

1. A decision from the U.S. District Court for the Southern District of Ohio finding that a “an experienced businessman” was negligent in failing to discover and disable an auto-delete function on his phone that resulted in the loss of relevant text messages and granting spoliation sanctions.

In *Safelite Group, Inc. v. Nathaniel Lockridge, et al.*, No. 21-cv-04558, 2024 WL 4343038 (S.D. Ohio Sept. 30, 2024), Chief U.S. District Judge Sarah D. Morrison assessed whether to grant spoliation sanctions based on an individual’s failure to remove an auto-delete function that resulted in the loss of relevant text messages.

Plaintiff, an auto-glass and repair and replacement company, brought this action against a competitor and certain of its former employees alleging misappropriation of trade secrets and interference with its employment contracts and business relationships. *Id.* at 1.

Defendant Nathaniel Lockridge resigned from Plaintiff’s employ in August 2021 and immediately began working for a competitor. Documents produced during discovery reflected that Lockridge spoke to and texted with other of Plaintiff’s employees for the purpose of recruiting them to work for the same competitor. On August 27, 2021, Plaintiff sent Lockridge a detailed cease-and-desist letter reminding him of his nonsolicitation obligations, demanding assurances that he was complying with those obligations, and threatening legal action absent such assurances. *Id.* at 1-2.

Plaintiff filed this action on September 13, 2021, and Lockridge was served with the complaint shortly thereafter. *Id.* at 3. Lockridge met with counsel on October 7, 2021, and was advised of his obligation to retain and not destroy, delete, or throw away any documents, records, or communications that dealt with the allegations in the lawsuit. He received a written litigation hold in November 2021.

During discovery, Plaintiff asked Lockridge to produce certain communications, including text messages. However, Lockridge admitted that he made no effort to preserve his text messages until February 3, 2022, when he claims to have discovered that his cell phone was set to delete any text messages older than 30 days. As a result, Lockridge did not preserve any text messages sent or received before January 4, 2022. Plaintiff filed a motion for an order finding that Lockridge spoliated evidence, imposing an adverse-inference sanction, and awarding costs and expenses.

Chief Judge Morrison began her analysis by explaining that a party to civil litigation has “a duty to preserve information, including [ESI], when he knows (or should know) that the information may be relevant to future litigation.” Quoting from Rule 37(e), she further explained that a party seeking sanctions for spoliation of ESI must show that (1) ESI that “should have been preserved in the anticipation or conduct of litigation” was lost; (2) the party responsible for preserving the information “failed to take reasonable steps to preserve” it; and (3) the information “cannot be restored or replaced through additional discovery.”

Chief Judge Morrison next explained that once these elements are satisfied, differing sanctions can be granted depending on the “cause and effect of the spoliation.” First, under Rule 37(e)(1), a court can impose sanctions that are “no greater than necessary to cure the prejudice” if the loss of information prejudices the movant, regardless of the nonproducing party’s intent. Alternatively, under Rule 37(e)(2), a court can impose more severe sanctions if (and only if) the court finds that the nonproducing party intended to deprive the movant of the information’s use in the litigation.

Chief Judge Morrison found that Plaintiff satisfied each of the elements of a spoliation claim against Lockridge.

First, she found that Lockridge was on notice of his duty to preserve after receiving Plaintiff’s August 27 cease-and-desist letter. *Id.* at 4. She noted that courts use an objective standard to determine the point at which a party is put on notice, and the “question thus becomes, when the non-producing party should have known that the evidence may be relevant to future litigation — not when he subjectively learned of the litigation.” She concluded that the August 27 letter was “detailed and specific” and directly threatened legal action.

Chief Judge Morrison rejected Lockridge’s argument that no duty could be imposed on him by Plaintiff’s August 27 cease-and-desist letter because he was a “lay person.” She noted that this argument was inconsistent with the applicable objective standard and counter to the relevant authorities’ finding that a party’s inexperience in litigation is a factor in evaluating whether he took reasonable steps to preserve evidence — not whether he had a duty to preserve.

