

In *DriveTime Car Sales Company, LLC v. Pettigrew*, 2019 WL 1746730 (S.D. Ohio April 18, 2019), U.S. District Judge George Smith rejected plaintiff's adverse inference sanction request but ordered that the jury should be allowed to hear evidence about a defendant's text message spoliation and denied defendants' summary judgment motion in part because the deleted text messages created an issue of disputed fact precluding summary judgment.

The case involved an alleged kickback scheme between defendant Pauley Motor Car Co., a car seller (Pauley Motor), and defendant Bryan Pettigrew, who purchased cars on behalf of plaintiff DriveTime Car Sales Co., LLC (DriveTime). Records cited by plaintiff showed that Pettigrew paid comparatively more for Pauley Motor's cars and paid comparatively less for cars sold by other parties, while a similarly situated DriveTime buyer paid comparatively less for Pauley Motor cars. There were also hearsay claims that Pettigrew had been seen being paid off by Pauley Motor in a bathroom, as well as claims that Pettigrew kept Pauley Motor gift cards given to its auction vehicle purchasers, notwithstanding a DriveTime policy and contractual obligation that DriveTime receive all auction purchase incentives. *Id.* at *1 – *2.

The plaintiff sued the defendants for fraud and conversion and issued a litigation hold requiring the defendants to preserve all text messages exchanged between them. A Pauley Motor executive stated, however, that he had exchanged text messages with Pettigrew, but lost some of those messages when he purchased a new phone after the litigation hold was in place. *Id.* at *3.

The defendants moved for summary judgment on the grounds that the plaintiff lacked any evidence of a fraud, and DriveTime filed a cross motion for spoliation sanctions and adverse inference instructions based on the Pauley Motor's failure to preserve the text messages.

Judge Smith denied DriveTime's request for an adverse inference under Fed. R. Civ. P. 37(e)(2) because it found no evidence that Pauley Motor discarded the text messages with an intent to deprive DriveTime of relevant evidence. In doing so, Judge Smith noted that "Rule 37(e)(2)'s intent standard is stringent and does not parallel other discovery standards." *Id.* at *4 (internal quotation marks and citations omitted).

Even though an adverse inference was not warranted, Judge Smith determined that lesser sanctions authorized by Rule 37(e) were warranted because the text messages were relevant to plaintiff's claims and the loss of the text messages prejudiced DriveTime under Rule 37(e)(1). "If as DriveTime alleges, Pauley Motor and Pettigrew entered into a kickback scheme, text messages between the two might provide highly relevant information. On the other hand, they might not — and at this point, we will never know." *Id.* at *5. Because the loss of the messages prejudiced DriveTime, Judge Smith decided to impose measures "no greater than necessary to cure the prejudice," as authorized by Rule 37(e)(1). To do so, he held that DriveTime could introduce evidence to the jury about the messages' existence and their subsequent destruction.

Judge Smith then considered the defendants' motion for summary judgment. As to each of the outstanding claims, he held either that there was conflicting evidence or that the loss of the messages created a genuine dispute of material fact that could be presented to the jury according to the court's curative measures, and therefore, the defendants were not entitled to summary judgment.