

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

MCSHANE CONSTRUCTION	)	
COMPANY LLC,	)	
	)	
Plaintiff/Counter-Defendant,	)	
	)	Case No. 24-0182-BC
v.	)	
	)	
GRADE A CONSTRUCTION, LLC,	)	
	)	
Defendant/Counter-Plaintiff.	)	

ORDER ON MOTION TO COMPEL AND FOR SANCTIONS

This matter came before the Court on October 31, 2025, upon Plaintiff/Counter-Defendant McShane Construction Company LLC's ("McShane") Motion to Compel and for Sanctions based upon its allegations of spoliation by Defendant/Counter-Plaintiff Grade A Construction, LLC ("Grade A"). The Court heard detailed argument from the parties and reviewed relevant filings. Having reviewed the entire record, the Court is ready to rule.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Summary of Claims

This is a commercial construction dispute between general contractor McShane and grading subcontractor Grade A in connection with a multi-family apartment and townhome project commonly known as the Novel Harpeth Heights project (the "Project"), located at 615 Old Hickory Boulevard, Nashville, Tennessee 37209. On March 5, 2021, Grade A contracted with McShane to perform site utilities and grading services pursuant to a multi-family subcontract, for one portion of the Project, and a townhome subcontract for the other portion of the Project. Pursuant to both subcontracts, Grade A was responsible for informing McShane of the amount of material requiring excavation to achieve a balanced site. In 2022, Grade A deposited the excess overburden on an

adjacent parcel which had ramifications on the Project. McShane ultimately retained a remediation contractor to complete the Project. McShane alleges this problem was a result of Grade A miscalculating the amount of material to be removed, and that it was negligent in balancing the site and depositing excess material, causing significant delays to Project completion on both contract scopes. Further, that as a result McShane was assessed liquidated damages by the Project Order for which Grade A is responsible.

Grade A has counter-claimed that it performed and completed all work on the Project pursuant to the terms of the parties' contract, and that McShane has materially breached its obligation to pay for the work performed.

McShane filed the lawsuit in this matter on February 29, 2024. Grade A answered and counter-claimed on April 26, 2024. The Court conducted a Rule 16 Scheduling Conference on July 2, 2024, at which the parties reported that Grade A had sent written discovery to McShane, which discovery had been answered, and Plaintiff intended to issue requests soon thereafter. The parties were also working on an ESI protocol. The Court entered an Order at that time setting deadlines to amend pleadings and would set a follow up Rule 16 Conference.

Grade A filed an amended answer and counter-claim on August 2, 2024.

The Court entered a Case Management Order on August 6, 2024, setting deadlines for initial discovery exchange and discovery related motions. By agreement of the parties, in an October 28, 2024 Agreed Order, those dates were extended and the follow up case management conference set for February 7, 2025.

Procedural History of Discovery Issues

On August 23, 2024, McShane served its first set of written discovery requests on Grade A, including requests for documents and communications it considered related to key issues in the

case. These requests included Grade A's calculations to balance the construction site at the Project (Request No. 41), Project inspections (Request No. 15), Project schedules (Request No. 16), Grade A's Project work (Request Nos. 28, 29), and Grade A's Project manpower (Request No. 47).

On October 22, 2024, Grade A served its written responses to McShane's requests, including a production of 1,949 pages. Additional production was promised following the entry of an ESI Order.

On January 17, 2025, McShane filed a Motion to Compel based upon its belief Grade A's production was deficient. Grade A filed a response on January 27, 2025, and two days later made a supplemental production of 382 documents. The parties communicated regarding McShane's position that Grade A's production was deficient.

McShane's Motion to Compel was heard on February 7, 2025, and the Court reserved its ruling until the parties further conferred in good faith about any undiscovered documents. It was apparent to the Court that the parties needed to further conference to better define the alleged deficiencies. The Court set a status conference for February 19, 2025 to readdress the discovery issues.

After further conferring, McShane agreed to strike its Motion to Compel, reserving the right to refile it if its concerns were not resolved. The Court cancelled the February 19, 2025 status conference and ordered the parties to reset the conference for April 2025.

