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TENNESSEE

SPOLIATION

1. Elements/definition of spoliation: Is it an "intentional or fraudulent" threshold or can it be negligent destruction of evidence.

Under Tennessee Rule of Civil Procedure 34A.02, "sanctions may be imposed upon a party or an agent of a party who discards, destroys, mutilates, alters, or conceals evidence." Tenn. R. Civ. P. 34A.02. In turn, Tennessee Rule of Civil Procedure 37.02 provides a wide range of potential sanctions, including: "dismissal of the action, rendering a judgment by default, limiting the introduction of certain claims or evidence, entering an order designating that certain facts be taken as established, and striking out pleadings or parts of pleadings." *Tatham v. Bridgestone Ams. Holding, Inc.*, 473 S.W.3d 734, 739 (Tenn. 2015) (citing Tenn. R. Civ. P. 37.02(A)-(D)).

A trial court has broad discretion in determining whether to impose sanctions in response to the spoliation of evidence, and the court's decision 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 evidence." *Id*. at 746, 747 (internal quotations omitted). What is more, the determination is made on a "case-by-case basis" and "should be based upon a consideration of the totality of the circumstances." *Id*. at 746.

In *Tatham v. Bridgestone Ams. Holding, Inc.*—the current, seminal case in Tennessee regarding the imposition of sanctions for the spoliation of evidence—the Tennessee Supreme Court provided four factors which are "relevant" to the trial courts analysis:

1. the *culpability of the spoliating party* in causing the destruction of the evidence, including evidence of intentional misconduct of fraudulent intent;

2. the *degree of prejudice* suffered by the non-spoliating party as a result of the absence of the evidence;

3. 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

4. the *least severe sanction available* to remedy any prejudice caused to the non-spoliating party.

Id. at 747-46 (emphasis added). As noted, the court's holding in *Tatham* determined that "intentional misconduct" was no longer a prerequisite to impose sanctions for the spoliation of evidence. *Id*. As these factors also demonstrate, spoliation of evidence is not a sperate, distinct cause-of-action, but, rather, it is an application of the trial court's authority to "preserve the integrity of the discovery

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process." *Id*. 742.

Thus, under Tennessee law, sanctions may be imposed for negligent destruction of evidence. Usually, if intentional or fraudulent conduct is found, the sanctions will be more severe.

2. Distinction between first party and third-party spoliation.

Tennessee law distinguishes between first party and third-party spoliation. While we have been unable to locate any Tennessee state court opinion directly addressing this distinction, at least two Tennessee Federal District Courts have addressed this issue. See Benson v. Penske Truck Leasing Corp., No. 03-2088 Ma/V, 2006 W.L. 840419 (W.D. Tenn. Mar. 30, 2006); and Poynter v. General Motors Corp., 476 F.Supp.2d 854 (E.D. Tenn. Fed. 21, 2007). The Court in Benson stated:

Spoliation claims can take two forms: first-party spoliation occurs when a defendant in a lawsuit destroys evidence of value to the plaintiff; third-party spoliation occurs when a third-party destroys evidence that could have been used by a plaintiff against a defendant in a separate suit.

Benson at 3.

3. Whether there is a separate cause of action for a spoliation claim.

Tennessee law does not recognize an independent cause of action for first party spoliation, finding that sanctions adequately address the issues raised by spoliation.

While we have been unable to locate any Tennessee state court opinion discussing a cause of action based on third-party spoliation of evidence, at least two Federal District Courts in Tennessee have indicated that they will entertain a cause of action for third-party spoliation based on the principles of negligence. See Poynter, 476 F.Supp. 2d at 857 and Benson at 3.

The Tennessee Civil Justice Act of 2011, codified at T.C.A. § 29-39-101, et seq., places caps on non-economic damages awards in the amount of $750,000 and, in cases of catastrophic injury, $1 million. The Tennessee Civil Justice Act of 2011 also places caps on punitive damages, not to exceed two times the amount of the compensatory damages awarded or five hundred thousand dollars, whichever is greater. However, both the caps on non-economic and punitive damages "shall not apply" if: the defendant intentionally falsified, destroyed, or concealed records containing material evidence with the purpose of wrongfully evading liability in the case at issue; provided however that this subsection (h) does not apply to the good faith withholding of records pursuant to privileges and other laws applicable to discovery, nor does it apply to the management of records in the normal course of business or in compliance with the defendant's document retention policy or state or federal regulations; T.C.A. § 29-39-102(h)(2) and T.C.A 29-39-104 (7)(B).

