

3. A U.S. District Court for the Western District of Virginia ruling that a defendant's representatives' continuous disregard for the court and its orders to provide the plaintiff with discovery warranted an adverse-inference jury instruction

In *Sines v. Kessler*, 2021 WL 1208924 (W.D. Va. March 30, 2021), Magistrate Judge Joel C. Hoppe found that one defendant's representatives' continuous disregard for the court and its orders to provide Plaintiff with relevant, discoverable materials warranted an adverse-inference jury instruction under Federal Rules of Civil Procedures 37(b)(2) and 37(e).

This civil rights action arose from the "Unite the Right" rallies held by a number of defendants in Charlottesville, Virginia, in August 2017. Plaintiffs, several local residents who were injured during the events, filed suit against the defendants, alleging that they "conspire[ed] to engage in violence against racial minorities and their supporters," in violation of the Civil Rights Act of 1871 and related state laws. *Id.* at *5. Plaintiffs also alleged that one Defendant, a white nationalist group, had a key role in planning the rallies, primarily via invite-only online platforms its members used to communicate. Plaintiffs cited a number of messages from this platform, which referenced various acts of violence before, during, and after the Unite the Right events.

After Plaintiffs initially filed suit, Defendant's officer and managing agent, Dillon Hopper, accepted service of process on its behalf. He then hired an attorney to represent Defendant. In response to Plaintiffs' first set of requests, Hopper provided "vague, evasive, and materially incomplete" responses. *Id.* at *6. He also indicated that he had not taken steps to preserve potentially responsive materials. Hopper and Thomas Rousseau, one of Defendant's other agents, continued similar discovery misconduct over the next 18 months, including disobeying a number of the court's orders related to discovery. As a result, "the litigation slowed and everyone else's costs piled up." From the onset of the litigation, Hopper's "consistent practice" was to "ignore outright the court's orders or submit chaotically and defectively to them." *Id.* (citations omitted). For these reasons, Magistrate Judge Hoppe had previously found that Hopper acted in bad faith and that Defendant's "repeated and ongoing misconduct so far ha[d] caused significant procedural prejudice to Plaintiffs' ability to resolve their claims in a just, speedy, and inexpensive manner." *Id.* at *7. Following this finding, Hopper wrote a letter to the court assuring it that Defendant would work diligently to comply with the court's orders. Believing that production was preferable to sanctions and awaiting deposition testimony of Defendant's agents regarding preservation of evidence, Magistrate Judge Hoppe held off on imposing sanctions at that time.

During Defendant's representatives' depositions, they testified that, though they were Defendant's leadership and social media managers during the relevant time period, they were unable to access any of the information in these accounts, including the usernames and passwords. Hopper claimed he had not understood the requests for documents he had received, though he did not indicate whether he had requested assistance from Defendant's attorney. Furthermore, despite agreeing during his deposition to submit his phone to a vendor for processing, Hopper failed to do so for five months following his deposition. When he finally provided the phone, the vendor was unable to collect relevant ESI. During Rousseau's deposition, he testified that he had not taken any steps to preserve information relevant to the litigation. Instead, he stated that he usually set up social media accounts so that messages would periodically delete automatically. *Id.* at *7-*8.

Plaintiffs filed a motion for sanctions, requesting a jury instruction that Defendant intentionally withheld discoverable documents and allowing the jury to draw adverse inferences from that fact, including that agents of Defendant “chose to withhold such documents because [the agents were] aware that such documents contained evidence that [Defendant] conspired to plan racially-motivated violence” at the Unite the Right rallies. *Id.* at *1.

Magistrate Judge Hoppe first discussed relevant portions of Rules 26 through 37 of the Federal Rules of Civil Procedure. He noted that courts depend on “the good faith and diligence of counsel and the parties in abiding by these rules and conducting themselves and their judicial business honestly.” *Id.* at *2. When the parties fail to do so, the Rules allow the court to sanction a misbehaving party through Rules 37(b)(2) and 37(e).

