IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

NICOLAS WILLIAM GORDON and, ERICA GORDON Plaintiffs, vs. ERIC ALMANZA, TRANSWOOD LOGISTICS, INC., TRANSWOOD INC., J.C. FLEMING, INC., LEASCO, INC., and TRANSWOOD CARRIERS, INC., Defendants.	No. 4:16-cv-00603 **ORDER**

This matter comes before the Court pursuant to Plaintiffs' motion for evidentiary sanctions. [Dkt. No. 108] Plaintiffs move for an adverse inference instruction for the alleged spoliation of four items of evidence. Defendants responded on January 30, 2018. [Dkt. No. 109] For the reasons below, the Court denies the motion.

I. STATEMENT OF THE FACTS

This is a personal injury action over a near-fatal tractor-trailer collision between Plaintiff Nicolas Gordon and Defendant Eric Almanza ("Almanza"). The Court refers to the summary judgment order for a more thorough discussion of the accident and the facts of the case.

Almanza has insisted that he collided with Nicolas Gordon's vehicle because he took his eyes off the road to place a soft drink into a cupholder. Plaintiffs do not believe this explanation. They believe that Almanza was driving while using his cellular telephone in some capacity and was likely not wearing his prescription glasses. There is no direct evidence in support of either contention.

Almanza destroyed his cellular telephone shortly after the accident. On November 25, 2014, Almanza threw his cellular telephone against the wall. He asserts that he did this out of frustration after a failed romantic encounter. No data was preserved from the cellular telephone.

Unfortunately, this means there is limited cellular telephone evidence from the time of the accident. Defendants did not preserve any phone data before the cellular telephone was destroyed and Verizon only maintains text message records for one prior rolling calendar year. Plaintiffs assert that Defendants intentionally destroyed the cellular telephone in anticipation of this litigation.

In addition, Defendants did not produce some of Almanza's driving logs or bills of lading. Defendants did not produce bills of lading from training trips or from the day of the collision. They also did not produce driving logs from the training drives between August 26 to August 29, or September 2, 2014. Finally, Plaintiffs allege that Defendants did not produce the copy of the driver's manual that Almanza received. Plaintiffs accordingly move for an adverse inference instruction claiming spoliation as to these four items of evidence.

II. STANDARD OF REVIEW

"A court's inherent power includes the discretionary 'ability to fashion an appropriate sanction for conduct which abuses the judicial process.'" *Stevenson v. Union Pac. R. Co.*, 354 F.3d 739, 745 (8th Cir. 2004). Such conduct includes the spoliation of evidence; "[s]anctioning the ongoing destruction of records during litigation and discovery by imposing an adverse inference instruction is supported by either the court's inherent power or Rule 37 of the Federal Rules of Civil Procedure." *Id.* "[F]ederal law applies to the imposition of sanctions for the spoliation of evidence." *Sherman v. Rinchem Co.*, 687 F.3d 996, 1006 (8th Cir. 2012).

III. ANALYSIS

"District courts have inherent authority to impose sanctions when a party destroys evidence that it knows or should know is relevant to potential litigation and thereby prejudices its potential adversary." *Hickerson v. Pride Mobility Prod. Corp.*, 243 F.R.D. 357, 359 (W.D. Mo. 2007). For "'an adverse inference instruction for spoliation to be warranted, a district court is required to make two findings: '(1) there must be a finding of intentional destruction indicating a desire to suppress the truth, and (2) there must be a finding of prejudice to the opposing party.'" *Lincoln Composites, Inc. v. Firetrace USA, LLC*, 825 F.3d 453, 463 (8th Cir. 2016). The parties dispute whether bad faith is required to impose sanctions.

