IN THE TENNESSEE PUBLIC UTILITY COMMISSION
AT NASHVILLE, TENNESSEE

IN RE:	**)**	
	)	
AT&T Tennessee Complaint Against	**)**	**DOCKET NO. 19-00099**
Cellular South, Inc. d/b/a C Spire	**)**	

MOTION TO DISMISS

Summary

Cellular South, Inc., d/b/a C Spire ("C Spire" moves to dismiss the above-captioned Complaint brought by BellSouth Telecommunications, LLC d/b/a AT&T Tennessee ("AT&T").

The Complaint rests entirely on the presumed accuracy of the "shared facility factors" provided by AT&T and used to retroactively bill C Spire for the use of a two-way, transmission facility between January, 2016 and August, 2017. According to the parties' contract, the "shared facility factor" represents the amount of local traffic on the facility that originates from a customer of AT&T and terminates to a customer of C Spire divided by the total minutes of all traffic that moves across the facility. AT&T is supposed to calculate the shared facility factor four times a year and provide that information to C Spire. From January 2013 until October 2017, however, AT&T failed to update the shared facility factor and, as provided in the contract, both companies continued to divide the cost of the transmission facility based on the most recent, shared facility factor provided by AT&T the last quarter of 2012.

Now AT&T seeks to retroactively bill C Spire based on the shared facility factors that AT&T claims should have been used between January 2016 and August 2017. Since this billing dispute first arose, C Spire has repeatedly asked to see the underlying data supporting AT&T's calculation of the shared facility factors, i.e., data showing "exactly which telecommunications

carrier originated the traffic" as well as the duration and classification (local or long distance) of all the calls carried across the facility. This information "is critical to determining" AT&T's share of the facility charge. Lee Pucket, Direct testimony at 5. AT&T, however, has failed to provide that information and now says that the underlying data has been deleted from AT&T's billing systems, making it impossible for anyone to verify or refute the accuracy of AT&T's retroactive charges.

Attached to this motion is a copy of Gardner v. R & J Express, LCC, 559 S.W. 3d 462 (Tenn. Ct. App., 2018), (application for permission to appeal denied September 13, 2018). The facts and legal issues in that case are strikingly similar to the facts and issues presented here. The plaintiff in Gardner caused the destruction of the key piece of evidence in the case. Although there was no evidence that the destruction was the result of intentional misconduct or fraud, the trial court found that plaintiff should have known at the time the evidence was destroyed that it was "reasonably foreseeable" that litigation would result and that the evidence would be relevant. Since the defendant had no opportunity to examine the evidence and could not challenge, except through cross-examination, the plaintiff's testimony about the missing evidence, the court concluded that the defendant had been severely prejudiced by the destruction of the evidence. Under the circumstances, the court found that the only appropriate remedy was to dismiss the plaintiff's complaint. The Court of Appeals affirmed the trial court's decision.

This case raises exactly the same problem. As discussed further below, there is good reason to doubt the accuracy of AT&T's retroactive calculations of the shared facility factors for the period at issue. Without the underlaying traffic data, however, it is impossible to determine whether or not AT&T accurately calculated those factors or to refute the testimony of AT&T's witness that the company's billing systems were all working properly four years ago when the

calculations were made.

AT&T initiated this billing dispute in October, 2017. C Spire responded by denying the dispute and asking to see the underlying traffic data. In light of the allegations traded between the parties and the large amount of money at issue, it was reasonably foreseeable at that time that this dispute would result in litigation and that the underlying traffic data might determine, one way or the other, the outcome of the case. Nevertheless, after the dispute arose, AT&T deleted the traffic data from its billing systems because, according to the company, AT&T "in general" only maintains traffic data "for a rolling, two-year period" and "no longer has a record" of the traffic that moved across the transmission facility during that period. C Spire, like the defendant in the Gardner case, has been severely prejudiced by AT&T's destruction of the underlying traffic data and the only sufficient remedy is, as in the Gardner case, for the Hearing Officer to dismiss AT&T's Complaint.

Statement of Facts

For purposes of this motion, the relevant facts are straightforward and not in dispute.

AT&T and C Spire send traffic back and forth over a "Two-Way Trunk Group Arrangement" that is described in Section V. B. of the parties' 2003 interconnection agreement. See Attachment 1 to Direct Testimony of Scott McPhee. As explained in that section of the interconnection agreement and in a 2006 "Letter Agreement" between the parties (Exhibit C to Lee Pucket's Direct Testimony), AT&T and C Spire share the cost of the transmission facility. Each month, AT&T bills C Spire for the full cost of the trunk group and then C Spire bills back to AT&T a charge for AT&T's proportional use of the facility. That proportion, called the "shared facilities factor," is the percentage of the facility used to deliver local calls from AT&T customers to C Spire customers compared to the total minutes of calls of all types, including

calls originated by customers of other carriers ("intermediary traffic"), that travel over the facility. If, for example, a total of 100 minutes of calls is carried over the trunk group and 20 minutes of those calls are local calls originated by AT&T, AT&T's "shared facility factor" would be 20%, and C Spire would bill AT&T for 20% of the monthly cost of the facility. As explained in the Letter Agreement, AT&T is responsible for calculating the shared facility factor on a quarterly basis and providing it to C Spire on the 20th of April, July, October and January of each year. In the absence of an updated factor from AT&T, C Spire uses "the prior months undisputed Local Traffic usage," as provided in Section VI. 4. a. of the interconnection agreement.

As a result of the reassignment of AT&T employees, AT&T stopped providing C Spire with quarterly shared facility factors in the first quarter of 2013 and, consistent with the interconnection agreement, advised C Spire to continue using the shared facility factor of 40.21% provided by AT&T for the last quarter of 2012. In the absence of updated factors, C Spire continued using the 40.21% figure to calculate AT&T's share of the transmission facility for the next four years and seven months.

In October, 2017, AT&T finally sent to C Spire shared facility factors for the past twelve months, August, 2016 through July, 2017. Based on those new factors, AT&T claimed that C Spire had overbilled AT&T by $138,060.29 in Tennessee during that twelve-month period.

C Spire disputed the revised bills, noting in letters dated March 12, 2018 and April 1, 2018 (copies attached) that AT&T had "submitted no supporting information to enable Cellular South [C Spire] to verify the traffic figures submitted by AT&T as required by the Interconnection Agreement [see Section XIV. G and Section XV]." Letter from Lee Pucket to Debbie Weber, April 1, 2019.

AT&T never provided the underlying traffic data to show how the company had measured and classified all the traffic to arrive at the quarterly shared facility factors. AT&T did, however, increased its claim to $234,104 by going back more than a year to January, 2016, despite the fact that Section VI. B. 5 of the interconnection agreement prohibits back billing beyond twelve months: "All charges under this Agreement shall be billed within one (1) year from the time the charge was incurred; previously unbilled charges more than one (10 year old shall not be billed by either Party."

