

1 **II. LEGAL STANDARD**

2 “A party seeking sanctions for spoliation of evidence must prove the following
3 elements: (1) the party having control over the evidence had an obligation to preserve it
4 when it was destroyed or altered; (2) the destruction or loss was accompanied by a culpable
5 state of mind; and (3) the evidence that was destroyed or altered was relevant to the claims
6 or defenses of the party that sought the discovery of the spoliated evidence.” *Surowiec v.*
7 *Capital Title Agency, Inc.*, 790 F. Supp. 2d. 997, 1005 (D. Ariz. 2011). The third element
8 is not at issue with respect to the batteries, but is at issue with the keys.

9 “In diversity cases, state law determines a party’s duty to preserve evidence that is
10 outcome-determinative, but federal rules govern sanctions for breach of that duty.” *State*
11 *Farm Fire & Cas. Co. v. Broan Mfg. Co.*, 523 F. Supp. 2d 992, 995 (D. Ariz. 2007) (citing
12 *Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d 804, 806 (7th Cir. 1995). Under Arizona law,
13 litigants must preserve evidence which they know or should know is relevant to an action
14 or is reasonably likely to be requested during discovery. *Souza v. Fred Carries Contracts,*
15 *Inc.*, 191 Ariz. 247, 955 P.2d 3, 6 (1997). Courts in the Ninth Circuit “generally agree” that
16 “as soon as a potential claim is identified, a litigant is under a duty to preserve evidence
17 which it knows or reasonably should know is relevant to the action.” *Apple Inc. v. Samsung*
18 *Elecs. Co.*, 888 F. Supp. 2d 976, 991 (N.D. Cal. 2012) (quoting *In re Napster, Inc.*
19 *Copyright Litig.*, 462 F. Supp. 2d 1060, 1067 (N.D. Cal. 2006)).

20 Sanctions in the Ninth Circuit are left to the broad discretion of the district courts
21 “to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly
22 trial.” *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th
23 Cir.1992); *see also Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (“A federal trial
24 court has the inherent discretionary power to make appropriate evidentiary rulings in
25 response to the destruction or spoliation of relevant evidence.”).

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1 **III. DISCUSSION**

2 **A. Batteries**

3 *i. Duty to Preserve*

4 Because Arizona law does not impose a duty on third parties to preserve evidence,
5 the Court cannot impose spoliation sanctions based on Plaintiff's ex-girlfriend's failure to
6 preserve the batteries. *Lips v. Scottsdale Healthcare Corp.*, 224 Ariz. 266, 267, ¶ 11, 229
7 P.3d 1008, 1009 (2010) (declining to recognize the tort of negligent third-party spoliation
8 because "[c]ourts have not recognized a general duty to exercise reasonable care for the
9 purely economic well-being of others, as distinguished from their physical safety or the
10 physical safety of their property").

11 Additionally, Oueis Gas fails to provide, nor is the Court aware of, any Arizona law
12 holding that an attorney's failure to preserve evidence is imputable to the plaintiff for
13 spoliation sanctions. There is federal law on the issue. *See Jordan v. Ford Motor Co.*, No.
14 2:09-CV-0865-HRH, 2010 WL 11627610, at *3 (D. Ariz. Apr. 19, 2010) (relying on
15 Fourth Circuit law) ("Plaintiff's counsel's failure to take any steps to preserve the Escort
16 is imputable to plaintiff."). But Plaintiff clarified at oral argument, and Oueis Gas did not
17 dispute, that he did not retain his lawyer until two weeks after the batteries were discarded.

18 Plaintiff surely had access to and control over the contents of his pockets and, as the
19 plaintiff in this case, had a duty to preserve them as soon as the explosion occurred. *Apple*
20 *Inc.*, 888 F. Supp. at 991. However, the main issue regarding whether Plaintiff can be liable
21 for the spoliation of the batteries centers around whether he had a culpable state of mind,
22 which will be addressed below.

