24-5449

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Kimberly Smith — PETITIONER

vs.

Menards, Inc. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner:	Respondent(s) Counsel:
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QUESTION(S) PRESENTED

The Eighth Circuit Court of Appeals holds that, under Federal Rules of Civil Procedure Rule 37(e), before a Rule 37(e)(2) remedy can be awarded, there must be a finding of (1) "intentional destruction indicating a desire to suppress the truth" and (2) "a finding of prejudice to the opposing party." Additionally, when dealing with pre-litigation destruction of evidence, the Eighth Circuit requires an additional finding of "bad faith" before any Rule 37(e)(2) remedy can be awarded. The Eighth circuit has imposed this overburdensome dual or triple bar requirement for Rule 37(e)(2) sanctions to be awarded. In addition, in this case, the district court, in evaluating whether a FRCP 37(e)(1) or FRCP 37(e)(2) remedy was appropriate, in effect, employed a "clear and convincing" standard rather than a "preponderance of the evidence" standard to evidentiary questions. The question presented is: (1) Did the Eighth Circuit Court of Appeals err by requiring both a finding of "prejudice" and "intentional destruction indicating a desire to suppress the truth" before a Rule 37(e)(2) remedy could be granted? (2) Did the Eighth Circuit Court of Appeals eer by imposing an additional "bad faith" requirement on the intent, thereby in effect creating a pronged test or alternative definition of intent for awarding a Rule 37(e)(2) remedy? (3) Did the District Court eer by effectively using a "clear and convincing" standard rather

than a "preponderance of the evidence" standard when determining the appropriateness of Rule 37(e)(1) or Rule 37 (e)(2) remedies. (4) Lastly, was a sufficient FRCP Rule(e)(1) remedy of allowing already permissible testimony, given to address the prejudice Ms. Smith faced (due to the loss of electronically stored information (ESI) when Menards, Inc. cherry picked and chose to preserve only evidence to defend their side) a sufficient remedy.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page. These parties include Petitioner- Kimberly Smith and Respondent- Menards, Inc.

STATEMENT OF RELATED CASES

Petitioner is aware of no directly related proceedings arising from the same trial-court case as this case other than those proceedings appealed here.

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STATUTES AND RULES

IN THE SUPREME COURT OF THE UNITED STATES

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There really can be no peace without justice. There can be no justice without truth. And there can be no truth, unless someone rises up to tell you the truth. (Martin Luther King Jr, Louise Farranakhan) "Injustice anywhere is a threat to justice everywhere" (Martin Luther King Jr.)

The court represents truth and justice. When a law or how a circuit interprets an amendment to a statue tips the scales away from truth and justice it becomes necessary for the people to speak up and do everything within their power to tip the scales of justice back to center. Federal Rule 37 and the way the 8th Circuit is interpreting it is allowing for injustice by requiring a dual standard of intent,

prejudice and bad faith in order to grant Rule 37(e)(2) relief . This is because the 8th Circuit interprets FRCP 37 and reading with "and" instead of "or" placing a higher burden of proof on injured parties to prove to obtain relief in court when the party that controls the EIS fails to save all relevant EIS. This strikes against the intent of the statue itself that is using the word "or" not "and". In the case of Smith v Menards' Inc. Menards' employees' actions led to injuries Smith suffered and then those same employees were allowed to cherry pick the surveillance video they provided Smith to use in court after she served notice and they should have and did anticipate litigation on November 23, 2018.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix 1a to the petition and is reported at 2024 WL 2592284 and is unpublished.

The opinion of the United States district court appears at Appendix 2a to the petition and is reported at 2023 WL 7169096 and is published.

JURISDICTION

The date on which the United States Court of Appeals decided my case was May 24, 2024. App. 1a. No petition for rehearing was filed in my case. Kimberly Smith timely mailed this petition on August 21, 2024. This Court has jurisdiction under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are at App. E - 35a.

STATEMENT OF THE CASE

On November 23, 2018 Ms. Smith and Mr. Bartholomew walked through Menards' Inc. parking lot shortly before 6:00 AM. as invitees to Black Friday shop. Menards' Inc. did not serve notice of inadequate lighting. The inadequate lighting concealed rocks scattered on the parking lot that Smith and Bartholomew couldn't see. Smith stepped on a landscaping stone hidden in the darkness and suffered severe injuries including nerve damage, torn ligament and other injuries.

Smith reported the incident to an on-duty Menards' employee in front of the store's entrance before Menards' Inc. opened, Brackett (general manager), and Meeks (front end manager) at approximately 6:00 AM on November 23, 2018.

Smith immediately filed an incident report with Menards' Inc. on the computer and in a handwritten portion giving notice of the incident to Menards' Inc. Meek's began the investigation of the lot, took pictures, and wrote the distance as less

than 90 feet on the written portion of the incident report. The report and investigation of the incident triggered the obligation for Menards' to preserve and provide the video surveillance on November 23, 2018. On the hand written report that Smith filed on November 23, 2018 Smith requested that Menards' Inc. preserve and provide all surveillance videos from the morning of November 23, 2018 at Menards' INC. property in Iowa City, Iowa.