Plaintiffs assert that "no finding of bad faith is required for the imposition of an evidentiary sanction of an adverse inference instruction when the evidence was destroyed when litigation was imminent." [Dkt. No. 108-1 Pg. 1] The Eighth Circuit Court of Appeals has affirmed the

imposition of sanctions without a showing of bad faith in several cases. For example, "a district court does not abuse its discretion by imposing sanctions, even absent an explicit bad faith finding, where a party destroys specifically requested evidence after litigation has commenced." *Gallagher v. Magner*, 619 F.3d 823, 845 (8th Cir. 2010). Plaintiffs primarily rely on *E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 589 (D. Minn. 2005). In that case, the trial court concluded the party seeking sanctions "need not demonstrate bad faith or wilful intent to destroy" "because the destruction occurred after . . . [the] [d]efendants were aware of the potential for litigation." *Id*. In that case, however, related litigation had already begun and litigation was clearly imminent as the spoliator received notice "that the court was investigating [them for the alleged scheme at the basis of those proceedings]." *Id*. Further, in the same order, the *E*Trade* court still concluded, "[i]f destruction of relevant information occurs before any litigation has begun, in order to justify sanctions, the requesting party must show that the destruction was the result of bad faith," and undertook a bad faith analysis. *Id.*

This is in line with Eighth Circuit precedent. The Eighth Circuit has recognized that to impose sanctions for the pre-litigation destruction of evidence "there must be a finding of intentional destruction indicating a desire to suppress the truth." *Sherman v. Rinchem Co.,* 687 F.3d 996, 1006 (8th Cir. 2012); *see Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007); *Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002, 1006 (8th Cir. 2006) (affirming sanctions after performing bad-faith analysis); *Stevenson v. Union Pac. R. Co.*, 354 F.3d 739, 747 (8th Cir. 2004). "Intent rarely is proved by direct evidence, and a district court has substantial leeway to determine intent through consideration of circumstantial evidence, witness credibility, motives of the witnesses in a particular case, and other factors." *Morris v. Union Pac. R.R.*, 373 F.3d 896, 901 (8th Cir. 2004). "The ultimate focus for imposing sanctions for spoliation of evidence is the intentional destruction of evidence indicating a desire to suppress the truth, not the prospect of litigation." *Greyhound Lines*, 485 F.3d at 1035. This Court has found that "[a]n adverse inference instruction is not appropriate when evidence is lost or destroyed and the court is unable to determine the evidence is intentionally destroyed." *Rock v. Smith*, 985 F. Supp. 2d 1066, 1071 (S.D. Iowa 2013).

Second, "[t]here must be a finding of prejudice to the opposing party before imposing a sanction for destruction of evidence." *Stevenson*, 354 F.3d at 748. This element requires a fact-intensive inquiry of the nature of the destroyed evidence. There is no prejudice where there is "no

evidence that the [spoiled document] contained anything that would have harmed [the spoliator] or helped [the harmed party] in the course of [] litigation." *Koons v. Aventis Pharm., Inc.*, 367 F.3d 768, 780 (8th Cir. 2004). For example, in *Stevenson*, the Court upheld sanctions even though "there [was] no indication that the . . . [destroyed audio recording] could be classified as a smoking-gun," because "it [was] the only recording of conversations between the engineer and dispatch contemporaneous with the accident." *Stevenson*, 354 F.3d at 746. "In evaluating prejudice, [courts] have looked to whether an allegedly harmed party took other available means to obtain the requested information." *Gallagher v. Magner*, 619 F.3d 823, 844 (8th Cir. 2010).[1]

Sanctions are unwarranted here for the alleged spoliation of the four items of evidence. The Court first considers the cellular telephone. The evidence does not demonstrate either requisite element. Plaintiffs fail to satisfy the first element because it is pure speculation that TransWood and Almanza intentionally destroyed the cellular telephone. The only evidence on the destruction of the cellular telephone is Almanza's testimony that he threw the cellular telephone against the wall after a failed romantic encounter. Further, the Court finds that the destruction of the cellular telephone resulted in no prejudice to the Plaintiffs. As mentioned in the motion for summary judgment, there is no evidence supporting the contention that Almanza was on his cellular telephone at the time of the accident. The destruction of the cellular telephone has not prevented Plaintiffs from retrieving virtually all data needed to determine if Almanza was on his cellular telephone. Plaintiffs have the following records of phone use:

> 1. Voice records from Verizon indicating that Almanza was not calling anyone at the time of the accident.
> 2. Records from Facebook and Facebook Messenger showing that Almanza did not access either at the time of the accident.

