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Developments in Spoliation Case Law in the Second Year of the 2015 Amendments to F.R.C.P. 37(e) (January 2, 2018)

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On December 1, 2015, Rule 37(e) of the Federal Rules of Civil Procedure—which governs the imposition of sanctions for the failure to preserve electronically stored information ("ESI")—was amended. The prior version, enacted in 2006, contained only the following safe harbor language: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide for electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." Fed. R. Civ. P. 37(e) (prior to 2015 amendment). The amended version of Fed. R. Civ. P. 37(e) contains a more detailed framework to guide courts in determining when sanctions are appropriate. The rule now provides that sanctions may be awarded when the following conditions are met: (1) the electronically stored information at issue "should have been preserved in the anticipation or conduct of litigation"; (2) the information is lost because the party "failed to take reasonable steps" to preserve the information; and (3) the lost information cannot be "restored or replaced through additional discovery." *Id.*

Rule 37(e), subsections (1) and (2) outline different types of available sanctions. Subsection (1) applies if the court finds that the would-be receiving party was prejudiced by the loss, and it provides that the court "may order measures no greater than necessary to cure the prejudice." Subsection (2) applies if the court finds that the would-be producing party "acted with the intent to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e)(1)-(2). Subsection (2) does not require prejudice, instead inferring it from requisite intent. *See* Fed R. Civ. P. 37(e)(2) advisory committee's note to 2015 amendment ("Subdivision (e)(2) does not include a requirement that the court find prejudice . . . because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position."). Under subsection (2), when there is a showing of intent, then the court may: (a) presume the information was unfavorable to the would-be producing party; (b) instruct the jury that it may or must presume the information was unfavorable; or (c) dismiss the litigation or enter a default judgment. *See* Fed. R. Civ. P. 37(e)(2).

One year ago, we wrote an article surveying spoliation opinions issued in the first year after the 2015 amendments to the Federal Rules of Civil Procedure went into effect. Here, we take a look at some of the spoliation opinions from the second year of the amended rules to update our understanding of how courts are navigating the changes to Rule 37(e).

HSUEH v. N.Y. STATE DEP'T OF FIN. SERVS.

In *Hsueh v. N.Y. State Dep't of Fin. Servs.*, No. 15 Civ. 3401 (PAC), 2017 WL 1194706 (S.D.N.Y. Mar. 31, 2017), Hsueh raised a Title VII claim against the New York State Department of Financial Services ("DFS") alleging that she had been sexually harassed by her supervisor. At the initiation of litigation, Hsueh's counsel advised the DFS "'that it is extremely important that all documents and surveillance footage maintained by the [DFS] relating to this matter be immediately protected from destruction and preserved.'" *Id.* at *2 (citation omitted). Nevertheless, Hsueh subsequently admitted at deposition that she had recorded a conversation with the DFS's human resources department and subsequently deleted it, purportedly "because 'the voice recording itself . . . was not very clear, so [she] did not feel it was worth keeping.'" *Id.* at *2 (citation omitted). In response, the DFS filed a spoliation motion against Hsueh. However, before briefing on the motion was completed, Hsueh—with her husband's assistance—was able to recover and produce an audio file that she claimed to be the complete recording. *Id.* at *3. However, the court expressed skepticism that the produced audio constituted the entire recording because "the recording is only approximately 10 minutes long, yet the meeting appears to have lasted approximately 45 minutes," and "[t]he recording also appears to cut off mid-sentence." *Id.* at *5. After further discovery, the court ordered the parties to complete briefing on the spoliation motion.

At the threshold, the court analyzed whether Rule 37(e) was the appropriate framework for analyzing spoliation in this situation. The court explained that:

> The Committee Notes to the 2015 Amendment to Rule 37 explain that Rule 37(e) is meant to address "the serious problems resulting from the continued exponential growth in the volume of" ESI as well as "excessive effort and money" that litigants have had to expend to avoid potential sanctions for failure to preserve ESI. . . . These considerations are not applicable here. It was not because Hsueh had improper systems in place to prevent the loss of the recording that the recording no longer existed on her computer; it was because she took specific action to delete it.