On March 6, 2025, Grade A informed McShane that Grade A's document retention policy limited the accessibility of responsive documents and ESI and that any documents predating those windows of time were permanently deleted. On March 20, 2025, Grade A followed up that correspondence with a formal response to McShane's prior February 13, 2025 discovery letter. Grade A also served a PDF with 10,540 pages of Project documents and communications, without

metadata. Grade A conveyed that it was working with its in-house document retention policy provider, Microsoft, to locate additional ESI responsive to McShane's requests. According to Grade A, its document retention policy prevented it from retrieving ESI from former employees, including Seth Michael Reigard, Kenny Michael Reigard and Robert Ray. Further, that it had a nine-month retention policy applicable to Kris Neely and one-year retention policies for John Alan Reigard, Rachelle Reigard, Lance Lannom, Seth Michael Reigard, Kenny Michael Reigard, Mike Roberts, and Robert Ray.

At the April 10, 2025 Status Conference, McShane raised the issue of Grade A's failure to preserve its ESI to the Court, and Grade A represented that it would make a supplemental production of approximately 900 documents in the coming days. The parties proposed a scheduling order governing pre-trial deadlines and discovery that were included in the Agreed Scheduling Order entered on June 2, 2025. The two-week bench trial was set to commence on July 27, 2026, with a December 5, 2025 fact discovery deadline and December 19, 2025 expert disclosure deadline.

On May 1, 2025, Grade A made a supplemental production of 962 documents.

On May 30, 2025, McShane served a second set of written discovery requests specific to Grade A's recoverable ESI, litigation holds and document retention policies.

In its July 10, 2025 responses, Grade A responded in relevant part:

INTERROGATORY NO. 24: Identify all efforts You took to preserve evidence, including electronically stored information, related to this Project and/or the claims and defenses alleged in this Lawsuit between February 20, 2023, and the present.

RESPONSE: ...[E]-mails related to the Harpeth Heights project are stored in Microsoft 365, subject to Grade A's e-mail retention policy in place at the time of the Harpeth Heights Project of 6 – 24 months depending on the applicable custodian. Of note, the document retention policy affected Grade A's e-mails and e-mail attachments for the relevant custodians during the course of the Harpeth Heights Project as follows:

- John Alan, Rachelle Reigard, Lance Lannom, Seth Michael, Kenny Michael, Mike Roberts, and Robert Ray – one-year document retention.

- Kris Neely – 9-month document retention.

....

Seth Michael, Kenny Michael, and Robert Ray are no longer employed by Grade A and their e-mails are therefore no longer available to Grade A... Under Grade A's retention policy, employee e-mail accounts were set to auto-delete older emails from 6 to 24 months depending on custodian...Grade A did not adjust its standard e-mail retention policy throughout the duration of the Harpeth Heights project....

For the period of February 2023 through January 11, 2024, Grade A did not implement a "litigation hold."....After McShane requested to obtain ESI, Grade A's executive e-mails (Rachelle Reigard, John Alan, Lance Lannom) were set to "archive" and on "litigation hold" settings to preserve e-mails and relevant ESI on or around March 11, 2025. Thereafter, on July 1, 2025, Mike Roberts and Kris Neely's e-mails were set to "litigation hold" settings.

INTERROGATORY NO. 25: Identify the dates of all efforts identified in response to Interrogatory No. 24.

RESPONSE:Grade A also hired in-house information technology personnel on June 1, 2025, to manage its new informational technology system.

INTERROGATORY NO. 27: For all Grade A documents and electronically stored information which was not preserved and was (1) related to this Project and/or the claims and defenses alleged in this Lawsuit, or (2) requested by McShane, identify:

- Document type(s);
- Custodian(s);
- Subject matter;
- Time period(s); and
- If available, quantities.

RESPONSE: ...[E]-mail correspondence and attachments for the following custodians were not recoverable due to Grade A's e-mail retention policy in place throughout the duration of the Harpeth Heights project: Kris Neely, John Alan, Rachelle Reigard, Lance Lannom, Seth Michael, Kenny Michael, Mike Roberts, and Robert Ray. An unquantifiable amount of e-mails and e-mail attachments from the initial start of the Harpeth Heights project in 2020 through the date McShane filed suit against Grade A for the foregoing custodians was unable to be recovered due to Grade A's e-mail retention policy. In a good faith effort to recover additional data, Grade A is in the process of potentially retaining a forensic data recovery company to determine whether such ESI is recoverable.