Today, the underlying traffic data requested by C Spire no longer exists. It has been deleted from AT&T's billing records. As the company acknowledged in response to C Spire's discovery requests, AT&T "retains traffic information for a rolling two-year period' and while it retained for each quarter the total number of minutes carried on the two-way trunks and the number of minutes of "AT&T originated local traffic," the carrier no longer has the underlying traffic data to support those figures.

There are several reasons why C Spire suspects that the retroactive facility factors calculated by AT&T may be incorrect. See Rebuttal Testimony of Lee Pucket at 3-5 and Direct Testimony at 8. For example, AT&T asserts that the shared facility factor for the first quarter of 2016 was 26.02% but dropped to 8.5% in the second quarter of 2016. This was caused by a sudden, inexplicable increase in "intermediary traffic" (traffic that originated from third party carriers) from 6.4 million minutes to 19.2 million. As Mr. Pucket explains at pp. 6-7 of his rebuttal testimony, "[I]t is simply not possible for the shared facility factor to change by such a drastic amount absent a network change or outage or an intentional reclassification of traffic by AT&T." Without examining the underlying traffic to determine how many minutes of traffic originated with AT&T and how many minutes of traffic originated with other carriers, it is

impossible to determine the cause of the sudden, 300% increase in intermediary traffic. But as AT&T has admitted, "AT&T no longer has a record of the Intermediary Traffic" for the period in question. Response to Discovery Question 1.

Argument

C Spire files this motion pursuant to Rule 34.02 of the Tennessee Rules of Civil Procedure as interpreted by the Tennessee Supreme Court in Tatham v. Bridgestone Americas Holding, Inc., 473 S.W.3d 734 (Tenn. 2015) and by the Tennessee Court of Appeals in the Gardner case, supra (attached).

AT&T's Complaint relies entirely upon the alleged accuracy of the shared facility factors calculated by AT&T and retroactively applied to usage during the period of January, 2016 through July, 2017. If those numbers are wrong, AT&T's case falls apart. For that reason, AT&T's main witness has tried to evade the problem of the missing evidence by emphasizing the overall reliability of AT&T's billing system, asserting that AT&T "has always calculated the factors the same way, so if we are doing it correctly today, we were doing it correctly in 2016 and 2017." Rebuttal testimony of Scott McPhee at 7.

Mr. McPhee's assurances, however, do not meet the standard of proof required by the interconnection agreement. Parties are not required to accept statements like "if we are doing it correctly today, we were doing it correctly" four years ago. To the contrary, the agreement requires BellSouth to provide "any information necessary for billing where BellSouth provides recording capabilities" because "[t]his exchange of information is required to enable each Party to bill properly." Section XIV. G. "Any information" captured by BellSouth's "recording capabilities" includes all underlying traffic data showing the origin and length of each call carried on the trunk group. As Mr. McPhee himself testified the last time he was before the

Tennessee Commission, the "entire purpose" of an interconnection agreement is to provide for the exchange of "call detail information" so that the parties can accurately bill each other. As he said in that earlier testimony (Docket 11-00119):

> **Q. IS HALO REQUIRED TO PROVIDE ACCURATE CALL DETAIL INFORMATION FOR THE TRAFFIC IT EXCHANGES WITH AT&T TENNESSEE?**
>
> A. Yes. Section XIV.G of the ICA states:
>
> > The parties will provide each other with the proper call information, including all proper translations for routing between networks and any information necessary for billing where BellSouth provides recording capabilities. The exchange of information is required to enable each party to bill properly.
>
> As AT&T witness Mark Neinast describes in detail, Halo is sending traffic to AT&T that contains inaccurate call detail information. The entire purpose of carriers entering into ICAs is to provide the terms and conditions under which the parties will exchange traffic between their respective end users and to appropriately bill each other for that traffic. Call detail information is used expressly for the purpose of determining the appropriate intercarrier compensation applicable to each call. Without proper call detail information, calls cannot be accurately rated and billed. Halo completely defeats the purpose of the ICA by providing inaccurate call detail that is critical for each party to properly bill one another.

The language in the interconnection agreement at issue in Docket 11-00119 and quoted by Mr. McPhee is identical to the language in Section XIV. G. of the agreement between AT&T and C Spire. That section states in clear, unambiguous terms that AT&T is required to maintain call detail records and to provide them to the other party so that the parties can accurately bill each other. In Docket 11-00119, AT&T alleged – and the evidence proved – that the other carrier had provided inaccurate call detail information. Here, it is not possible to make that determination because the call detail information supporting AT&T's shared facility factors has been deleted by AT&T.

C Spire witness Lee Pucket similarly described the importance of examining the underlying traffic data to determine the accuracy of AT&T's share facility factors:

> **Q. Do you continue to believe the underlying traffic data is essential to determine the accuracy of the AT&T provided shared traffic figures?**
>
> Yes it is. This is highlighted by Chart 1 to the McPhee Direct Testimony. Chart 1 shows that AT&T's shared facility factor should be 26.02% for the period for the first quarter of 2016. Chart 1 then goes on to show that AT&T's shared facility factor should be 8.15% for the second quarter of 2016, a **319% drop in AT&T's shared facility factor in just one quarter!** I have been in this business a long time and it is simply not possible for the shared facility factor to change by such a dramatic amount absent a network change or outage or an intentional reclassification of traffic by AT&T. This is borne out by Chart 1 if you look at the third quarter of 2016 through the second quarter of 2017 where AT&T's own data only shows a variation between a low of 5.57% and a high of 6.52% for the AT&T shared facility factor. If we look at Chart 2 of the McPhee Direct Testimony we see that the total traffic sent over the shared interconnection facilities in Tennessee increased from 6.4 million minutes during the fourth quarter of 2015 to 19.2 million minutes during the first quarter of 2016 while AT&T originated traffic remained relatively flat. Clearly an extraneous event caused this because C Spire customers did not experience a 300% increase in calls received during this period. In any event this clearly highlights why C Spire would rationally question the veracity of the AT&T provided traffic figures both then and now. This is particularly true given the steps C Spire has taken over the years to move third party transit traffic from these interconnection facilities as previously noted herein and in my Direct Testimony.
>
> **Q. Do you believe AT&T that they cannot provide the underlying traffic data?**
>
> A. No. Their systems were able to do it historically and I don't see how they could generate PLU factors without the underlying traffic data now. In fact, Mr. McPhee states as much in his Direct Testimony: "[E]ach month the system captures the minutes of use for AT&T-originated local traffic, C Spire traffic, and "intermediary traffic" (which is traffic other carriers are directing to C Spire over the two-way facilities. That data, which I will refer to as "input data," is used to calculate the shared facility factor." AT&T admits it has the underlying traffic or "input data." AT&T is simply refusing to provide that data to C Spire in breach of the Agreement. Of course this would be outside the issue raised by AT&T's admission in discovery in this proceeding that it does not have the "input data" to support their billing dispute.