Id. at *4 (citation omitted). Accordingly, the court held, consistent with the DFS's position, that "Rule 37(e) applies only to situations where 'a party failed to take reasonable steps to preserve' ESI; not to situations where, as here, a party intentionally deleted" ESI. *Id.* at *4. Nevertheless, the court proceeded to grant spoliation sanctions, explaining that, "[b]ecause Rule 37(e) does not apply, the Court may rely on its inherent power to control litigation in imposing spoliation sanctions." *Id.*

The court's ruling that intentional destruction of ESI is outside the scope of Rule 37(e) raises questions about Rule 37(e)(2), which specifically authorizes severe sanctions "only upon finding that the party acted *with the intent* to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e)(2) (emphasis added). If the relevant intent is the intent to destroy ESI, then it would appear intentional destruction is within the purview of Rule 37(e). It appears that this court, however, took the position that the relevant intent is not the intent to destroy ESI, but the intent that ESI destroyed by the routine operation of a system will harm an opposing party.

JENKINS v. WOODY

In *Jenkins v. Woody*, Civ. A. No. 3:15cv355, 2017 WL 362475 (E.D. Va. Jan. 21, 2017), the plaintiff filed claims alleging that the death of Ms. Jenkins in police custody at the Richmond City Justice Center ("RCJC") shortly after its official opening was caused by negligence and deliberate indifference of defendant Sheriff Woody to Ms. Jenkins' medical needs. *Id*. at *1. Ms. Jenkins' cell was equipped with a surveillance camera which recorded video on an approximately 30 day loop. However, defendants took no steps to save a copy of the surveillance camera footage after Ms. Jenkins' death, and it was overwritten after 30 days had elapsed.

Defendants argued that they had no duty to preserve the surveillance camera footage because they had no reason to anticipate litigation. *Id*. at *14. Defendants claimed that they did not anticipate litigation until they received a FOIA request from plaintiff until 24 days after Ms. Jenkins' death, and that by then the footage had already been overwritten ahead of the 30-day overwrite schedule due to an excessive amount of data being recorded on that particular camera. *Id.* at *9. The court disagreed and found there were two reasons to anticipate litigation here. First, the court found that the RCJC's policy of instituting an Internal Affairs Division ("IAD") investigation immediately after the death of a prisoner "likely exists, at least in part, because of a reasonable anticipation of litigation." *Id*. at *15. Second, the court found that, "given the high number of lawsuits involving inmate deaths in his custody, and naming Sheriff Woody as a defendant, Sheriff Woody should certainly have anticipated litigation when another inmate died while in custody only four days after his new facility formally opened." *Id*. at *15.

Defendants further argued that sanctions were inappropriate because the video data could be replaced through additional discovery because—although it was not disputed that the data was not recoverable—"' the

digital video would be cumulative, and [Plaintiff] does not explain what the digital video contains, or might contain, that would add anything to what she has learned through depositions and written documents.'" *Id*. at *16 (alteration in original) (citation omitted). The court strongly disagreed with this position, particularly given the visceral nature of the case:

> [This argument violates] the timeless principle that a picture is worth a thousand words. When presented to a jury, testimony and Logbook entries provide poor substitute for audio and images of Ms. Jenkins while she was still alive. Testimony about an inmate talking to herself, feeding her imaginary daughter ripped-up pieces of toilet paper, and using a toilet paper roll as a telephone likely would impact a jury entirely differently than if the jury actually watched the video of an inmate experiencing those same auditory and visual hallucinations in an isolation cell. Great impact also would flow from video depicting the frantic moments as others tried to revive Ms. Jenkins. Most importantly though, without the video, Plaintiff loses the best and most objective evidence of whatever happened on August 1, 2014. Even assuming—which the Court does not one way or the other—that the information on the Video Data would have confirmed rather than contradicted Deputy Beaver's testimony and Logbook entries, the Video Data would still remain the "best," and not cumulative, evidence. The Video Data constitutes critical evidence that cannot be restored or replaced through additional discovery.

Id. at *16.

In evaluating the defendants' intent, the court expressed some uncertainty as to whether circumstantial evidence could be used to prove intent. *Id*. at *17 ("The Fourth Circuit, like most circuits, has yet to interpret the new Rule 37(e). The standard for proving intent under that rule is not settled."). However, even considering circumstantial evidence *arguendo*, and despite "significant" concern with some aspects of the record, the court declined to find intent. Nevertheless, the court found that "Plaintiff's prejudice is immense" because she was "deprived . . . of the best and most compelling evidence of what happened in cell 3A1 in the evening of August 1, 2014," which would have been "the only unbiased and dispassionate depiction of events that occurred between 5:00 p.m. and 10:48 p.m. on August 1, 2014, when Ms. Jenkins collapsed, was taken to the hospital, and ultimately died." *Id*. at *18.

Accordingly, the court awarded the following spoliation sanctions:

> (1) The Court will *tell the jury* that the video was not preserved;
>
> (2) The Court will allow all parties to *present evidence and argument at trial* regarding Sheriff Woody's destruction of, or failure to preserve, the Video Data. The jury will be instructed that it may consider that evidence, along with all the other evidence in the case, in making its decision;
>
> (3) The Court will *preclude any evidence or argument* that the contents of the video corroborated the Defendants' version of events;

(4) The Court will *preclude any evidence* or argument that on August 1, 2014, Erin Jenkins was exhibiting "the same," "identical," or "similar" symptoms as those she demonstrated on July 31, 2014, when she was seen by Dr. Emran; and,

(5) The Court will award fees to Ms. Jenkins, subject to briefing and oral argument, where all parties may be heard as to the propriety of, and the extent of, reasonable fees and expenses.

Id. at *18 (emphasis added). Certain of these sanctions appear to blur the line between Rule 37(e)(1) and 37(e)(2). Where prejudice is established, Rule 37(e)(1) permits "measures no greater than necessary to cure the prejudice." Fed. R. Civ. P. 37(e)(1). "[O]nly upon finding that the party acted with intent" does Rule 37(e)(2) permit a court to "instruct the jury that it *may or must* presume the information was unfavorable to the party." Fed. R. Civ. P. 37(e)(2). Here—despite declining to find intent—the court's order permitting the plaintiff to present evidence regarding spoliation to the jury appears nearly indistinguishable from the type of permissive jury instruction permitted only under Rule 37(e)(2). *See Eshelman v. Puma Biotechnology, Inc.*, No. 7:16-CV-18-D, 2017 WL 2483800, at *3 (E.D.N.C. June 7, 2017) (explaining that "Rule 37(e) of the Federal Rules of Civil Procedure governs the court's power to sanction a party for failing to preserve ESI. Rule 37(e)(2) provides for explicit relief in the form of an adverse jury instruction, but the court may also impose some form of a jury instruction under Rule 37(e)(1) to the extent necessary to cure prejudice caused by the loss of the ESI.").

WAL-MART STORES, INC. v. CUKER INTERACTIVE

In *Wal-Mart Stores, Inc. v. Cuker Interactive, LLC*, Case No. 5:14-cv-5262, 2017 WL 239341 (W.D. Ark. 2017), Walmart and Cuker, a web development contractor, filed competing claims for breach of contract and trade secrets misappropriation relating to certain Wal-Mart e-commerce websites. In relevant part, Cuker filed a motion for spoliation sanctions, contending that Walmart improperly erased ESI from the laptop of an employee who left Walmart a month after Walmart had allegedly begun to prepare to file suit. Though unable to provide the employee's laptop, Walmart did offer to produce backup tapes of the employee's emails. Cuker declined, contending that "there was much likely much more material on Mr. Herman's laptop than merely his emails; and . . . that in any event the backup tapes were unlikely to reveal much useful material because of Walmart's low email server size limits." *Id*. at *2. Unimpressed, the court explained that it was "unwilling to base a finding of prejudice here on speculation about the content of material that is not in

the record, when at least some of that absent material was discoverable and available to the party seeking the sanction, who nevertheless chose not to review it." *Id*. at *2.

Because the court found that "Cuker ha[d] not demonstrated prejudice, [it] therefore d[id] not reach the issue of intent." *Id*. at *2. Citing *Lincoln Composites, Inc. v. Firetrace USA, LLC*, 825 F.3d 453, 463 (8th Cir. 2016), the court explained that a spoliation instruction requires finding both intent and prejudice: "(1) there must be a finding of *intentional destruction* indicating a desire to suppress the truth, and (2) there must be a finding of *prejudice* to the opposing party." *Id*. Though *Lincoln Composites* issued after the 2015 amendments, it cites as authority for this proposition pre-amendment case law: *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 460 (8th Cir. 2013). This is a curious approach, because the text of Rule 37(e) would appear to suggest that prejudice and intent should be evaluated independently. Namely, "upon finding prejudice"—and regardless of intent—a court may "order measures no greater than necessary to cure the prejudice." Fed. R. Civ. P. 37(e)(1). Similarly, "only upon finding that the party acted with intent"—and regardless of prejudice—a court may award the harshest sanctions. Fed. R. Civ. P. 37(e)(2). Indeed, the advisory committee explicitly recognizes that there is no prejudice requirement under Fed. R. Civ. P. 37(e)(2):

> Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment. Accordingly, it appears the court technically should have gone on to consider intent. Moreover, it is not clear that this inquiry would have been moot. In particular, in declining Walmart's request for expenses incurred in responding to Cuker's motion, the court explained that, while it did not know whether the wiping of the laptop "was the result of bad intent or a simple oversight," it was nevertheless "a very poor practice for a company as sophisticated as Walmart to have wiped Mr. Herman's laptop under these circumstances." *Walmart Stores, Inc.*, 2017 WL 239341, *2. That said, it is unclear what sanctions, if any, would be appropriate where a destroying party intended harm but failed to cause any actual prejudice.

MOODY v. CSX TRANSP., INC.

In *Moody v. CSX Transp., Inc.*, No. 07-CV-6398P, 2017 WL 4173358 (W.D.N.Y. Sept. 21, 2017), Moody filed a personal injury suit against a railroad relating to a railway accident. In particular, Moody attempted to crawl beneath a train car. The train began to move while Moody was beneath it, dragging her "approximately twenty feet, resulting in injuries including an above-the-knee amputation of her left leg and the loss of toes on and crush injuries to her right leg." *Id*. at *1. The parties disputed whether the train sounded a horn or bell—which would have warned Moody—before moving. *Id*. at *1. Shortly after the accident, railroad employee Michael Lewandowski retrieved the black box data from the train's locomotive, saved it to his laptop, and attempted to upload the data to the railroad's server. *Id*. at *7. However, approximately four years later when responding to Moody's discovery requests, the railroad discovered that a key black box data file was missing from the server, possibly because Lewandowski's upload had failed. *Id*. at *8. Further, in the intervening years Lewandowski's laptop—which would have held a copy of the data—crashed, was sent in for service at a railroad facility, and apparently went missing or was destroyed. *Id*.

The railroad argued that, although it had a duty to preserve this ESI, its procedures for preserving this data—saving it to a laptop and uploading it to a company server—were reasonable. Though the court did not appear to find fault with railroad's procedures, it harshly criticized the railroad's failure to verify that its procedures had successfully preserved the data. As the court explained, had the railroad even once attempted to review the uploaded black box data, it would have realized the relevant data was missing, and would have been able to recover the data from Lewandowski's laptop: "The proposition that a sophisticated railroad transportation corporation such as CSX could be involved in a serious accident in which an individual lost a limb and thereafter fail for four years to review critical data relating to how that accident occurred is unfathomable." *Id*. at *11. As further evidence that the railroad's failure to review the data was unacceptable, the court cited Rule 11 of the Federal Rules of Civil Procedure, which would have required that the railroad conduct some investigation of the facts before filing its answer. *Id*. at *12. And, the court cited Rule 26 of the Federal Rules of Civil Procedure, which required the railroad to provide "without awaiting a discovery request . . . a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that [they had] in [their] possession, custody, or control and may use to support [their]

claims or defenses." *Id*. at *12 (alterations in original). Accordingly, the court held that the railroad's failure to verify the integrity of the uploaded black box data was unreasonable:

> In other words, defendants allowed the original data on the event recorder to be overwritten and destroyed without ensuring that it had been appropriately preserved. Just as it would be unreasonable for a party preserving a paper file to copy it blindly, put it in a drawer without ever looking at it, and then destroy the original, so too was it unreasonable for defendants to upload the event recorder data to the Vault and not even look at the files to confirm that the appropriate data had been uploaded and was accessible.

Id. at *12.

