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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
June 28, 2022 Session

JANET GRAHAM v. UT REGIONAL ONE PHYSICIANS INC.

**Appeal from the Circuit Court for Shelby County
No. CT-000808-18 Felicia Corbin Johnson, Judge**

No. W2020-01736-COA-R3-CV

This appeal concerns the trial court’s decision to dismiss an action under Tennessee Rule of Civil Procedure 34A.02 and the doctrine of unclean hands. The plaintiff is a Certified Registered Nurse Anesthetist who alleges that she was harassed and discriminated against while working for the defendant, a prominent physician group in Memphis, Tennessee. The trial court found that dismissal was warranted because the plaintiff “willfully deleted text messages from her personal electronic devices after being placed on notice regarding her preservation obligations, resulting in the deletion, and therefore spoliation, of critical evidence that cannot be recovered.” This appeal followed. We conclude that the doctrine of unclean hands does not apply in this case because the plaintiff’s misconduct relates to the litigation as a whole, not to her claims. Nonetheless, we also conclude that the trial court did not exceed its discretion by dismissing the case as a sanction for the plaintiff’s intentional spoliation of evidence under Rule 34A.02.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT JR., P.J., M.S., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S. and KENNY ARMSTRONG, J., joined.

Donald N. Capparella and Kimberly Ann Macdonald, Nashville, Tennessee, for the appellant, Janet Graham.

Jonathan C. Hancock and Emma J. Redden, Memphis, Tennessee, for the appellee, UT Regional One Physicians, Inc.

OPINION

FACTUAL AND PROCEDURAL HISTORY¹

Janet Graham (“Plaintiff”) worked as a Certified Registered Nurse Anesthetist (“CRNA”) for UT Regional One Physicians, Inc. (“Defendant”) at Regional One Medical Center in Memphis, Tennessee. As a CRNA, Plaintiff provided anesthesia to patients under the supervision of Defendant’s anesthesiologists.

Plaintiff commenced the present action in February 2018 while still employed by Defendant. In the complaint, Plaintiff asserted claims for discrimination, harassment, and retaliation under the Tennessee Human Rights Act (“the THRA”), Tenn. Code Ann. § 4-21-101 to -702.² Plaintiff alleged that Defendant, through its agents and employees, “engaged in purposeful, concerted effort to create, allow and perpetuate systemic discriminatory practices and hostile work environment based on gender (female).”

Among the employees identified in the complaint was Defendant’s former head of anesthesiology, Dr. Lebron Cooper. Plaintiff alleged, inter alia, that Dr. Cooper yelled at her and told her that she and the other CRNAs deserved to be fired for “doing things” without their attending physicians. But during discovery, Plaintiff produced a text message in which she claimed that Dr. Cooper’s outburst was part of her “plan . . . to make him lose his shit.” Plaintiff’s text messages further revealed that she had misled Defendant during a pre-suit investigation into her allegations.

At her deposition in February 2019, Defendant’s counsel asked Plaintiff if she thought the text messages were grounds for termination. Plaintiff said that she “wouldn’t have turned [the messages] in” if she did, and she asserted that that she “could have deleted [the messages] a long time ago before [she] even knew about a lawsuit.” But Plaintiff expressly denied deleting any text messages after filing her complaint. The week after her deposition, Defendant terminated Plaintiff’s employment.³

¹ The factual history is taken from the allegations in the complaint. Because this case was dismissed by the trial court upon Defendant’s motion to dismiss, we presume that the allegations are true and give Plaintiff the “benefit of all reasonable inferences.” See *Webb v. Nashville Area Habitat for Human., Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011).

² Plaintiff also asserted a claim for violation of the Tennessee Public Protection Act, Tenn. Code Ann. § 50-1-304. Plaintiff voluntarily dismissed that claim in July 2018.

³ Plaintiff has not asserted a claim for wrongful termination.

In early March 2019, Defendant submitted a third set of interrogatories that asked Plaintiff to identify, inter alia, all “potentially relevant” text messages that she “destroyed, deleted, or otherwise disposed of, either before or after retaining counsel.”

