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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 17, 2023 Session

LYNNE S. CHERRY ET AL. v. DEL FRISCO'S GRILLE OF TENNESSEE, LLC ET AL.

Appeal from the Circuit Court for Williamson County
No. 19CV-361 Michael Binkley, Judge

No. M2022-00969-COA-R10-CV

In this premises liability case concerning a customer's fall inside of a restaurant, video surveillance footage from a security camera in the restaurant was not preserved, precipitating the filing of a sanctions motion by the Plaintiffs for spoliation. Although several sources of evidence existed pertaining to the condition of the restaurant flooring where the customer fell, and although the trial court concluded that the Plaintiffs were not prevented from proving fault in this case in the absence of the video evidence, the trial court ultimately entered significant sanctions against the Defendants, including holding that it was conclusively established for purposes of trial that the Defendants had actual or constructive notice that the floor where the fall occurred was "slick" because of a substance or because of a general and continuing condition, as well as striking the Defendants' affirmative defenses of comparative fault. Upon the filing of an application by the Defendants, we granted an extraordinary appeal under Rule 10 of the Tennessee Rules of Appellate Procedure. For the reasons stated herein, we vacate the trial court's sanctions order and remand for further proceedings consistent with this Opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated and Remanded

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J., W.S., and KENNY ARMSTRONG, J., joined.

Wesley Clark, Nashville, Tennessee, for the appellants, Del Frisco's Restaurant Group, Inc., and Del Frisco's Grille of Tennessee, LLC.

Elizabeth A. Russell, Franklin, Tennessee, for the appellees, Brenton A. Cherry and Lynne S. Cherry.

OPINION

BACKGROUND AND PROCEDURAL HISTORY

This litigation concerns an incident occurring at a Del Frisco's Grille restaurant located in Brentwood, Tennessee. According to the operative complaint filed in this matter in the Williamson County Circuit Court ("the trial court"), Plaintiff Lynne Cherry was dining with friends and family at the restaurant on September 18, 2018, when she got up to go to the restroom and fell on her way. The complaint, which was brought against Del Frisco's Restaurant Group, Inc., and Del Frisco's Grille of Tennessee, LLC (collectively presented in the singular as "Del Frisco's"), specifically alleges that the floor was "wet and/or slippery" and that "[t]he dangerous condition of the floor was and is persistent and ongoing." Further, the complaint charges that employees of Del Frisco's had actual knowledge of the dangerous condition of the floor or, alternatively, that "Defendants' employees should have known of the dangerous condition on the floor." Moreover, the complaint alleges that Del Frisco's "intentionally exposed Plaintiff Lynne Cherry and others to inherently dangerous polished/coated concrete flooring without taking reasonable measures to correct the dangerous condition or to warn of its existence." Both Mrs. Cherry and her husband (collectively, "the Plaintiffs") sought to recover damages against Del Frisco's as a result of the September 18, 2018, incident, and they prayed that a jury be empaneled to try the issues in the case. Del Frisco's thereafter filed an answer praying for this lawsuit's dismissal, wherein, among other things, it denied that a dangerous condition existed and alleged that Mrs. Cherry had been intoxicated and was wearing shoes she was not accustomed to wearing at the time of the incident.

During the course of discovery, the Plaintiffs sought information regarding any videos that had been made pertaining to the September 18, 2018, incident, while also seeking information pertaining to other falls that had occurred in the restaurant. Eventually, as is at issue in this appeal, the Plaintiffs filed a motion seeking sanctions for alleged spoliation related to such evidence, averring in pertinent part as follows:

> Plaintiffs would show that Defendants' spoliation occurred when they either failed to preserve or intentionally destroyed security camera video footage of the exact location where Plaintiff, Lynne Cherry, slipped and fell while dining at Defendants' restaurant. This security camera footage not only captured Mrs. Cherry's slip and fall, but would have revealed that Defendants had actual notice of the dangerous and defective condition of their floors which resulted in Mrs. Cherry's severe and permanent injuries for which she will continue to need medical treatment throughout her life.
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> Additionally, Defendants spoliated documentary and electronically stored information relating to other slip and fall accidents occurring inside the same restaurant where Mrs. Cherry was seriously and permanently injured. The

> spoliation of both of these critical pieces of evidence, which were in the exclusive custody and control of the Defendants, severely and irreparably prejudices the Plaintiffs in their prosecution of this cause of action.

