No. 24-5449

In The
Supreme Court of The United States

KIMBERLY SMITH, PETITIONER

v.

MENARD, INC., RESPONDENT

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted,

Barbara Johnson
Barbara Johnson
POTTER & MURDOCK, PC
252 N. Washington Street
Falls Church, VA 20037
Telephone: (202) 528-0077
Facsimile: (703) 832-0211
E-mail: bjohnson@pottermurdock.com
Attorney for Respondent Menard, Inc.

QUESTIONS PRESENTED FOR REVIEW

1. Is an adverse inference instruction allowed to a pro se Plaintiff under Federal Rule of Civil Procedure 37(e) when Plaintiff propounded no discovery and relied solely on a defending party's production of electronically stored information produced pursuant to Federal Rule of Civil Procedure 26?

2. The trial court properly utilized "a preponderance of the evidence" standard when determining if an adverse inference instruction should be granted instead of the claimed "clear and convincing" standard. Regardless, this issue was not properly preserved for appeal.

LIST OF PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption to this matter.

CORPORATE DISCLOSURE STATEMENT

As required by Rule 29.6, Respondent in this case provides the following information to the Court:

The names of all associations, firms, partnerships, corporations, and other artificial entities that are related to the Respondent as a parent corporation:

The correct entity name of the Respondent is Menard, Inc. Menard, Inc. is a privately owned company, and no publicly owned company owns 10% or more of the corporation's stock.

STATEMENT OF RELATED PROCEEDINGS

- United States Supreme Court, No. 24-5449, *Kimberly Ann Smith v. Menard, Inc.,* current matter
- United States Court of Appeals for the Eighth Circuit, No. 23-2657, *Kimberly Ann Smith v. Menard, Inc.,* May 17, 2024, unpublished, Appendix 1
- United States District Court for the Southern District of Iowa, Eastern Division, No. 3:21-cv-00012-SBJ, *Kimberly Ann Smith v. Menard, Inc.,* Verdict June 15, 2023, Order Denying New Trial August 8, 2023, unpublished, Appendix 2
- Iowa District Court for Johnson County, No. LACV082147, *Kimberly Ann Smith v. Menard, Inc.,* removed to federal court February 16, 2021.

TABLE OF CONTENTS

Questions presented for review ii

List of Parties to the Proceeding iii

Corporate Disclosure Statement iii

Statement of Related Proceedings iv

Table of Contents ..... v-vi

Table of Authorities vii

Statement of Jurisdiction viii

Counter Statement of the Case 1

Plaintiff's Petition Fails to Meet the Criteria for Review Under Rule 10 of the Rules of the United States of the Supreme Court 7

I. All Circuits Agree that Intentional Destruction of Evidence Is Necessary for An Inference Instruction 8

II. Rule 37(e) Remedies, Including Adverse Inference Instructions, Are Not Available to the Petitioner in this Matter 11

III. The Trial Court Properly Applied a Preponderance of the Evidence Standard and This Question Was Not Properly Preserved for Appeal 14

IV. Petitioner Kimberly Smith's Argument on Prejudice is Improper 16

V. Conclusion 17

Certification of Compliance 18

Appendix Documents 19

Appendix 1: United States Court of Appeals for the Eighth Circuit, No. 23-2657, *Kimberly Ann Smith v. Menard, Inc.,* May 17, 2024, unpublished. .....App 1

Appendix 2: United States District Court for the Southern District of Iowa, Eastern Division, No. 3:21-cv-00012-SBJ, *Kimberly Ann Smith v. Menard, Inc.,* Verdict June 15, 2023, Order Denying New Trial August 8, 2023 .....App 3

Appendix 3: Selections of transcript of pretrial conference in United States District Court for the Southern District of Iowa, Eastern Division, No. 3:21-cv-00012-SBJ, *Kimberly Ann Smith v. Menard, Inc.*, containing counsel's representations regarding videos .....App 12

Appendix 4: Selections of transcript of trial in United States District Court for the Southern District of Iowa, Eastern Division, No. 3:21-cv-00012-SBJ, *Kimberly Ann Smith v. Menard, Inc.*, containing court's findings and rulings regarding adverse inference instruction. .....App 15

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) 5-6
Singleton v. Wulff, 428 U.S. 106 (1976) 15

