

OPINION OF THE FOURTH CIRCUIT
DENYING REVERSAL
(SEPTEMBER 17, 2018)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES LINLOR, CAPT.,

Plaintiff-Appellant,

v.

MICHAEL POLSON,

Defendant-Appellee.

No. 18-1303

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.

Anthony John Trenga, District Judge.
(1:17-cv-00013-AJT-JFA)

Before NIEMEYER and KING, Circuit Judges, and
HAMILTON, Senior Circuit Judge.

PER CURIAM

James Linlor appeals the district court's order
denying relief on his complaint filed pursuant to
*Bivens v. Six Unknown Named Agents of Fed. Bureau
of Narcotics*, 403 U.S. 388 (1971), and denying reconsi-
deration. We have reviewed the record and find no
reversible error. Accordingly, we deny Linlor's motion

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to supplement the record and affirm for the reasons stated by the district court. *Linlor v. Polson*, No. 1:17-cv-00013-AJT-JFA (E.D. Va. Feb. 1, 2018 & Mar. 16, 2018). Additionally, we deny Linlor's motions for sanctions, and we dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

Affirmed

**ORDER OF THE DISTRICT COURT OF VIRGINIA
DENYING PLAINTIFF'S MOTION TO
AMEND RECORD FOR APPEAL
(APRIL 6, 2018)**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JAMES LINLOR,

Plaintiff,

v.

MICHAEL POLSON,

Defendant.

Civil Action No. 1:17-cv-0013 (AJT/JFA)

Before: Anthony J. TRENGA,
United States District Judge.

This matter is before the Court on Plaintiff's Motion for District Court Additions to the Record on Appeal Pursuant to FRAP 10(e) [Doc. No. 310] (the "Motion"). On March 22, 2018, Plaintiff appealed the Court's February 1, 2018 Order [Doc. No. 289] granting Defendant's motion for summary judgment. *See* [Doc. No. 308] ("Amended Notice of Appeal"). Plaintiff now seeks to supplement the record on appeal by adding several documents he claims are relevant but were not previously filed. Motion ¶¶ 3, 4.

The record on appeal includes: “(1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk.” Fed. R. App. P. 10(a). The record may be modified or supplemented by the district court: “(1) if any difference arises as to what actually occurred before it, or (2) if anything material to either party is omitted from the record by error or accident.” *Himler v. Comprehensive Care Corp.*, 790 F. Supp. 114, 115 (E.D. Va. 1992) (citing Fed. R. App. P. 10(e)). However, the purpose of Rule 10(e) is not to allow a district court to add to the record on appeal matters that “did not occur there in the course of the proceedings leading to the judgment under review.” *Thomas v. Lodge No. 2461 of Dist. Lodge 74 of Intl Ass ‘n of Machinists & Aerospace Workers, AFL-CIO*, 348 F.Supp.2d 708, 710 (E.D. Va. 2004) (citations and quotation marks omitted). Moreover, a district court may properly refuse to supplement the record on appeal with discovery documents that were not filed or brought to the attention of the district court. *Rohrbough v. Wyeth Labs., Inc.*, 916 F.2d 970, 973, n.8 (4th Cir.1990)).

None of the documents Plaintiff seeks to add to the record were previously filed or brought to the attention of the Court in connection with the parties’ summary judgment motions or Plaintiff’s motion for reconsideration. *See Motion ¶¶ 1-9*. Plaintiff therefore seeks to add to the record matters that were not part of the proceedings under review on appeal. While “omission by error” can serve as a basis for supplementing the record, there must be a showing that the documents are “material” as well as some explanation that excuses that omission. *See Fed. R. App. P. 10(e)(2)*).

Here, Plaintiff seeks to supplement the record to include a “[s]tatement of 3/12/18 surgery,” Motion ¶ 1; “[f]ull transcripts of depositions,” *id.* ¶ 2; “record from a related case,” *id.* ¶ 3; and “[c]opy of DOT/FAA regulations,” *id.* ¶ 4. The only category that arguably contains material documents is deposition transcripts, although Plaintiff does not specifically identify which parts of those transcripts would have been relevant or admissible evidence in connection with the Court’s consideration of summary judgment. In any event, Plaintiff does not explain why these were not previously presented other than that he omitted them “by error.” But courts have long rejected efforts to supplement the record under Rule 10(a) with transcripts that were available in connection with challenged rulings. *See, e.g., Fassett v. Delta Kappa Epsilon*, 807 F.2d. 1150, 1165 (3d Cir. 1986). For these reasons, Plaintiff has presented no grounds upon which to supplement the record.¹ Accordingly, it is hereby

ORDERED that Plaintiff’s Motion for District Court Additions to the Record on Appeal Pursuant to FRAP 10(e) [Doc. No. 310] be, and the same hereby is, DENIED.

The Clerk is directed to forward copies of this Order to all counsel of record and to the *pro se* Plaintiff at his listed address.

¹ Plaintiff also seeks clarification whether the “Doll video,” Filed on January 2, 2018, will automatically be transmitted to the Fourth Circuit. The “Doll video” is considered an “exhibit” pursuant to Fed. R. App. P. 10(a) and will be transmitted to the Fourth Circuit for the Court’s consideration on appeal.

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/s/ Anthony J. Trenga

United States District Judge

Alexandria, Virginia

April 6, 2018

ORDER OF THE DISTRICT COURT DENYING
PLAINTIFF'S DISPOSITIVE MOTION
(FEBRUARY 1, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JAMES LINLOR,

Plaintiff,

v.

MICHAEL POLSON,

Defendant.