Although the Plaintiffs submitted that "the only equitable remedy for the Defendants' spoliation is default judgment in favor of the Plaintiffs followed by a hearing to determine an award of both compensatory and punitive damages," they alternatively requested that, in lieu of a default judgment, the trial court "fashion an appropriate sanction that emphasizes the seriousness of Defendants' conduct and remedies the prejudice experienced by the Plaintiffs as a direct result of Defendants' spoliation."

In a filing submitted in opposition to the Plaintiffs' requested sanctions, Del Frisco's responded to both of the concerns that had been lodged by the Plaintiffs. As for the raised issue pertaining to the complained-of video footage, Del Frisco's conceded, as had been acknowledged in a prior discovery response, that "the video was not preserved." Del Frisco's contended, however, that sanctions were not appropriate based on the applicable facts of this case and governing law. To support its position, Del Frisco's argued that the condition of the floor on the date of the incident was subject to two inquiries based on the Plaintiffs' pleaded allegations: (1) whether there was a transient condition where Mrs. Cherry fell that constituted a slip hazard and (2) whether the floor was inherently dangerous such that its general permanent condition constituted a slip hazard.[1] Because, according to Del Frisco's, "abundant evidence" existed as to both of these evidentiary inquiries, no sanctions were warranted. When later articulating this point, Del Frisco's argued as follows:

> [E]vidence of the floor's condition is and has been abundantly available to both parties throughout the litigation. The five witnesses who gave deposition testimony all opined on the condition of the floor. The photographs of the floor show its condition. The parties hired experts to evaluate the floor. The paramedics depicted in [photographs from the date of the incident] obviously provide another source of evidence regarding the condition of the floor (untapped by the Plaintiffs, perhaps out of concern that they would only provide further evidence that no liquid or debris was on the floor where Plaintiff Cherry fell). No one has "lost access" to any evidence of value in this case, especially considering the resolution of the video cameras compared to the photographs. . . . Finally, both parties are on equal footing with the ample evidence available regarding the condition of the

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[1] This theory of the case was more or less echoed by the Plaintiffs' counsel at the opening of the eventual hearing that was held on the motion for sanctions, as counsel stated that her client "was on her way to the restroom when she slipped and fell either on a substance on the floor or due to the floor itself at Del Frisco's." Similarly, in a memorandum filed in support of their motion for sanctions, the Plaintiffs noted that they were alleging that the floor was slippery "due to an unknown substance[] . . . or due to the construction of the floor itself."

floor.

Del Frisco's also asserted that the loss of the video had been inadvertent and submitted in the alternative that, if a sanction was deemed appropriate, it should be "minimal." According to Del Frisco's, the prejudice to the Plaintiffs on account of the loss of the video was "minimal to none."

As for the raised issue concerning information about other accidents within the restaurant, Del Frisco's argued that the matter was "moot." Indeed, Del Frisco's noted that, whereas the Plaintiffs were specifically complaining of an alleged failure to preserve information from a third-party database relating to other incidents at the restaurant, it had undertaken renewed efforts to recover the data from that database since the time the Plaintiffs' motion for sanctions was filed and that the information had been "fully retrieved." Del Frisco's further argued that, to the extent the Plaintiffs' motion was not moot in this regard, it was nonetheless "fatally flawed" because Del Frisco's had no control over the database.

A hearing on the Plaintiffs' motion for sanctions occurred on February 17, 2022. As revealed in the associated transcript that memorialized the events of the proceeding, the trial court signaled that, in addition to the evidence formally presented at the hearing, it would also consider prior sworn testimony and materials that had been submitted by the parties to the court.

Following the hearing on the Plaintiffs' motion for sanctions, and before the trial court entered an order adjudicating the sanctions request, the Plaintiffs filed an "Ex Parte Emergency Rule 65 Motion for Mandatory Injunctive Relief and Temporary Restraining Order" concerning a review that a Del Frisco's employee, but non-party to the litigation, had posted on the internet concerning the conduct of the Plaintiffs' counsel. Among other things, the Plaintiffs' filing requested that the trial court immediately issue a mandatory injunction directing the employee to remove the online review. Although the trial court did enter injunctive relief in favor of the Plaintiffs and ordered the employee and Del Frisco's to "immediately remove, delete, and otherwise take down any and all statements made regarding the Plaintiffs[] [and] Plaintiffs['] counsel," we subsequently granted an application for an extraordinary appeal under Rule 10 of the Tennessee Rules of Appellate Procedure regarding the matter, finding that the trial court's order "so far departs from the accepted and usual course of judicial proceedings as to require immediate review." We reversed the trial court's injunction and remanded the case with instructions to "enter an order denying in its entirety Plaintiffs' Ex Parte Emergency Rule 65 Motion for Mandatory Injunctive Relief and Temporary Restraining Order."