Eighth Circuit Cases

Davis v. White, 858 F.3d 1155 (8th Cir. 2017) 15
Stevenson v. Union Pac. R.R., 354 F.3d 739 (8th Cir. 2004) 10, 22

Other Court Cases

Bashir v. AMTRAK, 119 F.3d 929 (11th Cir. 1997) 9
Beaven v. United States DOJ, 622 F.3d 540 (6th Cir. 2010) 10
Bull v. UPS, 665 F.3d 68 (3rd Cir. 2012) 9
Grosdidier v. Broad. Bd. of Governors, Chairman, 709 F.3d 19 (D.C. Cir. 2013) 10
Jones v. Riot Hosp. Grp. LLC, 95 F.4th 730 (9th Cir. 2024) 10
ML Healthcare Servs., LLC v. Publix Super Mkts., Inc., 881 F.3d 1293 (11th Cir. 2018) 16
Norman-Nunnery v. Madison Area Tech. College, 625 F.3d 422 (7th Cir. 2010) 9
Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99 (2nd Cir. 2002) .. 9,10
Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68 (S.D.N.Y. 1991) 10
Turner v. Public Serv. Co., 563 F.3d 1136 (10th Cir. 2009) 9
United States v. Johnson, 996 F.3d 200 (4th Cir. 2021) 9, 10
United States v. Laurent, 607 F.3d 895 (1st Cir. 2016) 8
United States v. Wise, 221 F.3d 140 (5th Cir. 2000) 9

OTHER AUTHORITIES

Supreme Court Rules

Supreme Court Rule 10 ..... ix, 7, 8

Rules of Civil Procedure

Fed. R. Civ. P. 26 ..... ii, 4, 13
Fed. R. Civ. P. 37 .....

STATEMENT OF JURISDICTION

This action was originally filed by Plaintiff Kimberly Smith against Respondent Menard, Inc. on or about November 20, 2020 in the Iowa District Court for Johnson County, entitled *Kimberly Ann Smith v. Menard, Inc.,* Case No. LACV082147. Plaintiff Kimberly Smith is an individual and a resident of Washington, Iowa. Respondent, Menard, Inc., was the sole Defendant in the state court action and throughout this matter. Menard, Inc. is incorporated in Wisconsin and has its principal place of business in Eau Claire, Wisconsin. Menard, Inc. is deemed to be a citizen of Wisconsin. The matter was removed to the United States District Court for the Southern District of Iowa, Eastern Division, based on diversity jurisdiction. The matter was then litigated through trial to a jury, who issued a verdict in favor of Menard, Inc. on June 15, 2023.

Plaintiff Kimberly Smith filed a Motion for a New Trial and a Notice of Appeal on July 12, 2023 which were substantially similar. The District Court entered an Order denying Plaintiff's Motion for a New Trial on August 8, 2023. The United States Court of Appeals for the Eighth Circuit entered an unpublished judgment on May 24, 2024 affirming the judgment of the United States District Court. (App. Pp. 1-2) Plaintiff Kimberly Smith emailed copies of her Petition for Writ of Certiorari to counsel for Respondent on August 21 and 22, 2024 which included a Proof of Service indicating that paper copies were mailed on August 21, 2024. Counsel for Respondent received 3 paper copies of Plaintiff's Petition for Writ of Certiorari on or about August 22, 2024. Respondent does not dispute this Court's

jurisdiction over this case pursuant to 28 U.S.C. § 1254(1), but denies that this case satisfies the standard set forth in Supreme Court Rule 10.

COUNTERSTATEMENT OF THE CASE

On November 28, 2018, employees of Menard, Inc. at the Menard's store in Iowa City, Iowa began preparing for "Black Friday" at about 4 am. General Manager Daniel Brackett turned the parking lot lights on at 4 am, when he arrived at the store, because people were already starting to arrive in anticipation of deals. The parking lot lights were scheduled to turn on automatically at 4:45 am. Plaintiff Kimberly Smith arrived with her family shortly before 6:00 am. She parked at a nearby gas station due to the crowd and walked towards the store. As Plaintiff Kimberly Smith walked towards the Menard's store, she stepped on a small rock and fell, injuring her ankle. Plaintiff Kimberly Smith reported the incident to employees, who directed her to the service desk to make an incident report.

Menard's Front End Manager Amanda Meeks took a computerized report of the incident. Respondent Menard, Inc. ("Menard") does not utilize printed incident reports, but only takes information through a form which is saved to the computer. Amanda Meeks also went out to the parking lot with Petitioner Kimberly Smith to photograph the area and the rock. Amanda Meeks set the rock aside and photographed it as well. Amanda Meeks did not measure the distance from the area of the fall to the door of the store.