Plaintiff submitted her answers one month later, on April 8, 2019. Contradicting her deposition testimony—in which she denied deleting text messages after filing suit in February 2018—Plaintiff admitted that she had “deleted several text message conversations from her phone in or about August or September 2018.” But Plaintiff could not recall “with whom these messages were exchanged, their specific content, or the exact date on which they were deleted.” Plaintiff also admitted to deleting “approximately three to four text messages she exchanged with her mother, Ms. Cyndi Craft, notifying her of Plaintiff’s termination” as well as “three to four text messages she exchanged with her sister, Ms. Jaime Henson, notifying her of Plaintiff’s termination” in late February or early March 2019.

A subsequent inspection of Plaintiff’s cell phone revealed that she had, in fact, deleted over 200 messages in March 2019 alone. Of those, all but 50 were recovered.

In July 2019, Defendant moved to dismiss the case under the doctrine of unclean hands and Tennessee Rule of Civil Procedure 34A.02. Plaintiff opposed the motion, arguing that Defendant was not prejudiced by the spoliation because most of the messages were recovered. Moreover, Plaintiff’s counsel argued that the remaining 50 messages were irrelevant because they were photos that Plaintiff sent to herself for a genealogy project; however, Plaintiff presented no evidence to prove the contents of the missing messages.

At a hearing in March 2019, the trial court announced that it was going to grant Defendant’s motion and dismiss the case with prejudice:

[L]ooking at all the factors, all the evidence that I have heard, the statements that she made in her deposition, the—you know, not being truthful on her written discovery, deleting messages after the deposition, going through extensive exercise to try to recover, some of which were recoverable, some of which were not, the defendant is entitled to have all relevant information to defend their case. And it just seems to me that it would be unfairly, unduly prejudicial to the defendants to have to come in and defend their clients on a claim that is being made by your client, and she’s not been truthful. That—you know, and I have given her the benefit of the doubt from the point that she took a deposition, but what about the files that were deleted prior to her deposition when she decided to file her case? Many of those have not been recovered. We don’t know what they included.

So I think I narrowed it down to the time that she had her deposition because I’m thinking, well, you know, if there really wasn’t any—you know,

if she hadn't deleted anything or if they could be recovered, then, okay, you know, I can give that more weight because she was clearly on notice. You know, I'm trying to give her every benefit of the doubt because sometimes parties don't know. Sometimes they misunderstand their lawyers or they're not clear what their responsibility is. But in this case she was absolutely clear what her responsibility was or she should have been clear once you took her deposition. It was her responsibility to know, and it was her attorney's responsibility to advise her not to delete anything. And if so, that she needed to get with her lawyers before she did that. Apparently that didn't happen.

So while she has—you know, while this Court has said time and time and time again that I always prefer that clients have their day in court, that the courthouse be open, that their cases are decided by—on the merits, not disposed—you know, summarily dismissed, I'm not so sure under these circumstances that your client should have the right to have her case heard before a jury of her peers because of her conduct.

I think that it's been very prejudicial to the defendant, and because we are not able to recover, we have no idea of knowing what is out there. We can't necessarily assume that—again that they're genealogy documents. They could be files that she copied from her employer. Images of other emails or texts or—we just have no way of knowing.

. . . .
... [T]he communications, whether they're images or actual messages, they're gone. There's no way to recover them. So for those reasons, I'm going to grant the motion.

The court incorporated by reference this ruling into its written order and further explained the basis for its decision:

This case must be dismissed in its entirety, with prejudice, because Plaintiff Janet Graham (“Plaintiff”) willfully deleted text messages from her personal electronic devices after being placed on notice regarding her preservation obligations, resulting in the permanent deletion, and therefore spoliation, of critical evidence that cannot be recovered. Plaintiff's actions and conduct, as detailed in this Order, the related motions and other filings addressing these issues, the transcripts from the hearings conducted on these issues, and the record as a whole, warrants this Court's finding that dismissal is the only sanction consistent with the factors and considerations articulated by the Tennessee Supreme Court in *Tatham v. Bridgestone Americas Holding Inc.*, 473 S.W.3d 734, 747 (Tenn. 2015) and other applicable

Tennessee law, and this Court hereby finds that sanction appropriate and justified here for the following reasons:

3. . . . In response to Defendant's initial discovery requests, Plaintiff produced text messages relevant to this case and Defendant's defenses. Following Plaintiff's deposition in this case, which was conducted on February 13, 2019, Defendant served her with a Third Set of Interrogatories on March 5, 2019, requesting, among other information, that Plaintiff identify any potentially relevant text messages she may have deleted from the electronic devices in her control. On April 8, 2019 Plaintiff responded and indicated under oath in her Responses that she deleted only a very limited number of text messages, and she described the scope of what she maintained at that point in time she had deleted.
4. Defendant also requested that Plaintiff provide her electronic devices to a neutral third party for the purposes of allowing an inspecting of them to determine if text messages had been deleted and whether they could be recovered Plaintiff refused Defendant's request, and Defendant filed its Motion to Compel Plaintiff to Produce Her Cell Phone and Other Electronic Devices for Inspection and to Compel Plaintiff to Supplement Her Discovery Responses on April 4, 2019.
5. After an indication from this Court during oral argument that it was inclined to grant Defendant's Motion to Compel but would give the parties a chance to reach an agreement, the parties jointly engaged a digital forensic expert, Ted Scott of Verity Digital Forensics to conduct an inspection of Plaintiff's Apple iPhone, her Apple laptop computer, and her iCloud account.
6. Ted Scott's analysis confirmed Plaintiff deleted text messages after commencing this lawsuit and after her deposition. Mr. Scott was not able to recover the content of many of the deleted text messages, including the content of many deleted text messages dated after the date of Plaintiff's deposition. Despite this Court repeatedly permitting Plaintiff further efforts to recover the content of deleted text messages dated after Plaintiff's deposition, it was confirmed by Mr. Scott during the March 6, 2020 evidentiary hearing that the content of these and other text messages could not, in fact, be recovered. Also by that date,

Plaintiff, despite repeated chances to do so and her argument that the content could be recovered or reproduced, had not otherwise recovered these deleted text messages or produced them or their content from another source like the recipient of the text(s).

7. Mr. Scott's analysis also confirmed Plaintiff lied, under oath, about the spoliation and her lack of preservation efforts, specifically during her deposition and in her response to the Third Set of Interrogatories propounded by Defendant.

. . . .

8. Based on the foregoing, Plaintiff's conduct compels dismissal of her case under the Tennessee common law "unclean hands" doctrine. . . .

9. Plaintiff intentionally violated her duty and obligation to preserve relevant evidence for this case. Plaintiff lied at least twice under oath about her efforts to preserve and produce relevant text messages during discovery in this case. Further, even though Defendant was able to obtain a digital forensic analysis of Plaintiff's cell phone and other electronic devices, which recovered some deleted text messages, not all text messages or their content were recoverable. Thus, due to Plaintiff's intentional deletion of text messages, Defendant does not have access to what is possibly critical evidence to its defenses in this case. Plaintiff's destruction of this critical evidence and repeated dishonesty about it demonstrates her unclean hands and efforts to manipulate this litigation unfairly in her favor. The Court finds that Plaintiff's unclean hands prevent her from pursuing her lawsuit any further.

10. Based on the foregoing, Plaintiff's spoliation of evidence also compels dismissal of her case under the Tennessee Rules of Civil Procedure. . . .

. . . .

13. As the Court found during the March 6 hearing, "under the *Tatham* factors the appropriate sanction would be the dismissal with prejudice of Ms. Graham's claims." Plaintiff intentionally spoliated text message evidence, even after being reminded of her obligation to preserve potentially relevant evidence. Plaintiff then lied under oath on at least two occasions regarding the extent of

her spoliation of evidence and her lack of preservation efforts. While the content of some of the deleted text messages was recovered by Ted Scott, the content of many deleted text messages dated after Plaintiff's deposition are irretrievable and also not recoverable from any other source. Text messages are relevant evidence in this case and have proven to be critical to Defendant's defenses. Without this evidence, Defendant is unable to defend against Plaintiff's claims. Therefore, the only appropriate sanction is dismissal of Plaintiff's Complaint with prejudice.

