

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 06-10068-CIV-KING/GARBER

PETER ANGELOTTI,
Plaintiff,

vs.

RICHARD ROTH, in his capacity
as Sheriff of Monroe County, Florida,
and JOSEPH LINARES, Individually,
Defendants.

MOTION FOR SANCTIONS OR
FOR SPECIAL JURY INSTRUCTION

AND NOW COMES the Plaintiff, PETER ANGELOTTI, by his attorney, CHARLES M. MILLIGAN, and moves this Honorable Court for an Order striking any defenses raised by the Defendants or for a special jury instruction or for what other relief is deemed just and equitable and in support thereof says:

- 1) The Plaintiff has initiated an action against the Defendants alleging an excessive use of force subsequent to his arrest on February 3, 2004.
- 2) On the date of his arrest, the Plaintiff was transported to the Monroe County Detention Center by Deputy Drielsma of the Monroe County Sheriff's Department, who had advised dispatch that he was bringing in a "violent" prisoner.
- 3) At the time the Plaintiff arrived at the "sallyport", the area where prisoners are initially taken in the patrol vehicle, a number of corrections deputies

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met the Plaintiff and Deputy Drielsma in anticipation of problems with the Plaintiff.

- 4) The Plaintiff indicated that he would be no problem and exited the patrol vehicle, thence he was removed from the patrol vehicle and accompanied by the corrections deputies to the elevator that would transport them to the booking area.
- 5) Video surveillance of the Plaintiff in the "sallyport" and the elevator was recorded and does not show the Plaintiff acting in an uncooperative manner.
- 6) After being released from the Monroe County Detention Center, the Plaintiff indicated that he had been restrained with a spit mask placed over his face and pepper sprayed.
- 7) The Plaintiff filed a motion in the Circuit Court in and for Monroe County, Florida to prevent the destruction of any videotapes of the booking and/or processing of the Plaintiff at the Monroe County Detention Center where Plaintiff has alleged he was abused. A copy of the motion and order thereon are attached hereto.
- 8) The Monroe County Detention Center has a system whereby the facility is monitored by a video system on a 24 hour a day basis.
- 9) Notwithstanding the Order of the Circuit Court, the Monroe County Sheriff's Department failed to provide the Plaintiff with the ordered videotape and indicated that the system was not functioning at the time of the Plaintiff's arrest.

- 10) Upon being made aware that the video of Plaintiff's booking and subsequent treatment were no longer available, an investigation was commenced and it was concluded that the system had not suffered any technical or mechanical problems and that the reason that Plaintiff's booking and subsequent treatment were not recorded was that the videotaping system had been unplugged.
- 11) Notwithstanding the fact that Plaintiff's booking and subsequent treatment were not recorded, his removal from the patrol car in the "sallyport" and the walk to the elevator were recorded by the surveillance system which only became inoperable when Plaintiff reached the booking area.
- 12) The system that records all activities within the Monroe County Detention Center is within the control and custody of the Defendants who have been unable to provide any reasonable explanation as to why the Plaintiff's time in the Monroe County Detention Center when he was restrained and pepper sprayed was not captured on tape other than the video equipment was unplugged.
- 13) The surveillance system at all times material hereto was in the control and custody of the Monroe County Sheriff's Department who was obligated to secure the tape which the Plaintiff contends would have supported his allegations of the use of unreasonable and excessive force to establish a prima facie case of liability against the Defendant.
- 14) The destruction of evidence or the failure to preserve evidence constitutes spoliation and should afford the Plaintiff the remedy of either striking the Defendants' defenses or requiring that the jury be instructed that the failure of Monroe County Sheriff's Department to preserve the video recording creates the rebuttable presumption that the Defendants used

excessive and unreasonable force against the Plaintiff on the date of his arrest.

- 15) Pursuant to Rule 11 of the Federal Rules of Civil Procedure, this motion is made in good faith and not for any improper purpose.

