IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 18, 2007 Session

CHARLES GROSS ET AL. v. MICHAEL K. McKENNA ET AL.

Appeal from the Chancery Court for Knox County
No. 161298-2 Daryl R. Fansler, Chancellor

No. E2005-02488-COA-R3-CV - FILED OCTOBER 30, 2007

This case arose out of a construction contract between Charles Gross and Kathy Gross ("Homeowners") and Woodbridge Construction Services, LLC, a company run by Michael K. McKenna ("Builder"). The parties' relationship went sour in the midst of construction, and Homeowners sued Builder and Woodbridge seeking damages for breach of contract, fraud, misrepresentation, and violations of the Tennessee Consumer Protection Act ("the TCPA"). After a bench trial, the court awarded Homeowners damages of $79,622.31 against both defendants. Builder appeals on various grounds. Regrettably, he has failed to provide us with either a transcript of the proceedings or a statement of the evidence, and, as a result, we are unable to reach most of the issues raised by him, as we must accept the trial court's factual determinations as conclusive in the absence of a record. The only issue requiring extended discussion is Builder's claim that the trial court should have dismissed the case or imposed some other sanction against Homeowners for demolishing the home and thus destroying evidence during discovery without first notifying the court and Builder. Although this was a violation of the Tennessee Rules of Civil Procedure, the trial court has broad discretion to determine what, if any, sanctions to impose for such violations, and we do not find an abuse of discretion in its decision to impose no sanction. The remainder of Builder's issues are also found to be without merit. We therefore affirm.

Tenn R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Appellant Michael K. McKenna, Oak Ridge, Tennessee, Pro Se.

Heather G. Anderson and Shelley S. Breeding, Knoxville, Tennessee, for the appellees, Charles Gross and Kathy Gross.

OPINION

I.

The only facts before us on this appeal are those found by the trial court in its two memorandum opinions. We will utilize those findings as the prologue of this opinion.

Homeowners hired Builder – or, more precisely, hired Builder's company, Woodbridge, which was a co-defendant in this case but did not appeal – in October 2003 to construct a single-family home on Homeowners' land using a special method of construction known as Insulating Concrete Forms, or ICF. The trial court held that Builder "basically is Woodbridge," and all of Homeowners' dealings with Woodbridge were through Builder. According to the court, Builder held himself out as an expert in ICF construction and convinced Homeowners that he was an experienced builder. In reality, Homeowners' house was only the second construction project he had overseen.

Construction began around the first of the year in 2004. Within a few months, Homeowners became concerned about the quality of construction, and they sought advice from outside experts. These experts concluded that the home had multiple serious defects – for example, unstable supports, non-level surfaces, "humps in the floor," standing water under the house, and others – and that the best course of action was to demolish the house and "start over completely." Builder acknowledged some of the problems but said they would be fixed as construction continued. Homeowners' experts, on the other hand, said construction could not feasibly continue given the defective state of the foundation and subfloor. A dispute arose regarding payment, the parties reached an impasse, and construction was halted.

In early May, Homeowners began contacting demolition firms. They received an estimate on May 13 from the company they would ultimately hire to demolish the unfinished house. At the same time, they were preparing to take legal action against Builder and Woodbridge. On May 21, Homeowners filed suit, alleging breach of contract, fraud, misrepresentation, and violations of the Tennessee Consumer Protection Act. On June 1, the house was demolished. According to the trial court, Builder was present at the demolition and took photographs of it.

Subsequently, Builder filed a motion to dismiss the suit, or, in the alternative, to exclude the testimony of Homeowners' experts regarding the defects in the house. He argued that the demolition was a destruction of evidence, and that Homeowners had not complied with the Tennessee Rules of Civil Procedure regarding such an action. Following a hearing, the court denied the motion in December 2004 by way of a memorandum opinion. Discovery continued, and the case went to trial in July 2005. In September 2005, the court announced its judgment for Homeowners, and reiterated its decision not to impose sanctions for the demolition, in another memorandum opinion in September 2005. Builder appeals.

II.

Our review of the trial court's conclusions of law is *de novo* with no presumption of correctness. ***Taylor v. Fezell***, 158 S.W.3d 352, 357 (Tenn. 2005). The same standard applies to the trial court's application of law to the facts. ***State v. Thacker***, 164 S.W.3d 208, 248 (Tenn. 2005).

