IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 8, 2007 Session

CINCINNATI INSURANCE COMPANY v. MID-SOUTH DRILLERS SUPPLY, INC., ET AL.

Appeal from the Circuit Court for Wilson County
No. 13123 Clara W. Byrd, Judge

No. M2007-00024-COA-R3-CV - Filed January 25, 2008

The issue presented by this appeal is whether a trial court may exercise its discretion granted under rules 34 and 37 of the Tennessee Rules of Civil Procedure to dismiss a party's case for spoliation of evidence where the spoliation may have been inadvertent rather than intentional. We hold that the trial court has the discretion to sanction a party by dismissal of its case where the party's destruction of evidence severely prejudices an adverse party's defense irrespective of whether the destruction was inadvertent or intentional. We accordingly affirm the trial court judgement.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

E. RILEY ANDERSON, SP. J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR. JJ., joined.

John M. Neal, Knoxville, Tennessee, for the appellant Cincinnati Insurance Company.

D. Andrew Saulters, Deron H. Brown, Nashville, Tennessee, for the appellee, Mid-South Drillers Supply, Inc.;

C. Bradford Marsh, J. Christopher Fox, II, Atlanta, Georgia; Elizabeth Lane Guenther, Russell B. Morgan, Nashville, Tennessee, for the appellee, Eaton Aeroquip, Inc.

OPINION

I. BACKGROUND

The facts are not in dispute and are set out as follows: In 1998, a contract drilling company named Jackson Enterprises ("Jackson") bought a 1977 Ingersol Rand Well-Drilling Machine from defendant Mid-South Drillers Supply ("Mid-South"). From time to time, Mid-South and other

companies performed maintenance and repairs on the machine. On February 5, 2002, Jackson purchased a 27" No. 24 high pressure blue hose and hose ends from Mid-South. The blue replacement hose was installed by Jackson Enterprise employees on the well-drilling machine to serve as an air and oil line connecting its air compressor to a high-pressure air storage tank.

On May 14, 2002, one of Jackson's employees was operating the well-drilling machine when an explosion and fireball occurred, seriously damaging the machine. Apparently, no one was hurt. The following day, Jackson's insurer, Cincinnati Insurance Company, hired Applied Technical Services (ATS) of Marietta, Georgia to determine the cause and origin of the fire. Jeff Morrill, an employee of ATS, came to Tennessee to examine the machine. His detailed report, delivered on July 8, 2002 to Cincinnati, included photos of the machine and some of its components, as well as close-ups of the blue hose assembly, which he had removed from the machine. The report summary declared that:

> The fire was a direct result of the failure of a 350 psi airline at the bottom of the high-pressure air storage tank. It is our understanding that the hose assembly was purchased approximately two months prior to the loss. Employees of Jackson Enterprises installed the hose assembly. The hose assembly failed at the crimp area of the compressor end connection due to improper manufacture. When the hose failed, a large quantity of compressor oil under pressure was released and contacted the hot surface of the drilling rig accessory engine, ignited and erupted into the fireball described by the witnesses.

Jackson retained Mid-South to fix or rebuild the machine without informing Mid-South about Morrill's investigation. In the process of repair Mid-South discarded and replaced all the damaged parts of the machine. The $105,748.36 cost of the repair was paid on August 14, 2002 by Cincinnati Insurance Company to Jackson.

II. Legal Proceedings Begin

On January 13, 2004, Jackson filed a complaint against Mid-South, alleging that the hose the supply company had furnished was unreasonably dangerous and defective, and that it was the cause of the damage to the well-drilling machine. Jackson asserted claims under a number of theories, including strict liability, negligence, failure to warn, defective product, breach of express warranties, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose.

Mid-South filed an answer in which it denied that it had been negligent, and asserted that Jackson had purchased "the same blue hose" multiple times for various well-drilling machines prior to the accident, and that it continued to use the product for the same purposes after the accident. It also alleged that Jackson's own employees were themselves negligent because they continued to operate the machine although they reported that a hose was leaking, and that

> The blue hose was actually of tougher quality than the one that comes with the well-drilling machine from the manufacturer, but during normal usage can have wear, tear and leaks and it is up to the employees using the well-drilling machine to watch for any such conditions within the hose and to replace same as needed. To fail to do so was to be careless, reckless and negligent and the defendant has no control over the actions of the employees of the plaintiff nor can they supervise and inspect the product/blue hose once it has been sold to various customers.

Jackson later filed a motion to amend its complaint to add Eaton Aeroquip, Inc. ("Eaton") as an additional defendant. Jackson claimed that Eaton manufactured the blue hose and hose ends that were sold to Jackson on February 5, 2002.[1] The motion was granted.

III. Disappearance of a Vital Piece of Evidence

As the above account indicates, Jackson's own employees installed the blue hose, so it was clear from the very beginning that proof of its condition at the time of purchase was essential to the resolution of Jackson's claim. Of course when Jackson's expert examined it, it was no longer in its original condition, but he deduced from his inspection that it had been defective at the time it was installed.

On October 11, 2004, ATS sent a letter to Ken Burian of Cincinnati Insurance Company titled "Notice of Intent to Dispose of Evidence." The letter stated that ATS intended to destroy an air hose in its possession on November 11, 2004 unless it received a check for unpaid storage charges for the item in the amount of $480. The copy of the letter in the record contains the hand-written notation, "Ken Burian called and said we may destroy evidence." Burian denied in a sworn affidavit that he had made any such communication.

An invoice attached to the letter gave Cincinnati the opportunity to instruct ATS as to its wishes in the matter by checking a box next to the legend "Please keep the evidence in storage. (Payment is enclosed)." Burian checked that box and returned the invoice to ATS with Cincinnati's check for $480. The check was dated November 12, 2004, one day after the deadline set out in the letter.

On August 25, 2006, Mid-South filed a motion for summary judgment with an accompanying memorandum. The defendant argued that ATS's investigation of the cause of the fire involved destructive testing of the high-pressure hose and hose clamps, thus depriving Mid-South of the opportunity to mount its own investigation. Eaton joined in the motion. The defendants argued that this intentional spoliation of evidence prejudiced their ability to rebut the expert testimony that the Jackson intended to offer.

Jackson's response denied that there had been any destructive testing or spoliation of evidence, and asserted that "Mr. Morrill has preserved the hose and hose end." The response was

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[1]Eaton points out that the record contains no proof that it manufactured the allegedly defective hose.

supported by Jeff Morrill's affidavit, which declared, "...defendant's claim that I performed destructive testing is false. I did not separate the hose end from the hose itself. I found the hose in that condition, and it was readily apparent that the separation resulted from faulty assembly. It was this separation that caused the fire." He further stated that "the evidence and my file are still available for inspection here in my office."

Just prior to the hearing on the summary judgment motion, counsel for the parties agreed to meet at the ATS offices on April 3, 2006 to inspect the blue hose and interview Jeff Morrill. Mid-South had hired an expert for that purpose, and Eaton had hired two experts. Counsel and experts traveled to ATS headquarters in Marietta, Georgia, where Morrill was unable to produce the hose for their inspection. Jackson later admitted that the hose had been destroyed and was no longer in existence.

The summary judgment hearing was conducted in Wilson County on October 6, 2006. Jackson announced in open court that the claim was a subrogation matter, and that Cincinnati Insurance Company was the real party in interest. The trial court found that the plaintiff's agent had intentionally destroyed all evidence without giving the defendants the opportunity to inspect the evidence prior to its destruction. The court further found that without the missing hose the defendants would be severely prejudiced in their attempts to defend the claims asserted against them.

The trial court announced that it had reviewed the applicable case law, and that it found *sua sponte* that sanctions were in order because of the destruction of the evidence by the plaintiff. The court accordingly dismissed all claims against the defendants as a sanction for the plaintiffs' actions.[2] The plaintiff, Cincinnati, filed a motion to rehear, which was denied. This appeal followed.

IV. ANALYSIS

Rule 37 of the Tennessee Rules of Civil Procedure declares that the courts have the power to impose sanctions upon a party for failure to make or cooperate in discovery. A variety of sanctions are available to the court, including, in appropriate cases, "dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." Less severe sanctions include prohibiting parties from introducing designated evidence, refusing to allow a party to support or oppose designated claims or defenses, and striking out pleadings or parts of pleadings.