The railroad further argued that Moody was not prejudiced by the loss of the black box data, because "Moody has other evidence available to her regarding whether the bell and/or horn were sounded and that the event recorder data might not have supported Moody's claims." *Id*. at *13. The court disagreed, and, in part because "critical and irreplaceable data was *within defendants' complete control*," found that "it would be unreasonable and unfair to require Moody to demonstrate that the event recorder data would have been favorable to her." *Id*. at *14 (emphasis added). Moreover—in addition to prejudice on the merits—the court appeared to give some weight to the financial prejudice cause by the loss of ESI, explaining that had the data been preserved "Moody likely would not have deposed Lewandowski . . . and the Court could have determined as a matter of law whether or not defendants had complied with their duty to sound the bell and/or horn prior to train movement." *Id*. at *14. Accordingly, the court held that Moody was prejudiced by the loss of the black box data.

Finally, although there was no direct evidence of the state of mind of the railroad's employees, the court found that circumstantial evidence established intent to deprive Moody of the ESI. As the court explained, while Lewandowski's failure to properly upload the black box data may be excusable, "defendants' repeated failure over a period of years to confirm that the data had been properly preserved despite its ongoing and affirmative Rule 11 and Rule 26 obligations, particularly before discarding Lewandowski's laptop, is so stunningly derelict as to evince intentionality." *Id*. at *15. Accordingly, the court awarded Moody an adverse inference jury instruction.

CONCLUSION

Our understanding of the impact of the changes to Rule 37(e) will continue to evolve as additional case law emerges. However, the foregoing cases demonstrate several points of note. First, the line separating a court's inherent authority to issues sanctions and its more constrained authority under Rule 37(e) is not entirely clear, particularly where the destruction of ESI is intentional. *See United States ex rel. Scutellaro v. Capitol Supply, Inc.*, Civ. A. No. 10-1094 (BAH), 2017 WL 1422364, at *10–11 (D.D.C. Apr. 19, 2017) (suggesting that inherent authority, rather than Rule 37(e), may govern a motion for spoliation claiming not that information was spoliated in anticipation of litigation, "but rather that the spoliation was in violation of the defendant's regulatory and contractual obligations"). Second, courts continue to apply guidance from pre-amendment opinions to post-amendment actions, so practitioners would do well to keep such case law in mind. Third, courts are continuing to flesh out the contours of the requisite prejudice and intent, including as they relate to one another. *See Alabama Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730, 744 (N.D. Ala. 2017) (finding that "bad faith" was evidence of "prejudice" under subsection (e)(1), which shifted the burden to the non-movant to show lack of prejudice). Fourth, mechanical compliance with preservation policies is insufficient to avoid a finding of intent under Rule 37(e); parties should routinely audit data integrity rather than blindly storing it. Aside from the foregoing, other issues practitioners should consider include:

- The 2015 amendments to Rule 37(e) apply to pre-2015 actions "insofar as just and practicable." *Int'l Bus. Machines Corp. Plaintiff, v. Nagaseelan Naganayagam*, No. 15 Civ. 7991 (NSR), 2017 WL 5633165, at *5–6 (S.D.N.Y. Nov. 21, 2017). This requires consideration of the facts and circumstances at issue, and courts analyzing the issue have released differing results. *See Distefano v. Law Offices of Barbara H. Katsos, PC*, No. CV 11-2893 (PKC) (AKT), 2017 WL 1968278, at *4 (E.D.N.Y. May 11, 2017) (collecting cases reaching opposite results).
- At least one court has held that failure to name the individuals in possession of destroyed ESI as custodians undermines a motion for sanctions. *Air Prod. & Chemicals, Inc. v. Wiesemann*, No. CV 14-1425-SLR, 2017 WL 758417, at *2 (D. Del. Feb. 27, 2017).

- Multiple courts have awarded attorney fees as a sanction for improper destruction of ESI. *Snider v. Danfoss, LLC*, No. 15 CV 4748, 2017 WL 2973464, at *3–4 (N.D. Ill. July 12, 2017), *report and recommendation adopted*, No. 1:15-CV-04748, 2017 WL 3268891 (N.D. Ill. Aug. 1, 2017).

In short, courts continue to refine the contours of the 2015 amendments to Rule 37(e), and our understanding as practitioners will evolve as additional precedent develops.

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