With regard to the trial court's factual findings, as a general rule, we presume they are correct but will overturn them if we find that the evidence preponderates against them. ***Hass v. Knighton***, 676 S.W.2d 554, 555 (Tenn. 1984). However, "[t]he burden is . . . on the appellant to provide the Court with a transcript of the evidence or a statement of the evidence from which this Court can determine if the evidence does preponderate for or against the findings of the trial court." ***Coakley v. Daniels***, 840 S.W.2d 367, 370 (Tenn. Ct. App. 1992). *See also* Tenn. R. App. P. 24.

In this case, Builder has provided the court with neither a transcript nor a statement of the evidence. His briefs make various factual assertions and fact-based arguments, but "the recitation of facts and argument contained in [appellate briefs] and statements made by counsel during oral argument" before this court "are not evidence. . . . [and] neither can be considered in lieu of a verbatim transcript or statement of the evidence and proceedings." ***State v. Draper***, 800 S.W.2d 489, 493 (Tenn. Cr. App. 1990). Builder repeatedly cites to various exhibits, which were apparently presented at trial, but evidentiary exhibits "are meaningless without supporting testimony." ***Flanary v. Smith***, 1987 WL 11123, at *1 (Tenn. Ct. App. E.S., filed May 22, 1987).

Builder's failure to provide us with a record of the proceedings below severely limits our ability to review the issues he raises. As the Supreme Court stated in ***State v. Ballard***, 855 S.W.2d 557 (Tenn. 1993),

> [w]hen a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal. ***State v. Bunch***, 646 S.W.2d 158, 160 (Tenn. 1983). Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue. ***State v. Roberts***, 755 S.W.2d 833, 836 (Tenn. Cr. App. 1988). Absent the necessary relevant material in the record an appellate court cannot consider the merits of an issue.

Id. at 560-61. Put another way, "[w]here the issues raised go to the evidence, there must be a transcript. In the absence of a transcript of the evidence, there is a conclusive presumption that there was sufficient evidence before the trial court to support its judgment." ***Coakley***, 840 S.W.2d at 370.

In addition to exhibits, the record before us contains pleadings, orders, and other such documents. However, much like statements made in appellate briefs, factual assertions in these documents regarding the underlying dispute "are not evidence." ***Draper***, 800 S.W.2d at 493.

Because of the absence of a proper record, we are limited to addressing those issues which raise pure questions of law, as well as any issues challenging the trial judge's application of the law to the *facts as stated by the judge himself* in his memorandum opinions. *See* ***Baker v. Hancock County Election Commission***, No. 15, 1987 WL 7717, at *1 (Tenn. Ct. App. E.S., filed March 12, 1987) ("No transcript or statement of the evidence was filed, but we will accept as accurate the findings of fact in the Trial Court's memorandum opinion"). We cannot disturb the court's factual findings because we have no basis upon which to determine whether the evidence preponderates against them.

III.

In his main brief, Builder presents seven issues for review. We also discern two additional issues that he does not specifically delineate in his table of contents, but which are nevertheless argued extensively. The seven issues explicitly presented as taken verbatim from his brief are as follows:

> 1. Whether the Trial Court erred, or abused its discretion, in not finding the Plaintiffs liable for the first uncured material breach of contract.
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> 2. Whether the Trial Court erred in failing to grant the Defendants(Appelant's) [sic] Motion to Dismiss or Exclude Appellee's Expert Witness's [sic], or impose other sanctions, as a matter of law, stemming from Appellee's destruction of evidence during a civil proceeding forever creating judicial and equitable prejudice against Appellant.
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> 3. Whether the Trial Court erred in its decision to maintain Michael K. McKenna as a Defendant.
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> 4. Whether the Trial Court a) erred in its findings of fact, or b) abused its discretion in its finding of facts and judgments, specific to the "standard of care" applied to construction work or contract law.
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> 5. Whether the Trial Court erred in finding and applying the Tennessee Consumer Protection Act against Appellant.
>
> 6. Whether Trial Court erred in its award of damages to Appellee.