4. Remedies when spoliation occurs:

- Negative inference instruction

Yes, Tennessee courts allow for the imposition of a negative inference as a sanction for spoliation of evidence. See Tatham, 473 S.W.3d 734; Tenn. R. Civ. P. 37.02(a). Importantly, the Tatham Court held:

[W]hile in the past under the common law doctrine of spoliation, there clearly was a prerequisite of intentional misconduct for a trial court to impose the specific sanction of a negative inference against the spoliating party, we see no reason to continue the requirement of intentional misconduct for the imposition of sanctions for the spoliation of evidence whether the sanction be imposed under the common law doctrine, under the inherent authority of the court, or under Rule 34A.02.

See Tatham 473 SW.3d at 469.

This holding from Tatham conflicts with the Tennessee Patter Jury Instructions, which still require

that intentional and fraudulent conduct be proven for the imposition of a negative inference instruction. See T.P.I 2.13.

- Dismissal

Yes, Tennessee courts can dismiss a Complaint based on spoliation of evidence. See Tatham at 744; Tenn. R. Civ. P. 37.02(c). Additionally, Tennessee courts may enter default judgments against defendants who spoliate evidence.

- Criminal sanctions

While criminal sanctions are not explicitly addressed under Tennessee's Rules of Civil Procedure, Tenn. R. Civ. P. 37.02(b) does grant the court power to use contempt of court in addition to or in lieu of the other sanctions listed under the Rule. Importantly, Tennessee does recognize criminal contempt of court in addition to civil contempt of court. Criminal contempt of court is codified at T.C.A. § 29-9-101, et seq. Tenn. R. Crim. P. 42.

- Other sanctions

The full range of sanctions allowed under Tennessee law for spoliation of evidence can be found at Tenn. R. Civ. P. 37.02(A) through (E). In addition to the sanctions discussed above, courts may:

- Strike pleadings or portions of pleadings as a sanction for spoliation. See Tenn. R. Civ. P. 37.02(C).
- Stay proceedings until the order is obeyed. Tenn. R. Civ. P. 37.02(C).
- Granting a default judgment. Tenn. R. Civ. P. 37.02(C).
- Order refusing to allow the spoliating party to support or oppose designated claims or defenses. Tenn. R. Civ. P. 37.02(B).
- Removal of caps for non-economic damages and punitive damages for an intentional spoliation of material evidence.

The Tennessee Civil Justice Act of 2011, codified at T.C.A. § 29-39-101, et seq., places caps on non-economic damages awards in the amount of $750,000 and, in cases of catastrophic injury, $1 million. The Tennessee Civil Justice Act of 2011 also places caps on punitive damages, not exceed two times the amount of compensatory damages awarded or five hundred thousand dollars, whichever is greater. However, both the caps on non-economic and punitive damages "shall not apply" if: the defendant intentionally falsified, destroyed, or concealed records containing material evidence with the purpose of wrongfully evading liability in the case at issue; provided however that this subsection (h) does not apply to the good faith withholding of records pursuant to privileges and other laws applicable to discovery, nor does it apply to the management of records in the normal course of business or in compliance with the defendant's document retention policy or state or federal regulations; T.C.A. § 29-39-102(h)(2) and T.C.A 29-39-104 (7)(B).

5. Spoliation of electronic evidence and duty to preserve electronic information.

Spoliation of electronic evidence and duty to preserve the same are also governed by the Tatham analysis. However, the Rules recognize that the routine operation of computer systems means that information can be lost, destroyed, or "written over" in the normal course of business, and, therefore, Tenn. R. Civ. P. 37.06(2) affords additional protections for parties in possession of electronically stored information, saying:

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith, operation of an electronic information system. Tenn. R. Civ. P. 37.06(2)

However, as the Advisory Commission Comments make clear, protection provided by Rule 37.06(2) "applies

only to sanctions 'under these Rules'." See 2009 Advisory Commission Comments. Further, parties who are under a duty to preserve video surveillance footage should be cognizant that:

The good faith requirement of Rule 37.06(2) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.' Among the factors that bear on a party's good faith and the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.