> I find it difficult, if not impossible, for C Spire or this Commission to determine if the PLU factors provided by AT&T as the basis for its billing dispute are accurate without the underlying traffic data. AT&T is asking C Spire and this Commission to accept the accuracy of AT&T's PLU factors without giving C Spire the opportunity to verify or disprove those PLU factors. As noted elsewhere herein and in my Direct Testimony, there are a number of good reasons to question the veracity of those PLU factors but without the underlying traffic data, which AT&T has refused to provide and now says is no longer available, it is impossible to determine if those PLU factors are accurate which directly impacts the amount owed for the shared interconnection facilities by AT&T in a billing dispute properly brought under the terms of the Agreement (which this one was not).

Testimony of Lee Pucket, page 8 (footnotes omitted, emphasis added).

Application of the Spoliation Factors

In Lee Ann Tatham v. Bridgestone Americas Holding, supra, the Supreme Court discussed the history and purpose of the "doctrine of spoliation," which refers to the destruction of evidence and the imposition of sanctions against the spoliating party. In that case, the Supreme Court reversed a line of Tennessee cases holding it necessary to show that the spoliating party had acted with fraudulent intent or demonstrated intentional misconduct. Instead, the Court held that the culpability of the spoliating party was just one of several factors to be considered in deciding what, if any, sanction the trial court should impose. The Court explained that the determination of a sanction "depends upon the unique circumstances of each case" and that these four factors should be considered:

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 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.

In the Gardner case, the trial court applied those four factors and concluded that the only appropriate and sufficient sanction was to dismiss the plaintiff's suit. The Court of Appeals affirmed the trial judge's decision. The Hearing Officer should reach the same conclusion in this case.

Culpability of the Spoliating Party

1. In Gardner, the plaintiff was a truck driver who believed that a faulty trailer that he was towing caused him to lose control of his truck. On the other hand, the defendant and owner of the trailer believed that the accident may have been caused by the poor condition of the driver's truck. The truck was scrapped by the owner's insurance company shortly after the accident before either party could inspect it. The defendant conceded and the trial court found that there was no evidence that the plaintiff had acted with willful misconduct or fraudulent intent.

Similarly, although AT&T is obliged under the interconnection agreement to maintain traffic data for billing purposes, there is no evidence in this case that AT&T's practice of deleting billing data after two years was an act of willful misconduct or demonstrates fraudulent intent.

2. Degree of Prejudice Suffered by the Non-Spoliating Party

This was the critical factor in the Gardner case and is the critical factor in this case. While the plaintiff in Gardner offered testimony that the truck was in good working order, the trial court noted that the "Defendant has no avenue to refute this assertion." The court continued, "Defendant's theory of the case is impossible to prove without the inspection of the tractor. . .Unless the Defendant can inspect the tractor, he is left with mere cross-examination."

559 S.W.3d at 466.

C Spire, like the defendant in the Gardner case, suspects that AT&T's shared facility factors may not be accurate but without the ability to examine the underlying traffic data, it is not possible to determine whether those suspicions are correct. Like the truck driver in Gardner who testified that his truck was in good repair, AT&T's witness assures the Hearing Officer that the company's billing systems were running correctly four years ago just as they are running now. But without access to the deleted data, C Spire – like the defendant in Gardner – cannot prove its theory of the case and "is left with mere cross-examination."

3. Timing of the Destruction of Evidence

In Gardner, the trial court held that at the time the plaintiff turned his truck over to his insurance company, the plaintiff had already hired a lawyer and should have known that the truck would be relevant to "reasonably foreseeable" litigation.

The same is true here. AT&T itself initiated a formal billing dispute in October, 2017. C Spire rejected AT&T's dispute and demanded to inspect AT&T's underlying traffic data to verify the accuracy of AT&T's claims. The subsequent exchange of letters and the amount of money in dispute clearly indicated that litigation was "reasonably foreseeable" and that AT&T should have known that the underlying traffic data might be critical evidence in that litigation.

4. Least Severe Sanction to Remedy Prejudice to the Non-Spoliating Party

The trial court in Gardner found that since the Plaintiff had destroyed a critical piece of evidence resulting in severe prejudice to the Defendant, dismissal of the suit was the only equitable remedy.

Here, the underlying traffic is critical evidence that could either confirm or rebut AT&T's claims for payment. The destruction of that data has severely prejudiced C Spire's

ability to prove that the facility factors may be inaccurate for a number of reasons. Since AT&T's Complaint depends wholly upon the accuracy of the facility factors and since AT&T has deleted the only evidence that C Spire could have used to rebut AT&T's case, the only equitable remedy is to dismiss AT&T's Complaint.

Conclusion

C Spire asks the Hearing Officer to grant the Motion to Dismiss. Based on the 2018 Court of Appeals ruling in Gardner, dismissal is the only appropriate remedy to cure the prejudice suffered by C Spire caused by AT&T's destruction of crucial evidence in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of April, 2020, a copy of the foregoing document was served on the parties of record, via electronic email transmission and regular U.S. Mail, postage prepaid, addressed as follows:

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559 S.W.3d 462
Court of Appeals of Tennessee,
Eastern Section, AT KNOXVILLE.

John A. **GARDNER** et al.
v.
R & **J EXPRESS**, LLC

No. E2017–00823–COA–R3–CV
|
February 20, 2018 Session
|
FILED 5/07/2018
|
Application for Permission to Appeal Denied
by Supreme Court September 13, 2018

Synopsis

Background: Owner of over-the-road tractor, which was hauling a trailer, brought negligence action against trailer's owner, alleging that tractor owner and his wife had incurred damages in an accident that occurred when the tandem axle on the trailer broke while they were traveling down highway, thereby causing the tractor-trailer to overturn. Trailer owner filed motion for sanctions for spoliation of evidence based on fact that tractor was destroyed before it could be examined. The Circuit Court, Hamblen County, Beth Boniface, J., granted trailer owner's motion for sanctions and dismissed claims. Tractor owner appealed.

[Holding:] The Court of Appeals held that trial court did not abuse its discretion in imposing the sanction of dismissal for tractor owner's spoliation of evidence.

Affirmed and remanded.

West Headnotes (1)

[1] **Pretrial Procedure** Failure to Comply; Sanctions

Trial court did not abuse its discretion in dismissing over-the-road tractor owner's and his wife's negligence action against trailer owner, which alleged that tractor owner and his wife incurred damages in an accident that occurred when tandem axle on trailer that tractor was hauling broke while they were traveling down the highway, thereby causing tractor-trailer to overturn, as sanction for spoliation of evidence, namely tractor; trailer owner would have been severely prejudiced by absence of tractor, tractor owner and wife knew 19 days after accident that they intended to file suit, tractor owner, wife, and their counsel should have known that tractor was relevant to the foreseeable litigation, and dismissal was the only equitable remedy due to the severe prejudice suffered by trailer owner. Rules Civ.Proc., Rules 34A.02, 37, 37.02.