7. Whether the Appellant had Ineffective Assistance of Counsel[.]

In addition, Builder appears to argue that Homeowners' claim should have been dismissed because of contractual clauses regarding warranties, limitations of liability, and liquidated damages; and also that Homeowners' demolition of the property violated a duty to mitigate damages. Most of these issues require very little discussion because of Builder's failure to provide us with a record.

Builder's first listed issue fails to pass muster for two reasons. First, it appears he is raising several brand new breach-of-contract theories on appeal. Only the theory of breach by improper termination appears in his answer and counterclaim, and we have no record before us to determine whether the other theories of breach were tried by implied consent. "As a general rule, 'questions not raised in the trial court will not be entertained on appeal.'" ***City of Cookeville ex rel. Cookeville Reg'l Med. Ctr. v. Humphrey***, 126 S.W.3d 897, 905-06 (Tenn. 2004) (quoting ***Lawrence v. Stanford***, 655 S.W.2d 927, 929 (Tenn. 1983)). Secondly, with regard to the breach claim that he *did* raise at trial, improper termination, his issue raises a pure question of fact, and we are in no position to disturb the factual findings below due to the lack of a record.[1]

Builder's second issue is the only one that merits detailed discussion, and we will return to it after addressing his other claims.

Builder's third and fifth listed issues raise essentially the same legal question, namely whether the trial court improperly held Builder personally liable despite his status as an agent of an LLC. This is partially a question of law, and to that extent we can consider it despite the absence of a record. However, it is an easily resolved question. Builder argues that he should not have been held personally liable for the actions in question because he was acting on behalf of his building company, Woodbridge LLC. This argument misapprehends the legal doctrine regarding individual liability in such situations. Agency status is not a shield against personal liability for one's own acts. Indeed, the Tennessee Limited Liability Act specifically provides that,

> [n]otwithstanding the provisions [of this section limiting individual liability in other ways], a member, holder of financial interest, governor, manager, employee or other agent may become personally liable in contract, tort or otherwise by reason of *such person's own acts or conduct*.

Tenn. Code Ann. § 48-217-101(a)(3) (emphasis added). "It is settled law that an agent cannot escape liability for tortious acts, including fraud or misrepresentation, against third persons simply because the agent was acting within the scope of the agency or at the direction of the employer." ***Brungard v. Caprice Records, Inc.***, 608 S.W.2d 585, 590 (Tenn. Ct. App. 1980). The defendant in ***Brungard*** "made nearly all of the misrepresentations and he is therefore liable." ***Id.*** The same thing is true in

[1] We decline to address Homeowners' argument that Builder is the improper party to raise these breach-of-contract claims. Our holding in this cause renders this issue moot.

the instant case, according to the judge's final memorandum opinion – whose factual determinations are conclusively presumed to be correct because of the absence of a record.

Builder's fourth issue, regarding whether the trial court made a factual error with reference to the standard of care, is entirely fact-based and thus cannot be considered because we have no record of the evidence before us. Again, the trial court's determination on this issue is conclusively presumed to be correct.

The sixth issue, alleging an error in the award of damages, is somewhat ambiguous and is never explicitly argued under its own separate heading in Builder's brief. However, to the extent Builder is suggesting an improper allocation of damages, this too is a factual issue that we cannot review without an evidentiary record.

Likewise, Builder's apparent claim that Homeowners failed to mitigate damages is essentially a factual issue. The trial judge held in his final memorandum opinion that "the overwhelming testimony is that construction could not proceed on this residence given the condition of the foundation, walls, and subflooring in April of 2004" and "it was recommended that the existing foundation and subfloor be demolished, and that they start over completely." These statements necessarily imply that leaving the property intact, instead of demolishing it, would not actually have mitigated damages. Thus, because we are constrained to conclusively accept the trial court's factual findings as correct, we cannot entertain Builder's mitigation argument. As an additional ground for rejecting this claim, we note that Builder did not mention mitigation of damages in his pleadings, and again, we have no record before us to determine whether the issue was tried by implied consent.