Plaintiff later filed a motion to alter or amend the judgment, which the trial court denied.

Defendant then moved for an award of attorney's fees and expenses "incurred as a result of Plaintiff's spoliation of evidence, starting from February 2019 until the final judgment." Plaintiff did not oppose the award, but she disputed the amount of fees to which Defendant was entitled.

In its final order on December 4, 2020, the trial court awarded \$99,557.48 in attorney's fees, costs, and expenses to Defendant under Tennessee Rules of Civil Procedure 34A.02, 37.01(4), and 54.04. Plaintiff subsequently moved to stay execution of the judgment pending appeal, which the trial court granted, and she deposited surety of \$107,762.79 with the Shelby County Circuit Court Clerk.

This appeal followed.

ISSUES

Plaintiff raises four issues on appeal:

1. Whether the trial court erred as a matter of law in applying the equitable doctrine of unclean hands as a basis to dismiss this employment law case, when (1) it is not a case in equity, as Plaintiff made claims for legal, not equitable, relief; and (2) Plaintiff's alleged spoliation of text messages involved the discovery process, unrelated to the merits of the employment discrimination, harassment, and retaliation claims?
2. Whether the trial court abused its discretion by dismissing Plaintiff's employment law case as a spoliation sanction, in violation of *Tatham v. Bridgestone Americas Holding, Inc.*, 473 S.W.3d 734 (Tenn. 2015), relying instead on its findings of Plaintiff's credibility, intent, and speculation of prejudice to impose the most severe sanction, when (1) the trial court failed to make adequate findings about any prejudice

- Defendant allegedly suffered from spoliation of largely recovered text messages; (2) there was a complete lack of evidence about actual prejudice in the record, much less evidence sufficient to support a finding of significant prejudice; (3) the record demonstrates that any prejudice was sufficiently remedied by the forensic analysis and Plaintiff's subsequent investigation and explanation; (4) the trial court placed undue weight on Plaintiff's "intent" to commit spoliation; and (5) it did not find, nor could the evidence support, that dismissal was the least severe sanction available to remedy any remaining prejudice?
3. Whether the trial court abused its discretion by awarding Defendant full attorney's fees related to the alleged spoliation as a sanction, in violation of *Tatham v. Bridgestone Americas Holding, Inc.*, 473 S.W.3d 734 (Tenn. 2015), relying instead on its findings of Plaintiff's credibility, intent, and speculation of prejudice, when (1) the trial court failed to make adequate findings about any prejudice Defendant allegedly suffered from spoliation of largely recovered text messages; (2) there was a complete lack of evidence about actual prejudice in the record, much less evidence sufficient to support a finding of significant prejudice; (3) the record demonstrates that any prejudice was sufficiently remedied by the forensic analysis and Plaintiff's subsequent investigation and explanation; (4) the trial court placed undue weight on Plaintiff's "intent" to commit spoliation; and (5) it did not find, nor could the evidence support, that awarding nearly \$90,000 of attorney's fees was the least severe sanction available to remedy any remaining prejudice?
 4. Whether this court should reverse the trial court's award of discretionary costs should Plaintiff prevail on appeal, in whole or in part, as Defendant would no longer be the sole "prevailing party" under the rules?

ANALYSIS

I. UNCLEAN HANDS

As her first issue, Plaintiff asserts that the trial court erred by dismissing her case under the doctrine of unclean hands. Plaintiff reasons that the doctrine of unclean hands does not apply because her misconduct during discovery was unconnected to her claims.⁴

⁴ Plaintiff also argues (1) that the doctrine of unclean hands applies only to claims for equitable relief and (2) that trial court's written order—which was prepared by Defendant's counsel—does not

But as an initial matter, the parties disagree on the proper standard of review. Plaintiff asserts that we should review the trial court’s decision de novo with no presumption of correctness, and Defendant asserts that we should review the decision to determine whether the court exceeded its discretion.

