

In *Mannion v. Ameri-Can Freight Systems Inc.*, 2020 WL 417492 (D. Ariz. Jan. 27, 2020), U.S. District Judge Dominic W. Lanza rejected plaintiff's proposed spoliation adverse inference jury instruction as being improper in terms of form and timing, the legal standards cited in the instruction, the lack of evidence to support granting the sanction, and a determination that no reasonable juror could resolve the instruction in favor of the plaintiff.

This matter arose from a vehicle collision. At the outset of the matter, the court set a deadline for completion of discovery and a procedure for resolving disputes. The court made clear that discovery disputes must be raised and resolved prior to the discovery deadline. Neither party raised discovery issues during this time or the subsequent motions practice. Nearly eight months following the close of discovery, the parties submitted proposed jury instructions. One instruction proposed by the plaintiffs would have (1) asked the jury to decide whether the defendants had engaged in spoliation of seven items of evidence and (2) permitted the jury to apply an adverse inference against the defendants if the jury made a spoliation finding. The defendants opposed this instruction. *Id.* at *1–*2.

The court first addressed whether the defendants forfeited their ability to oppose the plaintiff's proposed spoliation instruction given their pretrial conduct. When the parties jointly submitted their instructions, it appeared the defendants were stipulating to the use of the spoliation instruction at trial. In the simultaneous joint pretrial order, however, spoliation was identified as a disputed issue. The court concluded that despite the confusion created by the defendants' seeming acceptance of the instruction, the simultaneous pretrial order did indicate their opposition to the instruction. Therefore, they had not forfeited their ability to object. *Id.* at *2–*3.

Turning to the merits, the court found that the form and timing of the plaintiffs' request were improper. The plaintiffs had not filed any discovery-related motions during the pretrial phase but instead treated the matter as a jury issue. The court observed that "[s]poliation is a discovery offense, so issues surrounding alleged spoliation should be resolved during discovery — not on the eve of trial." *Id.* at *3 (citation omitted). The court determined that it could reject the plaintiff's instruction on this basis alone. In addition, Judge Lanza noted that federal law governs spoliation in federal court, with two sources of a district court's ability to sanction a party for spoliation of evidence being the court's inherent power to sanction and sanctions available under Fed. R. Civ. P. 37. These sources emphasize that judges, not juries, should make decisions related to spoliation sanctions. The court admitted that some courts have shared this power with the jury by allowing it to reassess the judge's factual findings. Assuming that was an appropriate method, in this case, the plaintiff had never raised the issue to the judge. Therefore, there was nothing for the jury to reassess in this matter. *Id.* at *4–*5.

The court next determined that the plaintiffs' proposed instruction misstated the applicable law. The instruction proposed by the plaintiffs was based on state, rather than federal, law. Under the governing Rule 37(e)(2), the party seeking an adverse inference instruction must show that (1) the ESI cannot be restored or replaced through additional discovery, and (2) the adverse party acted with the intent to deprive the other party of the use of the missing information. Neither of these requirements was included in the proposed instruction. With respect to non-ESI, the parties' proposed instruction included an erroneous standard altogether. *Id.* at *5–*6.

Next, the court determined that the plaintiff had not presented sufficient evidence to support the imposition of an adverse inference instruction under federal standards. The plaintiff had sought the instruction related to seven pieces of evidence. For the first — a business card identifying a witness to the collision — the court found that the plaintiff had other sources, including a police report, disclosing this information. An adverse inference instruction was not warranted for such evidence. *Id.* at *6.

The second was a driver's log of the trip leading up to the collision. While other sources had this information, the plaintiffs had never sought to subpoena them. Additionally, this log book was located by the defendants during the trial. While the court had barred the defendants from introducing the log books at trial, given the late disclosure, it "would have been bizarre to pretend the logs had been destroyed and then instruct the jury that it could infer the logs were unfavorable to Defendants."

The third category was bills of lading for the shipment of the defendants' vehicle at the time of the collision. The court determined that an adverse inference instruction was unwarranted for numerous reasons. For one, the bills of lading were not lost; there was simply a disagreement as to whether those produced were the actual bills of lading. This was an issue for pretrial motions, and, at this point, the court did not have the basis to determine whether these were the actual bills of lading. Second, the plaintiffs' failure to complain about the lack of production throughout discovery indicated that the plaintiffs did not find these documents particularly important. Third, the relevance of the documents was insignificant.

The fourth and sixth categories of evidence involved the defendants' vehicle's brake system. The court found that an adverse inference was not warranted with respect to these categories because (1) the plaintiff had requested the evidence too late, (2) mechanical inspectors had evaluated the vehicle following the collision and identified no mechanical issues, and (3) the plaintiffs' theory was based on failure of the driver rather than failure of the vehicle. *Id.* at *7.

The fifth piece of evidence was an accident investigation kit filled out by one of the defendants following the collision. The court found that because the defendants had produced this defendants' handwritten statement and the plaintiffs had failed to establish what additional information might be included in the kit, an adverse inference was not warranted.

The final piece of evidence was one of the defendants' personal and company wireless communication devices. While the plaintiff had requested production of these communications, they had never followed up after the defendant failed to respond to the request. Because the plaintiff failed to file a motion to compel or raise the issue with the court, they seemingly did not find the records important. Furthermore, they could have obtained the information by subpoenaing the cell phone provider directly.

Finally, the court found that no reasonable juror could have resolved the elements in the proposed instruction in the plaintiffs' favor, based on the evidence (or lack thereof) presented at trial. The trial had not touched on the topics listed in the proposed jury instruction.

For these reasons, the court rejected the proposed jury instruction.