Menards' Inc. phoned Smith November 23, 2018 to get further details of the incident and what the stone looked like. Menards' Inc. phoned Smith several times after November 23, 2018, within the first 90 days of the incident.

Smith sought medical care the afternoon of the incident and many more times over the next several years.

Smith hired attorney Court Dial in November of 2020. Dial requested the surveillance videos again in writing. Dial filed a timely civil summons and complaint in Johnson County November 2020.

Smith survived Summary Judgement. Attorney Dial stepped down for work related reasons not pertaining to the case.

Smith was unable to afford another attorney and applied to be Plaintiff Pro Se. Smith filed motions to compel Menards' to provide the surveillance videos as well as the handwritten copy of the initial incident report.

At the pretrial conference in June 2023 Judge Jackson ordered Defendant Menards' Inc. to provide the incident report. However, Menards' Inc. and their council only provided the computerized

portion of the report Smith entered motion to compel Menards' to bring forth the hand written portion. Smith also entered a motion to find Menards' Inc. and their Council in contempt for not following the Court's order to provide the report. Judge Jackson never honored his order for Menards' Inc. to have to provide the full incident report.

During pretrial Conference June 2023 Judge Jackson was concerned that snippets of video tapes were provided indicating spoliation had occurred and ordered Menards' Counsel to provide the reason for this. In Court in June 2023 Brackett and Meeks testified that they searched through the surveillance videos and chose what to save. However, their testimony revealed they did not follow their own policy and that Meeks was willing to hide the fact that certain cameras existed.

Smith's motion for an adverse inference instruction for ESI spoliation was denied. In addition Jury instruction stating Menards' Inc. had a duty to provide lighting and safe passage was denied. Jury trial in June 2023 returned a verdict that Menards' Inc. was not guilty. Judge Jackson's final denial of a new trial admits "minimal" prejudice may have existed. The Appeals Court stated that Judge Jackson had not abused his discretion. The Eighth Circuit misinterprets the law and imposes overburdensome and unwarranted requirements on parties who have been injured by opposing parties' spoliation.

Smith seeks relief from the Supreme Court of the United States.

REASONS FOR GRANTING THE PETITION

Given the pervasive role of Electronically Stored Information (ESI) in modern litigation, it is exceptionally important that there be a uniform standard across all circuits for dealing with its loss. When ESI is lost, there is often no other relevant evidence for litigation. The failure to preserve ESI can lead to the complete obliteration of essential proof, thereby crippling a party's ability to present its case. The Eighth Circuit's departure from the text of FRCP Rule 37(e) and its imposition of an unwarranted dual requirement threatens the integrity of litigation nationwide. The Supreme Court's intervention is necessary to resolve this conflict and others, ensuring that all parties, regardless of jurisdiction, are subject to the same fair and equitable standards for the preservation of ESI.

I. The Eighth Circuit Erroneously Imposes a Dual Requirement for Rule 37(e)(2) Remedies Diverges From the Text of the Rule and the Approach of Other Circuits.

The Eighth Circuit has consistently required a dual finding of both "intentional destruction indicating a desire to suppress the truth" and "prejudice to the opposing party" before imposing sanctions under FRCP 37(e)(2). This dual requirement, as articulated in *Lincoln Composites, Inc. v. Firetrace USA, LLC*, 825 F.3d 453, 463 (8th Cir. 2016)., and further reinforced in other cases like *Zamora v. Stellar Mgt. Group, Inc.*, No. 3:16-05028-CV-RK, 2017 WL 1362688, at *2 (W.D. Mo. Apr. 11, 2017)., and *Smith v. Menards* exceeds

the plain language of Rule 37(e)(2) and imposes an unnecessary and unfair burden on litigants.

The Eighth Circuit has held that district court judges "must make the following two findings before an adverse inference instruction for spoliation is warranted: "(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." *Zamora v. Stellar Mgt. Group* at *2 (quoting *Lincoln Composites, Inc. v. Firetrace USA, LLC*).

A. The Plain Text of Rule 37(e)(2) Requires Only a finding of "Intent to Deprive"

Rule 37(e)(2) provides that if a court finds that a party acted with the intent to deprive another party of information that could have been used in litigation, the court may impose sanctions, including an adverse inference instruction as Ms. Smith requested for herself. However, the rule doesn't mandate a separate funding of prejudice before sanctions can be imposed. By requiring a finding of prejudice the Eighth Circuit is interpreting the word "or" like the word "and". This thereby elevates the burden on parties seeking relief for spoliation of ESI.

B. Unjustified Elevation of the Burden of Proof On Wronged Parties: Difficulty in Proving Both Prejudice and Intent to Deprive.