Rule 37(b)(2) allows a district court to impose sanctions when a court order is in effect and that order has been violated. The Fourth Circuit’s framework for which sanction to impose requires a court to consider “(1) whether the non-complying party acted in bad faith, (2) the amount of prejudice that noncompliance caused the adversary, (3) the need for deterrence of the particular sort of non-compliance, and (4) whether less drastic sanctions would have been effective.” *Id.* at *3. Adverse-inference jury instruction sanctions require the court to find that the party acted willfully or in bad faith.

Rule 37(e) dictates the court’s ability to impose sanctions when a party has failed to preserve ESI. A spoliation sanction may be appropriate if (1) the ESI should have been preserved; (2) the ESI was lost; (3) the loss was caused by a party’s failure to take reasonable steps to preserve the ESI; and (4) the ESI cannot be restored or replaced through additional discovery. The first factor is met when the court finds the party should have reasonably anticipated litigation and should have known that the evidence at issue would be relevant to that litigation. If the movant establishes this, the court must then determine whether the movant has also established one of two options that permit imposing sanctions. First, if the court finds there was prejudice to another party from loss of the information, it may impose sanctions “no greater than necessary to cure the prejudice.” *Id.* (citation omitted). Second, if the court finds a party intended to deprive another party of information, the court may presume that the information would have been unfavorable to the party who lost it and may instruct the jury that it may or must so presume, or dismiss the case or enter a default judgment.

Based on these rules, Magistrate Judge Hoppe found that Defendant’s “continued disregard for th[is] Court and its orders to provide or permit discovery of relevant materials within their control, leaves no doubt that a permissive adverse-inference instruction against [Defendant] is warranted under either Rule 37(b)(2) or Rule 37(e).” *Id.* at *8. (internal quotation omitted).

First, Defendant had a duty to preserve the requested ESI and other materials that were lost. The duty to preserve evidence arises as soon as a party “reasonably should know that the evidence may be relevant to anticipated litigation.” *Id.* (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001)). Defendant’s duty arose, at the latest, when Hopper was served with the summons and complaint. Despite this, Hopper took “no special steps” to preserve relevant materials or to identify other key players with relevant information. *Id.* at *9. Rousseau continued to use automatic deletion features when he was able. According to their deposition testimony,

neither Hopper nor Rousseau could recall how to log into the relevant accounts. Thus, these materials were lost and could not be restored.

Second, Defendant's failure to produce these relevant materials harmed Plaintiff's ability to prove their allegations. In attempting to prove a conspiracy, which is inherently difficult, Plaintiffs sought documents that would demonstrate Defendant's agreements with co-conspirators to engage in racially motivated violence. Hopper and Rousseau's failure to preserve and produce these types of materials "leaves an evidentiary gap justifying an appropriately tailored sanction against [Defendant]." *Id.* (internal quotation omitted).

Third, Defendant's agents "acted with the intent to deprive [the plaintiffs] of the information's use in th[is] litigation." *Id.* (quoting Fed. R. Civ. P. 37(e)). Magistrate Judge Hoppe had first found that Hopper acted in bad faith over a year earlier. Following this finding, Hopper claimed that the discovery responses had slipped his mind and assured the court he would work diligently to respond to the requests. However, it turned out it had not slipped Hopper's mind — in fact, Hopper had been discussing the litigation online. Hopper merely disregarded the lawsuit. Rousseau's actions indicated that he was similarly resistant and indifferent to his obligations. "On this record, Hopper's and Rousseau's failure to preserve and produce materials that 'naturally would have elucidated a fact at issue permits an inference' that they knew giving such information to Plaintiffs 'would have exposed facts unfavorable' to [Defendant] or its case." *Id.* (quoting *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995)).

Finally, "sanctions less severe than a permissive adverse-inference instruction" would not be effective. *Id.* at *10. Attorney's fees for the procedural prejudice suffered by Plaintiffs had already been awarded. Hopper and Rousseau continued to fail to produce requested materials, and their reasons for being unable to do so were not always believable. Magistrate Judge Hoppe determined that Defendant "clearly is unwilling to obey this Court's orders even under threat of severe Rule 37 sanctions." Magistrate Judge Hoppe therefore granted plaintiffs' request for a permissive adverse-inference instruction, subject to the presiding district judge's approval.