A. Standard of Review

It is well-established that “the application of the doctrine of unclean hands is within the [trial] court’s discretion, and we review the court’s decision under the abuse of discretion standard.” *Fuller v. Cmty. Nat’l Bank*, No. E2018-02023-COA-R3-CV, 2020 WL 1485696, at *5 (Tenn. Ct. App. Mar. 27, 2020) (quoting *Spirit Broadband, LLC v. Armes*, No. M2015-00559-COA-R3-CV, 2017 WL 384248, at *5 (Tenn. Ct. App. Jan. 27, 2017)); *see also In re Est. of Boote*, 265 S.W.3d 402, 418 (Tenn. Ct. App. 2007) (“Decisions regarding the proper application of the doctrine of unclean hands are heavily fact-dependent and are addressed to the considerable discretion of the trial court.”); *Coleman Mgmt., Inc. v. Meyer*, 304 S.W.3d 340, 348 (Tenn. Ct. App. 2009) (“Whether the doctrine of ‘unclean hands’ should apply is an issue within the trial court’s discretion and will not be reversed absent an abuse of that discretion.”).

The abuse of discretion standard encompasses three considerations:

- (1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the [trial] court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the [trial] court’s decision was within the range of acceptable alternative dispositions.

Lee Medical, Inc. v. Beecher, 312 S.W.3d 515, 524 (Tenn. 2010). The first two considerations implicate familiar standards of review: appellate courts “review the underlying factual findings using the preponderance of the evidence standard contained in Tenn. R. App. P. 13(d),” and we review the trial court’s legal determinations “de novo without any presumption of correctness.” *Id.* at 525.

The third *Lee Medical* consideration—whether the trial court’s decision was within the range of acceptable alternative dispositions—involves a much more deferential standard. This is because “discretionary decisions involve a choice among acceptable alternatives.” *Harmon v. Hickman Cmty. Healthcare Servs., Inc.*, 594 S.W.3d 297, 306 (Tenn. 2020) (quoting *State v. McCaleb*, 582 S.W.3d 179, 186 (Tenn. 2019)). Thus, while appellate courts must articulate “the boundaries of the permissible range of the trial court’s

accurately reflect the decision of the trial court. *See Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 315 (Tenn. 2014). We pretermitted these issues because we have resolved the appeal on other grounds.

options,” they cannot “second-guess a trial court’s exercise of its discretion simply because the trial court chose an alternative that the appellate courts would not have chosen.” *Id.* (first quoting *BIF, a Div. of Gen. Signals Controls, Inc. v. Serv. Const. Co.*, No. 87-136-II, 1988 WL 72409, at *3 (Tenn. Ct. App. July 13, 1988), then quoting *McCaleb*, 582 S.W.3d at 186). Accordingly, a trial court’s discretionary choice must be affirmed if “reasonable minds can disagree with the propriety of the decision.” *Id.* (quoting *McCaleb*, 582 S.W.3d at 186).

Plaintiff does not dispute whether the factual basis for the trial court’s decision is properly supported by evidence in the record or whether the court’s decision would be “within the range of acceptable alternative dispositions” if the doctrine applied. Instead, Plaintiff argues that the doctrine of unclean hands was inapplicable as a matter of law because her spoliation of evidence was unrelated to the merits of her claims. This argument implicates the second consideration in the *Lee Medical* framework: whether the trial court “applied the most appropriate legal principles.” 312 S.W.3d at 525. Therefore, our review will be de novo with no presumption of correctness. *See id.*; *see also Ne. Women’s Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1354 (3d Cir. 1989) (“Ordinarily, an abuse of discretion standard applies to our review of the district court’s application of the unclean hands doctrine. However, the parameters of the unclean hands doctrine implicate a matter of law.”); *accord United Bank v. Buckingham*, 761 F. App’x 185, 190–91 (4th Cir. 2019); *PCA Mins., LLC v. Merit Energy Co., LLC*, 725 F. App’x 342, 346 (6th Cir. 2018).

B. Nexus Between Claims and Misconduct

Plaintiff contends that the doctrine of unclean hands was inapplicable because her spoliation of evidence “related to the discovery process and [was] not tied to the merits of the case itself.” We agree.