Rule 34A of the Tennessee Rules of Civil Procedure deals specifically with spoliation of evidence and declares that "Rule 37 sanctions may be imposed upon a party or an agent of a party who discards, destroys, mutilates, alters, or conceals evidence." Trial courts have wide discretion to determine the appropriate sanction to impose for discovery abuses. *Mercer v. Vanderbilt University*, 134 S.W.3d 121, 133 (Tenn. 2004); *Lyle v. Exxon Corp.*, 746 S.W.2d 694, 699 (Tenn. 1988); *Brooks v. United Uniform Co.*, 682 S.W.2d 913, 915 (Tenn. 1984).

[2]The court stated that the defendants' motion for summary judgment based upon spoliation of evidence was denied.

The plaintiff, Cincinnati, contends that dismissal of an action is a drastic sanction which may be imposed only if the court concludes that a party's failure to cooperate in discovery is due to willfulness, bad faith or fault. The insurance company argues that in contrast to such cases, the destruction of the blue hose was an innocent mistake, resulting from "a severe disconnect" between the insurance company and its agent, ATS.

The defendant Mid-South responds that Rule 34A.02 of the Tennessee Rules of Civil Procedure does not require that a party's destruction of evidence must be intentional before sanctions are in order. Although the trial court here did find the destruction to be intentional; it also found that as a result of the actions of the plaintiff evidence as to any alternative cause for the fire was destroyed, and that the defendants had been severely prejudiced in their attempt to defend the claims against them.

We agree that sanctioning a party by completely dismissing its action is a severe remedy, which can only be justified in the most serious cases. Such cases include situations where a party has intentionally concealed or destroyed important evidence in order to suppress the truth. See *Alexander v. Jackson Radiology Associates,* 156 S.W.3d 11 (Tenn. Ct. App. 2004). However, nowhere in Rule 34A does it state that a finding of intentional destruction of evidence is required before a trial court can order sanctions under Rule 37.

Furthermore, there are other situations where spoliation of evidence would justify complete dismissal of an action. For example, such a sanction would be appropriate in circumstances where any less severe remedy would not be sufficient to redress the prejudice caused to a defendant by a plaintiff's spoliation of evidence. This case presents such circumstances.

The record indicates that when Jackson contracted with Mid-South to repair its rig, it already knew that its investigator had implicated defects in the blue hose as a likely cause of the fire. Thus, it was aware that it could bring suit against Mid-South as seller of the hose. Nonetheless, it did not share any of this information with Mid-South, and that company replaced all the damaged parts on the machine and discarded them, thereby losing the opportunity to preserve evidence as to other possible causes of the damage.

The blue hose itself remained in the custody of ATS. If the defendants' experts had been given the opportunity to inspect it, they may possibly have found evidence to rebut the conclusions of the plaintiff's expert. Once the hose was destroyed, however, that opportunity vanished. The plaintiff's lawyer himself conceded during oral argument that without the hose the defendants would have a difficult time mounting an effective defense. But he insisted that such a defense was still possible.

The trial court disagreed finding that the defendants had been severely prejudiced in their defense. The trial court then chose to exercise its discretion by dismissing the plaintiff's action. "The trial court's determination of the appropriate sanction to be imposed will not be disturbed on appeal unless the court commits an abuse of discretion." *Lyle v. Exxon Corp.*, 746 S.W.2d 694, 699 (Tenn. 1988). Abuse of discretion occurs only when "the trial court has misconstrued or misapplied

the controlling legal principles or has acted inconsistently with the substantial weight of the evidence." *White v. Vanderbilt University*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999) (citing *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999)). Appellate courts should allow discretionary decisions to stand even though reasonable judicial minds can differ concerning their soundness. *White,* 21 S.W.3d at 223; *Overstreet,* 4 S.W.3d at 709.

Plaintiff cites three unpublished cases of this court to support its theory that the court is only permitted to dismiss an action for spoliation of evidence where the spoliation was intentional or was done in bad faith. However, each of those cases is distinguishable from the present one on both procedural and factual grounds, and none of them directly addresses the question at hand. Among other things, all three involved summary judgments, which are not treated on appeal as matters within the discretion of the trial court.[3] The standard of review for Rule 37 sanctions is whether the trial court abused its discretion.