The following Monday, either Amanda Meeks or Daniel Brackett preserved video of the incident. Generally, Menard's policy, as stated during trial by their employees, was to preserve either as much video as possible OR to preserve the

video of the incident, if captured and, if not captured, the nearest camera, as well as the report being made, and the person entering and exiting the store. In this case, there was video preserved of the parking lot during the relevant time period, Petitioner Kimberly Smith entering the store, making a report, exiting the store with Ms. Meeks, paying for purchases with her family, and exiting the store. In total, approximately, one hour and 24 minutes of video were preserved, along with the photographs of the area of the incident and the rock at issue, and the electronic report drafted by Amanda Meeks. It is a misstatement of the law to indicate that Petitioner Kimberly Smith's report of the incident and Menard's subsequent investigation of the incident "triggered" the obligation to preserve and provide the video surveillance on November 23, 2018.[1] There is no information in the record regarding further contact or investigation either from Menard's or anyone on their behalf. It is a misstatement of the record of the facts of this case for Petitioner Kimberly Smith to state that Menard's "phoned [her] November 23, 2018 to get further details of the incident and what the stone looked like" or that Menard's "phoned" Petitioner Kimberly Smith several times within the first 90 days of the incident.

[1] Generally, the Federal Rules of Civil Procedure 37(e) require that a party take reasonable steps to preserve electronically stored information once it is clear that litigation is anticipated. The comments to the 2015 amendments state that "Many court decisions hold that potential litigants have a duty to preserve information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises." The comments further state that "[t]his rule recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection."

Figure 1: A still shot from Defendant's Exhibit E, showing the parking lot at approximately the time of the accident. The area of the accident is not marked, but various testimony placed it generally in the upper left-hand area of the photograph.

Petitioner Kimberly Smith retained an attorney who filed suit in Iowa state court and this matter was then removed to federal court. No discovery was served on behalf of Petitioner Kimberly Smith. No expert witnesses were designated on her behalf. No expert witness reports were disclosed on her behalf. All videos and reports in this case were provided by Respondent Menard, pursuant to their

disclosure obligations under Federal Rule of Civil Procedure 26. There is no information in the record regarding any attempts Petitioner Kimberly Smith's former attorney may have made to request any surveillance videos. It is a misstatement of the record to state that there were any requests made. After the close of discovery, Respondent Menard filed a Motion for Summary Judgment, which Petitioner Kimberly Smith's attorney successfully resisted before withdrawing from the matter. Petitioner Kimberly Smith then proceeded in this matter pro se.

At this point, Petitioner Kimberly Smith began fabricating a story of making a written statement or written incident report at the time of the accident, which does not exist. Menard's Front End Manager Amanda Meeks provided credible testimony that Menard's stores do not take handwritten statements. At the pretrial conference, the trial court inquired into the report at issue. Counsel for Respondent Menard represented that this report was in the form of an insurance report, inadmissible in Iowa courts. The trial court requested that counsel for Respondent Menard produce the initial report both to the Petitioner and to the court. This was done, although the report was not admitted into evidence. It is a misstatement of the facts and the record to indicate that counsel for Respondent Menard did not comply with all trial court orders or that the trial court did not take reasonable steps to attempt to provide Petitioner Kimberly Smith with any potential ESI that she had requested, although there had been no formal discovery in this case.

Petitioner Kimberly Smith additionally began to make claims that Menard's employees improperly culled the video they preserved in order to present this incident in the best light possible for them. Petitioner Kimberly Smith had several complaints with regard to the videos which were not clearly stated, but from the volume of her testimony and complaints, three themes appear. First, Petitioner Kimberly Smith believed that there should have been additional video preserved to include her re-entry into the store with Front End Manager Amanda Meeks after indicating the area of the accident. Second, Petitioner Kimberly Smith believed that the video of the parking lot was inadequate and that there should have been an additional view which clearly showed her fall. Third, Petitioner Kimberly Smith believed that the video of the parking lot had somehow been tampered with to appear lighter than it seemed at the time of the accident.