The Plaintiffs' motion for sanctions was thereafter ultimately addressed by the trial court in an order entered on June 22, 2022. Concerning the Plaintiffs' raised issue pertaining to information about other accidents at the restaurant, the trial court's order

found that the Plaintiffs were not prejudiced and that there was no basis for a spoliation sanction on account of that issue because, as the trial court noted, "Del Frisco's ultimately produced the record." The trial court additionally ruled, however, that sanctions were warranted in relation to the admitted spoliation of the video surveillance footage. Of note, notwithstanding its acknowledgement that the Plaintiffs were not thwarted from demonstrating Del Frisco's fault in the absence of the video surveillance footage, the trial court concluded that the degree of prejudice to the Plaintiffs was "high" and that a proper remedy for Del Frisco's spoliation included: (1) conclusively establishing, for purposes of the trial, that Del Frisco's had actual or constructive notice that the floor where Mrs. Cherry fell was "slick" because of a substance or because of a general and continuing condition and (2) the striking of Del Frisco's affirmative defenses regarding comparative fault. As part of its reasoning, the trial court found this Court's prior decision in *Gardner v. R & J Express, LLC*, 559 S.W.3d 462 (Tenn. Ct. App. 2018), to be instructive. In that case, which had been filed as a result of a tractor-trailer accident, this Court upheld the dismissal of the plaintiffs' complaint when the tractor involved in the accident was destroyed before examination by the defense. *Id.* at 463, 473.

The trial court's sanctions order prompted yet another application by Del Frisco's for relief pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure. We granted Del Frisco's application for an extraordinary appeal, leading to our present review.

STANDARD OF REVIEW

This Court should grant a Rule 10 extraordinary appeal only when the challenged ruling

> represents a fundamental illegality, fails to proceed according to the essential requirements of the law, is tantamount to the denial of a party's day in court, is without legal authority, is a plain and palpable abuse of discretion, or results in either party losing a right or interest that may never be recaptured.

Gilbert v. Wessels, 458 S.W.3d 895, 898 (Tenn. 2014). The decision to impose sanctions for the spoliation of evidence is a matter within the discretion of the trial court. *See, e.g.*, *Zukowski ex rel. Zukowski v. Hamilton Cty. Dep't of Educ.*, 640 S.W.3d 505, 520 (Tenn. Ct. App. 2021) (quoting precedent from the Tennessee Supreme Court). As for discretionary decisions generally, this Court has noted as follows:

> A trial court abuses its discretion if it (1) applies an incorrect legal standard, (2) reaches an illogical or unreasonable decision, or (3) bases its decision on a clearly erroneous evaluation of the evidence. *Elliott v. Cobb*, 320 S.W.3d 246, 249–50 (Tenn. 2010) (citation omitted); *see also Walker v. Sunrise Pontiac–GMC Truck, Inc.*, 249 S.W.3d 301, 308 (Tenn. 2008) (citation omitted). Additionally, a trial court abuses its discretion if it "strays beyond

> the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision." *Beecher*, 312 S.W.3d at 524 (citing *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)).
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> Appellate courts review a trial court's discretionary decision to determine "(1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the lower court's decision was within the range of acceptable alternative dispositions." *Id.* at 524–25 (citing *Flautt & Mann v. Council of Memphis*, 285 S.W.3d 856, 872–73 (Tenn. Ct. App. 2008)). We review the trial court's legal conclusions *de novo* with no presumption of correctness. *Id.* at 525 (citing *Johnson v. Nissan N. Am., Inc.*, 146 S.W.3d 600, 604 (Tenn. Ct. App. 2004); *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 212 (Tenn. Ct. App. 2002)). We review the trial court's factual conclusions under the preponderance of the evidence standard.

Wofford v. M.J. Edwards & Sons Funeral Home Inc., 528 S.W.3d 524, 538 (Tenn. Ct. App. 2017) (quoting *Roberts v. McNeill*, No. W2010-01000-COA-R9-CV, at *3-4 (Tenn. Ct. App. Feb. 23, 2011)).