Appeal from the Circuit Court for Hamblen County, No. 15CV181, Beth Boniface, Judge

Attorneys and Law Firms

Donald K. Vowell and Martin Ellis, Knoxville, Tennessee, for the appellants, John A. **Gardner** and Ester **Gardner**.

Trevor L. Sharpe, Knoxville, Tennessee, for the appellee, **R** & **J Express**, LLC.

Thomas **R**. Frierson, II, **J**., delivered the opinion of the court, in which John W. McClarty and W. Neal McBrayer, JJ., joined.

OPINION

Thomas **R**. Frierson, II, **J**.

In this negligence action that arose from a tractor-trailer accident, the trial court dismissed the plaintiffs' claims following the court's determination that a critical piece of evidence had been destroyed by the plaintiffs, resulting in severe prejudice to the defendant. The court further determined that dismissal was the only equitable remedy for the plaintiffs' spoliation of evidence. The plaintiffs timely appealed the dismissal of their claims. Discerning no reversible error, we affirm.

***463** I. Factual and Procedural Background

This action was filed as a result of a tractor-trailer accident that occurred on May 29, 2015, in North Carolina. John **Gardner**, one of the plaintiffs in this matter, owned an over-the-road tractor, which he was using to haul a trailer owned by the defendant, **R** & **J Express**, LLC ("**R** & **J**"), on the date in question. Ester **Gardner**, John **Gardner's** wife and co-plaintiff in this action, was riding with Mr. **Gardner** on that day as a passenger. The **Gardners** allege that the accident occurred because the tandem axle on the trailer "suddenly and unexpectedly" came loose while they were traveling down the highway, causing the tractor-trailer to overturn. Both the tractor and trailer were damaged, and Ms. **Gardner** was severely injured. Shortly thereafter, on June 17, 2015, the **Gardners** retained counsel.

On November 18, 2015, the **Gardners** filed a complaint in the Hamblen County Circuit Court ("trial court"), alleging that **R** & **J**, having exclusive control of the trailer, had been negligent in its inspection and maintenance of the trailer and had failed to ensure that the trailer was in compliance with all federal motor vehicle safety standards. The **Gardners** asserted that the trailer was the cause of the accident in question, which had caused Ms. **Gardner** to suffer severe and permanent bodily injury. The **Gardners** also asserted that Mr. **Gardner** had "suffered total loss of his tractor and said tractor having been destroyed this Plaintiff has incurred a lost wage claim and a loss of earning capacity." The **Gardners** sought damages in the amount of $850,000.

The **Gardners** subsequently filed an amended complaint, adding a claim for punitive damages based on their allegation that **R** & **J** had been falsifying its annual inspection reports with regard to the trailer. The **Gardners** increased their *ad damnum* clause to in excess of $15,000,000.

On January 12, 2016, **R** & **J** filed an answer, denying all allegations of negligence and wrongdoing. **R** & **J** asserted that the causes of the accident were Mr. **Gardner's** failure to keep the tractor under control, his failure to exercise due care, and his operation of the tractor-trailer at an excessive rate of speed. **R** & **J** further claimed that Mr. **Gardner** failed to perform the required pre-trip inspection in accordance with federal motor carrier safety regulations. In addition, **R** & **J** alleged that Mr. **Gardner's** own negligence barred any recovery and that Ms. **Gardner** was an unauthorized passenger in the vehicle.

On July 19, 2016, **R** & **J** filed a "Motion for Spoliation Sanctions with Incorporated Memorandum of Law." Relying on Tennessee Rule of Civil Procedure 34A.02, **R** & **J** asserted that the **Gardners** should be sanctioned for discarding or destroying evidence. In support, **R** & **J** argued that Mr. **Gardner** had discarded his tractor by allowing the insurance company to take possession of it, such that he no longer knew of its whereabouts. **R** & **J** further claimed that because no witnesses had observed the accident, **R** & **J's** expert needed to inspect the tractor in order to determine whether there existed a mechanical problem that may have caused the accident. Due to the "destruction" of this "crucial" piece of evidence, **R** & **J** claimed that it was unduly prejudiced and that the only adequate remedy was dismissal of the **Gardners'** claims.

The **Gardners** filed a response opposing the motion for sanctions, wherein they asserted that Mr. **Gardner** did not willfully allow the tractor to be destroyed in order to prevent its inspection. The **Gardners** also sought sanctions against **R** & **J** for its alleged production of falsified inspection records concerning the trailer during pretrial ***464** discovery. Mr. **Gardner** executed an affidavit stating that he had no knowledge of anything mechanically wrong with the tractor prior to the May 2015 accident. According to Mr. **Gardner**, the brakes, tires, engine bearings, and other items had been recently replaced.

As Mr. **Gardner** indicated, on the day of the accident, he informed the owner of **R** & **J**, Rex Satterfield, about the accident and told him the location of the garage to which the tractor and trailer had been towed. Mr. Satterfield dispatched another truck to that garage within forty-eight hours to pick up the items that were being hauled in the trailer. Mr. **Gardner** claimed that to his knowledge, Mr. Satterfield made no attempt to inspect the tractor at that time. Mr. **Gardner** also reported that he later signed over the title of the tractor to the insurer who afforded insurance coverage for the tractor. He further related that Mr. Satterfield was aware of the identity of the insurer. According to Mr. **Gardner**, he never intended to destroy the tractor and had no idea that it was going to be "scrapped out" by the insurer. Mr. **Gardner** affirmed that he retained counsel on June 17, 2015, with the intent of instituting the instant action.

Following the filing of numerous motions by the parties regarding possible sanctions, the trial court conducted a hearing on September 6, 2016. Following that hearing, the **Gardners** filed a motion *in limine* seeking to exclude the testimony of **R** & **J's** expert, arguing in part that his opinions were based on speculation because he had never inspected the

tractor. [1] The trial court held another hearing regarding the pending motions on November 17, 2016.

The trial court subsequently entered an order on December 8, 2016, determining that **R** & **J** had been "severely prejudiced" in its ability to defend against the **Gardners**' claims due to the unavailability of the tractor, which the court described as a "key piece of evidence." The court thus ordered that the **Gardners** would have thirty days to attempt to locate and produce the tractor for inspection. The court further directed that should the **Gardners** be unable to produce the tractor in the same condition as on the date of the accident, their complaint would be dismissed with prejudice. All other motions were held in abeyance.