Chief Judge Morrison also found that the lost text messages were likely relevant to the litigation. *Id.* at 4-5. She cited a number of circumstantial facts in support of this finding. For example, she cited to evidence that Lockridge texted and spoke on the phone to a number of individuals that were listed in an email he sent to his new employer and that Lockridge exchanged an unusually high volume of texts with one of those individuals in September 2021. In light of this

circumstantial evidence, Chief Judge Morrison rejected Lockridge's argument that he was texting the relevant individuals "as friends — about family and shared interests."

Second, Chief Judge Morrison found that Lockridge failed to take reasonable steps to preserve the text messages. She explained that Rule 37(e) "does not call for perfection," and courts consider a "party's familiarity with litigation, level of control over the lost evidence, resources, and any evidence of the routine, good faith operation of an information retention system." Chief Judge Morrison concluded that Lockridge made no effort to preserve his text messages, which were under his exclusive control, despite having the "wherewithal and the resources to discuss his obligations" with counsel.

Chief Judge Morrison declined to credit Lockridge's assertion that "he did not know his phone automatically deleted text messages after 30 days," finding that "Lockridge is an experienced businessman" and "[i]t is not plausible that a modern, professional smartphone user like Lockridge could carry on for four years without realizing that his text messages disappeared after 30 days."

Chief Judge Morrison also faulted Lockridge's counsel, who were obligated not only to implement a litigation hold but to monitor Lockridge's efforts to retain and produce the relevant documents. While Lockridge's counsel orally advised him of the "obligation to retain and not destroy, delete, or throw away any documents, records, or communications that dealt with the allegations in the lawsuit," Chief Judge Morrison stated that "an oral litigation hold is insufficient to reasonably protect against the spoliation of evidence."

Third, Chief Judge Morrison found that Lockridge's text messages could not be restored or replaced through additional discovery. *Id.* at 5-6. Plaintiff demonstrated that it was unable to obtain the text messages by other means, including from the other parties to those text messages. She also concluded that there was no substitute for the messages, because "[w]ithout the lost text messages, Plaintiff is deprived of the opportunity to know the precise nature and frequency of those private communications, which occurred during a critical time period."

Having concluded that Plaintiff demonstrated spoliation, Chief Judge Morrison turned to the appropriate sanction. She found that Plaintiff merited sanctions under Rule 37(e)(1) because Plaintiff showed that Lockridge was negligent in failing to preserve the text messages and Plaintiff was prejudiced by Lockridge's failure. Chief Judge Morrison explained that "[p]rejudice can be properly understood as a party's ability to obtain the proofs necessary for its case ... which is another way of saying the loss of ESI could negatively impact a party's ability to make its case, or prejudice that party because of the loss of information." Referring to the Advisory

Committee's notes to the 2015 amendment to Rule 37(e), she further explained that "[t]he rule does not place a burden of proving or disproving prejudice on one party or the other" but "leaves judges with discretion to determine how best to assess prejudice in particular cases."

Chief Judge Morrison stated that Plaintiff had demonstrated prejudice by proffering evidence that Lockridge exchanged extensive text messages with relevant individuals during a critical time period, and was communicating with his new employer about those individuals during that same critical period. She noted that prejudice could be found based on the fact that Plaintiff was "required to piece together information from other sources to try to recover relevant documents." Id. at 6.

With respect to the specific sanction, Chief Judge Morrison stated sanctions under Rule 37(e)(1) were appropriate based on Lockridge's negligent failure to preserve the text messages. She explained that "[t]he severity of the sanction is determined on a case-by-case basis, depending in part on [the] non-producing party's level of culpability," but must be "no greater than necessary to cure the prejudice." After "consider[ing] the record as a whole in assessing the extent to which [Plaintiff] has been prejudiced by the lost text messages," Chief Judge Morrison concluded that Plaintiff should be permitted to introduce evidence at trial of the August 27 letter and of Lockridge's failure to preserve his text messages. In addition, both Plaintiff and Lockridge would be permitted to present evidence and argue with respect to the appropriate inference that the jury should draw.

Accordingly, Chief Judge Morrison granted Plaintiff's motion for spoliation sanctions and ordered that the parties would be permitted to present admissible evidence of Lockridge's duty to preserve his text messages, and negligent failure to do so, and argument on whatever inference the jury should take from that evidence. She further awarded Plaintiff attorneys' fees and costs under Rule 37(a)(5)(A).