WHEREFORE, the Plaintiff prays for an Order

- A) striking all defenses of the Defendants, or
- B) sanctioning any rebuttal to Plaintiff's testimony as to what occurred when he was pepper sprayed, or
- C) charging the jury that the destruction or inability to provide the videotape of the pepper spraying incident must be viewed adversely to the Defendants or
- D) for what other relief is just and equitable.

Memorandum in Support of Motion for Sanctions

Pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure, this court can sanction certain inappropriate behavior by issuing an order finding certain facts to be established or striking pleadings.

While there does not appear to be any independent federal cause of action relative to spoliation, the Courts of the State of Florida have addressed the issue of spoliation on multiple occasions.

The most recent case in Florida addressing the issue of spoliation is Martino v. Wal-Mart Stores, 908 So.2d 342 (Fla.) 2005. While the primary holding in that case found that there is no longer a "first party" tort cause of action for spoliation that sanctions, an adverse inference and a rebuttable presumption of negligence were sufficient to remedy past spoliation and deter future spoliation by defendants.

In the case of Valcin v. Public Health Trust, 473 So.2d 1297 (Fl. 3DCA 1984) the Defendant failed to produce surgical operative notes which impaired the Plaintiff's malpractice action. The Court held that if the spoliation were to have been intentional, then an irrebuttable presumption of negligence arose. Prior cases had found that an irrebuttable presumption was violative of due process and thus the case was considered by the Supreme Court of Florida in Public Health of Dade County v. Valcin, 507 So.2d 596 (Fla. 1987) where the Court quashed the ruling of the lower court relating to the irrebuttable presumption but established certain parameters relative to rebuttable presumptions. In order to establish a rebuttable presumption, the Plaintiff must establish that the absence of medical records, in this case, video, hinders his ability to present a prima facie case.

Once the Plaintiff has established the fact that the destroyed evidence hinders his ability to present a prima facie case, then the burden of proof shifts to the Defendant by introducing evidence to disprove the presumed fact, i.e., the evidence was negligently or intentionally destroyed and if available would have proven Plaintiff's allegations, with the jury being the final determiner as to whether the Defendant has presented sufficient evidence to prove that the presumed fact (excessive and unreasonable force) does not exist.

There are a number of cases that have affirmed a trial court's right to strike pleadings as an appropriate sanction. In Sponco Mfg. Inc. v. Alcover, 656 So.2d 629 (3DCA 1995), the Court struck the pleadings of the manufacturer Defendant, Sponco, who lost a ladder and thus prevented the Plaintiff from listing it. The loss of two bolts that attached a table saw and motor justified the striking of the manufacturer's pleadings. Rockwell Int'l Corp. v. Menzies, 561 So.2d 677 (3DCA 1990).

The recent case of Golden Yachts, Inc. v. Hall, et al., 920 So.2d 777 (4DCA 2006), the appellate court upheld the trial court's adverse inference instruction to the jury when Defendant lost the wood cradle debris which had existed and was lost in the company's possession.

As the Defendant had control and custody of the videotaping equipment which in fact had been working immediately prior to the pepper spraying incident and no other explanation exists as to why the videotape stopped working other than it was unplugged entitles the Plaintiff to sanctions or an adverse inference jury instruction.

Dated: September 28, 2006
Key West, Florida

Respectfully submitted,

By:




Charles M. Milligan (FBN: 0246948)
Law Office of Charles Milligan
403 Whitehead Street
P.O. Box 1367
Key West, FL 33041-1367
Telephone: 305-294-8885
Facsimile: 305-294-8383
Attorneys for Plaintiff, Peter Angelotti

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Motion for Sanctions or Special Jury Instruction** was served by Regular U.S. Mail on this 28th day of September 2006 on all counsel or parties of record on the attached service list.