INTERROGATORY NO. 30: Identify any and all exceptions to or deviations from your document and ESI retention policy.

RESPONSE: ...John Alan's e-mail account was erroneously placed on a 1 Day delete during system updates on or about March 18, 2025. However, once discovered on March 24, 2025, John Alan's email was placed on a litigation hold.

REQUEST FOR PRODUCTION NO. 49: Produce all litigation holds or other communications to Grade A employees and officers regarding preservation of documents and electronically stored information related to this Project and/or the claims and defenses alleged in this Lawsuit.

RESPONSE: Grade A objects to this request on the grounds that the documents it seeks are subject to attorney-client privilege and/or the work product doctrine. Notwithstanding the foregoing objections and without waiving same, Grade A is not in possession of any documents responsive to this request.

REQUEST NO. 50: Produce all document retention policies which Grade A implemented during the period of February 20, 2023, to present.

RESPONSE: Grade A's document retention policy generally limits accessibility to e-mails and attachments to up to two (2) years retroactively. Microsoft advised Grade A that any e-mails and attachments past these dates ranges are permanently deleted, and Microsoft would not be able to retrieve additional documents from outside these periods. The e-mail retention policies for the following relevant custodians were as follows during the Harpeth Heights Project:

- One year – John Alan, Rachelle Reigard, Lance Lannom, Seth Michael, Kenny Michael, Mike Roberts, and Robert Ray; and

- Nine Months – Kris Neely.

Since Grade A's supplemental production, Grade A has revised its document retention policy so that all emails, except those that were placed on litigation hold identified in these responses, delete after two (2) years. John Alan's e-mail account was erroneously placed on a 1 Day delete during system updates on or about March 18, 2025. However, once discovered on March 24, 2025, John Alan's e-mail was placed on a litigation hold.

In summary, Grade A implemented a litigation hold March 1, 2025, thirteen months after this lawsuit was filed, more than six months after McShane first sent discovery requests, a month and a half after McShane filed its first Motion to Compel, and nearly three weeks after the Court ordered the parties to confer on the discovery at issue in that Motion. For two custodians, a

litigation hold was not implemented until July 1, 2025. Grade A retained no emails from former employees, including Kenny Michael Reigard and Seth Michael Reigard. McShane alleges that Grade A has produced only limited email correspondence from the actual Project timeframe: 9 emails from 2021, 79 emails from 2022, 308 emails from 2023, and 1 email from 2024.

On August 22, 2025, Grade A notified McShane that the ESI recovery vendor it retained on June 1, 2025 was able to recover approximately 72 GB of e-mail data from custodians Kris Neely and John Alan Reigard. Grade A also suspected there to be additional e-mail correspondence with Seth Michael Reigard and Rachelle Reigard and noted that its “supplemental production of documents will include relevant e-mails which could impact upcoming depositions.” Given the schedule in the case, McShane proceeded with the depositions of Rachelle Reigard and Seth Reigard in August and September 2025, and requested to set additional depositions.

On September 30, 2025, McShane and Grade A met and conferred regarding Grade A’s production. Grade A informed McShane that it had recovered a large volume of ESI but had not performed a privilege or relevance review to prepare the documents for production. Grade A did not provide a date by which McShane could expect Grade A to complete its document production.

Per Grade A’s update and as of the date of filing of the Motion, Grade A had recovered 54,291 documents from custodians John Alan Reigard and Kris Neely, and email communications involving Rachelle Reigard and Seth Michael Reigard were included in the recovered ESI.

McShane has issued and served numerous third-party subpoenas and public records requests, in large part to secure communications McShane believes Grade A had with third parties but failed to preserve and produce. In response, an additional 1,464 documents (consisting of 5,037 pages) have been collectively produced by six third parties, with additional documents forthcoming. Grade A has produced 1,346 documents (consisting of 18,296 pages) to date, including 397 emails.