During the pretrial conference, the trial court attempted to confirm if there was additional video which could be produced but was not and if there would be evidence available at trial on the question of video retention policy. (App. P. 13:21-25) It is a misstatement of the facts and record to state that the trial court was concerned that there were any indications of spoilation and that the trial court ordered counsel for Respondent Menard "to provide the reason for this." (App. P. 13:21-25) At trial of this matter, Menard's General Manager Daniel Beckett and Front End Manager Amanda Meeks provided credible evidence regarding the location of cameras and the video retention policy. (App. P. 45:4-6) It is a misstatement of facts and of the record to state that Menard's employees did not

follow their video retention policy or that Front End Manager Amanda Meeks "was willing to hide the fact that certain cameras existed."

At trial of this matter, there was extensive testimony regarding Menard's general policies for investigating customer accidents as well as the specific evidence which existed in this case. Petitioner Kimberly Smith's son, who witnessed the accident, provided testimony on her behalf. Other members of Kimberly Smith's family who were at the Menard's store on the day of the accident provided testimony on her behalf. Petitioner Kimberly Smith also testified on her own behalf. As noted above, two Menard's employees who were at the store on the date of the accident also provided testimony regarding the facts of the accident. The trial court found that there was "no discovery violation" by Respondent Menard. (App. P. 44:12-16) The trial court made appropriate discretionary decisions regarding whether to grant a jury instruction on adverse inference regarding any perceived lack of preservation of electronic evidence. (App. Pp. 44:17-45:6) Petitioner Kimberly Smith is attempting to frame the facts of her case as a dispute between the United States Circuit Courts of Appeal in an attempt to inflate its importance. This is simply an evidentiary dispute, properly decided by the trial court, and ratified by the United State Circuit Court for the Eighth Circuit in an unpublished opinion (further underlining the relative insignificance of the matter.) There is no need for this Court to devote time and attention to this matter.

PLAINTIFF'S PETITION FAILS TO MEET THE CRITERIA FOR REVIEW UNDER RULE 10 OF THE RULES OF THE UNITED STATES OF THE SUPREME COURT

The Court should deny Petitioner's Petition for Writ of Certiorari because it fails to meet the criteria set forth in Rule 10 of the Rules of the United States Supreme Court and there is no compelling reason for the Court to grant this matter its limited time and attention. Rule 10 states that:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual court of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> > (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
> > (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question that conflicts with relevant decisions of this Court.
>
> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Petitioner Kimberly Smith attempts to present the facts of this matter as an important split of the United States Circuit Courts of Appeal on the question of Federal Rule of Civil Procedure 37 on the issuance of spoilation or adverse inference instructions to the jury in order to meet the requirements of Supreme Court Rule

10(a). However, a review of the relevant facts and law will show that instead, there is no significant split between the Circuit Courts of Appeal on the relevant issue. The trial court appropriately applied the facts and law in this matter as did the United States Court of Appeals for the Eighth Circuit.

Petitioner Kimberly Smith's Petition does not meet the criteria listed above for review. Petitioner Kimberly Smith is simply unhappy with the discretionary evidentiary rulings made by the trial court in this matter and affirmed by the United States Court of Appeals for the Eighth Circuit.

I. All Circuits Agree that Intentional Destruction of Evidence is Necessary for an Adverse Inference Instruction

There is no split in the Circuit Courts of Appeal which requires this Court's attention on the issue whether intentional destruction of evidence is required before an adverse inference instruction may be issued to the jury. All of the Circuit Courts of Appeal are in agreement that a showing of, at the least, intentional destruction, or at the most, bad faith destruction, of evidence is required before an adverse inference instruction may be issued. However, the trial court in this matter did not find an intentional destruction of evidence. (App. P. 45:3) There is no need for this Court to address the issue of adverse inference instructions in this matter.

The Eighth Circuit Court of Appeals, from which this case issues, is joined by the First, Third, Fifth, Seven, Tenth, and Eleventh Circuit Courts of Appeal in the view that something more than mere intentional destruction is necessary for an adverse instruction to be issued to the jury. *See Stevenson v. Union Pac. R.R.*, 354

F.3d 739, 748 (8th Cir. 2004) *See also United States v. Laurent*, 607 F.3d 895, 902 (1st Cir. 2016) (holding that "the instruction usually makes sense only where the evidence permits a finding of bad faith destruction"); *Bull v. UPS*, 665 F.3d 68, 79 (3rd Cir. 2012) ("a finding of bad faith is pivotal to a spoilation determination."); *United States v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000) (holding that "[a]n adverse inference drawn from the destruction of records is predicated on bad conduct."); *Norman-Nunnery v. Madison Area Tech. College*, 625 F.3d 422, 428 (7th Cir. 2010) (plaintiff "must demonstrate that the defendants intentionally destroyed the documents in bad faith."); *Turner v. Public Serv. Co.*, 563 F.3d 1136, 1149 (10th Cir. 2009) (holding that "if the aggrieved party seeks an adverse inference to remedy the spoilation, it must also prove bad faith."); *Bashir v. AMTRAK*, 119 F.3d 929, 931 (11th Cir. 1997) ("an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith.").