With regard to Builder's seventh issue, we cannot possibly make a determination regarding a claim of ineffective assistance of counsel without a transcript of the proceedings below that would allow us to evaluate the counsel's actions. Moreover, Builder's complaints about his attorney, even if true, do not appear to rise to the level of extreme ineffectiveness that he would be required to demonstrate. "[A]s a general rule . . . in civil cases relief may not be premised upon the theory of ineffective assistance of counsel." ***Thornburgh v. Thornburgh***, 937 S.W.2d 925, 926 (Tenn. Ct. App. 1996). There "may be cases where the facts are so egregious that justice may require some relief," ***Id.***, but here Builder's complaints, on their face, do not suggest the requisite egregiousness – and even if they did suggest such a thing, we would be in no position, absent a record, to make a determination on the matter.

Finally, Builder's apparent claim that contractual limitations of liability should have governed this case raises legal questions, but again, those questions are easily answered. With regard to the liquidated damages clause purporting to limit Builder's liability for breach of contract, such clauses are unenforceable where the actual damages caused by a breach are "readily susceptible to accurate proof," as in this case. ***Wilson v. Dealy***, 434 S.W.2d 835, 837 (Tenn. 1968); *see also* ***Guiliano v. Cleo, Inc.***, 995 S.W.2d 88, 98 (Tenn. 1999), Restatement (First) of Contracts § 339 (1932), Restatement (Second) of Contracts § 356 (1981). Moreover, the liquidated damages clause cannot govern damages for fraud, misrepresentation or violations of the Tennessee Consumer

Protection Act. Cf. ***Underwood v. Nat'l Alarm Servs., Inc.***, No. E2006-00107-COA-R3-CV, 2007 WL 1412040, at *5 (Tenn. Ct. App. E.S., filed May 14, 2007). Likewise, the contract's warranty and limitation-of-liability clauses cannot apply to fraud, misrepresentation or TCPA violations – only to breaches of contract that are neither intentional nor reckless. "Tennessee, like most jurisdictions, does not permit disclaimers of liability or exculpatory clauses to excuse a party from fraud." ***In re Sikes***, 184 B.R. 742, 746 (Bankr. M.D. Tenn. 1995). More broadly, Tennessee follows section 195 of the Restatement (Second) of Contracts which states that "[a] term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy." ***Id***. at (1) (1981). *See* ***Adams v. Roark***, 686 S.W.2d 73, 75-76 (Tenn. 1985). The court's last memorandum opinion makes clear that its judgment against Builder was based largely on fraud, misrepresentation, TCPA violations, and other intentional and/or reckless conduct. For example, the court stated that "[t]his situation deteriorated solely because of the obstinate position taken by Mr. McKenna." The court later held as follows:

> The Court finds that all of these statements by Mr. McKenna were designed to conceal his lack of experience in residential construction, his statements regarding his education and training as an engineer were designed to lead them to believe that he had the expertise to take a set of plans designed for wooden construction and adapt them to this concrete structure, all this designed to give the plaintiffs the impression that they were getting exactly what they were looking for, an experienced contractor with an engineering background to be able to adapt the plans. Instead, the Court finds that what they got was what was more accurately described by Dr. Deatherage as a contractor outside of his field of experience.
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> So the Court does find that there were misrepresentations made, and if not intentionally made by Mr. McKenna, they certainly were made without regard for their truth, and they were made recklessly, knowing that plaintiffs wanted an experienced contractor, and made with the intention of convincing them that that's what he was. So the Court finds that these misrepresentations do amount to a violation of the Tennessee Consumer Protection Act. . . .

Accepting, as we must, the trial court's factual conclusions, we cannot allow Builder to shield himself from liability on the basis of contractual warranties or the like. For all of the foregoing reasons, we hold that the various limitations of Builder's liability are not implicated by the facts found by the trial court.

That leaves only one claim still to be discussed: Builder's second issue, regarding destruction of evidence.

IV.

As an initial matter, we note that, contrary to Builder's statements on appeal, the Tennessee Rules of Civil Procedure at the time of the trial in this case did not specify that Rule 37 sanctions may be imposed for violations of Tenn. R. Civ. P. 34A. The provision linking Rule 34A with Rule 37 was added in an amendment effective July 1, 2006.[2] The complaint in this case was filed in May 2004, and the alleged destruction of evidence took place in June 2004. However, this point is not terribly significant because, under both the pre-amendment and post-amendment rule, the court has broad discretion in deciding what sanctions, if any, are appropriate.