23 *ii. Culpable State of Mind*

24 Plaintiff alleges he should not be held liable for spoliation because he was "on
25 intravenous Versed and a high dose of Fentanyl, with the hospital staff cutting the burned
26 flesh from his legs with a scalpel, going in and out of consciousness." (Doc. 109 at 2).
27 Plaintiff does not provide any caselaw indicating that a party does not have a duty to
28 preserve evidence while incapacitated at the hospital. However, as explained above, "[a]

1 party seeking sanctions for spoliation of evidence must prove . . . the destruction or loss
2 was accompanied by a culpable state of mind.” *Surowiec*, 790 F. Supp. 2d at 1005.

3 “Courts have not been uniform in defining the level of culpability—be it negligence,
4 gross negligence, willfulness, or bad faith—that is required before sanctions are
5 appropriate.” *Id.* at 1006 (internal quotation and citation omitted). “Nor is there consensus
6 as to how the level of culpability is to be determined, or what prejudice, if any, may be
7 presumed from culpable conduct.” *Id.* at 1006–07. However, it is clear that “[a]n allegedly
8 spoliating party’s culpability must be determined case-by-case.” *Id.* at 1007; *see also Al*
9 *Otro Lado, Inc. v. Wolf*, No. 317CV02366BASKSC, 2021 WL 631789, at *5 (S.D. Cal.
10 Feb. 18, 2021) (“The required culpable state of mind includes negligence.”) (internal
11 quotations and citation omitted).

12 Plaintiff was negligent in this case when he allowed the batteries to be discarded.
13 “To establish negligence, the courts focus on whether or not the caretaker of the evidence
14 can foresee possible harm to the [other party] if the evidence is destroyed.” *Bravo v.*
15 *Foremost Ins. Group*, No. C94–20467 RPA, 1994 WL 570643, at *4 (N.D. Cal. Oct. 11,
16 1994). Here, Plaintiff had retained a lawyer when he was in the hospital. (Doc. 105-1
17 at 16).¹ Plaintiff could have and should have foreseen harm to Oueis Gas if the batteries
18 were destroyed in light of how central they are to Plaintiff’s theories of the case. A
19 reasonable person in Plaintiff’s situation would have preserved the batteries.

20 *iii. Appropriate Sanction*

21 “The negligent spoliation of evidence may still be sanctionable where it results in
22 prejudice to the opposing party because each party should bear the risk of its own
23 negligence.” *Net-Com Servs., Inc. v. Eupen Cable USA, Inc.*, No. CV 11-2553 JGB SSX,
24 2013 WL 4007785, at *3 (C.D. Cal. Aug. 5, 2013) (internal citations and quotations

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26 ¹ Plaintiff clarified at oral argument that he later retained new counsel several weeks after
27 his hospitalization. However, the fact that he had an attorney while in the hospital at all is
28 relevant to show he was aware of impending litigation and, therefore, aware that the
batteries would be necessary for Oueis Gas’s defense.

1 omitted). Additionally, spoliation sanctions should be proportionate to the prejudice cause
2 to the other party. *See, e.g., Al Otro Lado, Inc. v. Wolf*, No. 317CV02366BASKSC, 2021
3 WL 631789, at *7 (S.D. Cal. Feb. 18, 2021) (“[A]lthough defendants negligently spoliated
4 relevant evidence, the Court finds that plaintiffs’ requested adverse-inference sanctions are
5 disproportional to the prejudice caused by the spoliation.”); *Apple Inc. v. Samsung Elecs.*
6 *Co.*, 888 F. Supp. 2d 976, 994-95 (N.D. Cal. 2012) (finding “strong adverse inference
7 instruction” was not warranted where prejudice to opposing party was minimal). “Other
8 courts considering whether loss of evidence merits an instruction allowing an adverse
9 inference generally require evidence of either bad faith or intentional destruction.” *Smyser*
10 *v. City of Peoria*, 215 Ariz. 428, 440, 160 P.3d 1186, 1198 (Ct. App. 2007). However, in
11 *Smyser*, the Arizona Court of Appeals held that “when no evidence shows intentional or
12 bad faith destruction of evidence, *particularly when Catherine had other means to establish*
13 *what the strips likely would have revealed*, a spoliation instruction was not mandatory and
14 the failure to give it was not reversible error.” *Id.* (emphasis added). The court did not hold,
15 however, that a spoliation instruction would not be appropriate under some
16 circumstances—particularly where the evidence destroyed is central to the case.

17 Here, Plaintiff’s failure to preserve the contents of his pockets likely does not rise
18 to the level of intentional or bad faith destruction. However, his failure to preserve the
19 batteries was at least negligent, as explained above. Furthermore, the batteries are central
20 to disproving Plaintiff’s arcing theory. Without the batteries, Defendant will face
21 significant challenges in defending against Plaintiff’s theories of what caused the
22 explosion. When asked at oral argument what other evidence Plaintiff had to show
23 causation, Plaintiff pointed only to the video tape of the explosion, Plaintiff’s testimony
24 that he had keys and batteries in his pocket, and the keychain that he had in his pocket. But
25 none of this evidence adequately substitutes the *actual* batteries in this case.

26 At oral argument, Plaintiff argued that, as a matter of law, the batteries (and keys,
27 which will be addressed below) are not necessary to proving or disproving their causation
28 theories because they had burned up badly in the explosion. Plaintiff cited *Dietz v. Waller*,

1 141 Ariz. 107, 109, 685 P.2d 744, 746 (1984) and *Rocky Mountain Fire & Cas. Co. v.*
2 *Biddulph Oldsmobile*, 131 Ariz. 289, 291, 640 P.2d 851, 853 (1982). In *Dietz*, a boat had
3 burned up and the owner sued the maker of the boat under strict liability. The Arizona
4 Supreme Court held that plaintiffs “must be permitted to rely upon circumstantial evidence
5 alone in strict liability cases, because it is unrealistic to expect them to otherwise be able
6 to prove that a particular product was sold in a defective condition.” *Dietz*, 141 Ariz. at
7 110. The decision did not deal with spoliation. Similarly, the court in *Rocky Mountain Fire*
8 explained that “[t]he plaintiffs must be permitted to rely upon circumstantial evidence
9 alone” because “[t]here will seldom be a case based upon strict liability where a person
10 will be able to testify from his personal knowledge that a particular product was sold in a
11 certain defective condition.” 131 Ariz. at 292. Again, the decision did not discuss the
12 spoliation of evidence.

13 The spoliation analysis requires the Court to consider prejudice to the defendants in
14 light of the missing evidence. Defendant Ouis Gas will be significantly prejudiced by the
15 absence of the batteries, even if they could also rely on circumstantial evidence to put on
16 their defense. The Court therefore finds that sanctions are warranted based on Plaintiff’s
17 failure to preserve the batteries.

18 Because Plaintiff’s spoliation of the batteries was merely negligent, the Court finds
19 that dismissal would be too harsh of a sanction. *Anheuser–Busch, Inc. v. Natural Beverage*
20 *Distributors*, 69 F.3d 337, 348 (9th Cir. 1995) (explaining that, for dismissal to be proper,
21 the conduct to be sanctioned must be due to willfulness, fault, or bad faith.). Accordingly,
22 the Court will read a limiting instruction to the jury regarding the absence of the batteries.

23 “[C]ourts have formulated adverse inference instructions that range in their level of
24 severity.” *Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132, 1150 (N.D. Cal. 2012).
25 The degree of harshness should be dictated by the “nature of the spoliating party’s
26 conduct—the more egregious the conduct, the more harsh the sanction.” *Pension Comm.*
27 *of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 470 (S.D.N.Y.
28 2010) (abrogated on other grounds). Because Plaintiff’s spoliation was merely negligent,

1 the Court will not instruct the jury to infer that the batteries were favorable to Oueis Gas's
2 position. Instead, the instruction, included at the end of this Order, will merely explain that
3 Plaintiff failed to preserve evidence which has prejudiced Oueis Gas's ability to defend
4 itself in this litigation. The parties can argue, and the jury can decide, the extent to which
5 the evidence would have been necessary to prove Plaintiff's claims in this case.

6 **B. Keys**

7 *i. Duty to Preserve*

8 As explained above, Plaintiff had a duty to preserve the contents of his pockets,
9 including the keys.

10 *i. Relevance to the Litigation*

11 Unlike the batteries, it is disputed what relevance the keys have to the litigation.
12 Plaintiff's only argument on this point is that Oueis Gas delayed bringing the prejudice of
13 the keys' spoliation to the Court's attention. Specifically, Plaintiff points out that that
14 nowhere does Oueis Gas's expert's opinion about how loss of evidence interfered with a
15 proper forensic examination does it mention the keys, and that Oueis Gas did not mention
16 the keys until the instant Motion to Dismiss. (Doc. 109 at 9). However, just because Oueis
17 Gas waited until the instant motion to assert that the keys are relevant to the claims and
18 defenses in this case does not make it untrue. In fact, Plaintiff alleges that Defendants
19 "fail[ed] to design the battery to adequately guard against shorting *when it comes to contact*
20 *with meta objects.*" (Doc. 30 at ¶ 16). Obviously, the metal objects in Plaintiff's pocket at
21 the time of the explosion are highly relevant to Plaintiff's claims.

22 *ii. Culpable State of Mind*

23 There were three keys on the keychain at the time of the explosion: a mailbox key,
24 an apartment key, and a Volkswagen key. (Doc. 109 at 8-9). Plaintiff concedes that he
25 turned the mailbox and apartment keys into his apartment years ago, and turned over the
26 Volkswagen key when he sold it during the same period. (Doc. 108 at 9). However, Oueis
27 Gas provides no evidence that Plaintiff's disposal of the keys was done intentionally to
28 harm its ability to defend this lawsuit. Although Oueis Gas argues Plaintiff allowed his

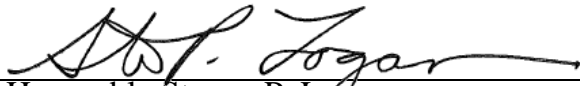
1 expert to inspect the keys before discarding them, the evidence does not support this
2 accusation. Plaintiff's expert merely testified that the keychain he inspected had *some* keys
3 on it. (Doc. 121 at 3-4). However, when asked about the keys, Plaintiff testified that the
4 keys his expert saw were not the same keys that were in his pocket at the time of the
5 accident. The evidence supports this, because the keys examined by the Plaintiff's expert
6 had a Mercedes key fob attached to it, and not keys to a Volkswagen. The Court finds that
7 Plaintiff's failure to preserve the keys constitutes negligence. Similar to the instruction for
8 the batteries, because the failure to preserve the keys is based on negligence, the Court will
9 give a limited adverse instruction. The instruction will read:

10 Plaintiff Christopher Walsh has failed to prevent the
11 destruction of relevant evidence for Defendant Oueis Gas's use
12 in this litigation. This is known as the "spoliation of evidence."
13 I instruct you, as a matter of law, that Plaintiff failed to preserve
14 this evidence after his duty to preserve arose. The failure to
15 preserve the evidence has prejudiced Oueis Gas's ability to
16 defend itself in this litigation. Whether this finding is important
17 to you in reaching a verdict in this case is for you to decide.
18 You may choose to find it determinative, somewhat
19 determinative, or not at all determinative in reaching your
20 verdict.

21 Accordingly,

22 **IT IS ORDERED** that Defendant Oueis Gas's Motion to Dismiss or Alternatively
23 for an Adverse Instruction Based on Plaintiff's Spoliation of Evidence (Doc. 105) is
24 **granted** to the extent stated in this Order.

25 Dated this 16th day of August, 2021.

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Honorable Steven P. Logan
United States District Judge