The remaining circuits take the view that evidence destroyed with either "a culpable state of mind" or "intent" is sufficient for the trial court to provide an adverse inference instruction. *See below, infra.* These requirements are a step above mere negligence, but a step below the requirement of bad faith. *See e.g. United States v. Johnson*, 996 F.3d 200, 217 (4th Cir. 2021) (stating "the mere 'negligent loss or destruction of evidence' is an insufficient basis for an adverse inference. Meanwhile, 'a finding of bad faith suffices to permit such an inference' but 'is not always necessary.") (citations omitted) As the Second Circuit Court of Appeals noted "[t]he inference is adverse to the destroyer not because of any finding of moral

culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss." *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2002) (citing *Turner v. Hudson Transit Lines, Inc.,* 142 F.R.D. 68, 75 (S.D.N.Y. 1991). *See also Beaven v. United States DOJ*, 622 F.3d 540 (6th Cir. 2010) ("the 'culpable state of mind' factor is satisfied by a showing that the evidence was destroyed knowingly, even if without to intent to breach a duty to preserve it, or negligently." (quoting *Residential Funding Corp*, 306 F.3d at 108, punctuation omitted)); *Grosdidier v. Broad. Bd. of Governors, Chairman*, 709 F.3d 19, 27-28 (D.C. Cir. 2013) (in the context of required records retention related to EEOC claims, "there are instances where the court can determine the likely relevance of destroyed evidence without a showing of bad faith destruction."); *United States v. Johnson*, 996 F.3d at 217 (holding that "there simply needs to be a showing that the party's intentional conduct contributed to the loss or destruction of the evidence.") (citation omitted); *Jones v. Riot Hosp. Grp. LLC*, 95 F.4th 730 (9th Cir. 2024) ("Rule 37(e) does not define 'intent,' but in context, the word is most naturally understood as involving the willful destruction of evidence with the purpose of avoiding its discovery by an adverse party.")

Petitioner Kimberly Smith argues that it is vital, that the circuits be made to conform to the perceived requirements of the FED. R. CIV. P. 37(e)(2) and require only "intent" and not bad faith to allow the courts to impose the sanctions listed in FED. R. CIV. P. 37(e)(2)(A)-(C). All circuits already agree that intentional destruction is necessary for an adverse inference instruction to be issued to the jury. The trial

court in this case did not find any intentional destruction of evidence in this matter. (App. P. 45:3) Even if this slightly less rigorous standard were applied to this matter, there would be no change in the outcome of this case. This Court should deny Petitioner Kimberly Smith's Petition for Writ of Certiorari on this basis.

II. Rule 37(e) Remedies, Including Adverse Inference Instructions, Are Not Available to the Petitioner in this Matter

As the Petitioner argues, Federal Rule of Civil Procedure 37(e) governs the remedies available to the federal trial courts in case of failure to preserve electronically stored information. However, in this matter, even if the trial court followed the guidance of FED. R. CIV. P. 37(e), then the remedy requested by Petitioner Kimberly Smith would not be available to her.

In relevant part, FED. R. CIV. P. 37 states as follows: "[i]f electronically stored information 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, and it cannot be restored or replaced through additional discovery, the court" has certain remedies. For the trial court to move forward with an appropriate remedy, the trial court must make the following necessary findings: (1) there was electronically stored information ("ESI"); (2) the ESI should have been preserved in the anticipation of litigation; (3) the ESI was lost because a party failed to take reasonable steps to preserve it; and (4) the ESI cannot be restored or replaced through additional discovery. FED. R. CIV. P. 37(e). Once those findings are made, the court has remedies available through FED. R. CIV. P. 37(e)(1) and (2), including:

> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
> (2) only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> (C) dismiss the action or enter a default judgment.