See 2009 Advisory Commission Comment.

6. Retention of surveillance video.

Retention of surveillance video and the party's liability for sanctions for spoliation of the same are likewise governed under the standard announced in Tatham v. Bridgestone. See, generally, Wilson v. Weigel Stores, Inc., No. E201900605-COA-R3-CV, 2020 W.L. 2529859 (Tenn. Ct. App. 2020).

Further, destruction of video surveillance footage (or any electronic data) could potentially open a party and its personnel up to additional depositions, discovery requests, and other judicially crafted discovery management protocol to provide substitute or alternative for some or all of the lost or destroyed information.

COLLATERAL SOURCE

7. Can plaintiff submit to a jury the total amount of his/her medical expenses, even if a portion of the expenses were reimbursed or paid for by his/her insurance carrier?

Yes, in Tennessee a plaintiff is allowed to submit to a jury the full amount of his/her medical expenses based upon the amount charged, not what was actually paid. *Dedmon v. Steelman*, 535 S.W.3d 431, 466 (Tenn. 2017). The collateral source rule as applied in Tennessee and elsewhere is succinctly articulated in the widely-cited Section 920A of the Restatement (Second) of Torts:

> (1) A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability.
>
> (2) Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.

535 S.W.3d at 442.

8. Is the fact that all or a portion of the plaintiff's medical expenses were reimbursed or paid for by his/her insurance carrier admissible at trial or does the judge reduce the verdict in a post-trial hearing?

No, the evidentiary component of the collateral source rule flows from the rule of law. If a plaintiff's recovery may not be reduced by collateral benefits, then "evidence that a plaintiff has received benefits or payments from a collateral source independent of the tortfeasor's procuration or contribution" must be excluded. *Bozeman*, 879 So.2d at 699 (noting that "[t]he issue typically arises at trial following the submission of a Motion in Limine").

Comment *c* to Section 920A relates to the evidentiary component of the collateral source rule. This comment lists the type of benefits precluded by the collateral source rule: (1) insurance policies, whether maintained by the plaintiff or a third party, (2) employment benefits, either gratuitous or arising out of contract, (3) gratuities, and (4) social legislation benefits, such as social security benefits, welfare, and pensions. *Id.* § 920A cmt. c. As most commonly applied, the evidentiary rule bars "any evidence that all or part of a plaintiff's losses have been covered by insurance."

9. **Can defendants reduce the amount plaintiff claims as medical expenses by the amount that was actually paid by an insurer? (i.e. where plaintiff's medical expenses were $50,000 but the insurer only paid $25,000 and the medical provider accepted the reduced payment as payment in full).**

Tennessee law provides that the introduction into evidence of a personal injury plaintiff's medical bills creates a rebuttable presumption that such medical, hospital or doctor bills are reasonable. *Dedmon,* 535 S.W.3d at 462 (citing Tenn. Code Ann. § 24-5-113). To rebut this presumption, defendants are free to submit any competing evidence that does not run afoul of the collateral source rule. *Id*. Defendants are precluded from submitting evidence of the discounted rates actually paid to medical providers from an insurance company to rebut the plaintiffs' proof that the full, undiscounted charges are reasonable. The jury then determines the "reasonable value" of the medical services in light of all of the evidence.

ACCIDENT AND INCIDENT REPORTS

10. **Can accident/incident reports be protected as privileged attorney work product prepared in anticipation of litigation or are they deemed to be business records prepared in the ordinary course of business and discoverable?**

Tennessee law provides that accident reports shall not be used "as evidence in any trial, civil or criminal, arising out of an accident…." Tenn. Code Ann. § 55-10-114.

SOCIAL MEDIA

11. **What means are available in your state to obtain social media evidence, including but not limited to, discovery requests and subpoenas? Can you give some examples of your typical discovery requests for social media?**

The means of discovering social media evidence from parties are the same for discovering evidence generally as allowed by the Tennessee Rules of Procedure, including interrogatories and requests for production. A party may seek to obtain a non-party's social media information through a subpoena.