By:



Charles M. Milligan

SERVICE LIST
CASE NO: 06-10068-CIV-KING/GARBER

Richard A. Giuffreda, Esq.
Purdy, Jolly, Giuffreda & Barranco, P.A.
2455 East Sunrise Blvd.
Suite 1216
Fort Lauderdale, FL 33304
Telephone: 954-462-3200
Facsimile: 954-462-3861
Attorneys for Defendants

Charles M. Milligan
Law Office of Charles Milligan
403 Whitehead Street
P.O. Box 1367
Key West, FL 33041-1367
Telephone: 305-294-8885
Facsimile: 305-294-8383
Attorneys for Plaintiff

MOTION FOR SUBPOENAS DUCES TECUM

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA
FELONY DIVISION

CASE NO: 2004-CF-115-K
JUDGE RICHARD PAYNE

STATE OF FLORIDA,
Plaintiff,

vs.

PETER ANGELOTTI,
Defendant.

MOTION FOR SUBPOENAS DUCES TECUM

AND NOW COMES the Defendant, **PETER ANGELOTTI**, by his attorney, CHARLES M. MILLIGAN, and moves this Honorable Court for an Order authorizing the issuance of Subpoenas Duces Tecum for certain video tapes of the **Monroe County Sheriff's Department**, and in support thereof says:

1. The Defendant is charged with a number of felony offenses including Corruption by Threat and Resisting Arrest with Violence.
2. The Defendant verily believes that a videotape of him was made at the Monroe County Detention Center but said items are not set forth in the Response to notice of Intent to Utilize Discovery.
3. In order to ascertain the truth or falsity of the charges against the Defendant, it is necessary that the Defendant have access to any video or audio tapes made incident to his arrest, which tapes may have been made as surveillance tapes at the Detention Center and not as part of the investigation of the arresting officer.

4. This motion is made in good faith and is not intended to embarrass or harass anyone.

WHEREFORE the Defendant prays for an Order authorizing the Clerk of the Circuit Court to issue a Subpoena Duces Tecum for the any tapes of the Monroe County Detention Center made on February 3, 2004 and for any audio tapes in the possession of the Monroe County Sheriff's Department made on the same date involving the Defendant.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **Motion for Subpoenas Duces Tecum** has been furnished to **Natileene Cassel, Esq.**, Assistant State Attorney via Hand Delivery; and **Mark Willis, Esq.**, Attorney for Monroe County Sheriff's Department, 5525 College Road, Key West, FL 33040, via regular U.S. Mail/Fax on this 18 day of **March 2004**.

Law Office of CHARLES M. MILLIGAN

By: 

Charles M. Milligan
513 Whitehead Street
P.O. Box 1367
Key West, FL 33041-1367
305-294-8885
FBN: 0246948

**ORDER ON
MOTION FOR SUBPOENAS DUCES TECUM**

**IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT IN AND
FOR MONROE COUNTY, FLORIDA** **CRIMINAL DIVISION**

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. 2004-CF-115-K

PETER ANGELOTTI,

Defendant.

ORDER ON MOTION FOR SUBPOENA DUCES TECUM

THIS MATTER having come on to be heard on Defendant's Motion for Prior Authorization of a Subpoena Duces Tecum, and the Court having reviewed the Motion and having heard the arguments of counsel, it is therefore

ORDERED and ADJUDGED that Defendant's Motion be and is hereby granted and it is further

ORDERED and ADJUDGED that the Clerk of the Circuit Court is hereby authorized and directed to issue a Subpoena Duces Tecum to the Sheriff of Monroe County requiring that they produce any and all videotapes of arrestees on February 3 and 4, 2004 and specifically the above-named Defendant made at the Monroe County Detention Center, and it is further

ORDERED and ADJUDGED that the Sheriff of Monroe County, Florida not destroy any tapes or reuse those tapes without further Order of Court.

DONE and ORDERED at Key West, Florida this 27th day of March, 2004.

Richard G. Payne

Circuit Judge

cc: Mark Kohl, Esq.
Richard Roth.
Charles M. Milligan, Esq.