



## DISCUSSION:

There is no evidence to support a finding that Defendants intentionally destroyed any material relevant to Plaintiffs' claims. Rather, it appears that some electronically stored data sought by Plaintiffs in discovery was unrecoverable, due to the fact that Rhoads & Sinon, LLP decommissioned its former computer file servers (hereinafter the "File Servers") when the firm ceased doing business. The issue presented by Defendants' motion is what, if any, evidence should be presented to the jury regarding the lost data.

The Count notes the discussion of a similar issue in the matter of *Hammons v. Ethicon, Inc.*, 190 A.3d 1248 (Pa.Super. 2018), where our Superior Court observed as follows:

Spoliation standards do not apply, however, when the trial court merely considers whether to permit evidence during trial that a party destroyed documents. A decision cited in Ethicon's brief, *Caparotta v. Entergy Corp.*, 168 F.3d 754 (5th Cir. 1999), is instructive. There, the district court declined to give an adverse inference instruction to the jury but permitted the plaintiff to introduce evidence that the defendant had destroyed documents. The Fifth Circuit observed that the decision whether to give an adverse inference instruction is distinct from the decision whether to admit evidence of document destruction for the jury to consider with other trial evidence: Entergy correctly points out that under this court's holding in *Vick v. Texas Employment Commission*, 514 F.2d 734, 737 (5th Cir. 1975), an adverse inference drawn from the destruction of records is predicated on bad conduct by the defendant. Because the district court found no bad faith, Entergy argues that evidence of the inadvertent destruction of documents should not have been presented to the jury. Entergy is correct to the extent that it argues the spoliation doctrine did not apply and that the jury could not be instructed that the destroyed evidence was unfavorable to Entergy. However, *Vick* does not apply to the issue of whether the district court could nonetheless admit the fact of the destruction of documents for the jury to weigh with the other evidence in the case because such evidence was relevant. *Caparotta*, 168 F.3d at 757. The proper test was not spoliation standards but the usual evidentiary standards of relevance and prejudice. *Id.* at 757–58. Here, as in *Caparotta*, the trial court denied Hammons' request for an adverse inference instruction but permitted Hammons to introduce evidence of Ethicon's destruction of documents. *Caparotta* teaches that the test governing admission of this evidence is relevance and prejudice, not the three-prong spoliation test. As an appellate court, we review the trial court's application of relevance and prejudice standards for abuse of discretion. *Commonwealth v. Tyson*, 119 A.3d 353, 357 (Pa. Super. 2015). "[A]n abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will[,] or partiality, as shown by the evidence or the record." *Commonwealth v. Cameron*, 780 A.2d 688, 692 (Pa. Super. 2001).

We hold that the trial court acted within its discretion by permitting Hammons to present Mittenenthal's testimony that Ethicon destroyed large numbers of documents within the computer files of high-ranking Ethicon officials. As the trial court observed in its opinion, Mittenenthal testified that the entire computerized files of multiple officers involved in Prolift's development were wiped away. P-3411, at 4, 16-19, 20-21. Since other high-ranking officials at Ethicon had thousands of documents in their files, it was reasonable to infer that the destroyed documents numbered in the thousands, if not in the tens of thousands. The absence of these documents was relevant, because Hammons had the burden of proof, and the jury might have held the documents' absence against her unless she demonstrated why they were missing. Moreover, the absence of the documents was relevant to the jury's consideration of the credibility of witnesses whose documents were destroyed. For example, Owens testified that she frequently communicated by email about Prolift with Prolift's inventors, Professor Jacquetin and Dr. Cosson. She testified that Jacquetin and Cosson never indicated Prolift should not have been launched in March 2005, or that Prolift was counter-indicated in sexually active women. D-23 at 5-7. Because Ethicon wiped clean Owens' custodial file, Hammons' counsel was hampered in cross-examining Owens, because counsel could not challenge her credibility on whether these purported conversations took place or their content. Mittenhall's testimony about Ethicon's destruction of records allowed Hammons to explain to the jury why Owens' email exchange was not presented for their consideration.

*Hammons v. Ethicon, Inc.*, 190 A.3d 1248, 1281-1282 (Pa.Super. 2018),

It appears inevitable that the jury will learn that Rhoads & Sinon, LLP has ceased doing business. Plaintiffs sought a variety of electronically stored material from the “File Servers”). As a result of the fact that those file servers were decommissioned years ago, some electronically stored material was recovered from the File Servers, but other material was not.

Under these facts, it appears that Plaintiffs are entitled to prove, either through limited testimony, or through a mutually acceptable stipulation, at least the following:

1. Rhoads & Sinon, LLP, maintained computer File Servers which stored emails, correspondence, documents, billing records, and other electronically stored data, all of which was created and maintained in the ordinary course of business.
2. At the time that Rhoads & Sinon, LLP, ceased doing business, those File Servers were decommissioned, and placed in storage.
3. After this litigation was filed, Plaintiffs sought copies of all materially relevant to the professional services provided by Rhoads & Sinon, LLP, to the Plaintiffs, including all data formerly stored on the decommissioned File Servers.

4. Defendants arranged to re-commission the File Servers, in an effort to secure the data requested by Plaintiffs. At that time, Defendants discovered that emails stored on the File Servers were available, but correspondence, documents, billing records, and other electronically stored data formerly stored on the File Servers were lost.
5. There is no evidence that any individual or company deliberately deleted or destroyed any information from the File Servers. Rather, it appears that data formerly stored on the Fire Servers was lost as a result of the fact that the File Servers were decommissioned.

### **ORDER**

And now, this \_\_\_ day of June, 2026, for the reasons more fully set forth above, Defendants' Motion in Limine No. 3, is denied. Plaintiffs will be permitted to introduce at trial limited testimony, or a mutually acceptable stipulation, consistent with the facts set forth above. Nothing set forth herein is intended to preclude the Defendants from introducing testimony to explain the circumstances under which the File Server data was lost. Nothing set forth herein is intended to indicate what, if any, instruction to the jury might be appropriate regarding the lost documents.

BY THE COURT,

William P. Carlucci, Judge

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