

**In *Guarisco v. Boh Brothers Constr. Co. LLC*, 2019 WL 4881272 (E.D. La. Oct. 3, 2019), District Judge Carl J. Barbier granted a defendant’s motion for spoliation sanctions but relied on the court’s inherent authority to grant the sanctions after concluding that Fed. R. Civ. P. 37(e) did not apply because the spoliated materials had not been irretrievably lost.**

The spoliation motion was filed in a case arising out of an automobile accident at an intersection at the site of a federally funded flood control and drainage construction project overseen by state and federal agencies. *Id.* at \*1. According to the defendant, the general contractor on the project, the plaintiff “willfully spoliated evidence by altering a photograph to delete evidence of a two-way street sign and deleting up to 22 videos and photographs entirely.” *Id.* at \*7. As Judge Barbier explained, “Plaintiff’s claim [was] largely premised on [the] alleged failure to properly place a two-way sign at the intersection.” *Id.* at \*7 n.3.

Defendant supported its spoliation motion with an affidavit of an expert computer scientist whose affidavit “emphatically state[d] that photos of the accident in the [p]laintiff’s possession were deliberately deleted or altered.” *Id.* at \*7. As relief, defendant asked the court for attorneys’ fees and costs. In response, “[p]laintiff neither denie[d] [the] allegations nor provide[d] evidence of a plausible, alternative reason the photographs were altered and deleted.”

Judge Barbier began his analysis by stating that “[a] district court has broad discretion to use its inherent powers to administer sanctions for spoliation.” But, he clarified, “[t]he Court’s inherent authority is limited to ‘instances of bad faith or willful abuse of the judicial process.’ ” *Id.* (citation omitted). In this case, the request for sanctions was “complicated by the digital nature of the evidence at issue.” *Id.* at \*8. As Judge Barbier explained, “[I]t [was] undisputed that the photographs [were] not lost” because defendant managed to obtain the unaltered picture from a Facebook post the plaintiff made after the accident. While Fed. R. Civ. P. 37(e) addresses the spoliation of digital evidence, “the plain language of Rule 37(e) only applies to cases where the digital evidence is irrecoverably lost.” Accordingly, without proof that any of the digital evidence at issue was lost, Judge Barbier ruled that it would be premature to conclude that Rule 37(e) applied in this instance.

But Judge Barbier did not end his inquiry with Rule 37(e). In his view, “Because the power to sanction spoliation is an inherent power,” it “may be invoked even in the presence of procedural rules sanctioning the same conduct.” Moreover, this “inherent power is ... not restricted when the procedural rule does not sanction the precise conduct at issue.” Indeed, “[t]o allow a party to avoid sanctions merely because the attempt to destroy evidence was unsuccessful would be to ignore one of the primary goals of sanctioning spoliative conduct.” Judge Barbier also recognized that “inherent powers should be exercised with restraint” and that courts in the Fifth Circuit “have a duty to impose the least severe sanction that is sufficient to deter future conduct.”

Ultimately, Judge Barbier found that plaintiff “intentionally altered evidence to make it appear more favorable to her case” and concluded that the least severe sanction that would still deter future similar conduct would be to impose the expert’s fees as a sanction on plaintiff.