At the close of the evidence in the trial of this matter, Petitioner Kimberly Smith requested an adverse inference instruction, a remedy generally allowed pursuant to Rule 37(c)(2)(B). The trial court properly denied her request. (App. Pp. 28-45) The trial court specifically found that there was "no discovery violation" by Respondent Menard. (App. P. 45:12-16)

There were no sanctions available to the trial court under the FED. R. CIV. P. 37. Element one (1) of FED. R. CIV. P. 37 was satisfied, there was ESI involved in this litigation. Element two (2) was not satisfied. There was no finding that any particular ESI should have been preserved in the anticipation of litigation. The Notes of the Advisory Committee on the 2015 Amendments to the Federal Rules of Civil Procedure Rule 37(e) state that "a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that information would be relevant." The information that Menard's employees had at the time that ESI was preserved was that Petitioner Kimberly Smith had fallen on a rock and injured her ankle (after which she was able to shop for an hour and a half) and an angry statement that she was going to sue Menard's. Menard's employees preserved a great deal of ESI, including photos and an hour and a half of video.

Element three (3) requires a finding that relevant ESI was lost because a party failed to take reasonable steps to preserve it. However, the Notes of the Advisory Committee on the 2015 Amendments to the Federal Rules of Civil Procedure Rule 37 subdivision(e) state that "[t]his rule recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection." Petitioner Kimberly Smith calls for perfection. Not only perfection, but Petitioner Kimberly Smith calls for additional ESI which never existed.

Element four (4) requires a finding that the ESI cannot be restored or replaced through additional discovery. In this matter, there were no proper formal discovery requests issued by or on behalf of Petitioner Kimberly Smith during the time this matter was pending in the district court. It is not possible to restore or replace information through discovery that was entirely one-sided. Respondent Menard timely produced all information, including electronically stored information, which it planned to use to support its defenses, pursuant to the FED. R. CIV. P. 26. This information included all video which was preserved from the date of the incident.

During the pre-trial conference, the trial court, recognizing that Petitioner Kimberly Smith was proceeding pro se, inquired if there was additional video which could have been produced but which was withheld. Counsel for Respondent Menard represented that all video which was preserved from the date of the incident was produced several times, not only to Petitioner Kimberly Smith, but also to her prior counsel before his withdrawal. During the trial, there was extensive testimony

about the video which was preserved, Menard's video preservation policy, and the video which could have been preserved but which was not.

The trial court made no specific findings regarding the predicate elements of Federal Rule of Civil Procedure 37(e). However, the trial court did find that there "was no discovery propounded by Plaintiff, and so in terms of Rule 37, it kind of takes it out of the discovery context." (App. P. 45:12-16) Without these findings, neither FED. R. CIV. P. 37(e)(1) nor FED. R. CIV. P. 37(e)(2) remedies are available to the trial court. Further, the trial court stated: "I don't find there's prejudice because Ms. Smith and her witnesses have been sufficiently able to talk about what they believe the video would show." (App. Pp. 44:25-45:2) The trial court did not address bad faith specifically, but instead made a finding consistent with the Federal Rules of Civil Procedure, stating that "I cannot find intentional destruction. There's been credible testimony as to the processes and procedures followed in this case." (App. P. 45:3-5) Because this case does not meet the predicate requirements of FED. R. CIV. P. 37(c), this case does not present an opportunity for the court to decide the question presented by the Petitioner Kimberly Smith: whether the trial court must find both prejudice AND intent or only intent to issue an adverse influence instruction. This Court should deny Petitioner Kimberly Smith's Petition for Writ of Certiorari.

III. The Trial Court Properly Applied a Preponderance of the Evidence Standard and This Question Was Not Properly Preserved for Appeal

Petitioner Kimberly Smith alleges that the trial court and the Court of Appeals for the Eighth Circuit utilize a "clear and convincing" standard as opposed to the more appropriate "preponderance of the evidence" standard when determining if an adverse inference instruction should be granted. At trial, the court does not articulate a standard for granting the instruction, holding only that there were "no grounds in law or fact for any sanction in this case." (App. P. 44:24-25) When called upon to explain this ruling further, in an Order denying a new trial, the trial court quotes the applicable law as "[t]his is a high bar because an 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." (App. P. 10) (citing *Davis v. White*, 858 F.3d 1155, 1160 (8th Cir. 2017) (punctuation removed). The trial court elaborates further "[i]n this Court's opinion, the evidence presented at trial, was not sufficient to warrant the imposition of sanctions under Rule 37(e) or the submission of an adverse inference instruction to the jury as requested by Smith." *Id.* The trial court then explains the evidence which led to this conclusion. *Id.* at 8-9. The trial court does not make any indication that it did anything but make a careful and considered decision regarding the evidence presented and deny the Petitioner's request for an adverse inference jury instruction. The trial court does not state that it applied a heightened level of scrutiny. The Circuit Court of Appeals for the Eighth Circuit did not address this issue in its ruling. *See generally*, App. 1-2. This issue was not properly preserved for appeal. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008) When an issue is not