At all relevant times, Rule 34A read as follows:

> RULE 34A. TESTING OR DESTRUCTION OR DISPOSITION OF TANGIBLE THINGS
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> Before a party or an agent of a party, including experts hired by a party or counsel, conducts a test materially altering the condition of tangible things that relate to a claim or defense in a civil action, or destroys or otherwise disposes of such tangible things, the party shall move the court for an order so permitting and specifying the conditions.

(Capitalization in original). The rule did not specifically provide for sanctions if it was violated. However, the Supreme Court held as follows in ***Mercer v. Vanderbilt University, Inc.***, 134 S.W.3d 121 (Tenn. 2004):

> Although the Tennessee Rules of Civil Procedure do not provide a sanction for abuse of the discovery process, trial judges have the authority to take such action as is necessary to prevent discovery abuse. ***Lyle v. Exxon Corp.***, 746 S.W.2d 694, 699 (Tenn. 1988); ***Strickland v. Strickland***, 618 S.W.2d 496, 501 (Tenn. Ct. App. 1981). Trial courts have wide discretion to determine the appropriate sanction to be imposed. ***Strickland***, 618 S.W.2d at 501. Such a discretionary 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 the evidence." ***White v. Vanderbilt Univ.***, 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

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[2] This amendment also split Rule 34A into Rules 34A.01 (regarding destructive testing) and 34A.02 (regarding other forms of evidence destruction).

> concerning their soundness. ***White***, 21 S.W.3d at 223; ***Overstreet***, 4 S.W.3d at 709.

Mercer, 134 S.W.3d at 133.[3]

The trial court's wide discretion in imposing sanctions against parties who destroy evidence necessarily implies that the factual circumstances of the case are crucial, as we noted in ***Thurman-Bryant Elec. Supply Co. v. Unisys Corp.***:

> [T]he trial judge has discretion to impose sanctions on a party for the destruction or loss of evidence. The severity of the sanctions, however, *must necessarily depend upon the circumstances of each case* i.e., was the evidence lost negligently, inadvertently, intentionally, etc.

Id., No. 03A01-CV00152, 1991 WL 222256, at *5 (Tenn. Ct. App. W.S., filed November 4, 1991) (emphasis added).[4] Thus, once again, our review is severely limited by Builder's failure to provide an evidentiary record. We have nothing to rely upon in assessing the factual circumstances aside from the trial court's memorandum opinions, so we must uphold the court's decision on sanctions unless that decision is so at odds with the *facts as stated by the court* as to constitute an abuse of discretion.

The court's first memorandum opinion, issued in response to Builder's motion to dismiss, stated in pertinent part as follows:

> Defendants take the position that they cannot respond to plaintiffs' experts now that the house has been demolished. They have submitted the affidavits of two engineers wherein they conclude that they have insufficient information to form an opinion regarding the workmanship and materials used by defendants.

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[3] ***Mercer*** was decided 18 days before the complaint was filed in the instant case.

[4] ***Thurman-Bryant*** was decided before the adoption of Rule 34A at a time when such violations were a matter of common law. However, we see no reason why the enactment of the rule would change the fact that sanctions "must necessarily depend upon the circumstances of each case," especially given that Rule 34A did not provide for sanctions prior to 2006. In addition, we do not believe that the doubt cast upon ***Thurman-Bryant*** in the federal case ***Clark Constr. Group, Inc. v. City of Memphis***, 229 F.R.D. 131, 139-40 (W.D. Tenn. 2005), is relevant to our analysis. ***Clark*** concluded that the Supreme Court most likely would not agree with ***Thurman-Bryant***'s holding, as characterized by ***Clark***, "that an intentional act is a prerequisite for imposing a negative inference against a party." ***Clark***, 229 F.R.D. at 140 n.3. That aspect of ***Thurman-Bryant*** is not at issue here. ***Clark*** does not call into question the general proposition, stated in ***Thurman-Bryant***, that the severity of sanctions for the destruction of evidence depends on the circumstances of the case.

On the other hand, plaintiffs had submitted the affidavit of an expert engineer who said that he can form an opinion based upon photographs and measurements obtained by the original experts hired by plaintiffs.