In its decision to sanction by dismissing plaintiff's case the trail court found persuasive a Michigan court of appeals case whose facts closely resemble those of the present case. In *Citizens Insurance Company v. Juno Lighting, Inc.*, 635 N.W.2d 379 (Mich. App. 2001) an insurance company's investigator concluded that a house fire was caused by a defective lighting fixture. The investigator called the manufacturer to find out where he could obtain another one of its fixtures so that he could perform additional tests, but he did not advise it of the fire investigation because he was afraid the manufacturer would inform its legal department. The damaged home was repaired shortly after the fire. The manufacturer first learned about its suspected role in the fire when it was served with a summons and complaint, by which time it was impossible to test any of the other viable theories of causation developed by its expert.

The defendant moved for sanctions, including possible dismissal of the case. The defendant's expert testified as to other possible causes of the fire, including a defective heat/fan light or defective installation of defendant's fixture, but the heat/fan light had not been preserved, and the repair of the house rendered it impossible to reconstruct what the wiring situation was at the time of the fire. The trial court considered the possibility of limiting the evidence that each party could

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[3]Among the three cases the facts of *Thurman-Bryant Electric Supply v. Unisys Corporation,* No. 03A01-CV00152, 1991 WL 22256 (Tenn. Ct. App., Nov. 4, 1991)(rule 11 perm. app. denied Mar. 16, 1992) are most similar to those of the present case. In *Thurman-Bryant*, the plaintiffs alleged that a computer the defendants furnished caused a fire in the plaintiffs' premises. After examining the allegedly defective computer, the plaintiff's agent destroyed it. The trial court granted the defendant summary judgment on two grounds, one of which was spoliation. We reversed the trial court on both grounds. We did discuss the general rule that spoliation or destruction of evidence raises an inference that the evidence would have been unfavorable to the cause of the spoliator, and we stated that the inference only arises where the spoliation was intentional, and not where the destruction "was a matter of routine with no fraudulent intent." However, we affirmed that the trial judge has the discretion to impose sanctions on a party for destruction and loss of evidence, the severity of which depends on the circumstances of each case.

The facts of the other two cases, *McLean v. Bourget's Bike Works*, No. M2003-01944-COA-R3-CV, 2005 WL 2493479 (Tenn. Ct. App. Oct. 7, 2005)(no rule 11 perm. app. filed), and *Trumbo v. Witco Corp.*, No. W2002-01186-COA-R3-CV, 2003 WL 21946734 (Tenn. Ct. App., Aug. 11, 2003)(no rule 11 perm. app. filed) were very different from those of the present case, but all did involve destruction or loss of evidence and arguments that the parties responsible should suffer some legal detriment because of it. In both cases, the court discussed the distinction between intentional and unintentional acts, but the resolution of neither case turned on that distinction.

present, but concluded that even if it did, the case could not be tried fairly because of the way in which the insurance company had conducted its investigation and the state in which it had left the evidence. It accordingly dismissed the case as a sanction for the insurer's failure to preserve evidence.

The Michigan appeals court affirmed, noting that

> In cases involving the loss or destruction of evidence, a court must be able to make such rulings as necessary to promote fairness and justice. To deny the courts the power to sanction a party in such circumstances would only encourage unscrupulous parties to destroy damaging evidence before a court order has been issued. Furthermore, regardless of whether evidence is lost as the result of a deliberate act or simple negligence, the other party is unfairly prejudiced because it is unable to challenge or respond to the evidence . . . . 635 N.W.2d at 382-383 (citing *Brenner v. Kolk*, 573 N.W.2d 65 (Mich. App. 1997)).

We agree with and find persuasive the reasoning of the Michigan appeals court in *Citizens Insurance Company, supra*, and we believe the same reasoning applies to the present case. Cincinnati's failure to notify Mid-South of the results of its investigation and its agent's subsequent destruction of the blue hose, whether advertent or inadvertent, made it extremely difficult if not impossible, for the defendants to present an effective defense to counter the plaintiff's theory of the cause of the fire. Since the plaintiff bears the sole responsibility for the loss of the evidence, and since any lesser sanction than dismissal would not have been an adequate remedy; the trial court did not abuse its discretion in its decision to sanction the plaintiff by dismissing its action.

V.

The judgment of the trial court is affirmed. We remand this case to the Circuit Court of Wilson County for any further proceedings necessary. The costs on appeal are taxed to the appellant, Cincinnati Insurance Company.

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E. RILEY ANDERSON, SPECIAL JUDGE