The **Gardners** subsequently filed a motion to reconsider, reporting their discovery that the tractor's engine had been removed and the chassis sold for salvage by their insurance carrier. The **Gardners** stated that the tractor had been in the custody of the insurer since the accident and that the **Gardners** had no control over its disposition. The **Gardners** further posited that **R** & **J** should not be allowed to claim prejudice because **R** & **J** did not request that the tractor be preserved until January 25, 2016, which was 242 days following the accident. [2]

On December 19, 2016, **R** & **J** provided written notice to the trial court that the tractor had not been produced within the thirty-day time limit established by the court's prior order. On April 4, 2017, the trial court entered an order granting **R** & **J's** motion for sanctions, stating in pertinent part:

> The Court will first address the Defendant's Motion for Spoliation Sanctions. In 2015, the Tennessee Supreme Court clarified the totality of the circumstances ***465** analysis to be used in spoliation cases. The Court stated the determinative factors:
>
> 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 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.
>
> *Tatham v. Bridgestone Ams. Holding, Inc.*, 473 S.W.3d 734, 747 (Tenn. 2015).

In the present case, there is no evidence of intentional misconduct or fraudulent intent in Plaintiffs' destruction of the tractor; however, intentional misconduct is not a prerequisite to imposing sanctions for spoliation. *Id.* at 746. There is no doubt that as of June 17, 2015, when Plaintiffs retained legal counsel, they intended to file a lawsuit for damages. On June 24, 2015, their attorney sent a letter to Defendant informing him of Plaintiffs' intention to file an action and Defendant's responsibility to preserve the relevant evidence. After sending the preservation letter to the Defendant, Plaintiffs signed over the title to the tractor and the tractor was destroyed. Apparently, having sent a preservation letter to Defendant, Plaintiffs knew or should have known that the tractor was crucial evidence needing to be examined to determine the cause of the wreck. Citing Tennessee Rule of Civil Procedure 34, Plaintiffs state that the tractor was not in their "possession, custody or control" because it was at the wrecker service. The tractor would still be at the wrecker service had Plaintiffs not relinquished ownership of the tractor to the insurance company. Before signing the title, Plaintiffs at all times had ownership rights and control over the tractor and its location. If Plaintiffs did not intend to preserve the tractor for inspection, then they should have given Defendant notice of their desire to relinquish ownership of the tractor. Plaintiffs acknowledge that they had a duty to preserve the crucial evidence but, argue that Defendant did not send a preservation letter until 242 days after the accident. Plaintiffs fail to credit that Defendant's letter was sent approximately two months after being served with the Complaint. Defendant did not send the letter 242 days after commencement of the litigation. Plaintiffs argue that Defendant failed to file a Rule 34 Motion compelling Plaintiffs to produce the tractor. But the tractor was tendered to the insurance company within 30 days of the accident so an earlier letter or Rule 34 Motion would have been futile. Plaintiffs, not the Defendant, had the responsibility to preserve the tractor pursuant to Tennessee Rule of Civil Procedure 34.

The next inquiry is the degree of prejudice suffered by the Defendant. Plaintiffs argue that the evidence has "never indicted the tractor at all as the proximate cause of the accident." Therein lies the rub, the tractor could

not be identified as the cause of the accident because it has always been unavailable to be inspected. Plaintiffs allege that a Declaration of Scott Moore, the person who repaired the brakes, overcomes the possibility that the brakes were faulty. Defendant has no avenue to refute this ***466** assertion. Defendant would have no proof that the brakes were malfunctioning, defective or improperly installed, whereas, Plaintiffs have had access to the evidence necessary to establish their theory of the case. Defendant is left with accepting the Plaintiffs' theory of causation as there is no way to refute it. The Plaintiffs filed a Motion in Limine to Exclude Testimony of Bryce O. Anderson, Ph.D. Regarding Brakes and Welds, because the expert opinion would be based on "conjecture, speculation and simple guesswork." Plaintiffs argue that Dr. Anderson has not inspected the crucial piece of evidence, the tractor. Plaintiffs withdrew their Motion in Limine subject to the Plaintiffs' right to cross-examine Dr. Anderson. Allowing Dr. Anderson to testify does not cure the problem. Clearly, Dr. Anderson would have to admit, as he has in his Affidavit, that he cannot perform an adequate or thorough inspection without the tractor. Dr. Anderson's testimony would not carry any weight. Defendant's expert has not had an opportunity to measure or inspect the crush pattern, brakes or any Electronic Control Module recording device. The Defendant's expert cannot give an opinion as to causation within a reasonable degree of scientific certainty. Had the tractor been available for inspection, the evidence may have shown that the rusted/broken welds caused the accident, but it might have shown that excessive speed and faulty brakes were the primary cause of the accident. "Because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition." *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001).

Plaintiffs argue that both sides are equally prejudiced because neither was able to inspect the tractor. *See Tatham v. Bridgestone Ams. Holding, Inc.*, 473 S.W.3d 734 (Tenn. 2015). This argument does not account for the fact that Plaintiffs have had access to the trailer which is the crucial piece of evidence necessary to establish their theory of the case. The two most important pieces of evidence are the tractor and the trailer. It is true that Plaintiffs' case would be stronger if they had inspected the tractor and could definitively state that there was no defect in the tractor, but Defendant's theory of the case is impossible to prove without the inspection of the tractor. Plaintiffs do not need to inspect the tractor to prove their case. Plaintiff John **Gardner** will testify that he was not speeding and his brakes were in perfect working order. Unless Defendant can inspect the tractor, he is left with mere cross-examination.

Having determined that a critical piece of evidence has been destroyed by the Plaintiffs resulting in severe prejudice to the Defendant, the Court finds that dismissal is the only equitable remedy.

With regard to the **Gardners**' claim that **R** & **J** filed falsified documents in response to discovery, the trial court ruled that the imposition of sanctions was not required. Rather, the court determined that the proper redress would be to allow the documents into evidence and then permit the **Gardners** to cross-examine **R** & **J's** witnesses concerning the authenticity of the documents. The court also stated, however, that because the **Gardners**' claims were being dismissed, this issue had become moot. The **Gardners** timely appealed.

***467** II. Issues Presented

The **Gardners** present nine issues for our review, all of which relate to the overarching issue of whether the trial court properly sanctioned the **Gardners** by dismissing their claims. We have restated those issues slightly as follows:

1. Whether the trial court erred by dismissing the **Gardners**' claims based on their purportedly innocent spoliation of evidence.

2. Whether the trial court misapplied the controlling legal authority when imposing the sanction of dismissal.

3. Whether the trial court properly assessed the factors listed in *Tatham v. Bridgestone Ams. Holding, Inc.*, 473 S.W.3d 734, 747 (Tenn. 2015), when making its determination regarding an appropriate sanction.