Sample Interrogatory and Request for Production: "Please state whether or not you have maintained a social network account, including but not limited to Facebook; Myspace; Twitter; Instagram; TikTok; LinkedIn; Flickr.com; Match.com; eHarmony.com; GoFundMe; Chemistry.com; and YouTube. If so, the identity of each and every social networking site you have maintained and whether you or anyone else has posted, referenced, or uploaded to any such account any image, document, or comment that relates to the subject accident or the damages and/or treatment you claim arise therefrom, and identify any such item. Please produce any and all posts, comments, images, documents, etc."

12. **Which, if any, limitations do your state's laws impose on a party on obtaining social media evidence from an opposing party? Possible limitations include a privacy defense, relevance, etc.**

Once a court determines that information is relevant and is not privileged, the court should balance the need for the information with the harm that could result from its disclosure. *West v. Schofield*, 460 S.W.3d 113 (Tenn. 2015). Germane in this balancing test is the "protection of privacy, property and secret matters and the protection of parties or person from annoyance, embarrassment, oppression, or undue burden or

expense." *Id.* at 128 (internal quotations omitted).

13. What, if any, spoliation standards has your state's Bar or courts set forth on social media for party litigants?

There are no spoliation rules specific to social media. In Tennessee, "Rule 37 sanctions may be imposed upon a party or an agent of a party who discards, destroys, mutilates, alters, or conceals evidence. Tenn. R. Civ. P. 34A.02.

14. What standards have your state's courts set for getting various types of social media into evidence? Please address relevance, authenticity, and whether any exclusionary rule might apply (e.g., Rules 404(a) or 802).

Relevance: Courts in Tennessee analyze the relevance of social media evidence under the same rule as evidence generally. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. Rule 401.

Authenticity: Courts in Tennessee analyze the authenticity of social media evidence under Tennessee Rules of Evidence Rule 901. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims." Tenn. R. Evid. Rule 901. The Tennessee Court of Criminal Appeals has described it as a "fact specific analysis" to determine whether there is sufficient evidence, including circumstantial evidence, so that a reasonable juror could find in favor of authenticity. State v. Spivey, No. M2018-00263, 2020 Tenn. Crim. App. LEXIS 74, *34-36 (Tenn. Crim. App. February 7, 2020). For example, the Tennessee Court of Appeals found a printed-out series of social media messages to be authentic where the recipient of the messages knew the sender and identified the printed-out messages as what she and the sender said to each other. State v. Burns, No. M2014-00357, 2015 Tenn. Crim. App. LEXIS 325, *32 (Tenn. Crim. App. May 5, 2015) (citing Dockery v. Dockery, No. E2009-01059, 2009 Tenn. App. LEXIS 717 (Tenn. Ct. App. October 29, 2009). Similarly, the Tennessee Court of Criminal Appeals found that a printout of social media messages was authentic where the defendant admitted that he owned the account from which the messages were sent and the detective verified that the account belonged to the defendant based on the account's information. Id. at 40. Moreover, the court in 2019 held that where the defendant challenged the admissibility of emails sent from her account because the prosecution had not proven that she actually sent the emails, the argument went to weight, not admissibility. State v. Potter, No. E2015-02262, 2019 Tenn. Crim. App. LEXIS 73, *118 (Tenn. Crim. App. February 5, 2019).

Exclusionary Rules: Tennessee's exclusionary rules apply in the same manner to social media evidence as they apply to evidence generally.

15. How have your State's courts addressed an employer's right to monitor employees' social media use?

Tennessee state court have not addressed an employer's right to monitor employees' social media use.

16. How have your State's state or federal courts addressed limitations on employment terminations relating to social media?

Tennessee state courts have not addressed limitations on employment terminations relating to social media.

Federal courts have addressed the issue of when a public employer can fire a public employee for speech. A public employee can establish a claim for First Amendment retaliation by showing that

> (1) he engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct; [and] (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by his protected conduct.

Bennett v. Metro. Gov't of Nashville & Davidson Cty., 977 F.3d 530, 537 (6th Cir. 2020) (internal quotation omitted). To determine whether the speech is constitutionally protected, the court will balance the employee's interest in making the comment as well as the public's interest in receiving it, with the public employer's interest in promoting efficiency. Id.