are sufficient to support a spoliation sanction. See *Matlock Place Apartments, L.P. v. Druce*, 369 S.W.3d 355 (Tex.App.—Fort Worth, 2012, pet. denied).

Second, the party seeking a remedy for spoliation must demonstrate that the other party breached its duty to preserve material and relevant evidence. *Brookshire Bros.*, 438 S.W.3d at 20. If a party has a duty to preserve evidence, that party breaches that duty by failing to exercise reasonable care. *Id.* The breach is either intentional or negligent. *Id.*

### **Intentional Spoliation**

Intentional spoliation, also referred to as bad-faith or willful spoliation, occurs when a party acts with a subjective purpose to conceal or destroy discoverable evidence after it knows or reasonably should have known that there was a substantial chance the non-spoiling party would make a claim against it and that the concealed or destroyed evidence would constitute material evidence. *Id.* at 21. Intentional spoliation includes “willful blindness”, which occurs when a party allows for the destruction of relevant and discoverable evidence, although the party does not directly destroy the evidence. *Id.* Negligent spoliation occurs when a party conceals or destroys discoverable evidence but does not deliberately do so. *Id.* at 23.

In *Brookshire Bros.*, the Texas Supreme Court held that a trial court’s finding of

intentional spoliation is necessary to a spoliation sanction such as an instruction to the jury, and the Court carved out an exception whereby negligent spoliation will also support a spoliation sanction.

In this case plaintiff has refused to produce, and in fact, has hidden information demonstrating that they never captured Hobo. Plaintiff has obstructed defendants' access to the video that shows that the dog was never captured, and plaintiff has refused to produce the original video. On behalf of STS, Boehler has also deleted all comments of Hobo followers that did not agree with her position or that contradicted her public position.

Such conduct merits a spoliation instruction.

### **Negligent spoliation**

When a party negligently breaches its duty to reasonably preserve evidence and that breach irreparably prevents the non-spoliating party from having any meaningful opportunity to present a claim or defense, a severe spoliation sanction is justified. *Id.* citing *Wal-Mart Stores*, 106 S.W.3d at 721 (recognizing that the “loss or destruction of evidence may seriously impair a party’s ability to present its case”).

If the court determines that a party has spoliated evidence, the court must assess and impose an appropriate remedy by assessing the culpability of the producing party, evaluating any prejudice suffered by the requesting party, and impose a remedy. *Brookshire Bros., Ltd.*, 438 S.W.3<sup>rd</sup> at 21. The court must look at whether there is other competent evidence available to replace the missing evidence. *Id.* Sanctions available for discovery abuse under Texas Rules of Civil Procedure 215.2 and 215.3 are available to a court when imposing a remedy for spoliation. *Id.* Sanctions can include an award of attorney fees, an instruction, the exclusion of evidence, striking a party’s pleadings, or dismissing a party’s claims. *Id.* The remedy crafted by the trial

court must be proportionate when weighing the culpability of the spoliating party and the prejudice to the non-spoliating party. *Id.* The remedial purpose underlying the imposition of a spoliation remedy is to “restore the parties to a rough approximation of their positions if all evidence were available.” *In re J.H. Walker, Inc.*, 05-14-01497-CV, 2016 WL 819592, at \*9 (Tex. App.—Dallas Jan. 15, 2016, no pet.) citing *Brookshire Bros.*, 438 S.W.3d at 21; *Wal-Mart Stores*, 106 S.W.3d at 721.

In this case, plaintiff had a duty to preserve the evidence she alleges supports her contention of a capture. She also had a duty not to alter current evidence to manufacture that claim. As such, the spoliation instruction is still necessary to restore the parties to the positions they would have held if plaintiff had protected and secured the necessary evidence instead of deleting it – purposefully or negligently.

### **III. CONCLUSION**

WHEREFORE PREMISES CONSIDERED, defendants pray that the Court enter a finding that such video and blog records were intentionally spoliated, that the information contained in those images and postings would have been adverse to the plaintiff—demonstrating evidence of her manufacture of information on an alleged capture of Hobo/Hachi and for such and further relief to which the defendants may be justly entitled.

Respectfully submitted,

/s/ April F. Robbins  
April F. Robbins  
State Bar No. 16983470  
BRACKETT & ELLIS,  
A Professional Corporation  
100 Main Street  
Fort Worth, TX. 76102-3090

817.338.1700  
817.870.2265 - fax  
[arobbins@belaw.com](mailto:arobbins@belaw.com)

ATTORNEY FOR DEFENDANTS

**CERTIFICATE OF SERVICE**

I, April F. Robbins, hereby certify that on the 1<sup>st</sup> day of July 2019, a true and correct copy of the above and foregoing document was served upon the following counsel via ECF:

Randy Turner  
**Law Offices of Randall E. Turner, PLLC**  
5017 El Camp Ave.  
Fort Worth Texas 76107  
[randy@randyturner.com](mailto:randy@randyturner.com)

Gary Lee Hach  
**Hach Law Office**  
312 W. Northwest Hwy, Suite B  
Grapevine, Texas 76051  
[gary@hachlaw.com](mailto:gary@hachlaw.com)

*/s/ April F. Robbins* \_\_\_\_\_  
April F. Robbins

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 § ELLIS COUNTY, TEXAS

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AFFIDAVIT OF ANDREAS DUPAL

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BEFORE ME, the undersigned authority, personally appeared Andreas Dupal, who being first duly sworn by me, upon his oath stated and deposed as follows:

1. "My name is Andreas Dupal. I am over the age of twenty-one years and I am competent to make this affidavit. I have personal knowledge of the facts stated herein and they are true and correct.
2. In June of 2018 I began assisting StreetsToSheets Animal Rescue in their effort to capture the dog known as "Hobo."
3. On June 26, 2018 I came up with the idea of wearing a "Ghillie Suit" to camouflage myself so that I could hide near a cage trap until Hobo entered it. Once he entered the cage I would spring the trap door shut. The evening of June 26, 2018 I put on the Ghillie Suit and waited quietly for Hobo to enter the cage. When he entered the cage, I sprung the trap door and captured him. After I had secured Hobo in the cage, other people exited their vehicles that were parked nearby and came to the scene of the capture. Everyone who was at the scene of the capture—including Selena Schmidt—agreed that Hobo would be taken to Mutts & Mayhem's veterinarian for emergency medical treatment and, once he was well, Hobo would be returned to StreetsToSheets Animal Rescue. I captured Hobo on behalf of StreetsToSheets Animal Rescue.
4. Further Affiant sayeth not."

  
 \_\_\_\_\_  
 ANDREAS DUPAL

SUBSCRIBED AND SWORN to before me by Andreas Dupal on this 28 day of September, 2018.

  
 \_\_\_\_\_  
 Notary Public



JO SUMLIN  
 NOTARY PUBLIC  
 Caldwell County  
 North Carolina  
 My Commission Expires October 23, 2021

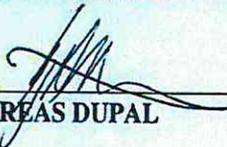
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