The doctrine of unclean hands states that “he who comes into a court of equity, asking its interposition in his behalf, must come with clean hands.” *In re Mattie L.*, 618 S.W.3d 335, 344 (Tenn. 2021) (quoting *C.F. Simmons Med. Co. v. Mansfield Drug Co.*, 23 S.W. 165, 168 (Tenn. 1893)). The doctrine “provides the court with a basis to decline to grant relief to parties who have willfully engaged in unconscionable, inequitable, immoral, or illegal acts with regard to the subject matter of their claims.” *In re Est. of Boote*, 265 S.W.3d at 417 (footnote omitted). Its purpose is to “repel” a party “whose requested ‘relief grows out of or depends upon or is inseparably connected with his own prior fraud.’” *In re Mattie L.*, 618 S.W.3d at 344 (quoting *Fuller*, 2020 WL 1485696, at *5).

The doctrine of unclean hands is considered an “affirmative defense.” *See Tennessee State Bank v. Mashek*, 616 S.W.3d 777, 813 (Tenn. Ct. App. 2020). But it “is intended to protect the courts,” not the parties. *In re Est. of Boote*, 265 S.W.3d at 417 (citations omitted). The doctrine allows a court to avoid interposing “its aid to secure the fruits of unfair and unscrupulous dealings,” becoming “a party to the scheme,” or

encouraging “the practice of devious ways that corrupt the place of its habitat.” *Fuller*, 2020 WL 1485696, at *6 (quoting *S. Coal & Coke Co. v. Beech Grove Min. Co.*, 381 S.W.2d 299, 303 (Tenn. Ct. App. 1963)).

However, the doctrine “is limited to ‘misconduct connected with *the particular matter* in litigation.’” *In re Mattie L.*, 618 S.W.3d at 345 (quoting *Chappell v. Dawson*, 308 S.W.2d 420, 421 (Tenn. 1957)). In other words, the doctrine applies only to a party’s misconduct “**in and about the same matters** whereof he complains of his adversary, or if his claim to relief **grows out of or depends upon** or is **inseparably connected** with his own prior fraud.” *Fuller*, 2020 WL 1485696, at *5 (emphasis added) (citation omitted) (quoting *C.F. Simmons Med. Co.*, 23 S.W. at 168). This is because a party guilty of misconduct “in reference to a particular transaction” cannot enforce rights “growing out of such transaction.” *Alexander v. JB Partners*, 380 S.W.3d 772, 776 (Tenn. Ct. App. 2011) (quoting *Riverside Surgery Ctr., LLC v. Methodist Health Sys., Inc.*, 182 S.W.3d 805, 813 (Tenn. Ct. App. 2005)).

Defendant argues that Plaintiff’s misconduct was inseparably tied to her claims of discrimination, harassment, and retaliation because she incited Dr. Cooper to “lose his shit” in May 2017 and then misrepresented the extent of her contact with a witness during Defendant’s internal investigation. The trial court, however, made no findings on these allegations. Instead, the court found that Plaintiff’s hands were unclean because she tried to manipulate the litigation by permanently and intentionally deleting text messages and lying about it:

9. Plaintiff intentionally violated her duty and obligation to preserve relevant evidence for this case. Plaintiff lied at least twice under oath about her efforts to preserve and produce relevant text messages during discovery in this case. Further, even though Defendant was able to obtain a digital forensic analysis of Plaintiff’s cell phone and other electronic devices, which recovered some deleted text messages, not all text messages or their content were recoverable. Thus, due to Plaintiff’s intentional deletion of text messages, Defendant does not have access to what is possibly critical evidence to its defenses in this case. Plaintiff’s destruction of this critical evidence and repeated dishonesty about it demonstrates her unclean hands and efforts to manipulate this litigation unfairly in her favor. The Court finds that Plaintiff’s unclean hands prevent her from pursuing her lawsuit any further.