The Eighth circuit's dual requirement imposes an undue burden on litigants who are already disadvantaged by the destruction of crucial ESI. In cases of spoliation, especially when evidence is completely destroyed, it can be nearly

impossible for the wronged party to demonstrate exactly how the loss of evidence prejudices their case. This is because the party can no longer access the evidence to show what was lost. For instance, if critical emails or documents are deleted, the opposing party might not know what the contents were, making it difficult to prove how they were harmed by the loss. This creates a paradox: the more effective the spoliation (i.e., the more thoroughly the evidence is destroyed), the harder it is for the wronged party to prove prejudice, even though the very purpose of the destruction was to prevent the evidence from being used against the spoliator. By demanding proof of both intentional destruction and prejudice, the court raises the bar for obtaining sanctions, potentially leaving wronged parties without adequate remedies for spoliation. The Eighth Circuits heightened standard undermines the Rule's purpose of providing meaningful sanction to address the loss of critical evidence. The Eighth Circuits interpretation also undermines the uniformity and fairness the rules 2015 amendment was intended to promote.

C. The Need for Uniformity and Adoption of the Majority Approach.

The dual requirement interpretation of the Eighth Circuit diverges sharply from the approach taken by most other circuits which adhere more closely to the rule's language. In the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and D.C. only a finding of intentional destruction is required. However, the Second, Seventh, and Eighth Circuits indicate that a finding of prejudice is also a

requirement to being awarded a Rule 37(e)(2) sanction.

Fifth Circuit: The Fifth Circuit presumes prejudice upon a finding of intent to deprive, as evidenced in *Falkins v. Goings*, No. CV 21-1749, 2022 WL 17414295, at *4 (E.D. La. Dec. 5, 2022). The court explicitly stated that Rule 37(e)(2) "does not include a requirement that the court find prejudice to the party deprived of the information."

D.C. Circuit: The D.C. Circuit's decisions, including *Borum v. Brentwood Vill.*, LLC, 332 F.R.D. 38 (D.D.C. 2019), clarify that sanctions under Rule 37(e)(2) are warranted upon a finding of intent to deprive, without necessitating a showing of prejudice.

The First, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and D.C. circuits recognize that once intentional destruction/intent to deprive is established, the integrity of the judicial process has been sufficiently compromised to warrant sanctions, irrespective of the prejudice to the opposing party. Most circuits recognize that the intentional destruction of evidence itself warrants sanctions, regardless of whether specific prejudice can be demonstrated. This is because the integrity of the judicial process has already been compromised by the spoliation. The Eighth Circuit's requirement for additional proof of prejudice deviates from this broader understanding and creates inconsistency in how Rule 37(e)(2) is applied across jurisdictions. This inconsistency can lead to unfair outcomes where similarly situated litigants receive different levels of protection based solely on the circuit in which their case is heard.

The requirement to show prejudice in addition to intent to deprive under Rule 37(e)(2) is unfair because it places an unreasonable burden on the party seeking sanctions, contradicts the purpose of the rule, and undermines the deterrence of intentional spoliation. The presumption or assumption of prejudice in cases of intentional destruction is a more equitable and logical approach, ensuring that wronged parties are not doubly disadvantaged by both the loss of evidence and the heightened burden of proof.

I. The Eighth Circuits Addition of a "Bad Faith" Requirement is Erroneous

The Eighth Circuit's addition of a required "Bad Faith" finding in addition to the above mentioned dual-requirement exceeds the plain language of Rule 37(e)(2), imposes an unnecessary and unfair burden on litigants, and departs from the majority of Circuits. This "Bad Faith" requirement is imposed selectively on litigants. The Eighth Circuit reads into Rule 37(e)(2) a distinction between pre litigation and post litigation destruction of evidence.

The existence of this "bad faith" requirement is best explained in the case of In Re Petters Co., Inc where the court held

> In the Eighth Circuit, some cases require a finding of bad faith before imposing any spoliation sanctions, while others do not.220 In determining bad faith or serious culpability regarding the destruction of evidence, timing of when the destruction occurred may bear on whether a finding of bad faith is

> required.221 When evidence is destroyed after litigation has commenced, most cases state that no explicit finding of bad faith is required. 222 For pre-litigation destruction of evidence, the heightened requirement of bad faith is required.223 Either way, failure to preserve some types of ESI while destroying others is a reasonable basis to conclude bad faith.

In re Petters Co., Inc., 606 B.R. 803, 828 (Bankr. D. Minn. 2019), aff'd sub nom. *Kelley as Tr. of BMO Litig. Tr. v. BMO Harris Bank N.A.*, 657 B.R. 475 (D. Minn. 2022).

If ESI is destroyed pre-litigation there is a mandatory requirement that "Bad Faith" must be shown by the injured party in addition to "prejudice" and "intentional destruction indicating a desire to suppress the truth". This standard is reiterated in multiple cases, including *Hallmark Card, Inc. v. Murley*, 703 F.3d 456, 460 (8th Cir. 2013). where the court emphasized the necessity of explicit findings of bad faith and prejudice prior to delivering an adverse inference instruction. See also *Pioneer Civ. Constr., LLC v. Ingevity Arkansas*, LLC, No. 1:22-CV-1034, 2023 WL 7413336, at *4 (W.D. Ark. Nov. 9, 2023).