Civil Action No. 1:17-cv-0013 (AJT/JFA)

Before: Anthony J. TRENGA,
United States District Judge.

On January 26, 2018, Plaintiff filed Plaintiff's Dispositive Motion under FRCP 45, 37, 26, and 11 for Failure to Preserve and Produce Key ESI and Other Evidence and Witnesses [Doc. No. 281] (the "Motion"). In the Motion, Plaintiff reiterates his contention that the Defendant, non-party TSA and William Whetsell failed to produce evidence that justifies the entry of a default judgment against Defendant and sanctions against TSA. More specifically, Plaintiff contends that the Defendant "is proven to have willfully (despite repeated and specific litigation holds, verbal and writ-

ten) failed to preserve text messages, social media, and video evidence, while falsely claiming that the one remaining video is controlling beyond its affirming of an excessive and striking force being imposed by Defendant on Plaintiff.” [Doc. No. 281] at 1. While the Motion is unclear as to the specific materials at issue, the Motion appears to duplicate in substance Plaintiff’s Dispositive Motion to Determine Spoliation of Evidence and Appropriate Sanctions [Doc. No. 210] (the “Dispositive Spoliation Motion”). In response to the Dispositive Spoliation Motion, the Magistrate Judge issued Proposed Findings of Fact and Recommendations [Doc. No 223]; and by Order dated February 1, 2018 [Doc. No. 285], the Court, after its *de novo* review, denied Plaintiff’s Rule 72 objections to those proposed findings and recommendations (Plaintiff’s Motion for Appeal to Findings of Fact (Judicial Notice of Spoliation) [Doc. No. 240]); and hereby again denies Plaintiff’s Motion for the same reasons, as set forth in its Order dated February 1, 2018 [Doc. No. 285]. Accordingly, it is hereby

ORDERED that Plaintiff’s Dispositive Motion under FRCP 45, 37, 26, and 11 for Failure to Preserve and Produce Key ESI and Other Evidence and Witnesses [Doc. No. 281] be, and the same hereby is, DENIED.

The Clerk is directed to forward copies of this Order to all counsel of record and to the *pro se* Plaintiff.

/s/ Anthony J. Trenga
United States District Judge

Alexandria, Virginia
February 1, 2018

ORDER OF THE DISTRICT COURT DENYING
PLAINTIFF'S DISPOSITIVE MOTION TO
DETERMINE SPOILATION OF EVIDENCE
AND APPROPRIATE SANCTIONS
(FEBRUARY 1, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JAMES LINLOR,

Plaintiff,

v.

MICHAEL POLSON,

Defendant.

Civil Action No. 1:17-cv-0013 (AJT/JFA)

Before: Anthony J. TRENGA,
United States District Judge.

On December 6, 2017, the Magistrate Judge issued his Proposed Findings of Fact and Recommendations [Doc. No. 223] with respect to Plaintiff's Dispositive Motion to Determine Spoliation of Evidence and Appropriate Sanctions [Doc. No. 210] (the "Motion"). On December 19, 2017, Plaintiff filed Plaintiff's Motion for Appeal to Findings of Fact (Judicial Notice of Spoliation) [Doc. No. 240] (the "Objections"), which the Court has construed as objections to the Magistrate

Judge's Proposed Findings of Fact and Recommendations pursuant to Fed. R. Civ. P. 72(b)(2). On January 3, 2018, Defendant filed his Memorandum of Law in Opposition to Plaintiffs Motion for Appeal to Finding of Fact (Judicial Notice of Spoliation) [Doc. No. 260] ("Opposition").

In the Objections. Plaintiff makes various allegations against Defendant, non-party Transportation Security Administration ("TSA"), and TSA manager William Whetsell related to their duty to preserve evidence. Specifically, Plaintiff objects to the Magistrate Judge's Proposed Findings of Fact and Recommendations on the grounds that the Magistrate Judge's analysis did not consider: (1) the relevant case law, (2) material misrepresentations made in court filings by Defendant and non-party Transportation Security Administration ("TSA"), and (3) the obligations of "Spoilers" to preserve evidence.

The Court has reviewed *de novo* the record pertaining to Plaintiffs Objections and finds that the Magistrate's proposed findings of fact are fully supported by the record and reflect its own findings based on that *de novo* review. It also concludes that the Magistrate Judge's recommendations reflect the Court's own conclusions following its *de novo* review of the Objections as the appropriate disposition of Plaintiff's Motion. For these reasons, the Court adopts and incorporates by reference herein the Magistrate Judge's Proposed Findings of Fact and Recommendations [Doc. No. 2231]. Accordingly, it is hereby

ORDERED that Plaintiff's Motion for Appeal to Findings of Fact (Judicial Notice of Spoliation) [Doc. No. 240] be, and the same hereby are, DENIED and the

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objections contained therein OVERRULED; and it is further

ORDERED that Plaintiff's Dispositive Motion to Determine Spoliation of Evidence and Appropriate Sanctions [Doc. No. 210] be and the same hereby is, DENIED.

The Clerk is directed to forward copies of this Order to all counsel of record and to the *pro se* Plaintiff.

/s/ Anthony J. Trenga
United States District Judge

Alexandria, Virginia
February 1, 2018

**ORDER OF THE FOURTH CIRCUIT DENYING
PETITION FOR REHEARING EN BANC
(NOVEMBER 27, 2018)**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES LINLOR, Capt.,

Plaintiff-Appellant,

v.

MICHAEL POLSON,

Defendant-Appellee.

No. 18-1303

(1:17-cv-00013-AJT-JFA)

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor
Clerk

**Additional material
from this filing is
available in the
Clerk's Office.**