

# Tennessee Litigation Update: Spoliation in Tennessee

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In Tennessee, courts have both express and inherent authority to impose sanctions for spoliation.<sup>[i]</sup> There are many sanctions that a court may impose on a spoliator, including: <sup>[ii]</sup>dismissal of the plaintiff's action, default judgment against the disobedient party, an adverse inference instruction against the disobedient party, or striking or precluding the admission of evidence presented by the disobedient party. *See, e.g., Smartt v. NHC Health Care*, 2009 WL 482475, \*17-18 (Mar. 10, 2011) (stating that trial court's instructions to the jury was correct framing of the doctrine of spoliation; the instructions stated that in the event the jury found the defendants had destroyed records with an improper purpose, then the jury should assume that the unavailable evidence would be unfavorable to defendants.). Courts are given "wide discretion" to impose any sanction they deem appropriate as long as it "serves the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." *Id.*; *Clark Constr. Grp, Inc. v. City of Memphis*, 229 F.R.D. 131, 138 (W.D. Tenn. 2005). <sup>[iii]</sup>

In Tennessee, prior to 2015, it was unclear whether a party could be sanctioned for spoliation of evidence if the spoliator did not lose or destroy the evidence intentionally. Courts of Appeals generally agreed with the statement "...an intentional act is a prerequisite for imposing a [sanction, such as] a negative inference against a party." *Bronson v. Umphries*, 138 S.W.3d 844, 845 (Tenn. Ct. App. 2003). <sup>[iv]</sup> In a departure from the intent requirement, one Court sanctioned a party that unintentionally lost or destroyed evidence. *See, e.g., Cincinnati Ins. Co. v. Mid-South Driller Supply, Inc.*, 2008 WL 220287, \*1 (Tenn. Ct. App. Jan. 25, 2008) (holding that "a trial court has the discretion to sanction a party . . . [for] destruction of evidence . . . irrespective of whether the destruction was inadvertent or intentional."). <sup>[v]</sup>

In 2015, the Tennessee Supreme Court addressed the issue regarding spoliation of evidence in the case of *Tatum v. Bridgestone Ams. Holding, Inc.*, 473 S.W.3d 734 (Tenn. 2015). In *Tatum*, the Plaintiff was in a motor vehicle accident due to the failure of a new tire. Plaintiff brought a products liability case against the seller and the manufacturer. At the advice of her insurance company, the Plaintiff transferred title to the vehicle along with the tire, to the wrecker service. After doing so, she filed suit against the Defendants. Among other theories of dismissal the Defendants filed a motion for summary judgment requesting the court to dismiss her case due to spoliation. The Trial Court refused to award the sanction because it held the Plaintiff did not intentionally destroy or otherwise spoliates the tire. The Defendants appealed, arguing the trial court abused its discretion. Defendants argued an intentional act was not a prerequisite to a finding of spoliation under Tennessee law.

The issue made its way to the Tennessee Supreme Court. The Supreme Court noted the judicial power to award sanctions for spoliation arose from two sources: the common law doctrine of spoliation, and the inherent authority and discretion of the courts. The Court noted that Tennessee courts have long applied the prerequisite of intentional misconduct in spoliation issues. [\[vi\]](#) The courts had in the past held a trial court could draw a “negative inference” in those situations. Over the years, the Courts of Appeals began to apply other sanctions than the “negative inference doctrine” (common law), which included limiting introduction of evidence and in some rare instances, dismissing cases. [\[vii\]](#) At the same time, the Courts maintained they have inherent authority and broad discretion in fashioning a remedy and sanction for spoliation. The Supreme Court explained the inherent to impose sanctions did not arise out of the common law; rather, it “...is rooted in the trial court’s inherent power to ensure the proper administration of justice.” [\[viii\]](#) As such, there is a large component of judicial discretion involved. A trial court’s decision is not set aside on appeal unless “...the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence.” [\[ix\]](#) *Id.*, at 743, quoting *White v. Vanderbilt University*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999).