In the case of *Smith v. Menards* the court incorrectly categorized the destruction of ESI as pre-litigation even though Menards had ample notice that litigation was likely. Therefore, Ms. Smith was subject to this extremely overburdensome and unexplainable "Bad Faith" requirement. Smith was essentially subject to a three pronged test contrary to the "intentional

destruction indicating a desire to suppress the truth" test that the plain language of Rule 37(e)(2) imposes.

The lower court employed this "Bad Faith" requirement when Judge Jackson's order stated:

"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.' " Id. (quoting *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 460 (8th Cir. 2013) (internal alteration and quotation omitted)). Id.; see also, e.g., *Burris v. Gulf Underwriter Ins.*, 787 F.3d at 879 (quoting *Hallmark*, 703 F.3d at 460). As explained by the Eighth Circuit, given "the gravity of an adverse inference instruction, which 'brands one party as a bad actor,' *Morris v. Union Pac. R.R.*, 373 F.3d 896, 900 (8th Cir.2004), ... a district court must issue explicit findings of bad faith and prejudice prior to delivering an adverse inference instruction." *Hallmark*, 703 F.3d at 461." *Smith v. Menard*, Inc., No. 3:21-CV-00012-SBJ, 2023 WL 6537993, at *3 (S.D. Iowa June 8, 2023)

It's clear that Bad Faith is an additional or heightened specific requirement in addition to "intentional destruction indicating a desire to suppress the truth". The Eighth Circuits Bad Faith requirement for only pre-litigation spoliation strikes against the purpose of Rule 37(e) itself as the rule is meant to cover evidence when litigation is anticipated.

"It is important to recognize, however, that Rule 37(e) only applies when ESI that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it. Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment." *Feindt v. U.S.*, No. CV 22-00397 LEK-KJM, 2023 WL 8650190, at *5 (D. Haw. Dec. 14, 2023).

A. Higher Burden on litigants deprived of ESI

The requirement to prove "bad faith" on top of "prejudice" and "intentional destruction" creates a higher evidentiary burden. Litigants must now gather and present more substantial evidence to meet this heightened standard, which can be particularly difficult when crucial evidence has already been destroyed. This extra burden forces parties to expend more resources, time, and effort, making litigation more expensive and complex. There is no substitute for the original ESI in comparison. Plaintiffs, who often rely on ESI to prove their claims, are disproportionately affected by this requirement. If crucial evidence is destroyed before litigation begins, plaintiffs may be unable to meet the "bad faith" standard, even if the destruction was intentional and prejudicial. This puts plaintiffs at a significant disadvantage, as they may be unable to obtain the adverse inference instruction or other sanctions necessary to remedy the harm caused by spoliation. Therefore the court is prejudice against parties who are deprived of ESI.

B. Parties encouraged to spoliate ESI pre-litigation.

Furthermore, the pre-litigation focus of the "bad faith" requirement may discourage parties from preserving ESI before litigation is formally initiated. Knowing that a higher standard will apply if evidence is destroyed before a lawsuit is filed, parties may be less vigilant in their preservation efforts, undermining the rule's goal of encouraging the timely preservation of evidence. The heightened Bad Faith requirement whether applied in pre or post litigation spoliation encourages parties to spoliate ESI sooner rather than later. In fact this is exactly what has taken place with Menards Inc. where Menards either failed to properly train their employees or the employees failed to properly follow their policy to cover their mistakes. In the Seventh and Eighth Circuits where a heightened Bad Faith requirement is needed for parties to be awarded a Rule 37(e)(2) sanction, Menards Inc. has had numerous cases where ESI has been spoliated, yet this prelitigation bad faith requirement encourages Menards to not properly train their employees to preserve ESI.

C. Significant Circuit Split Exists

Lastly, it's important to note that there is a circuit split. The Second, Seventh, Eighth, and Eleventh circuits require a heightened bad faith finding before a Rule 37(e)(2) sanction will be awarded. On the other hand the remaining circuits recognize no such Bad Faith requirement before rewarding a Rule 37(e)(2) sanction. However, this issue clearly represents a circuit divide among those circuits who require a Bad Faith showing and the majority which doesn't.

II. The Eighth Circuits Misapplication of a "Clear and Convincing" Standard

A. The Clear and Convincing Standard Was Effectively Used

While the Eighth Circuit and Judge Jackson in the case of *Smith v. Menards* never explicitly articulated that a clear and convincing evidence is required for adverse inference instructions under Rule 37(e)(2), its decisions in cases such as *Hallmark Cards, Inc. v. Murley*, and *Morris v. Union Pacific Railroad* demonstrates an effective imposition of this standard. Specifically, Judge Jackson pointed to the fact that Morris holds "This is a high bar because "[a]n adverse inference instruction is a powerful tool"; it "brands one party as a bad actor" and "necessarily opens the door to a certain degree of speculation by the jury, which is admonished that it may infer the presence of damaging information." *Morris v. Union Pac. R.R.*, 373 F.3d 896, 900 (8th Cir. 2004)." *Smith v. Menard, Inc.*, No. 3:21-CV-00012-SBJ, 2023 WL 7169096, at *5 (S.D. Iowa Aug. 8, 2023).

It is evident that the stringent requirement of proving bad faith effectively elevates the burden of proof beyond a mere preponderance of the evidence. The necessity of establishing a specific bad faith intent, which must be demonstrated to a degree that persuades the court of its validity, mirrors the application of a "clear and convincing" standard more than a preponderance of the evidence standard. This stringent requirement is imposed on all Rule 37(e)(2) sanctions due to the courts incorrect view that an adverse inference instruction is too speculative for a jury unless the

court is firmly convinced. However, juries are routinely tasked with drawing inferences from evidence—or the lack thereof. The notion that an adverse inference instruction is "speculative" underestimates the jury's ability to weigh the credibility of evidence and the significance of its absence.

B. Significant Circuit Split Exists

In the first circuit the court once held that for dispositive motions a clear and convincing standard is appropriate. *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 926 (1st Cir. 1988), aff'd, 900 F.2d 388 (1st Cir. 1990). But most courts in the first circuit have adopted the preponderance of the evidence approach when dealing with cases like Ms. Smith's where an adverse inference instruction is sought. *Watkins v. New York City Transit Auth.*, No. 16 CIV. 4161 (LGS), 2018 WL 895624, at *10 (S.D.N.Y. Feb. 13, 2018). In the second circuit a preponderance of the evidence standard is used for Rule 37(e)(1) sanctions. But when dealing with Rule 37(e)(2) the court decided to employ a clear and convincing standard. *Chepilko v. Henry*, No. 1:18-CV-02195 (SDA), 2024 WL 1203795, at *4 (S.D.N.Y. Mar. 21, 2024). In the third circuit the court has adopted a preponderance of the evidence approach to all Rule 37(e) sanctions. The court explained its reasoning:

> While we recognize some courts have applied the stricter "clear and convincing" standard when the movant seeks a judgment disposing of the case, we decline to do so.25 Discovery sanctions are a remedy in civil litigation.

> ...For example, several claims involving some indicia of state of mind, such as breach of contract and negligence, require proof by a preponderance of the evidence. We also do not find a value in the higher standard of proof upon the aggrieved party who is left trying to understand and explain facts of which it could not definitely know absent the spoliating party's admission. The higher onerous standard may, contrary to the purposes of Rule 37, allow the spoliator to benefit from its conduct. We are also aware Hotwire has not requested a judgment in its favor in the underlying case but asks for an adverse inference.

DVComm, LLC v. Hotwire Commun., LLC, No. CV 14-5543, 2016 WL 6246824, at *6 (E.D. Pa. Feb. 3, 2016).

In the Fourth Circuit the courts have not definitively settled the burden of proof for Rule 37(e)(2) sanctions. "Finally, to be entitled to any sanctions under Rule 37(e), whether a party must demonstrate spoliation by clear and convincing evidence or by a preponderance of the evidence is unsettled. See Jenkins, 2027 WL 362475 at *12 *Butler v. Kroger LP I*, No. 2:19CV673, 2020 WL 7483447, at *4 (E.D. Va. Nov. 30, 2020)., report and recommendation adopted, No. 2:19CV673, 2020 WL 7482186 (E.D. Va. Dec. 18, 2020). In the Fifth Circuit the courts employ a preponderance of the evidence standard. They explain that unless a statute or the constitution demands a higher standard a preponderance of the evidence should be

used in civil litigation. *Jim S. Adler, P.C. v. McNeil Consultants*, LLC, No. 3:19-CV-2025-K-BN, 2023 WL 2699511, at *14 (N.D. Tex. Feb. 15, 2023). In the Sixth Circuit the courts had not yet decided what evidentiary standard to employ. *Franklin v. Shelby Cnty. Bd. of Educ.*, No. 220CV02812JPMTMP, 2021 WL 5449005, at *9 (W.D. Tenn. Nov. 22, 2021). In the Seventh Circuit the courts have adopted a preponderance of the evidence standard because unless a statute or the constitution demand a higher standard then a preponderance of the evidence should be used in civil litigation. *Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 776-81 (7th Cir. 2016). In the Ninth Circuit the courts have recognized that the preponderance standard is the proper evidentiary standard because the "clear-and-convincing standard, by contrast, would reflect an unwarranted preference for one party over the other." *Fast v. GoDaddy.com LLC*, 340 F.R.D. 326, 336 (D. Ariz. 2022). In the tenth circuit the courts have adopted a preponderance of the evidence standard for Rule 37(e) sanctions. Though it remains unsettled in the D.C. circuit it appears preponderance of the evidence is used unless the case involves fraud. *Shepherd v. ABC*, 62 F.3d 1469, 1481 (D.C.).

C. The Appropriate Evidentiary Standard: Preponderance of the Evidence

The text of Rule 37(e) does not explicitly specify the evidentiary standard to be used when determining the applicability of sanctions. However, the rule's structure and the advisory committee notes suggest that the "preponderance of

the evidence" standard is appropriate. The rule is designed to balance fairness and accountability, aiming to penalize parties who intentionally or negligently cause the loss of ESI while avoiding unduly harsh penalties for those who have taken reasonable steps to preserve such information.

The "preponderance of the evidence" standard is a well-established principle in civil litigation, requiring that a party show that something is more likely than not. This standard is generally applied when courts assess whether certain facts or conditions are met in civil cases. Under Federal Rule of Civil Procedure 37(e), when determining whether sanctions are warranted for the loss of Electronically Stored Information (ESI), the "preponderance of the evidence" standard should guide the court's analysis of both the existence of prejudice and the intent to deprive another party of information. It's a reasonable and clear standard that encourages parties to take the necessary steps to preserve ESI. This upholds the integrity of the discovery process, and litigation. Too high of a standard such as a clear and convincing standard may mean judges seek direct evidence when in fact there is rarely direct evidence (let alone unbiased) of why certain ESI was preserved and not other. Often this can be years after the initial incident making it harder for a party affected by spoliation of ESI to prove their case.

The preponderance standard ensures that parties can seek relief when they have been prejudiced by the loss of ESI without facing an unreasonable high burden of proof. This is

particularly important in cases where the lost information is essential to proving or defending a claim. The Eighth Circuits has emphasized the need for a very high bar for a party to be awarded Rule 37(e) remedies. Yet, many circuit courts find that reasoning lacking.While a Rule 37(e) remedy can be severe, the harm a party can face in litigation to proving their case is serious as well when ESI is spoliated. Therefore, a preponderance of the evidence standard is the most fair approach to balancing the two sides' potential harms.

IV. The Inadequacy of the Remedy Provided to Ms. Smith for Prejudice

To first be awarded a Rule 37(e) remedy a litigant must first prove (1) lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. (2) a party failed to take reasonable steps to preserve the information. (3) information was lost as a result. (4) information couldn't be restored through additional discovery. Finally, a court may resort to Fed. R. Civ. P. 37(e)(1) measures only "upon finding prejudice to another party from loss of the information." see also *Blazer v. Gall,* No. 1:16-CV-01046-KES, 2019 WL 3494785, at *3 (D.S.D. Aug. 1, 2019). (listing these predicate elements of Rule 37(e)); *Borum v. Brentwood Vill., LLC*, 332 F.R.D. 38, 43 (D.D.C. 2019) (stating that the party alleging spoliation under Rule 37(e) bears the burden of proof) Ms. Smith met these requirements as we will demonstrate below and as the court found these steps had been satisfied enough to make a prejudice and intent analysis.

A. Kimberly Smith Demonstrated that the Lost ESI Should Have Been Preserved Due to the Anticipation of Litigation

Menards' Inc. knew litigation was probable based on several key actions: Smith reporting the incident to Menards employees, Meeks initiated an investigation, Menards' employees filed an incident report (computerized and written), took photographs, and completed other investigative steps. Smith specifically requested the preservation of surveillance video the morning of the incident. Despite this Menards' employees allowed the ESI to be overwritten, thereby destroying evidence that had been requested for preservation.

Additionally, Menards, Inc's actions further indicated they expected litigation. A representative from Menards called Smith and Mr. Bartholomew on the day of the incident, asking for a description of the rock and a picture of a similar one. Menards' insurance company contacted Smith multiple times within the first 90 days, and the defendant's legal representative called Smith to obtain more details on the day of the incident. Lastly, at trial Meeks stated she observed that Smith was "pretty angry and said she was going to sue Menards. Trial Tr. vol. 1, 232:20–21. These actions clearly demonstrate that Menards, Inc. anticipated litigation and was preparing for it.Therefore, in accordance with FRCP ESI should have been preserved.

B. Menards failed to take reasonable steps to preserve lost ESI

Menards' Inc. has a long history of litigating over the intentional destruction of ESI as seen in

the *Navratil v. Menards*, Inc. case and others. Menards knew that ESI would be critical in a case involving a slip and fall injury. Despite this, Menards did not even follow its own preservation policy. *Navratil v. Menard, Inc.* established that Menards' policy is to preserve evidence of (1) the customer walking into the store, (2) the incident, (3) the customer filling out the incident report, and (4) the customer exiting the store." *Navratil v. Menard, Inc.*, No. 8:19-CV-9, 2020 WL 974161, at *5 (D. Neb. Feb. 28, 2020), aff'd, 830 Fed. Appx. 494 (8th Cir. 2020)(unpublished).

In court, Meeks misstated Menards' policy as if it is a choice between preserving video of the incident or the incident report. Trial Tr. vol. 1, 196:9-13. Neither were provided fully. However *Navratil v. Menard*, Inc. reveals that both the report and the surveillance video of the incident are supposed to be preserved. Brackett admitted that Menards selectively saves what they feel to be relevant, which isn't a legitimate policy. Trial Tr. vol. 2, 297:19–20.

Menards interfered with its routine policy by not preserving the four specified types of evidence. According to the Advisory Committee Note to the 2015 Amendment of Rule 37, the court should be sensitive to a party's sophistication in litigation when evaluating preservation efforts. Menards, a company with significant litigation experience, specifically over ESI spoliation issues should be found to be a sophisticated party. Knowing litigation was anticipated, Menards' employees spent time cherry picking video footage that was favorable to them, rather than preserving all

relevant evidence to Ms. Smith's claim or Menards' own policy. Attorney's for Menards Inc. should have implemented a litigation hold in the first 90 days as they had ample notice that litigation was likely. As Mendard's employees testified, the lost ESI can never be restored.

C. Relevant ESI was lost as a result of spoliation

It is undisputed that Menards, Inc. cherry-picked portions of video evidence to be preserved or not. During the pretrial, the Court identified this cherry-picking had occurred. The only question at that point was if intent or prejuicy existed. As noted during the Final Pretrial Conference:

> "THE COURT: Well, that doesn't answer my question. And so my question comes up because when you look at the videos, it's – it seems clear or evident that there's different angles and there's different snippets of time, and so that then that leads you to maybe believe that there certainly would have been other videos or other time frames from these different clips. Does that make sense?"

P. Tr. vol. 1, 21:7–13.

"THE COURT: Okay. And with that, though, there needs to be evidence explaining why only certain portions of the videos were produced, and so do you have any evidence of that? Ms Kirk: No, there's no evidence of that."

Despite Smith's preservation request and the ample notice that litigation was likely, Menard's

employees and legal counsel cherry picked ESI to be overwritten, thereby destroying critical and at a minimum relevant evidence to Ms. Smith's claims.

Specifically, Menards chose to not preserve the surveillance video of the incident of Smith falling. Menards chose to not preserve the conditions of the lights in the parking lot or inside the store. They choose not to preserve video of where the rocks were at the time. They choose not to preserve video of which areas the partial inspection, Dan Brackett claimed took place, actually took place. They chose not to preserve the surveillance video of the investigation by Meeks and Smith where Ms. Smith had fallen. Even though Menards' "claimed" the incident took place in the same lanes of the three lanes of traffic video (a false claim as disputed in court); they didn't preserve the non-infrared camera that had the ability to record where the incident took place. This camera covered 85% of the parking lot yet Menards employees preserved the infrared camera of non-relevant lanes. Menards employees failed to preserve video of the entrance/exit doors that would have shown Meeks and Smith walking in the second time and finishing the incident report after the investigation took place outside. Menards failed to preserve the inside store's video of the time Meeks and Ms. Smith filled out the incident report. Menards choose to preserve video that would best aid them in defeating Smith in litigation. *Decker v. Target Corp.*, No. 116CV00171JNPBCW, 2018 WL 4921534, at *2 (D. Utah Oct. 10, 2018). This lost video was crucial to proving Menards negligence.

D. The ESI couldn't be restored through additional discovery

None, of the above mentioned videos or the handwritten portion of the incident report could be recovered. And contrary to what the lower court found being able to testify as to what was depicted and not depicted in video, or if the remaining video was accurate, Menards' employees testimony of the location and type of camera, and their preservation policy/procedure for preserving ESI, is not a substitute for the evidence surveillance video would have depicted. *Smith v. Menard*, Inc., No. 3:21-CV-00012-SBJ, 2023 WL 7169096, at *4 (S.D. Iowa Aug. 8, 2023). This court should recognize the irreplaceable nature of video evidence in establishing the facts of an incident. For instance, in *Nagy v. Outback Steakhouse*, the court found that lost video footage could not be substituted by witness testimony, as the surveillance camera provided an unbiased and continuous recording of the incident, which no witness could replicate. *Nagy v. Outback Steakhouse*, No. CV1918277MASDEA, 2024 WL 712156, at *4 (D.N.J. Feb. 21, 2024). Similarly, in *Hollis v. Ceva Logistics U.S.* the court determined that witness statements could not substitute for lost video footage, especially when witnesses disagreed on the events. The court emphasized that video evidence would have definitively established what occurred. Finally, it found that "But obtaining statements from witnesses is not what Rule 37(e) meant by "restored or replaced through additional discovery." Fed. R. Civ. P. 37(e)." *Hollis v. CEVA Logistics U.S., Inc.*, 603 F. Supp. 3d 611, 622 (N.D. Ill. 2022).

Finally, in *Phan v. Costco Wholesale Corp.* the court noted that testimony is an insufficient substitute for lost video footage, as memories fade and witnesses may be biased. The video, by contrast, would have provided objective and reliable evidence of the incident. *Phan v. Costco Wholesale Corp.*, No. 19-CV-05713-YGR, 2020 WL 5074349, at *3 (N.D. Cal. Aug. 24, 2020).