The Court conducted a hearing on this issue on August 30, 2004. At the conclusion of the testimony the Court invited expert testimony by way of affidavits referred to above.

The Court has reviewed the original reports of [Homeowners' experts] James Quarve and Michael Whaley. Unquestionably, these reports contain numerous statements of fact regarding measurements, the degree of level, squareness and plumbness of the structure. It is obvious that since the structure has been destroyed no one is in a position to test the accuracy of the measurements.

However, one would assume that during the course of construction defendants [i.e., Builder] were in a position to insure squareness, levelness, plumbness, appropriate measurements and the use of proper construction methods. Therefore, one would also presume that defendants are in a position to refute the factual assertions with which they disagree contained within the reports.

Since plaintiffs' experts would be relying upon their photographs and measurements then it would appear to the Court that defendants and any experts retained by the defendants would be in a position to look at those same photographs and refute, if appropriate, the statements and conclusions of the expert witnesses.

The Court notes that in reviewing the affidavits of [Builder's expert witnesses] engineers Duncan and Shah, they both concluded that they had inadequate information to form an opinion. However, they failed to explain to the Court how they were unable to rely upon the reports of Quarve and Whaley, the photographs taken by them, and the knowledge held by the defendants and reach some conclusion.

CONCLUSION

It is clear that Rule 34A T.R.C.P. prohibits a party, or an agent of a party, from destroying or otherwise disposing of tangible things that relate to the claim or defense in a civil action without first applying to the Court for an order permitting them to do so and specifying the conditions under which the thing would be destroyed. It is

> undisputed that no effort was made by plaintiffs to obtain such an order prior to the destruction of the foundation or to even notify defendants of their decision to do so.
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> Under comments to the rule the Advisory Commission stated that "requiring a motion, which would put the opponent on notice, and giving the court discretion to set conditions should prevent an unjust result."
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> As outlined above, it appears that defendants are in a position, based on their own knowledge and their supervision of the construction of this foundation, to refute any inaccurate measurements or observations made by plaintiffs' experts. Additionally, defendants had over a month from the receipt of the experts' reports until the actual destruction to have requested the opportunity to inspect the foundation had they desired to do so. Of course there was nothing compelling the defendants to do so at that time inasmuch as no action had been filed. The Court only notes that no request was made to point out that defendants may have felt no need to inspect because they already possessed the knowledge that would enable them to refute the factual statements made by the experts.
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> In short, the Court fails to find an unjust result at this time. However, if defendants during the course of discovery or during the proof at the trial of this case can show that as a result of the destruction defendants will suffer an unjust result then defendants are at leave to renew the motion to seek appropriate sanctions either as set out in Rule 37 T.R.C.P. or which may be available to the Court under its inherent powers.
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> Accordingly, defendants' motion is overruled at this time with leave to resubmit should circumstances warrant.

The court revisited the demolition issue in its final memorandum opinion, which accompanied the judgment in the case:

> There remains the issue in this case, of course, of spoliation of evidence. It is the contention of the defendant that his ability to defend this case has been impaired by the destruction of the foundation and subflooring. The Court previously addressed a motion to dismiss filed on behalf of the defendants Woodbridge and McKenna asking that the plaintiffs' claim be dismissed with prejudice because of this destruction of the structure. At that time the Court

> denied the motion and pointed out that throughout the time in question, that the defendant had access to the property, at least up until work ceased sometime in March or early April of '04, and, further, that at all times he was in charge of the work that was being done and was even, according to his testimony at trial, frequently if not daily on the job site.
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> Additionally, the Court would note that at trial, Defendant McKenna testified that as the subfloor decking was laid, his framer took grade shots to determine the levelness of the floor. There were others who testified about using laser levels to shoot the level when they inspected the subflooring, and the Court presumes that Mr. McKenna is referring to a similar type of measurement when he says that his framer took grade shots as the floor was laid. The framer of course was not called to testify at trial. And since he took the shots, it would be presumed that he would have personal knowledge of the level or the lack thereof of the floor at the time it was laid or immediately thereafter.
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> Additionally, Mr. McKenna, who is really the only representative of Woodbridge, did not dispute many of the claimed defects, particularly in the framing or the flooring. In fact, he testified that they were there, but it was his intent to correct them as time allowed during the progress of the work.
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> So the Court feels that this, of course, is not a case for dismissal because of the destruction of the foundation, and, further, based upon the evidence that was produced at trial, does not feel that this is a situation where any presumption should be applied that had the evidence been retained, that it would be detrimental to the plaintiffs' case.