4. Whether the trial court erred by failing to properly consider that the **Gardners** had signed over the title to the tractor in the routine course of insurance business, exactly as the *Tatham* plaintiff had done.

5. Whether the trial court erred by failing to consider that the tractor was available for inspection by **R** & **J** for a period of time following the accident.

6. Whether the trial court erred in its assessment of the degree of prejudice to **R** & **J**.

7. Whether the trial court erred by determining that Mr. **Gardner** knew or should have known that the tractor was "crucial evidence" when he transferred its title to his insurance company.

8. Whether the trial court erred by failing to consider any less severe sanctions.

9. Whether the trial court erred by failing to consider that **R** & **J** was guilty of intentional discovery fraud or fabrication of evidence.

III. Standard of Review

In *Tatham*, a case which involved spoliation of evidence, our Supreme Court explained as follows concerning the proper standard of review applicable to a trial court's determination of sanctions:

> [I]rrespective of the doctrine of spoliation, Tennessee courts also have long maintained that trial courts have broad discretion in imposing procedural sanctions in order to preserve the integrity of the discovery process. *See Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 133 (Tenn. 2004) ("[T]rial 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) ("[T]he inherent power of trial judges permits the trial judge to take appropriate corrective action against a party for discovery abuse."); *Alexander v. Jackson Radiology Assocs., P.A.*, 156 S.W.3d 11, 13–16 (Tenn. Ct. App. 2004) ("[T]rial courts possess the inherent authority to take actions to prevent abuse of the discovery process.") (citing *Mercer*, 134 S.W.3d at 133); *Clark Const. Grp., [Inc. v. City of Memphis]*, 229 F.R.D. [131,] 140 [(W.D. Tenn. 2005)] ("[T]he Tennessee Supreme Court stresses that the trial court should have wide discretion to impose the appropriate sanction [to prevent discovery abuse]."). This authority does not arise from the common law doctrine of spoliation but, instead, is rooted in the trial court's inherent power to ensure the proper administration of justice. *See Lyle*, 746 S.W.2d at 699 (noting the "inherent power of trial judges"); *Alexander*, 156 S.W.3d at 13–16 (recognizing the trial court's "inherent authority").

***468** *Tatham*, 473 S.W.3d at 742. Furthermore, in *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 133 (Tenn. 2004), our Supreme Court stated:

> 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. Trial courts have wide discretion to determine the appropriate sanction to be imposed. 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 concerning their soundness.

(Additional internal citations omitted.)

IV. Dismissal as Sanction for Spoliation of Evidence

As previously stated, all of the **Gardners**' issues on appeal relate to whether the trial court properly dismissed their claims as a sanction for their purportedly unintentional spoliation of evidence. The trial court determined that dismissal was the only appropriate remedy because of the significant prejudice to **R** & **J's** ability to defend against the **Gardners**' claims due to **R** & **J's** inability to inspect the tractor involved in the accident.

Tennessee Rule of Civil Procedure 34A.02 provides: "Rule 37 sanctions may be imposed upon a party or an agent of a party who discards, destroys, mutilates, alters, or conceals evidence." Rule 37.02 provides for various sanctions that may be imposed for a party's failure to comply with a discovery order, including "[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

In *Tatham*, our Supreme Court was asked to determine whether the sanction of dismissal was appropriately denied by the trial court when the plaintiff discarded important evidence. The *Tatham* plaintiff had filed a products liability

action against the defendants, alleging that her recently purchased automobile tire had failed while she was driving, thereby causing her to become involved in an accident and suffer significant physical injuries. *See Tatham*, 473 S.W.3d at 738. Following the accident, the plaintiff was informed that her vehicle had been totaled, and she transferred the car's title to the wrecker service on the advice of her insurance company. *Id.* at 739. The tire at issue remained on the car at the time title was transferred, and the plaintiff had not yet hired an attorney and did not realize that the tire needed to be preserved. *Id.*

Following the filing of the *Tatham* plaintiff's complaint, which alleged that the tire was defective and dangerous, the defendants filed a motion seeking to have the case dismissed as a sanction for the spoliation of evidence. *Id.* Although the trial court denied the motion, the court granted the defendants an interlocutory appeal. *Id.* This Court denied the defendants' application for an interlocutory appeal, but the Supreme Court granted an appeal to determine, *inter alia*, whether the trial court abused its discretion by refusing to dismiss the case as a sanction for the spoliation of evidence. *Id.*

With regard to spoliation, the *Tatham* Court explained:

> ***469** In light of both [Tennessee] Rule [of Civil Procedure] 34A.02 and the long-standing recognition discussed herein of a trial court's inherent authority and wide discretion in imposing sanctions to ensure fundamental fairness and the proper administration of justice, we hold that intentional misconduct is not a prerequisite for a trial court to impose sanctions for the spoliation of evidence, including that of a negative inference. Indeed, while 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. We hold today that the analysis for the possible imposition of any sanction for the spoliation of evidence should be based upon a consideration of the totality of the circumstances. To adopt an inflexible, bright-line rule restricting a trial court's power to fashion the appropriate remedy for spoliation of evidence would be contrary to the trial court's inherent authority to sanction abuses of the discovery process and to remedy the potential prejudice caused thereby. 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 decision to impose sanctions for the spoliation of evidence is within the wide discretion of the trial court. The determination of whether a sanction should be imposed for the spoliation of evidence necessarily depends upon 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:
>
> > (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.
>
> A trial court's discretionary 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 evidence.' " *Mercer*, 134 S.W.3d at 133 (quoting *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999)). With regard to the specific sanction of dismissal of an action, although we recognize that the dismissal of an action is a severe sanction, we hold that "such a sanction would be appropriate in circumstances where any less severe remedy would not be sufficient to redress the prejudice caused" to the non-spoliating party by the loss of the evidence. ***470** *Cincinnati Ins. Co.* [*v. Mid–South Drillers Supply, Inc.*], [No. M2007-00024-COA-R3-CV,] 2008 WL 220287, at *4 [(Tenn. Ct. App. Jan. 25, 2008)].

473 S.W.3d at 745–47 (footnotes and additional internal citations omitted).

Therefore, the High Court determined in *Tatham* that the trial court had not abused its discretion in denying the sanction of dismissal for the plaintiff's spoliation of evidence. *Id.* at 748. The Court considered that the spoliation was not the result of any intentional misconduct because the proof demonstrated that the plaintiff had simply transferred the title of her car to the wrecker service upon advice from her insurer, and the car was subsequently destroyed as part of a "routine practice." *Id.* at 747. The Court also considered that because neither party had the opportunity to examine the tire, the defendants incurred no real prejudice. As the Court noted, the plaintiff's expert only offered testimony "regarding the general nature of tire manufacturing and accidents caused by tire failure," and the defendants were able to offer rebuttal testimony on this same topic. *Id.*

In the case at bar, the trial court's order demonstrates that the court properly considered all four of the factors listed in *Tatham*. The court rendered extensive findings regarding each factor, as detailed above. The court specifically found that there was no evidence of intentional misconduct or fraud on the part of the **Gardners** with regard to the destruction of the tractor; we agree that the evidence supports such a finding. However, as the *Tatham* Court explained, this factor "simply should be one of the factors considered by the trial court" in determining the appropriate sanction for spoliation of evidence. *See id.* at 746.