E. Ms. Smith suffered Serious Prejudice because crucial ESI was spoliated

Prejudice exists when spoliation prohibits a party from presenting relevant evidence, and it is impossible to determine what information has been destroyed. *Kelley as Tr. of BMO Litig. Tr. v. BMO Harris Bank N.A.*, 657 B.R. 475, 484 (D. Minn. 2022). All of the evidence Menards destroyed was relevant to Ms. Smith proving the negligence of Menards Employees. In *Blazer v. Gall*, the court found that the loss of ESI prejudiced the plaintiff because it resulted in a "he said, she said" situation, making it difficult to resolve key issues. *Blazer v. Gall*, No. 1:16-CV-01046-KES, 2019 WL 3494785, at *4 (D.S.D. Aug. 1, 2019). Ms. Smith was left in a "he said she said" situation due to the cherry picking of which ESI to preserve or not by Menards. This court should adopt the approach of other circuits and recognize that "For purposes of spoliation, some courts allow a showing of prejudice to be made with "plausible, concrete suggestions as to what [the destroyed] evidence might have been." *Prudential Defense Sols., Inc. v. Graham*, No. 20-11785, 2021 WL 4810498, at *8 (E.D. Mich. Oct. 15, 2021). Obviously, this is because no one can truly know what evidence no longer exists might

have shown. *Buddenberg v. Est. of Weisdack*, No. 1:18-CV-00522, 2024 WL 159001, at *73 (N.D. Ohio Jan. 16, 2024). The Eighth Circuit failed to recognize this due to their higher evidentiary standard they impose to prove what evidence would have been relevant or not.

Had Smith had surveillance video of Smith falling the jury would have seen the inadequate lighting Menards' provided to Black Friday Shoppers on the busiest day of the year. The jury would have seen the tripping hazard of the rocks scattered across the parking lot that Smith could not see being surrounded by such a state of darkness. The jury would have seen how hard Smith fell upon the pavement of Menards' parking lot. The jury would have seen Smith stop and access the situation and try to get herself to safety. If Menards' employees had not spoiled the surveillance videos inside the store they would have seen Meeks and Smith walk to the middle of the store and access the lighting this would have added more credibility to Smith's claim of inadequate lighting because Brackett testified that the lights in the store would be ⅓ off if the parking lot lights were off due to performing the override of the lighting system inadequately. If the videos of the rocks in Menards' parking lot had not been spoiled the jury would have seen how long the rocks had been in Menards' parking lot and therefore how long the rocks had been a hazard in Menards' parking lot. Had Menards' employees not spoiled the video surveillance of Brackett completing the inspection as he claimed to do the jury would have known if he did complete an inspection, if the

inspection were partial, the knowledge of Menards' employees of the hazards, and the steps taken or not taken to prevent hazards in their parking lot. Smith would have also been able to see the license plate of a witness to her injury that she could have used in her case. She could have also known the identity of the first employee Smith reported her injuries to. Meeks and Brackett chose not to preserve the surveillance videos of Meeks and Smith investigating where Smith had fallen. These surveillance videos would have been captured on the camera that Brackett claimed in Court captured 85% of Menards' parking lot. This was invaluable documentation that could have identified the truth for the jury when Meeks lied in court about where the incident had taken place and Meeks lied about not measuring the stone to the store that day but rather doing it only years afterwards when requested by Menards' attorneys. This surveillance video would have identified the desire for Meeks to cover the truth of what investigation had been performed the day of Smith's injuries. Meeks and Brackett specifically chose to only save the surveillance video from the infrared camera (deceived the jury) instead of the camera that captured 85% of the parking lot that would have disproved Meeks incorrect testimony.Menards' spoliation of surveillance video of Smith hand writing on the report increased the court's opinion of what Smith had to prove to receive an adverse inference instruction or lesser sanctions by spoiling proof that Smith had requested all Surveillance Videos be preserved and provided to Smith documenting all relevant data of

Smith's injuries and the events that occurred between 5:00 AM to 7:00 AM on the Morning of November 23, 2018. Instead Menards' Inc. and their employees Meeks and Brackett chose to preserve surveillance video of a camera taken with inferred lighting to mislead the jury. Meeks and Brackett's preservation of certain video while not fully following their policy lent credibility enough to mislead judge and jury into believing Menards' had taken reasonable steps in their preservation of surveillance video.

Once a finding of prejudice is made, a court may employ measures "no greater than necessary to cure the prejudice." Yet the lower court did nothing to cure the prejudices faced by Ms. Smith because as mentioned above contrary to what the lower court found being able to testify as to what was depicted and not depicted in video, or if the remaining video was accurate, and Menards' employees testimony of the location, type of camera, and their preservation policy/procedure for preserving ESI, is not a substitute for the evidence surveillance video would have depicted.

We request that the Supreme Court of the United States move to send this case back down to the lower courts with instructions to retry the case applying the correct legal standards and order relief to Smith in the form of an adverse inference instruction and / or any other appropriate relief.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the Eighth Circuit Court of Appeals reversed.

Respectfully submitted,

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