For its part, Grade A asserts it is actively producing documents recovered through its ESI recovery expert, NetEvidence, on a rolling basis. Further, it asserts, much of the ESI McShane has sought would have been unavailable even if Grade A implemented retention protocols in February of 2024 because its longest standard document (e-mail) retention policy for custodians relevant to the Project is one-year, which has been in place long before the issues in this litigation. The policy was not adopted to destroy evidence in this case or any other case. Grade A utilized this document retention policy because it is a smaller business and e-mail/data flow impacted functionality of its e-mail servers, thus requiring a limited e-mail retention policy to ensure overall functionality. Thus, even if Grade A sought preservation of these e-mails from the date litigation commenced on February 19, 2024, only materials dating back to January of 2023 would have been preserved based upon its e-mail retention policy. Anything beyond this date range would more than likely have been unrecoverable.

LEGAL STANDARD

The standards to demonstrate spoliation, whether spoliation is sanctionable, and how to determine an appropriate sanction, were most recently set by the Tennessee Supreme Court in *Tatham v. Bridgestone Americas Holding, Inc.*, 473 S.W.3d 734 (Tenn. 2015). In defining spoliation, the Court analyzed Tennessee Rule of Civil Procedure 34A.02, which provides that “Rule 37 sanctions may be imposed upon a party or an agent of a party who discards, destroys, mutilates, alters, or conceals evidence.” *Id.* at 744-745.

After analyzing a number of Tennessee Court of Appeals decisions on the subject, the Tennessee Supreme Court declined to adopt an inflexible, bright-line rule “which 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.” *Id.* at 746. The *Tatham* court held “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.” *Id.* Further, that “[t]he decision to impose sanctions for the spoliation of evidence is within the wide discretion of the trial court” depending upon the “unique circumstances of each case.” *Id.* Relevant factors include, but are not limited to, the following:

- (1) the culpability of the spoliating party in causing the destruction of the evidence, including evidence of intentional misconduct or fraudulent intent;
- (2) the degree of prejudice suffered by the non-spoliating party as a result of the absence of the evidence;
- (3) whether, at the time the evidence was destroyed, the spoliating party knew or should have known that the evidence was relevant to pending or reasonably foreseeable litigation; and
- (4) the least severe sanction available to remedy any prejudice caused to the non-spoliating party.

Id. at 746-747. The first and third factors relate to the spoliating party’s intent and knowledge, and the second and fourth to the non-spoliating party’s injury or the prejudicial impact on them. *Graham v. UT Regional One Physicians Inc.*, No. W2020-01736-COA-R3-CV, 2023 WL 2496413, at *9 (Tenn. Ct. App. June 28, 2022) (citing *Tatham*, 473 S.W.3d at 746).

The range of sanctions available are set out in Rule 37.02, and include dismissal of the action, entry of default against the offender, limiting certain claims or evidence, entering an order designating certain facts to be taken as established, and striking all or part of pleadings. *Tatham* further guides the Court regarding the type of sanction appropriate and when dismissal is appropriate. 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.’” *Tatham*, 473 S.W.3d at 747 (quoting *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999)).

ANALYSIS

Order Compelling Completion of Production

In its motion, McShane seeks an Order compelling Grade A to immediately complete and produce its review of the documents recovered by its ESI vendor disclosed on August 22, 2025, and further discussed at the hearing on this motion. At the hearing, Grade A counsel confirmed that the review process was ongoing without an estimated completion date. Upon being pressed, Grade A counsel committed to complete that process and make production, including a privilege log, by **November 7, 2025**. The Court ORDERS Grade A's production of discoverable documents from those recovered materials by that date.

Order Regarding Spoliation

McShane seeks spoliation sanctions pursuant to Rules 34A and 37 of the Tennessee Rules of Civil Procedure and the Court's inherent authority to impose sanctions for abuses of the discovery process. McShane seeks, in addition to fees, mandatory adverse inferences as follows:

- (a) Grade A improperly performed its cut/fill calculations to balance the site;
- (b) Grade A understaffed the Project and failed to take required recovery efforts;
- (c) Grade A did not use the appropriate elevations in its grading on site;
- (d) Grade A did not timely procure materials; and
- (e) Grade A did not timely schedule or pass inspections;

McShane asserts that these negative inferences are appropriate because the material Grade A failed to retain goes directly to these issues, which are at the heart of its claims.