With regard to the second factor, the trial court determined that the non-spoliating party, **R** & **J**, would be severely prejudiced by the absence of the tractor in this matter. We agree with this determination. Without the opportunity to examine the tractor's condition and determine whether it possibly caused or contributed to the accident, **R** & **J** would have the sole remaining option of defending the condition of its trailer, which both parties were able to thoroughly examine. **R** & **J** would also be unable to refute Mr. **Gardner's** testimony regarding the condition of the tractor at the time of the accident. The trial court placed great emphasis on this factor in its analysis regarding the appropriate sanction for spoliation.

Concerning the third factor, the trial court determined that the **Gardners** knew as of June 17, 2015, the date upon which they retained counsel and a mere nineteen days following the accident, that they intended to file an action seeking damages. Mr. **Gardner** affirmed this to be true in his deposition. As the trial court pointed out, the **Gardners**' counsel sent a letter to **R** & **J** on June 25, 2015, informing **R** & **J** of the **Gardners**' intent to file a lawsuit and of **R** & **J's** responsibility to preserve the trailer as evidence. This letter **expressly** states in pertinent part:

> This letter is to formally demand the preservation of certain evidence related to this collision. If you fail to properly secure and preserve these important pieces of evidence it will give rise to the legal presumption that the evidence would have been harmful to your side of the case. The destruction, alteration, or loss of any of the below constitutes a spoliation of evidence.

The first item on the list of evidence the **Gardners** requested to be preserved was the trailer. Despite this request for preservation of the trailer and having the benefit of legal counsel, Mr. **Gardner** acknowledged that he transferred title of the tractor four days later on June 29, 2015. The tractor was then dismantled and sold for ***471** scrap within a matter of days.[3] Clearly, Mr. **Gardner** and his counsel should have known that the tractor was relevant to the foreseeable litigation.

Finally, with regard to the fourth factor, the trial court found that dismissal was "the only equitable remedy" due to the severe prejudice suffered by **R** & **J**. Again, we agree with the trial court's determination. As the court aptly recognized in its written order:

> Defendant is left with accepting the Plaintiffs' theory of causation as there is no way to refute it.... Had the tractor been available for inspection, the evidence may have shown that the rusted/broken welds caused the accident, but it might have shown that excessive speed and faulty brakes were the primary cause of the accident.

The court further noted that both parties were not equally prejudiced by the absence of the tractor because "Plaintiffs have had access to the trailer which is the crucial piece of evidence necessary to establish their theory of the case." By contrast, the court recognized that "Defendant's theory of the case is impossible to prove without the inspection of the tractor. Plaintiffs do not need to inspect the tractor to prove their case."

Because **R** & **J** was rendered unable to effectively set forth its defense due to the destruction of the tractor, the trial court determined that dismissal of the **Gardners**' action was warranted. Although we agree that dismissal is a severe sanction, our Supreme Court has **expressly** held that " 'such a sanction would be appropriate in circumstances where any less severe remedy would not be sufficient to redress the prejudice caused' to the non-spoliating party by the loss of the evidence." *See Tatham*, 473 S.W.3d at 747 (quoting *Cincinnati Ins. Co. v. Mid–South Drillers Supply, Inc.*, No. M2007-00024-COA-R3-CV, 2008 WL 220287, at *4 (Tenn. Ct. App. Jan. 25, 2008)).

The **Gardners** argue that the holding in *Tatham* requires the opposite result in this case. Although the trial court in *Tatham* ultimately reached a different conclusion regarding the appropriate sanction, we cannot conclude that the trial court in this matter "misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of evidence," thus abusing its discretion. *See Mercer*, 134 S.W.3d at 133. There are two obvious factual distinctions between the circumstances presented in *Tatham* and those of the instant action. First, in *Tatham*, there was a witness to the accident who corroborated the plaintiff's testimony that the tire had failed, who claimed that she saw something on the tire "flapping" and subsequently witnessed a piece of the tire "c[o]me out from under the car" immediately before the accident occurred. *See Tatham*, 473 S.W.3d at 738. By contrast, in the instant action, the only witnesses to the accident were the **Gardners**. Ergo, no other witness could rebut the **Gardners**' assertion that the accident was caused by a mechanical problem with the trailer rather than the tractor.

Second, there existed two critical pieces of evidence in this case (the tractor and the trailer), compared to a single piece of evidence in *Tatham*. Thus, as the trial court herein pointed out, the **Gardners** were able to inspect the trailer and gather ***472** evidence to support their theory of the accident's cause while **R** & **J** was unable to similarly inspect the tractor and determine whether it contributed to or caused the accident.

In *Tatham*, neither party was able to inspect the tire at issue, and accordingly, both parties were left in the identical position of relying on expert testimony to establish whether a "flaw in the design or manufacturing of the tire led to its failure." *Id.* at 747. By contrast, in the case at bar, without the ability to inspect the tractor at issue, the parties are placed in quite disproportionate postures. We therefore conclude that the **Gardners**' reliance solely on the outcome in *Tatham* is misplaced.

Importantly, the Supreme Court's decision to affirm the trial court's ruling in *Tatham* was premised substantially on the applicable standard of review. The Court specifically stated:

> Although the trial court did not **expressly** consider in its order any of the other factors discussed herein, nothing in the record supports the conclusion, as the Defendants suggest, that the trial court applied intentional misconduct as a rigid prerequisite to sanction. Therefore, we cannot conclude from the record that the trial court based its ruling on an incorrect legal standard. Nor can we, based on our own analysis of the record in light of the relevant factors, conclude that the trial court acted inconsistently with the substantial weight of the evidence. *See Mercer*, 134 S.W.3d at 133 ("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.' ") (quoting *White*, 21 S.W.3d at 223). Based on the foregoing reasoning, we conclude that the trial court did not abuse its discretion when it declined to dismiss the case as a sanction for the spoliation of evidence in this case.

Tatham, 473 S.W.3d at 748. Accordingly, the trial court's decision in this case must be evaluated incorporating the same deferential standard. We determine that the trial court herein neither "based its ruling on an incorrect legal standard" nor "acted inconsistently with the substantial weight of the evidence." *Id.* We therefore conclude that the trial court did not abuse its discretion regarding the sanction imposed.