While we do not condone Plaintiff’s conduct, we respectfully disagree that the doctrine of unclean hands applies in this case. In doing so, we find the Tennessee Supreme Court’s decision in *In re Mattie L.*, 618 S.W.3d 335 to be particularly persuasive. In that case, the defendant-father made misrepresentations during discovery about his military

service and his treatment for alcohol addiction. *Id.* at 344. The Court held that the doctrine of unclean hands did not apply because the father was defending against a petition to terminate his parental rights on the ground of abandonment. *Id.* at 345. The Court reasoned that the father’s misrepresentations related “to the litigation as a whole” and were “not material to whether [the f]ather had abandoned his child.” *Id.*

Similarly, we find Plaintiff’s deletion of text messages and misrepresentations about her preservation efforts “relate to the litigation as a whole” and are not material to whether Defendant discriminated, harassed, and retaliated against Plaintiff. In other words, Plaintiff’s claims did not “grow out of” or “depend upon” her deletion of text messages and lack of candor during discovery. For these reasons, we disagree with the trial court’s decision to dismiss Plaintiff’s action under the doctrine of unclean hands.

II. SANCTION FOR SPOILIATION

Next, Plaintiff contends that the trial court exceeded its discretion by dismissing the case and awarding Defendant its attorney’s fees as a remedy for her spoliation of evidence under Tennessee Rule of Civil Procedure 34A.02.

Rule 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 sanctions include but are not limited to orders dismissing the action or rendering a default judgment. Tenn. R. Civ. P. 37.02(C).

It is uncontested that Plaintiff deleted text messages and that those text messages were “evidence” for the purpose of Rule 34A.02.⁵ The issue is whether the trial court erred in its choice of sanction. In *Tatham v. Bridgestone Americas Holding*, 473 S.W.3d 734 (Tenn. 2015), the Tennessee Supreme Court held 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.” *Id.* at 746. The Court then identified four relevant, non-exclusive factors:

Factors which are relevant to a trial court’s consideration of what, if any, sanction should be imposed for the spoliation of evidence include:

⁵ In her reply brief, Plaintiff argues for the first time that the trial court made insufficient findings of relevance. However, in a May 2019 agreement for the inspection of her cellphone, Plaintiff stipulated that text messages were “relevant and discoverable in the lawsuit.” During the hearing in January 2020, counsel for Plaintiff conceded that Plaintiff deleted relevant text messages.

(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 746.⁶

As Plaintiff correctly observes, the first and third *Tatham* factors pertain to the spoliating party’s intent and knowledge, and the second and fourth factors focus on the non-spoliating party’s injury. *See id.* at 746 (discussing “the trial court’s inherent authority to sanction abuses of the discovery process and to remedy the potential prejudice caused thereby”); Jamie S. Gorelick et. al, *Destruction of Evidence* § 3.16 (2022) (“To fulfill the purposes of discovery sanctions . . . —that is, to restore the accuracy of the trial, compensate innocent victims, and punish guilty spoliators—courts select the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim.”).

As for intent, the trial court found that Plaintiff “willfully” and “intentionally” deleted the text messages “after being placed on notice regarding her preservation obligations” and then “lied under oath on at least two occasions regarding the extent of her spoliation [of] evidence and her lack of preservation efforts.” For prejudice, the trial court acknowledged that it had “no [way] of knowing” what the missing messages contained, but the court noted that text messages were “relevant evidence” and had “proven to be critical to Defendant’s defenses.” And while the court did not articulate the specific

⁶ More generally, “In determining the appropriate sanction when a party abuses or violates the discovery process, a trial court should consider the following four factors: (1) the party’s explanation for not providing evidence during discovery; (2) the importance of the evidence; (3) the other party’s need for time to prepare to meet the evidence; and (4) the possibility and propriety of granting a continuance.” *Adams v. Illinois Cent. R.R. Co.*, No. W2020-01290-COA-R3-CV, 2022 WL 170134, at *8 (Tenn. Ct. App. Jan. 19, 2022) (citing *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 133 (Tenn. 2004); *Est. of Brock ex rel. Yadon v. Rist*, 63 S.W.3d 729, 732 (Tenn. Ct. App. 2001)).

prejudice suffered by Defendant, it found that it would be “unduly prejudicial” to force Defendant to defend against Plaintiff’s claims.