Grade A contends that McShane has not been prejudiced by the absence of the ESI at issue and, regardless, the failure to retain was not intentional but due to pre-existing retention policies. Further, that adoption of these inferences would be equivalent to granting McShane summary judgment on its claims and end the litigation.

The Court discusses the relevant *Tatham* factors below and notes that the first and third *Tatham* factors pertain to the spoliating party's intent and knowledge, while the second and fourth factors focus on the non-spoliating party's injury. *Graham*, 2023 WL 2496413, at *9.

Culpability of Spoliating Party

- (1) the culpability of the spoliating party in causing the destruction of the evidence, including evidence of intentional misconduct or fraudulent intent;

Grade A contends that there is no evidence of intentional misconduct or fraudulent intent because the deletion of ESI occurred pursuant to a pre-existing document retention policy and was not done because of the subject claims. Moreover, the failure to modify the retention policy was an oversight and there is no evidence it was done intentionally.

The Court finds there is no evidence that ESI was destroyed as the result of intentional misconduct or fraudulent intent.

Whether Spoliating Party Knew or Should Have Known Evidence Relevant

- (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;

The Court finds Grade A knew or should have known that the ESI it was failing to preserve was relevant to pending or reasonably foreseeable litigation. At the very latest, Grade A was on notice as of the date of filing suit, on February 19, 2024.

Prejudice to Non-Spoliating Party

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

McShane contends it has suffered prejudice for over a year since it served written discovery requests to Grade A, by not having a complete production of responsive ESI from Grade A and not having access to both recovered and deleted ESI to prepare for depositions and to support its

claims and defenses. Grade A argues that McShane merely speculates the lost ESI “could have” contained relevant evidence. The Court is unclear what information could have been included in the lost ESI and how it might relate to McShane’s claims.

Least Severe Sanction

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

“The decision to impose sanctions for the spoliation of evidence is within the wide discretion of the trial court” depending upon the “unique circumstances of each case.” *Tatham*, 473 S.W.3d at 747. The Court finds that the requested negative inferences would, in essence, be equivalent to granting McShane summary judgment and, at this stage of proceedings, is not supported by the events at issue. Grade A failed to disrupt its document retention protocol to retain ESI that may have been relevant to this case. It may be demonstrated that the lack of information available from Grade A impacts not only McShane’s ability to prosecute its claims and defense against Grade A’s counter-claims, but also have that same impact on Grade A. The Court appreciates Grade A counsel’s disclosure and candor about the lack of preservation efforts upon discovery, and its further efforts to remedy that error through its ESI vendor. The Court expects, as set out above, Grade A to complete its document review with great haste so that the parties can move forward to complete discovery.

Fee Request

The Court does find, pursuant to Rules 34A and 37 of the Tennessee Rules of Civil Procedure, that McShane should be able to recover its fees for the bringing of this motion. Grade A created the problem through its failure to retain and to complete its review of recovered documents in a timely manner. As discussed below, this will likely cause the schedule in the case to be reset and may require some witnesses to be redeposed. The Court therefore GRANTS

McShane's requests for fees for the preparation of this motion, responding to the opposition with its reply, and arguing same. The Court ORDERS McShane to submit its fee request within ten (10) days of this Order, including an affidavit of fees and the billing records. Grade A has ten (10) days after that filing to object. Thereafter, the Court will enter an order as to the amount of reasonable fees and expenses upon reviewing such affidavit/declaration of fees and expenses and any opposing submission without argument.

CASE MANAGEMENT

As was discussed at the hearing on McShane's motion, the fact discovery deadline is December 5, 2025, and the initial expert disclosures due December 19, 2025. Given the delays in discovery, the Court has serious concerns about whether the current July 27, 2026 two-week trial setting is realistic. While the Court still has trial dates available in the fourth quarter of 2026, it wants to revisit the schedule with the parties and have a Rule 16 Conference the first week of December. The parties are ORDERED to contact the Calendar Clerk within five (5) days of this Order to obtain a date for an in-person or Zoom Rule 16 Conference to discuss whether the current schedule is feasible or if the case needs to be reset to allow the completion of discovery and dispositive motions.

IT IS SO ORDERED.

s/Anne C. Martin

ANNE C. MARTIN
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

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