The **Gardners** also present essentially an unclean hands argument, asserting that **R** & **J** was guilty of wrongdoing by allegedly providing falsified inspection records in response to discovery, such that the trial court should have imposed a lesser sanction against the **Gardners** because there existed "impropriety" on both sides. In response, **R** & **J** points out that the **Gardners** did not actually prove any wrongdoing by **R** & **J** because **R** & **J** had explained that it was guilty of admittedly "sloppy recordkeeping" but did not commit fraud.

The trial court determined that the proper remedy for any issues concerning R & J's inspection reports was to permit the Gardners to cross-examine R & J's witnesses respecting the authenticity of the documents. Ultimately, however, the issue was rendered moot when the Gardners' claims were dismissed. The Gardners have not demonstrated that they would have suffered prejudice by the admission of these documents, subject to proper cross-examination, similar to the prejudice R & J would have experienced by being denied access to a critical piece of evidence. We determine this argument to be unavailing.

V. Conclusion

For the foregoing reasons, we conclude that the trial court did not abuse its discretion ***473** in imposing the sanction of dismissal for the Gardners' spoliation of evidence. We therefore affirm the trial court's ruling in all respects. Costs on appeal are assessed to the appellants, John and Ester Gardner. This case is remanded to the trial court for collection of costs assessed below.

All Citations

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Footnotes

1 The Gardners subsequently withdrew this motion on December 12, 2016.

2 We note, however, that R & J's preservation request was made approximately two months following the filing of the complaint.

3 A communication from Mr. Gardner's counsel contained within the record demonstrates that the tractor was “sold as salvage to Charlotte Truck Parts and received in their salvage yard on July 2, 2015.” Therefore, any argument by the Gardners that R & J had ample opportunity to inspect the tractor following their notification of an impending lawsuit on June 25, 2015, and the disposal of the tractor on or before July 2, 2015, is untenable.

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March 12, 2018

Debbie Weber
Sr. Financial Analyst
AT&T
4th Floor
740 N. Broadway
Milwaukee, WI 53222
Dw9461@att.com

Via Email and U.S. Mail

Re: Letter of October 19, 2017

Dear Ms. Weber,

I am in receipt of your letter dated October 19, 2017 where AT&T appears to be disputing the charges for certain interconnection facilities shared by the parties going back to September 2016. AT&T's dispute appears to be based on new traffic information calculated by AT&T retroactively for the period from 8/1/2016 to 8/1/2017. The figures are dramatically different from the latest traffic information submitted by AT&T to Cellular South, and you have submitted no supporting information to enable Cellular South to verify those figures.

Nevertheless, the Interconnection Agreement between the parties does not permit AT&T to provide new traffic figures in October of 2017 and apply those figures to traffic exchanged between the parties back to 8/1/2016.[1] Furthermore, Section VI.A.3 of the Interconnection Agreement requires AT&T to update the percent of total terminating traffic to Cellular South that was originated by [AT&T] on a quarterly basis.[2] AT&T failed to do this for a period of years

[1] The Interconnection Agreement further provides if AT&T does not provide updated actual traffic measurements, then the default billing percentages set forth in the Interconnection Agreement shall apply. *See* Interconnection Agreement, Section VII.D.

[2] "Such percent will be used to bill [AT&T] for the [AT&T] Local Traffic for the following quarter." Interconnection Agreement, Section VI.A.3.

despite Cellular South's repeated requests for updated quarterly traffic information as provided under the terms of the Interconnection Agreement. Had AT&T performed its obligations under the Interconnection Agreement then the parties would have had more timely traffic information. However, as noted previously, AT&T cannot recalculate the traffic figures to be applied to 8/1/2016 through 8/1/2017. When AT&T fails to provide the actual traffic figures on a quarterly basis in breach of the Interconnection Agreement, then per the Interconnection Agreement the billing is based on the most currently available traffic figures or the default traffic figures.[3] Since Cellular South billed AT&T correctly under the terms of the Interconnection Agreement, AT&T's dispute is not valid and is rejected.

Since the alleged dispute is without merit Cellular South hereby demands that AT&T immediately pay all monies owed by AT&T to Cellular South. If such funds are not remitted by March 31, 2018, then late payment charges shall accrue beginning on April 1, 2018, as provided in Section VI.B.4 and 5 of the Interconnection Agreement.

Cellular South again requests that AT&T provide updated quarterly figures for the actual traffic exchanged between the parties during the last fiscal quarter of 2017.

Thank you for your assistance with this matter. Please feel free to contact me at (601) 974-7746 if you have questions or would like to discuss further.

Sincerely,

Lee Puckett

cc: Ken Rogers

[3] Specifically, Cellular South is required to "utilize the prior months undisputed Local Traffic usage billed by [AT&T] and Carrier to develop the percent of [AT&T] originated traffic." Interconnection Agreement, Section VI.A.4.a.

C Spire
1018 Highland Colony Parkway Suite 330
Ridgeland, MS 39157

April 1, 2019

Debbie Weber
Sr. Financial Analyst
AT&T
4th Floor
740 N. Broadway
Milwaukee, WI 53222
Dw9461@att.com

Via Email and U.S. Mail

Re: Dispute over charges for interconnection facilities

Dear Ms. Weber,

As you know on October 19, 2017 you sent me a letter stating that AT&T was disputing the charges for certain interconnection facilities shared by the parties going back to September 2016 (the "Dispute"). The Dispute appears to be based on new traffic information calculated by AT&T retroactively for the period from 8/1/2016 to 8/1/2017. Furthermore, AT&T determined to withhold $278,824.49 in payments due to Cellular South (the amount of the Dispute that AT&T alleges is owed to AT&T by Cellular South) despite the fact that the Interconnection Agreement between the parties does not allow a party to set off against money they are owed under the terms of the Interconnection Agreement. Finally, despite Cellular South's repeated requests, you have submitted no supporting information to enable Cellular South to verify the traffic figures submitted by AT&T as required by the Interconnection Agreement and as AT&T has historically done.

On March 12, 2018 by my letter to you Cellular South formally rejected the Dispute, detailed the reasons for such rejection, and formally put AT&T on notice that it would impose late fees on the amounts AT&T was improperly withholding from Cellular South. Cellular South again requests that AT&T immediately provide Cellular South with supporting information for the traffic figures submitted by AT&T to Cellular South, pay Cellular South the money being improperly withheld by AT&T plus late charges from April 1, 2018, and designate a representative or representatives to promptly engage in discussions to attempt to resolve this

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Dispute (if that is someone other than you). For the purposes of this letter "immediately" means no later than 5:00 p.m. central standard time on Monday April 8, 2019.

Thank you for your assistance with this matter. Please feel free to contact me at (601) 974-7746 if you have questions or would like to discuss further.

Sincerely,

Lee Puckett

cc: Ken Rogers, Esq.
Brian Jones

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