properly preserved for appeal, the Court does not generally act on it. *Id.* (stating "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." (citing *Singleton v. Wulff*, 428 U.S. 106, 120, (1976))) There is no need for this Court to grant this Petition for Writ of Certiorari on this issue.

IV. The Court Found No Prejudice and Petitioner Kimberly Smith's Argument is Improper

Petitioner Kimberly Smith provides extensive factual argument regarding the prejudice she believes she has suffered as a result of the missing video in this matter. The trial court stated that "I don't find there's prejudice because Ms. Smith and her witnesses have been sufficiently able to talk about what the believe the video would show." (App. Pp. 44:24-45:2) It is worth noting that this is mere quibbling over a few minutes here and there. There was extensive testimony over the facts of the accident, the video coverage, and why the accident itself was not viewable in the video that did cover the parking lot. *See also,* Figure 1*, supra.* "[f]ailure to preserve such speculative evidence does not raise the specter of bad faith in the same way that a failure to preserve evidence of a specific, crucial event in a case might." *ML Healthcare Servs., LLC v. Publix Super Mkts., Inc.,* 881 F.3d 1293, 1309 (11th Cir. 2018) The majority of Petitioner Kimberly Smith's concerns are improperly related specifically to her case and were already resolved in the trial court and in the Circuit Court of Appeals for the Eighth Circuit. The Eighth Circuit held that "[w]e conclude the district court did not err in … denying her motions for

contempt and for a spoilation instruction." (App. P. 2) Petitioner's arguments regarding the prejudice allegedly suffered during this case hold no national importance and do not justify this Court's time and concern.

V. Conclusion

This case does not present any novel discovery issues which affect the nation or the circuit courts in general. This Petition is simply an impermissible effort by the Petitioner to relitigate matters which were fully and properly decided both by the trial court and the appeals court. The Supreme Court should deny Petitioner Kimberly Smith's Petition for Writ of Certiorari.

CERTIFICATION OF COMPLIANCE

As required by Supreme Court Rule 33.2, this BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI is allowed to be submitted in 8.5x11 inch paper format as the Petitioner in this matter has elected to proceed *in forma pauperis*. This BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI has been prepared in sized 12-point Century Schoolbook font for the text and contains 17 pages, excluding the parts which are exempted by Supreme Court Rule 33.1(d).

Respectfully Submitted,

/s/ Barbara Johnson

Barbara Johnson
POTTER & MURDOCK, PC
252 N. Washington Street
Falls Church, VA 20037
Telephone: (202) 528-0077
Facsimile: (703) 832-0211
E-mail: bjohnson@pottermurdock.com
Attorney for Respondent Menard, Inc.

APPENDIX DOCUMENTS

Appendix 1: United States Court of Appeals for the Eighth Circuit, No. 23-2657, *Kimberly Ann Smith v. Menard, Inc.,* May 17, 2024, unpublished. .....App 1

Appendix 2: United States District Court for the Southern District of Iowa, Eastern Division, No. 3:21-cv-00012-SBJ, *Kimberly Ann Smith v. Menard, Inc.,* Verdict June 15, 2023, Order Denying New Trial August 8, 2023 .....App 3

Appendix 3: Selections of transcript of pretrial conference in United States District Court for the Southern District of Iowa, Eastern Division, No. 3:21-cv-00012-SBJ, *Kimberly Ann Smith v. Menard, Inc.*, containing counsel's representations regarding videos .....App 12

Appendix 4: Selections of transcript of trial in United States District Court for the Southern District of Iowa, Eastern Division, No. 3:21-cv-00012-SBJ, *Kimberly Ann Smith v. Menard, Inc.*, containing court's findings and rulings regarding adverse inference instruction. .....App 15