

FULKERSON LOTZ *Update*



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DON'T LET SPOILIATION SPOIL YOUR DAY



When Fulkerson Lotz partner, Jerry Mitchell first gave his presentation on Texas spoliation law, he thought it would be a one-time event.

But, Mitchell says the lecture has been so popular, he's been invited to give the talk 4 times in the last year. He most recently spoke on the topic to the Houston Paralegal Association on June 30, 2015.

Even Mitchell has been surprised by the reaction, but, he says, it's due to information overload. "The advent of electronic data discovery, whether it's preservation, collection, or just digesting the vast quantity of information, is an issue the courts have struggled to keep up with," he says.

Spoliation refers to the wrongful destruction of discoverable evidence. Twenty years ago finding such evidence just meant that you looked in a file cabinet or a storage box.

Today there are emails, texts, videotapes, electronic video recording, and a host of other media that are all discoverable.

Mitchell says that the Texas Supreme Court first took up the issue of spoliation in 1852. Over the years appeals court interpretations had created an inconsistent system throughout the state.

Last year the Texas Supreme Court purposely agreed to take on a case styled Brookshire Brothers, LTD v. Aldridge to clarify the issue. The court acknowledged

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DON'T LET SPOILIATION, SPOIL YOUR DAY (CONT.)

that spoliation had become a serious problem and that the prevalence of electronic data and uncertainties associated with preserving data had resulted in an “all time high” in sanctions.

The actual case involved a videotape from a store security camera that recorded the slip and fall of a customer. Weeks after the incident, the store manager decided to allow all but eight minutes of the video to be over-written with new material. The plaintiff accused the store of spoliation in destroying the evidence.

Mitchell notes, “It could have been a very short opinion on whether or not the jury should be asked to decide

spoliation. But the justices wanted to lay out what they called a “complete analytical framework.”

In the past, if spoliation was an issue, the judge could ask the jury to decide whether spoliation had occurred, and then instruct the jury that if they did find spoliation, it was to assume the evidence destroyed was damaging.

Under the new ruling, the judge has to decide the spoliation issue, including whether the spoliating party had a duty to reasonably preserve the evidence. Jurors can only be instructed to consider the destroyed evidence as damaging if the judge finds there was intentional destruction.

PITCH AND PUTT FOR A CURE

Fulkerson, Lotz client Alan Killingsworth, says his dedication to cancer research began with a handshake which he “will never forget.”

Jim Hooten, his co-worker and friend of almost 20 years, was laying in a hospital bed wracked with pain from AML Leukemia, when Allen visited in 2000. “I was on my way to Europe for a business trip, when they called to tell me I should stop by the hospital to see Tom,” Killingsworth says. He knew it might be the last time he saw him.

“I walked into the room, and tried to cheer him, by telling him he could beat the disease, but he just reached out his hand and when I took it, he gave me the strongest handshake, I’ve ever felt.”

When Jim died, just days later, Killingsworth says, he and his friends wanted to do something to honor their co-worker, so they chose two of his favorite activities. “We went to a ball game and then played golf.”

That’s where the idea for the annual “Pitch and Putt for a Cure” first surfaced and now, 15 years later the

organization has raised almost \$700,000 for the MD Anderson Cancer Research Center.

Research has focused on helping find a cure for the disease which is extremely debilitating and disproportionately affects young people.



Killingsworth and his wife Roya, run the event each year, along with Bill Slattery, donating 100% of the proceeds to the hospital.

Fulkerson and Lotz became involved four years ago after the firm represented FMC Technologies in a court case and got to know Killingsworth, who is Director of Global Sales and Marketing for Fluid Controls.

“Alan has tremendous commitment and energy,” says Tom Fulkerson who participated this year, along with fellow partner Wes Lotz.

Killingsworth returns the compliment calling Fulkerson “a great friend.”

This year’s event was held on June 22nd with 128 golfers participating. Killingsworth says that they limit the field so that it doesn’t become burdensome. “It’s all about fellowship and raising money for research,” he says pointing out that lunch is provided and many of the

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PITCH AND PUTT FOR A CURE (CONT.)

participants bring family members just to enjoy the day.

Fulkerson admits that he and Lotz "came in dead last" despite "the most generous handicap available," but he insists it is not about the score. "It is for a great cause—hopefully our clients can take comfort that we're not spending too much time on the links."

There are a number of events that have been added on, but Killingsworth says, the goal is to relate the research to real people. Dr. Patrick Zweidler-McKay, who runs the Pediatric Research program, comes to the event each year and provides an update on the research.



Dr. Zweidler-Mckay notes that federal research funds for cancer have not increased substantially in years, making events like the Pitch and Putt "more critical than ever."

Typically the event raises over \$40,000 annually although this year's total may be a bit lower due to the declines in the oil and gas economy, but Killingsworth says, "we'll be back next year and I'm sure we'll be back to normal."

More details on the event or donations can be found at <http://www.pitchandputtforacure.com>

NEWS BRIEFS

Wes Lotz has been honored by the Houston Business Journal as one of the 2014 "40 under 40" leaders in the community. Lotz recently joined 4 other recipients in a panel discussion focusing on critical challenges facing Houston for the next ten years.

Top Gun Judges

Tom Fulkerson and Wes Lotz were judges at this year's "Top Gun" mock trial competition at Baylor University. The competition, held each Spring, features participants from 16 of the nation's best law schools. The annual event, won this year by NYU, is one of the most prestigious mock trial competitions in the nation.

Arbitration Award

Following a two-week securities arbitration, Fulkerson Lotz has recovered \$3.6 million for 19 Exxon Mobil retirees. The arbitration panel found that the investment advisors, USCA Securities, LLC, US Capital Advisors, LLC and USCA RIA, LLC breached their fiduciary duties in the management of their retirement savings accounts.





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ON THE MOVE



Fulkerson Lotz LLP will move into the 8,000 square foot office building they have purchased at 4511 Yoakum Boulevard in late August.

After some interior build-out the firm will occupy more than half the office space available in the two-story structure, located near St. Thomas University.

The move gives the 10-member firm “plenty of room for expansion” according to partner Wes Lotz.