We find no abuse of discretion here. The memorandum opinions reflect that the trial court engaged in a thorough analysis of the factual circumstances and concluded that Builder was not prejudiced by the demolition of Homeowners' house, and thus said demolition did not create an unjust result. Rule 34A does not contain an "unjust result" test, but certainly courts may consider the justness of the result as part of their "broad discretion" to decide how or whether to impose sanctions on parties in violation of the rule.

Simply put, Builder was unable to convince the trial court that any actual prejudice to his case resulted from the demolition, and thus the court saw no need to impose sanctions on Homeowners for conduct that it concluded was both innocent and harmless. With regard to the former point, it should be noted that the court clearly did not believe Homeowners acted in bad faith in deciding to

demolish the house. As noted earlier, the court stated in its final memorandum opinion "that the overwhelming testimony is that construction could not proceed on this residence given the condition of the foundation, walls, and subflooring in April of 2004" and "it was recommended that the existing foundation and subfloor be demolished, and that they start over completely." In other words, demolition was the logical course of action – not for evidence-destroying reasons, but because the house was in such bad shape that construction could not continue. Once again, we must accept this factual conclusion by the trial court because we have no record to judge it against.

It would be difficult if not impossible for Builder to demonstrate, without providing a record, that the trial court erred in concluding that the demolition was harmless. Moreover, even taking his arguments on appeal at face value, they are unconvincing. Instead of specifying particular examples of precisely *how* the demolition weakened his case – i.e., by making it impossible to refute specific aspects of Homeowners' evidence – Builder makes only broad, sweeping claims such as: "The Appellees [sic] destruction of evidence renders the entire case, as it pertains to the structure, conjecture and speculation" and "Appellee's destruction of evidence during a civil proceeding forever creat[ed] judicial and equitable prejudice against Appellant." This simply is not good enough, because it fails to answer the basic question: *what* prejudice? If Builder believes that he lost his case because Homeowners introduced faulty measurements or misleading photographs and Builder was unable to rebut them due to the demolition, he should have said so, he should have been specific about his claims, and he should have provided us with a record of evidence so that we would be able to assess those claims. He did not do any of these things, and in the absence of anything more convincing than bare, unsupported, generalized assertions of harm, we see no reason to disturb the trial court's decision on sanctions – especially when the court's verdict against Builder ultimately rested mostly on Homeowners' claims of fraud, misrepresentation, TCPA violations and other intentional acts, none of which can be proven or disproven by structural photographs or laser-level measurements.

Moreover, although the court stated that "[it] is undisputed that no effort was made by plaintiffs to obtain such an order prior to the destruction of the foundation or to even notify defendants of their decision to do so," the court also stated, earlier in the same memorandum opinion, that Builder "observed and photographed the demolition of the structure." Clearly, then, Builder had some awareness of what was occurring, and presumably could have attempted to stop or delay the demolition if he truly believed it would result in the destruction of evidence crucial to his case. There is no indication, either in his argument or elsewhere, that Builder made any such attempt – nor, again, is there any indication of actual, specific instances of harm or prejudice from the demolition. Perhaps Builder hoped that the mere fact of spoliation would allow him to win the case, but without an actual demonstration of prejudice, we will not disturb the ruling below.

For all of the foregoing reasons, we conclude, on the basis of the information available to us, that the court was acting well within the bounds of its discretion when it declined to impose sanctions against Homeowners for violating Rule 34A.

V.

The ruling of the trial court is affirmed in all respects. We decline, however, to hold that this appeal is frivolous under T.C.A. § 27-1-122 (2000) as requested by the Homeowners. Although many of Builder's claims are not susceptible to serious review in the absence of a record, he does raise some genuine issues of law, as reflected above, and we believe this *pro se* appeal was made in good faith, not "solely for delay." Costs on appeal are taxed to the appellant Michael K. McKenna.

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CHARLES D. SUSANO, JR., JUDGE