To be sure, there are gaps because of the destruction of the cellular phone. There are no text records from the time of the collision because Verizon only keeps them for one rolling year. Further, Plaintiffs claim that Almanza was possibly using some other app. This, however, is pure speculation. Almanza testified that he used no other phone apps at the time of accident and Plaintiffs made no effort to discover data from other possible app providers. Without any showing

[1] Plaintiffs briefly argue that defendants failed to comply with 49 C.F.R. § 395.8(k) by not preserving the cellular telephone or the other three items of evidence. The Court rejects this argument. The regulation simply requires motor carriers to retain records for "6 months from the date of receipt." 49 C.F.R. § 395.8(k).

of prejudice or intentionality, the Court must reject sanctions for the destruction of the cellular telephone.

The Court also denies the imposition of sanctions for the alleged spoliation of the driver's logs, bills of lading, and driver's manual. Even if the defendants had and destroyed these items of evidence there is no prejudice to the Plaintiffs. For example, the Plaintiffs assert that the driving logs from the training drives are necessary to determine whether Almanza had a history of distracted driving or corporate defendants had a history of authorizing their drivers to use cellular telephones while driving. This is irrelevant to the determination of the cause of the collision at issue or the amount to award for damages. As discussed in the summary judgment order, there is no genuine issue of material fact over whether Almanza used his cellular telephone at the time of the collision. Further, there is no evidence that the driving logs from the training drives were intentionally destroyed to "suppress the truth," as Defendants could not have anticipated their relevance to future litigation.

These same arguments are equally applicable to bills of lading. First, although Defendants admit that the bills of lading are lost somewhere in a "cyber world," there is no evidence that Defendants intentionally destroyed them in anticipation of this lawsuit. Second, Plaintiffs suffer no prejudice from the inability to access the bills of lading. Plaintiffs contend that if "the bills of lading [were] available, [they] would have compared them to Almanza's phone usage/data, GPS data, and logs under section B to evaluate Almanza's overall credibility, his hours of service, the truthfulness of his statements regarding his negligence causing the accident, his purported record of duty status/log, and/or whether or not Almanza placed or received calls/text messages." Bills of ladings, however, are records of cargo delivery. In essence, they are delivery receipts. The information contained within them is irrelevant to the collision or the determination of the cause of said collision. Further, even if the bills of lading were somehow relevant, there is no evidence suggesting that the Defendants were aware of their relevance to potential litigation.[2]

Finally, the Court considers the driver's manual. Plaintiffs insist that Defendants produced the wrong driver's manual in discovery. Almanza signed a receipt for a manual revised on March

[2] Defendants speculate that Plaintiffs mistakenly referred to documents known as "Trip Data Sheets" as "Bills of Lading." Plaintiffs, however, have not filed a reply or made any indication in the motion for the sanctions that this is the case. The Court accordingly does not consider this possibility.

24, 2014. The manual produced is dated as revised on June 6, 2012. Defendants contend that the March 24, 2014 revision date is not for the manual but for the *receipt form* for the manual. Plaintiffs offer no evidence to dispute this explanation, or otherwise in support of their contention that Defendants provided them with the wrong manual. The Court denies sanctions here.

IV. CONCLUSION

Sanctions are unwarranted here. Plaintiffs provide no support for their contentions that any evidence was intentionally destroyed or that prejudice stemmed from the alleged spoliation.

Upon the foregoing,

IT IS ORDERED that Plaintiffs' Motion for Sanctions is **DENIED**.

DATED this 5th day of March, 2018.

JOHN A. JARVEY, Chief Judge
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA