IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

GREGORY WOODEN,

Plaintiff,

v. Case No. 1:16-cv-378-WTH-GRJ

CLYDE BARRINGER,

Defendant.
_____/

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SPOLIATION SANCTIONS

Defendant Clyde Barringer, in his individual capacity, by and through undersigned counsel, and pursuant to Federal Rules of Civil Procedure 6(d) and Local Rules for the Northern District of Florida 7.1, file his response in opposition to Plaintiff's Motion for Spoliation Sanctions [Doc. 50]. In support thereof, Defendant states the following:

INTRODUCTION

1. On December 23, 2016, Plaintiff filed his initial complaint, alleging a 42 U.S.C. § 1983 Civil Rights Excessive Force cause of action for alleged violations of his constitutional rights under the Fourth Amendment. (Doc. 1). Plaintiff sued Defendant Clyde Barringer in his individual capacity. (Id.). Specifically, Plaintiff alleged that Defendant Barringer, a correctional officer

employed by the Alachua County Sheriff's Office, used excessive force against Plaintiff while he was incarcerated at the Alachua County Jail "on February 11, 2016, at about 11:30am in C-Zone housing." (Id. at 5-6).

2. On May 23, 2017, in response to written discovery, Defendant Barringer provided Plaintiff with a copy of video footage from February 11, 2016, that captured the alleged use of force (Exhibit 1) and his medical file (Exhibit 2). The video footage is actually from three different cameras, capturing three different angles. (Exhibit 3, Video Clip Details).[1]

3. Plaintiff claims "these video records are incomplete and have been manipulated to not show specifically alleged uses of force by Defendant Barringer." However, the only *specific* incomplete or manipulated part of the videos Plaintiff can point to is that on the second video (Zone_3_C3_POD_32), it "fails to show the prolonged choking of Plaintiff by Defendant Barringer, or Defendant Barringer's falling down, or the inmates cleaning up the blood from Plaintiff's wounds." (Doc. 50 at 5).

[1] If the Court opens up Exhibit 1, the video provided, at the bottom of the screen, to the left of the rewind, play, and fast-forward buttons, are three other symbols. If the Court hovers its mouse over the middle icon that looks like a piece of paper, a little pop up will say "Show file details." If the Court clicks on that icon, a separate screen appears that shows the video clip details. This is what "Exhibit 3" is composed of for the Court's convenience.

4. Plaintiff also claims that Defendant Barringer acted in bad faith and knowingly failed to preserve video recordings or destroy the video recordings of Defendant Barringer escorting Plaintiff to medical and of Plaintiff once he was in medical. (Doc. 50 at 13; 18).

5. Plaintiff asserts that because the recordings in medical and his escort to medical "would have shown that Plaintiff suffered severe injuries from Defendant Barringer's use of force, Defendant Barringer either actually destroyed the recordings or was privy to the destruction." (Doc. 50 at 14).

6. Plaintiff claims that Defendant Barringer was on notice of a lawsuit regarding his use of force and resultant injuries and was prejudiced by Defendant Barringer's failure to preserve the aforementioned video recordings. (Doc. 50 at 14-15).

7. Plaintiff alleges that he was prejudiced because these recordings would have shown the severity of Plaintiff's injuries, Plaintiff's demeanor after the use of force, and the great disparity between size and weight of Plaintiff and Defendant Barringer and such prejudiced cannot be cured. (Doc. 50 at 13-16). Plaintiff claims he is now "denied the ability to show the damages and injuries inflicted by Defendant Barringer's unnecessary use of force." (Doc. 50 at 17).

8. Plaintiff asserts that sanctions are necessary and seeks the extraordinary sanction of entry of default judgment against Defendant Barringer as to liability and to refer the case to arbitration to determine damages. (Doc. 50 at 22-25).

9. However, contrary to Plaintiff's allegations, Defendant Barringer was unaware of any potential litigation until he was served a summons and copy of the complaint in this lawsuit on March 3, 2017; he did not have either authority or control over the preservation of the video recordings at the jail; and he most definitely did not intentionally manipulate, alter, or destroy any potentially relevant video recordings. (Exhibit 4, Barringer's Sworn Affidavit).

10. Furthermore, Plaintiff has failed to establish how such "evidence" was crucial or how Plaintiff was prejudiced by the alleged spoliation. More importantly, Plaintiff failed to prove how Defendant Barringer acted in bad faith and thus, sanctions are not appropriate.

11. Based on the foregoing, Plaintiff's Motion for Spoliation Sanctions should be denied.

MEMORANDUM OF LAW

Spoliation is the "intentional destruction of evidence of the significant and meaningful alteration of a document or instrument." Southeastern Mech. Serv., Inc.

v. Brody, 657 F.Supp. 2d 1293, 1299 (M.D. Fla. 2009) (citing Green Leaf Nursery v. E.I. DuPont De Memours & Co., 341 F.3d 1292, 1308 (11th Cir. 2003). Spoliation is established where the moving party demonstrates (1) the missing or destroyed evidence existed at one time, (2) the non-moving, allegedly spoliating party had a duty to preserve the evidence, and (3) the allegedly spoliated evidence was crucial to the movant's ability to prove a prima facie case or defense. QBE Ins. Corp. v. Jorda Enterprises, Inc., 280 F.R.D. 694, 696 (S.D. Fla. 2012)

> In meeting the requirement to demonstrate that the spoliated evidence was crucial to the movant's ability to prove its prima facie case or defense, it is not enough that the spoliated evidence would have been relevant to a claim or defense. Managed Care Solutions, 736 F.Supp.2d at 1327–28 (finding that the allegedly spoliated evidence was not crucial to the plaintiff's claims because it could still prove its case through other evidence already obtained elsewhere). See also Floeter v. City of Orlando, 6:05–cv–400–Orl–22KRS, 2007 WL 486633, at *6 (M.D. Fla. Feb. 9, 2007) (missing emails may be relevant to Plaintiff's case but they were not critical and would have been cumulative).

Point Blank Solutions, Inc. v. Toyobo Am., Inc., No. 09-61166-CIV, WL 1456029, at 8 (S.D. Fla. 2011).

Even if all three elements are met, "'a party's failure to preserve evidence' rises to the level of sanctionable spoliation in this Circuit 'only where the absence of that evidence is predicated on bad faith,' such as where a party purposely "tamper[s] with the evidence." Wandner v. Am. Airlines, 79 F. Supp. 3d 1285 (S.D. Fla. 2015) (citing Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997); see

also, Penalty Kick Mgmt. Ltd. v. Coca Cola Co., 318 F.3d 1284, 1294 (11th Cir. 2003) (holding that there was no adverse inference from missing label at issue because there was no indication of bad faith).

"Mere negligence [or even grossly negligent conduct] in losing or destroying records or evidence is insufficient to justify an adverse inference instruction for spoliation." Wandner, 79 F. Supp. 3d at 1298. District Courts in the Eleventh Circuit "regularly deny adverse inference requests even when there is an indisputable destruction of evidence." Id.; Socas v. Nw. Mut. Life Ins. Co., No. 07–20336, 2010 WL 3894142 (S.D. Fla. Sept. 30, 2010) (denying motion to dismiss and for adverse inference jury instruction when doctor negligently failed to suspend her ordinary policy of purging inactive patient files after learning the information in those files was relevant to her disability claim).

In considering the particular spoliation sanction to impose, courts should consider the prejudice to the non-spoiling party as a result of the destruction of evidence, whether the prejudice can be cured, the practical importance of the evidence, whether the spoiling party acted in good or bad faith, and the potential for abuse of expert testimony about evidence not excluded. Marshal v. Dentfirst, P.C. 313 F.R.D. 691 (N.D. Ga. 2016).

I. PLAINTIFF'S ALLEGATIONS THAT THE VIDEOS PROVIDED ARE INCOMPLETE AND MANIPULATED ARE BASELESS, CONCLUSORY, AND FALSE

Plaintiff's first allegation is that the videos provided to him are incomplete and have been manipulated. However, the only *specific* incomplete or manipulated part of the videos Plaintiff can point to is that on the second video (Zone_3_C3_POD_32), it "fails to show the prolonged choking of Plaintiff by Defendant Barringer, or Defendant Barringer's falling down, or the inmates cleaning up the blood from Plaintiff's wounds." (Doc. 50 at 5). Such an allegation is baseless, unsubstantiated, and false. The video footage that was provided to Plaintiff is actually from three different cameras, capturing three different angles.

The first angle is from the camera name "Zone_3_C2_and_C3_POD_ENTRY_13" and shows the control panel and sally port area entering into Zone C3. It begins at 11:36:15 AM and ends at 11:39:39 AM. This camera angle captures part of the events leading up to the alleged use of force incident from the entry way and ends with Officer Barringer leaving the entry way and entering the sally port for Zone C3 at approximately 11:39:07 AM.

The second angle is from the camera named "Zone_3_C3_POD_32" and shows inside Zone C3 looking towards the phone area from the entry way. It begins at 11:37:39 AM and ends at 11:40:30 AM. This video picks up where the first one ended and, at approximately 11:39:11 AM, the viewer can see Officer

Barringer who has just entered the pod. In this angle, the viewer can see the events leading up to the alleged use of force event from inside the pod, including seeing Plaintiff on the phone beforehand and Officer Barringer walking towards Plaintiff, as well as, part of the alleged use of force incident and Plaintiff being escorted out of the pod afterwards.

The third angle is from the camera named "Zone_3_C3_POD_33" and captures the angle opposite of the second camera, showing Zone C3 from the phone area looking towards the entry. It begins at 11:39:07 AM and ends at 11:40:29 AM. This video picks up where the first one left off and the viewer can see Officer Barringer on camera leaving the sally port and entering the pod at approximately 11:39:08 AM. With this angle, the viewer can see the entire alleged use of force incident, the handcuffing of Plaintiff, and Plaintiff being escorted out of the pod.

Admittedly, the angle from the second camera does not capture the full alleged use of force. However, the third video (Zone_3_C3_POD_33), which is from a different angle, does in fact cover the entire alleged use of force, including the events that led up to Officer Barringer falling to the ground (captured at approximately 11:39:25 to 11:39:35 AM).

In viewing all three videos as a whole, the entire alleged use of force incident is captured and there are no missing parts. A close view of all three videos indicates that there are no time gaps, cuts, jumps, or any other evidence whatsoever of manipulation or tampering. Further, it is unclear how Plaintiff has any personal knowledge that inmates cleaned up the "blood from his wounds" in the pod after the alleged incident. The record is clear that Plaintiff was escorted to the infirmary wherein he stayed overnight after the alleged use of force incident. (See Appendix A and C attached to Plaintiff's Motion). Lastly, and most importantly, Officer Barringer did not manipulate or intentionally tamper with the videos.

Based on the foregoing, Plaintiff has failed to establish the intentional destruction or meaningful alteration of the video recordings.

II. PLAINTIFF'S ALLEGATIONS THAT DEFENDANT BARRINGER DESTROYED VIDEO RECORDINGS OF BARRINGER ESCORTING PLAINTIFF TO MEDICAL AND OF PLAINTIFF IN MEDICAL ARE BASELESS, CONCLUSORY, AND FALSE

Plaintiff's second allegation that Defendant Barringer destroyed video recordings of Plaintiff's escort to medical after the alleged use of force incident and of Plaintiff once in medical is baseless, conclusory, and false.

A. Plaintiff Has No Way of Knowing Whether The "Recordings" Existed at One Time

Plaintiff has not met his burden of demonstrating that the video evidence he is seeking actually existed before the videos were not preserved because they were overwritten. See, Wandner v. Am. Airlines, 79 F. Supp. 3d 1285, 1304 (S.D. Fla. 2015). Even if one or more cameras would have filmed the area where Defendant Barringer escorted him to medical or the infirmary itself, the cameras may not have captured Plaintiff at the relevant times. Id. Other officers, inmates, visitors, or staff, could have been standing next to, in front, or behind Plaintiff, blocking the views. Medical equipment, carts, or boxes could have obstructed the camera's view at critical moments. Id. Plaintiff has no way of knowing that such "recordings" would show "gratuitous amounts of blood all over Plaintiff's face, neck, and torso…extensive wounds to his eye, eyebrow, and forehead area with blood streaming down his face and onto his torso" or "contusions to his forehead, chest, face, back of the head, and…lacerated eyebrow." (Doc. 15). What was captured on those recordings could be "something" or it "could be nothing or it could be anything or it could be everything. Who knows?" Id.

Thus, Plaintiff has failed to establish the evidentiary value of these recordings. Although there were cameras, Plaintiff has no way of knowing how the cameras were positioned and whether or not certain camera angles on the route Defendant Barringer took Plaintiff to medical or in medical itself would have shown Plaintiff and his alleged injuries. Plaintiff never indicated that he saw such

recordings or that such recordings would be important to his lawsuit prior to serving discovery requests. Additionally, Plaintiff never alleged that Barringer saw such recordings and Barringer himself testified that he never saw such recordings. Based on the foregoing, Plaintiff failed to establish that he had any way of knowing whether the "recordings" existed at one time.

B. **Defendant Barringer, the Non-Moving Allegedly Spoliating Party Had No Duty to Preserve the "Recordings"**

A party has a "duty to preserve relevant information from the time that [the] litigation became reasonably anticipated." Se. Mech. Services, Inc. v. Brody, 8:08-CV-1151T30EAJ, 2009 WL 2242395, at *3 (M.D. Fla. July 24, 2009). Plaintiff has failed to adequately explain why Defendant Barringer, as opposed to *only* his employer, Sadie Darnell, in her official capacity as Sheriff of Alachua County, Florida, was under an affirmative duty to Plaintiff to preserve evidence. Plaintiff cites to the February 12, 2016, inmate request (Doc. 50, Appendix A), March 5, 2016, informal grievance (Id. at Appendix B), and the two April 2016, Notice of Intent to Sue (Id. at Appendix C, D), in an attempt to establish Defendant Barringer's duty to preserve evidence.

However, the cited letters by Plaintiff only serve to establish that a third party, Sheriff Darnell, in her official capacity, may have had a duty to Plaintiff to preserve potentially relevant evidence. Such letters are silent as to Defendant

Barringer's notice of a potential civil action. Moreover, none of these requests, grievances, or notices indicate that any other video, other than the video recordings that were preserved capturing the alleged use of force incident in Charlie Zone on February 11, 2016, around 11:30 am, would be relevant to his potential lawsuit. Plaintiff himself specifically states that after the alleged use of force incident, he was escorted out of the dorm *without further incident*.

First, Appendix A is an inmate request form dated February 12, 2016, wherein Plaintiff complains about the alleged excessive force incident that occurred while Plaintiff was in "C-3" on February 11, 2016. In the request, Plaintiff specifically cites that the incident occurred in C-3 and states "*check camera for proof and medical records about my head injury and arm injury*." It is clear from the face of the document that Officer Clyde Barringer was neither the officer who received the request from Plaintiff on February 12, 2016, nor the officer who responded to the request on March 3, 2016.[2] Moreover, based on this letter, it is not clear that the officer reviewing this request would have even realized a need to preserve video footage of Plaintiff being escorted to medical or showing Plaintiff in medical as "evidence." However, the Sheriff's Office did preserve the video footage capturing the incident in C-3 on February 11, 2016, and through discovery, Defendant Barringer has since provided Plaintiff a copy of these videos.

[2] Officer Barringer's ID # is 1298.

Second, Appendix B is an Inmate Grievance Form, given to Plaintiff on February 26, 2016, by Officer Rachel Brown, in response to the above inmate request attached as Appendix A. Plaintiff again complains about Officer Barringer's use of force and specifically states "*I wasn't resisting check camera on C-3*." Again, it is evident that Officer Barringer was neither the officer who received the grievance from Plaintiff on March 8, 2016, nor the officer who responded to the grievance on March 16, 2016. Similar to above inmate request, it is not even clear that Captain Warren, the officer who reviewed this request, would have even realized a need to preserve video footage of Plaintiff being escorted to medical or showing Plaintiff in medical as "evidence."

Third, Appendix C appears to be a letter, dated April 12, 2016, pursuant to § 768.28(6)(a), Fla. Stat., from Plaintiff and addressed to the Sheriff of Alachua County regarding the use of force by Officer Barringer on February 11, 2016. It appears that Plaintiff may have "cc" general counsel for the Sheriff's Office, Internal Affairs, Department of Financial Services, and Division of Risk Management. Appendix D appears to be another correspondence, pursuant to 768.28, Fla. Stat., dated April 25, 2016, from Plaintiff's wife to the Sheriff, Internal Affairs, General Counsel for the Sheriff's Office, the Mayor, and the Department of Financial Services containing similar allegations as the previous letter. Pre-suit notice letters, pursuant to § 768.28(6), Fla. Stat., are sent to the

governmental entity or the head of such entity in her official capacity of which the individual officer is an employee. See also, § 768.28(9)(a), Fla. Stat. Additionally, absent from the letters are any indication that it was addressed to Officer Barringer. Again, Plaintiff only describes the use of force incident that occurred in the pod where he was housed in "Charlie Zone." Plaintiff specifically states that after the use of force incident occurred, he "*was escorted out of the housing unit without further incident*." Thus, it is not clear from reviewing these notices that the Sheriff would have even realized a need to preserve video footage of Plaintiff being escorted to medical or showing Plaintiff in medical as "evidence."

Nothing in the record prior to the summons and complaint being served on Defendant Barringer indicates that Barringer himself was aware of any potential litigation arising out of the alleged incident. Moreover, Plaintiff can point to no case wherein the employee can be held responsible for his employer's failure to preserve evidence and therefore judgment should be entered in favor of Plaintiff without any consideration of whether the officer himself was in any way responsible for the spoliation. In other words, Plaintiff has not adequately explained why the Court should determine that Officer Barringer, as opposed to only Sadie Darnell, in her official capacity as Sheriff of Alachua County, Florida, was under an affirmative duty to Plaintiff to preserve these recordings, if at all. Lastly, even if Barringer had a limited ability to request preservation of the video

recordings of the escort to medical and in medical (he is in no way conceding that he does), it is not clear, absent Plaintiff specifically requesting that the Sheriff preserve such evidence, that there was any duty to preserve this specific "evidence."

Other than a conclusory, baseless statement, Plaintiff has failed to establish that Officer Barringer, who has no higher rank as either a supervisor, sergeant, lieutenant, captain, or chief, just by merely being an employee of the Alachua County Sheriff's Office, has control or even custody over the video recordings. Similarly, Plaintiff has failed to provide any evidence that Officer Barringer himself was on notice of a potential litigation *prior to* the override of any potential videos that may have existed of Plaintiff being escorted to medical and in medical. Even if this Court finds that Barringer did have some duty to preserve evidence, Plaintiff has failed to establish Officer Barringer acted in bad faith and knowingly and affirmatively refused to preserve evidence to inhibit Plaintiff's ability to prove his claims. At most, Plaintiff has only alleged negligence or gross negligence on behalf of a third party.

Based on the foregoing, Plaintiff's failure to establish that Defendant Barringer had a duty to preserve the recordings is alone reason enough to deny Plaintiff's motion. However, in an abundance of caution, Defendant Barringer will address the remaining spoliation element.

C. **The Allegedly Spoliated Evidence Was Not Crucial to the Movant's Ability to Prove a Prima Facie Case For 42 U.S.C. § 1983 Excessive Force Claim in Violation of the Fourth Amendment**

In meeting the requirement to demonstrate that the spoliated evidence was crucial to the movant's ability to prove its *prima facie* case or defense, it is not enough that the spoliated evidence would have been relevant to a claim or defense. Managed Care Solutions, 736 F.Supp.2d at 1327–28 (finding that the allegedly spoliated evidence was not crucial to the plaintiff's claims because it could still prove its case through other evidence already obtained elsewhere); see also Floeter v. City of Orlando, 6:05–cv–400–Orl–22KRS, 2007 WL 486633, at *6 (M.D. Fla. Feb. 9, 2007) (missing emails may be relevant to Plaintiff's case but they were not critical and would have been cumulative). Just because Plaintiff may not like what the evidence shows (or does not show) or what the witnesses may (or may not) testify to, does not mean that alternative evidence is not available and it most definitely does not equate to the situation where a party destroyed the only evidence concerning a critical issue. See, Wandner v. Am. Airlines, 79 F. Supp. 3d 1285, 1304 (S.D. Fla. 2015).

Plaintiff claims he is prejudiced by Defendant Barringer's failure to preserve the videos of Plaintiff being escorted to medical and of medical because the videos would have demonstrated the injuries Plaintiff sustained and the great disparity between the sizes and weight of Officer Barringer and Plaintiff, and such prejudice

cannot be cured. (Doc. 50 at 15-16). Despite Plaintiff's allegations to the contrary, there is other evidence to demonstrate the alleged injuries Plaintiff sustained and the disparity of size and weight between the parties. The three videos, previously provided to Plaintiff, show three different angles and capture the events leading up to Officer Barringer's use of force; the use of force event itself; Officer Barringer handcuffing Plaintiff; and Officer Barringer escorting Plaintiff out of Charlie Zone. The third camera, Zone 3_C3_Pod_33, clearly shows the state of the floor, where Plaintiff was lying face down, after Officer Barringer picked up Plaintiff and escorts him out of the pod. All three camera angles in the videos already provided to Plaintiff show the "disparity" between the sizes and weight of Plaintiff and Officer Barringer. Additionally, as Plaintiff indicated, in Barringer's Responses to Plaintiff's Request for Admissions, Officer Barringer admitted that Barringer was 6'2", 220 pounds.

Moreover, Defendant Barringer provided Plaintiff his complete medical file from September 30, 2015, to February 17, 2016. This medical file was maintained by Corizon Health, Inc., an independent company in the business of providing correctional health care services, who was contracted by the Alachua County Sheriff's Office to obtain and provide reasonably necessary medical and health care services for persons committed in the custody of the Alachua County Jail. (Exhibit 5). His medical file includes notes regarding his injuries after the alleged

use of force on February 11, 2016, including visits to medical on the day of the incident, as well as, other follow up visits to medical wherein the medical records indicate that the nurses attended to a wound, allegedly as a result of the use of force. Furthermore, within this medical file are documents from an *outside provider*, Invision N. FL. Outpatient Imaging, documenting the results of a CT Exam of his head he received on February 23, 2016.

Lastly, there are several witnesses — including Officer Sullivan, Nurse Hewitt, and inmates — to Officer Barringer's exchange with Plaintiff. The mere fact that Officer Sullivan and Officer Barringer have the same employer does not mean that this alternative evidence cannot come in.[3] See, Wandner v. Am. Airlines, 79 F. Supp. 3d 1285, 1304 (S.D. Fla. 2015). Plaintiff may not like their testimony but this does not equate to a situation where a party destroyed the only evidence concerning a critical issue. Id. Plaintiff himself admits that Nurse Hewitt examined Plaintiff's injuries in medical. (Doc. 50 at 3, Appendix C). Moreover, Eric White, DC # G17697, an inmate at Alachua County Jail at the alleged time, swore to being an eyewitness of the alleged use of force incident and testified in his sworn to affidavit, that once Officer Barringer picked Plaintiff up to escort him out of the

[3] Nurse Hewitt is an employee of Corizon Health, not the Alachua County Sheriff's Office. (Exhibit 5).

pod, "I noticed Gregory Wooden had blood coming from his face and his mouth." (Doc. 48).

Plaintiff claims he is prejudiced by Defendant Barringer's failure to preserve the aforementioned videos. However, the evidence may not have assisted Plaintiff in proving his case at all. Rather, the evidence may have hindered his ability to prove his case. For example, if the videos had depicted a trickle of blood over his left eyebrow, or no blood at all, and had shown Plaintiff "playing games" and refusing medical treatment, then the evidence would have helped Officer Barringer and hinder Plaintiff's ability to prove his case. Thus, Defendant Barringer had no motive to purposefully destroy the videos or act in bad faith because the videos might have helped his defense. See, Wandner, 79 F. Supp. 3d at 1304.

Therefore, it is clear from the record that the allegedly spoliated evidence is not crucial to Plaintiff's claim because he can still prove his alleged injuries through other evidence already obtained elsewhere. Any other additional evidence from the "recordings," while relevant to Plaintiff's case, are not critical to Plaintiff's case and would merely be cumulative and unnecessary. Even if there is potential missing or destroyed evidence that is somehow related to a Plaintiff's claim, under the required spoliation analysis, the missing evidence must be *crucial*, not merely relevant or even helpful. Based on the foregoing, Plaintiff has failed to establish that allegedly spoliated evidence was crucial to his ability to prove a

prima facie case for 42 U.S.C. § 1983 excessive force claim in violation of the Fourth Amendment.

III. PLAINTIFF HAS FAILED TO ESTABLISH THAT DEFENDANT BARRINGER ACTED IN BAD FAITH AND THEREFORE SANCTIONS ARE NOT APPROPRIATE

A showing of bad faith, as required for a court to issue sanctions for a party's spoliation of evidence requires the plaintiff to demonstrate that a party purposely loses or destroys relevant evidence; mere negligence in destroying evidence is not sufficient to justify striking an answer. Marshal v. Dentfirst, P.C. 313 F.R.D. 691 (N.D. Ga. 2016).

> Parties can establish the requisite bad faith through either direct or circumstantial evidence. Calixto, 2009 WL 3823390, at *16. In order to demonstrate a party destroyed evidence in bad faith through circumstantial evidence, the movant must establish all of the following four factors: (1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator. Calixto, 2009 WL 3823390, at *16 (emphasis added); see also Managed Care Solutions, 736 F.Supp.2d at 1331–32 (adopting four-factor test for circumstantial evidence of bad faith).
>
> When a party's actions lead to the destruction of evidence but were not done in bad faith, then sanctions are inappropriate

Wandner v. Am. Airlines, 79 F. Supp. 3d 1285, 1300 (S.D. Fla. 2015). Plaintiff has failed to provide evidence of bad faith in this case.

As for the first bad faith factor, it cannot "fairly be supposed" that the videos of Plaintiff being escorted to medical and in medical existed that were material to the proof or defense at issue in the case." As previously mentioned, there was no indication as to what the cameras actually captured of Plaintiff and his injuries, if anything at all. Additionally, Plaintiff has other evidence that shows the extent of his injuries and damages.