The inherent authority to award sanctions is not replaced or encapsulated totally by the Tennessee Rules of Civil Procedure. Tennessee Rule of Civil Procedure 34A (“Spoliation of Evidence”). TRCP 34A deals with spoliation in filed civil cases. It applies the full range of sanctions available under TRCP 37, but only when the spoliation occurs in the face of a court’s discovery order. Since the Rules deal with spoliation after a lawsuit is filed, they do not address the courts’ inherent authority to deal with pre-litigation issues of spoliation. The Supreme Court noted it had upheld the inherent authority to award sanctions even when the Rules of Civil Procedure did not address the issue. It noted, even after the adoption of TRCP 34A, the courts have still utilized the prerequisite of intentional action, although the Rules are silent as to whether intentional conduct is required or not. The Court noted the need for a universal rule, and in so doing, held under TRCP 34A and under the court’s inherent authority, intentional action is no longer a prerequisite for imposing spoliation sanctions on an actor, either under the common law, the Rules or the inherent authority of the courts. [\[x\]](#) *Id.*, at 746. The Court held

“Therefore intentional misconduct should not be a prerequisite to the imposition of some sanction under any approach. Rather, such determinations should be made on a case-by-case basis considering all relevant circumstances. Whether the conduct involved intentional misconduct simply should be one of the factors considered by the trial court....the determination of whether a sanction should be imposed for the spoliation of evidence depends on the unique circumstances of each case. Factors which are relevant to a trial court’s consideration of what, if any, sanction should be imposed for the spoliation of evidence include:

- The culpability of the spoliating party in causing the destruction of the evidence, including evidence of intentional misconduct or fraudulent

- intent;
- The degree of prejudice suffered by the non-spoliating party as a result of the absence of evidence;
- Whether, at the time the evidence was destroyed, the spoliating party knew or should have known that the evidence was relevant to pending or reasonably foreseeable litigation, and,
- The least severe sanction available to remedy any prejudice caused to the non-spoliating party.

A trial court's decision to impose a particular sanction 'will be set aside on appeal only when the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence.' [\[xi\]](#)

It is instructive to note the Supreme Court then upheld the Trial Court's decision not to award sanctions against the Plaintiff. It held the tire was destroyed as a matter of routine practice shortly following an accident, and interestingly cited the lower court's ruling the destruction was not intentional. The *Tatum* case seeks to create a balance in spoliation doctrine while retaining in large part the emphasis on trial court discretion and a trial court's need to fashion remedies at the trial level.

[\[i\]](#) Tenn. R. Civ. P. 34A; *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 133 (Tenn. 2004); Tenn. R. Civ. P. 34A.02; Tenn R. Civ P. 37.02

[\[ii\]](#) See, e.g., *Smartt v. NHC Health Care*, 2009 WL 482475, \*17-18 (Mar. 10, 2011) (stating that trial court's instructions to the jury was correct framing of the doctrine of spoliation; the instructions stated that in the event the jury found the defendants had destroyed records with an improper purpose, then the jury should assume that the unavailable evidence would be unfavorable to defendants.).

[\[iii\]](#) *Clark Constr. Grp, Inc. v. City of Memphis*, 229 F.R.D. 131, 138 (W.D. Tenn. 2005).

[\[iv\]](#) *Bronson v. Umphries*, 138 S.W.3d 844, 845 (Tenn. Ct. App. 2003).

[\[v\]](#) See, *Cincinnati Ins. Co. v. Mid-South Driller Supply, Inc.*, 2008 WL 220287, \*1 (Tenn. Ct. App. Jan. 25, 2008) (holding that "a trial court has the discretion to sanction a party . . . [for] destruction of evidence . . . irrespective of whether the destruction was inadvertent or intentional").

[\[vi\]](#) *Id.*, at 740.

[\[vii\]](#) *Id.*, at 742.

[\[viii\]](#) *Id.*, at 742 (citations omitted).

[\[ix\]](#) *Id.*, at 743, quoting *White v. Vanderbilt University*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999).

[\[x\]](#) *Id.*, at 746.

[\[xi\]](#) *Id.*, at 746-47 (citations omitted).

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