DISCUSSION

There is no dispute in this case that Del Frisco's did not preserve video surveillance footage of the September 18, 2018, incident. The matter at hand is the propriety of the sanctions order issued by the trial court as a result of this admitted spoliation. The law governing this issue was outlined by the Tennessee Supreme Court in *Tatham v. Bridgestone Americas Holding, Inc.*, 473 S.W.3d 734 (Tenn. 2015). Under *Tatham*, trial courts are to consider the "totality of the circumstances" when analyzing the possible imposition of a sanction for spoliation, *id.* at 746, and relevant factors include the following:

> (1) the culpability of the spoliating party in causing the destruction of the evidence, including evidence of intentional misconduct or 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. Although the trial court properly acknowledged that this law governed its

analysis, we respectfully conclude that the sanctions awarded were based on a clearly erroneous evaluation of the evidence, amounting to, in our view, a plain and palpable abuse of discretion on the part of the trial court.

The error of the trial court's sanctions order stems from the trial court's underlying conclusion that the degree of prejudice suffered by the Plaintiffs in this case "is high." This assessment of prejudice is simply not justified based on the substantial weight of the evidence in this record and places a wholly unwarranted significance on the absence of the video surveillance footage to the Plaintiffs' pursuit of recovery. In this vein, we note that, whereas the trial court appears to have found this Court's decision in *Gardner* to be somewhat analogous, the circumstances surrounding the prejudice question in that case are noticeably different from those involved here. As noted earlier, *Gardner* involved an action that was filed as a result of a tractor-trailer accident, and the tractor involved in the accident was destroyed before examination by the defense. *Gardner*, 559 S.W.3d at 463. The trial court in that case observed that "Defendant's theory of the case is impossible to prove without the inspection of the tractor," *id.* at 466, and on appeal, we agreed that this implicated a matter of severe prejudice. *Id.* at 470. This is easy to understand: because the defense could not examine the condition of the tractor in *Gardner*, it could not make a determination of whether the tractor had caused or contributed to the accident. Here, though, the evidence simply does not support a similar finding of severe prejudice, or "high" prejudice as stated in the trial court's order. Indeed, the video footage that was not preserved, although potentially of some utility on some questions, is not vital in any way to proving the Plaintiffs' case, as, per the record, many sources of evidence concerning the condition of the restaurant's floor exist. In fact, the trial court itself acknowledged that the Plaintiffs would be able to demonstrate Del Frisco's fault without the video footage. Even the Plaintiffs have pointed to their ready ability to prove Del Frisco's fault in this matter. Notably, in their answer to Del Frisco's Rule 10 application, the Plaintiffs noted that, in the context of this litigation, they have "presented ample proof that [Del Frisco's] had both actual and constructive notice of the dangerous condition existing on [its] floors."

Yet, as sanctions for the spoliation of the video, the trial court deemed that it should be conclusively established that Del Frisco's had notice that the floor was "slick" because of a substance "or because of a general and continuing condition." As to this latter consideration of the floor's general and continuing condition specifically, a consideration upon which the Plaintiffs are notably seeking punitive damages in this lawsuit,[2] it is respectfully unclear how the spoliation of the video footage is even of any marginal prejudice to the Plaintiffs. Unlike the destruction of the tractor in *Gardner*, the floor itself remains at Del Frisco's restaurant; it has not been destroyed and is available for inspection and scrutiny. In fact, the record indicates that experts have been retained by both sides to

[2] In seeking punitive damages, the Plaintiffs' complaint notes that "Defendants proceeded with conscious indifference to the rights, safety, and welfare of others by failing to remove or warn of the persistent and continuing dangerous condition of its floors."

provide opinions as to the floor's condition. The trial court's order, however, in effect cuts off such an inquiry due to the absence of the video footage. It is unclear how video footage would even foster an intelligible assessment of the floor's general intransient condition. Yet, even assuming, arguendo, that it somehow could, the record does not support the notion that there is any appreciable prejudice to the Plaintiffs on this question stemming from the video's absence. Again, the floor remains.

Further, there is other evidence available to the Plaintiffs pertaining to the condition of the floor on the date of the incident, as well as available evidence that, on its face, casts aspersions on whether Del Frisco's operated in a manner that promoted clean and dry floors.[3] For instance, during the oral argument of this matter, counsel for the Plaintiffs referenced that there was extensive testimony from Del Frisco's former executive chef, Ryan Charabowski, that certain restaurant policies and procedures were ignored, including the removal of mats from the kitchen that counsel argued were intended to keep grease from the kitchen from being tracked back and forth into the restaurant. Moreover, counsel noted that, whereas Mr. Charabowski had testified in connection with this litigation that he knew who cleaned the floors on the *morning* of the incident, Mr. Charabowski had also acknowledged that Del Frisco's safety policy and procedures playbook instructs that the cleaning product used in the restaurant is to be used at *night* so that the product can "evaporate and . . . rest."