The next factor is whether Defendant Barringer "engaged in an affirmative act causing the evidence to be lost." Here, Plaintiff cannot show that the video recordings were deleted pursuant to an affirmative act by Defendant Barringer and there is sworn testimony by Officer Barringer that states he did not in fact manipulate, tamper, or intentionally destroy video recordings. In this case, the "destroyed" videos were deleted pursuant to the jail camera system's automatic overwrite policy. There is no evidence that Officer Barringer intentionally deleted the videos or intentionally failed to preserve them to ensure that the relevant videos would be deleted. See, Calixo, 2009 WL 3823390 at 16 (S.D. Fla. 2009) (holding that the movant had shown an affirmative act where the spoliator intentionally deleted the email inbox). But see, Managed Care Sols., Inc. v. Essent Healthcare, Inc., 736 F. Supp. 2d 1317, 1332 (S.D. Fla. 2010) (holding that the movant failed to show an affirmative act where the emails were deleted pursuant to the defendant's automatic email retention policy and there was no evidence that the

defendant intentionally deleted the emails). Plaintiff cannot point to any affirmative acts by Officer Barringer in failing to preserve the video recordings.

The third factor is whether "the spoliating party engaged in an affirmative act while it knew or should have known its duty to preserve the evidence." If there is no affirmative act, the Court does not need to reach this factor. See Atlantic Sea Company, S.A. v. Anais Worldwide Shipping, Inc., No. 08–23079–CIV, 2010 WL 2346665, at *2 (S.D. Fla. June 9, 2010). However, in an abundance of caution, as briefed above, there is no evidence that Officer Barringer was personally aware of a potential litigation until the summons and complaint was served on him.

The fourth factor is whether "the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator." Although Defendant Barringer did not engage in an affirmative act, the undersign will address this factor as well. Here, Plaintiff gave no indication that the video recordings in the hallway on the way to medical and in medical needed to be preserved. Officer Barringer had no duty to preserve them as he was unaware of any potential lawsuit and had no authority to go in and delete videos or save video for that matter. Additionally, after the use of force incident, Officer Barringer's superiors, Sgt. Robert Duncan, Lt. Thomas Studstill, Capt Corey Warrant, and Major Charles Lee conducted an investigation into the alleged use of force incident. (Exhibit 6). Initially, Sgt. Duncan was unable to view the incident on

February 11 because the jails camera system was not working and could only interview Barringer. However, rather than just accepting Barringer's word, on February 16, after the camera system was working again, Lt. Studstill viewed the incident to confirm Barringer's statements *and* the incident was exported from the cameras and saved to a disc. (Id.; Exhibit 3).

Moreover, as previously mentioned, the evidence may not have assisted Plaintiff in proving his case at all. Rather, the evidence may have hindered his ability to prove his case. Thus, Defendant Barringer had no motive to purposefully destroy the videos or act in bad faith because the videos might have helped his defense. And, Defendant provided Plaintiff evidence of the alleged use of force incident and injuries.

CONCLUSION

Based on the foregoing, there is simply no basis for sanctions of any kind in this case and Plaintiff provides no support for his allegations that Defendant Barringer provided incomplete or manipulated video capturing the use of force incident that was provided to Plaintiff or that Defendant Barringer acted in bad faith in affirmatively destroying alleged videos of Plaintiff being escorted to medical and in medical. At best, Defendant Barringer can be said to have negligently failed to preserve these videos. However, these videos are not crucial

to Plaintiff's prima facia case and in no way prejudiced Plaintiff. Contrary to Plaintiff's claims, these alleged videos provide no evidence that Plaintiff does not already have in his possession. Defendant Barringer has not exhibited bad faith. Accordingly, sanctions are not appropriate.

Wherefore, Defendant Clyde Barringer, in his individual capacity, hereby respectfully requests that Plaintiff's Motion for Spoliation Sanctions and Enter Default Judgment be denied.

Respectfully submitted this 27th day of October, 2017.

/s/ Kayla E. Platt Rady
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RULE 7.1(f) CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.1(f), I certify that according to the word count feature of the word-processing system used to prepare this document, the Response and incorporated memorandum contains 5,449 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U. S. Certified Mail – Return Receipt Requested to Gregory Wooden, #B01409, Century Correctional Institution, 400 Tedder Road, Century, Florida 32535 this 27th day of October, 2017.

/s/ *Kayla Platt Rady*
KAYLA PLATT RADY