We will set aside a trial court’s choice of sanction only when the 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 *Mercer*, 134 S.W.3d at 133). Plaintiff has not appealed the trial court’s findings related to her intent, but she contends that the trial court misapplied the controlling legal principles by not making “sufficient findings” of prejudice. In the alternative, Plaintiff argues that the trial court acted inconsistently with the substantial weight of evidence. We respectfully disagree.

Prejudice is only one of four non-exclusive factors that the Supreme Court identified in *Tatham* as relevant to a trial court’s consideration of what, if any, sanctions to impose. *See id.* at 747. Contrary to Plaintiff’s position on appeal, the Supreme Court did not hold that prejudice was a prerequisite to the imposition of sanctions, even the sanction of dismissal. Rather, the Court stated, “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.” *Id.* at 746.

Moreover, “the intentional spoliation or destruction of evidence relevant to a case raises a [rebuttable] presumption . . . that the evidence would have been unfavorable to the cause of the spoliator.” *Id.* at 741 (quoting *Thurman-Bryant Elec. Supply Co., Inc. v. Unisys Corp., Inc.*, No. 03A01-CV00152, 1991 WL 222256, at *5 (Tenn. Ct. App. Nov. 4, 1991). Importantly, “A presumption is a substitute for evidence.” *Raines v. Pile*, 185 S.W.2d 628, 631 (Tenn. 1945) (quoting *Siler v. Siler*, 277 S.W. 886, 887 (Tenn. 1925)). Thus, the presumption that intentionally spoliated material would have been unfavorable to the cause of the spoliator stands in for evidence of prejudice and shifts the burden of proof. *See Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995) (discussing burden-shifting effect of presumptions); *Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801, 804 (6th Cir. 1999) (“If a threshold showing of spoliation is made, the burden then shifts to the proponent of the evidence to prove that the other side was not prejudiced by the alteration or destruction of the evidence.”).

Accordingly, once Defendant made a threshold showing of intentional spoliation, a presumption arose that Defendant was prejudiced by the loss of evidence. *See Tatham*, 473 S.W.3d at 741. Plaintiff attempted to rebut this presumption by recovering the missing messages, which she was unable to do. And while Plaintiff contends that the missing messages were related to a genealogical project, she never presented any evidence, via deposition or affidavit, to support this contention. The contention was merely theorized by Plaintiff’s attorneys, who surmised that the attachments were related to a family history project, which is significant because “argument of counsel is not evidence.” *Martin v.*

Norfolk S. Ry. Co., 271 S.W.3d 76, 86 fn. 3 (Tenn. 2008); see *Groves v. Ernst-W. Corp.*, No. M2017-01779-COA-R3-CV, 2018 WL 3600015, at *6 (Tenn. Ct. App. July 26, 2018) (holding that statements made by counsel during the course of a hearing, trial, or argument are not evidence (citing *Trotter v. State*, 508 S.W.2d 808, 809 (Tenn. Crim. App. 1974))). And for reasons that are unknown, Plaintiff waited until after the trial court ruled against her to obtain a second opinion on whether the missing messages could be recovered from her laptop.⁷

Plaintiff acknowledges on appeal that the trial court's primary reason for imposing sanctions was its findings related to Plaintiff intentional misconduct—which Plaintiff does not contest on appeal. Based on the above, we cannot say that the trial court incorrectly applied the law or that the evidence preponderates against the court's decision. *See id.*⁸

CONCLUSION

We affirm the trial court's judgment. Costs of appeal are assessed against appellant, Janet Graham, and this matter is remanded for further proceedings consistent with this opinion.

FRANK G. CLEMENT JR., P.J., M.S.

⁷ Even after obtaining a second opinion saying that the missing messages were still preserved on her devices, Plaintiff stopped short of actually producing the messages or otherwise proving their contents. For this and other reasons, the trial court found Plaintiff's late-submitted evidence was not credible.

⁸ Because we have affirmed the trial court's decision, we premit the issue of whether this court should reverse the trial court's award of discretionary costs.