During the opening of the sanctions hearing, the trial court commented that the consideration of prejudice "is a key here" and that "[p]rejudice is the issue." We certainly have no dispute with the trial court that prejudice is a key consideration to the spoliation sanctions inquiry given that it is embraced within two of the four outlined *Tatham* factors. The problem lies, though, as we have noted, in the trial court's assessment that the prejudice to the Plaintiffs here is high. Again, such an assessment is simply not supported by the evidence in the record, for as illustrated, one of the specific matters covered by the sanctions order, i.e., the issue of the floor's general intransient condition, does not appear to implicate a matter of even marginal prejudice to the Plaintiffs. Yet, the trial court's sanctions order cuts off any inquiry into whether Del Frisco's was aware of a dangerous condition, despite much available evidence on the matter outside of what any video footage might have shown. In relation to this concern, we highlight a statement by the trial court that Mrs. Cherry "has only her own testimony," a statement which appears just lines above the court's ultimate assessment that the prejudice here is high. This statement wholly ignores that the Plaintiffs have retained an expert who is apparently prepared to opine on the existing floor surface conditions of the restaurant. Moreover, we note again that the Plaintiffs have freely acknowledged in this Court that they have "ample proof that [Del Frisco's] had both actual and constructive notice of the dangerous condition existing on [its] floors."

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[3] As noted elsewhere herein, the Plaintiffs themselves have noted that they have "ample proof" that Del Frisco's had notice of a dangerous condition existing on its floors.

In addition to the foregoing, it is unclear how there is any substantial prejudice to the Plaintiffs from the spoliation with respect to Del Frisco's assertion that Mrs. Cherry was comparatively at fault due to her alleged intoxicated state and alleged inability to walk properly in light of same. Although, again, the trial court's order suggests that Mrs. Cherry "has only her own testimony" to rebut Del Frisco's asserted positions in this case, this is a clearly erroneous evaluation of the evidence. For instance, we note that when Mrs. Cherry's server at the restaurant, Jack Henry, was asked during his deposition whether he had noticed anything about Mrs. Cherry's behavior that would make him think she had "had too much to drink," he, although somewhat equivocal regarding the extent of his memory, responded in the negative. Moreover, Mr. Henry testified that he "felt like we didn't [overserve her]" and that he had gotten her one glass of champagne. Further, although Del Frisco's has averred that, alongside her alleged intoxication, Mrs. Cherry's attire on the date of the incident also contributed to her alleged inability to walk, it should be noted that Ashley Williams, former front house manager at Del Frisco's, stated in her deposition that Mrs. Cherry was "[f]or sure" dressed like an average patron. Perhaps more significantly, it does not appear from this record that Del Frisco's has any direct evidence that Mrs. Cherry was intoxicated and walking unsteadily.[4] When this is considered in connection with the evidence that *is* available concerning Mrs. Cherry's general behavior in the restaurant, the notion that the Plaintiffs are significantly prejudiced by the video footage's absence concerning the comparative fault issue is substantially weakened.

Given that the sanctions order is based on an assessment of prejudice that is simply incompatible with the weight of the evidence, we vacate the sanctions awarded against Del Frisco's and remand for the reconsideration of what sanctions should follow from its spoliation of the video. In particular, given that the record does not support a finding of severe or "high" prejudice, the trial court should, of course, as part of the totality of the circumstances test outlined in *Tatham*, reconsider what is the *least* severe sanction available to remedy any prejudice caused to the Plaintiffs. *See Tatham*, 473 S.W.3d at 747.[5] Although Del Frisco's has suggested that reassignment of this case to a different judge would be appropriate, we decline to give any such relief within the framework of the present appeal. If Del Frisco's believes sufficient cause exists to request the trial court judge's recusal, it is obviously free to pursue such an issue on remand by way of the filing of a motion under Tennessee Supreme Court Rule 10B.

CONCLUSION

In light of the foregoing, we vacate the trial court's sanctions order and remand for

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[4] Interestingly (insofar as it appears to bear on the tenuous nature of its defense) Del Frisco's itself has argued that Mrs. Cherry's own testimony remains the only evidence about whether or not she walked steadily before her fall.

[5] As part of this process, the trial court could consider whether, among other things, it is appropriate to do anything more than give an adverse-inference jury instruction that would allow the jury to infer that the spoliated video footage would be unfavorable to Del Frisco's on certain matters.

further proceedings consistent with this Opinion.

s/ Arnold B. Goldin
ARNOLD B. GOLDIN, JUDGE