UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ROBERT G. SWOFFORD, JR., an individual, and his wife, SHARON L. SWOFFORD, an individual,

Plaintiffs,

vs. Case No.: 6:08-cv-00066-MSS-DAB

DONALD ESLINGER, in his official capacity as the SHERIFF OF SEMINOLE COUNTY, STATE OF FLORIDA; WILLIAM MORRIS, JR., in his individual capacity, and RONALD REMUS, in his individual capacity,

Defendants.
_____/

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION BY DEFENDANTS SHERIFF, REMUS AND MORRIS TO EXTEND TIME TO ANSWER MOTION FOR SANCTIONS FOR SPOLIATION OF EVIDENCE

The Plaintiffs, Robert G. Swofford, Jr., and Sharon L. Swofford ("Plaintiffs"), pursuant to Federal Rules of Civil Procedure 6(b) and Middle District Local Rule 3.01(b), hereby oppose the Motion by Defendant Sheriff, Defendant Remus and Defendant Morris to Extend Time to Answer Plaintiff's Motion for Sanctions Against Defendants for Spoliation of Evidence (Doc. 45), as follows:

To put it simply, Defendants have not provided the Court with "good cause" for an extension for time to answer Plaintiff's Motion for Sanctions Against Defendants for Spoliation of Evidence (Doc. 44), as required by Federal Rule 6(b)(1), and Plaintiffs are being prejudiced by the Defendants' cumulative delay.

"Good cause" requires:

> at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice, and some showing of 'good faith on the part of the party seeking enlargement and *some reasonable basis for noncompliance within the time specified'*...

Wilson v. Transworld Systems, Inc., 2000 WL 1310658, *1 (M.D.Fla.2000) (emphasis added) (quoting *Williams v. Publix Warehouse,* 151 F.R.D. 428, 431 (M.D.Fla.1993) (quoting *Winters v. Teledyne Movible Offshore, Inc.,* 776 F .2d 1304, 1306 (5th Cir.1985) (citation omitted)).

The only proffered basis for the needed extension by Defendants is that additional time is needed to "finalize" their expert reports and because they have not yet responded to several of Plaintiffs' discovery requests. (Doc. 45 at p. 2, ¶¶ 4-5). While these facts may be true, they do not justify additional time. To begin, Defendants have had more than enough time to prepare their expert reports. This is not even close to the normal case where a Defendant discovers who the other side will offer as experts and the subject of their testimony right before their own expert reports are due. The Defendants have known who the Plaintiffs' experts were going to be and what they would opine on from almost the very beginning. The Defendants have known who nine out of eleven of the Plaintiffs experts would be since January 24, 2008, because these individual's names and areas of expertise were disclosed in Plaintiffs' initial Rule 26 disclosures. The later two experts and their areas of expertise were disclosed to Defendants on July 3, 2008 and October 23, 2008, respectively, after each respective expert was retained. Moreover, the deadline for expert reports was extended by two weeks from October 15, 2008 to October 31, 2008, during October, giving the Defendants two *more* weeks to prepare. While the Defendants did not have the actual expert reports of Plaintiffs until on or around November 10, 2008, that in no way prevented them from retaining their own experts and providing background materials in the case ***well*** in advance of that time, by almost a year.

Defendants allege that a failure to grant them an extension of time will prejudice them in preparing their experts reports. In fact, Defendants even say in their motion for extension of time that they need more time so their expert reports can be "finalized in light of [Plaintiffs'] expert reports." (Doc. 45, p. 2, ¶4). It is interesting to note that Plaintiffs disclosed their expert reports by U.S. Mail to Defendants on November 7, 2008. Based on the deadlines today (after extension), Defendants are required to produce their expert reports on December 7, 2008. This means that, as of today, Defendants have had about three weeks to analyze and respond to Plaintiffs' expert reports and "finalize" their rebuttal reports.

Furthermore, Defendants have known for months that Plaintiffs have sought and have been denied access to certain pieces of evidence mentioned in Plaintiffs' Motion for Sanctions because of the Defendants' spoliation, and that Plaintiffs were not happy with that state of affairs. Prior to this motion, Plaintiffs' counsel has requested access to this evidence on numerous occasions, and counsel have discussed these issues times without number. In fact, this evidence has been the sole issue in numerous interrogatories, requests for admission, and requests to produce, most of which are attached to Plaintiffs' Motion for Sanctions. (*See, e.g.*, Exhibits 1, 19, 23, and composite 29 attached to Doc. 44). The missing evidence has also been the subject of numerous letters and emails between the parties. Not only has this spoliation affected discovery in this case, it had also affected Plaintiffs' expert reports. (For example, see Plaintiffs' expert, Richard Ernest's report referencing missing pieces of evidence, attached as Exhibit 26 to Doc. 44 at pp. 10-11). Indeed, this issue will be particularly relevant in Richard Ernest's impending deposition.

For the Defendants to now suggest that they are the only ones who are prejudiced by this "time crunch" begs credulity. If it were not for the Defendants' spoliation, Plaintiffs' Motion for

Sanctions (Doc. 44) never would have been filed in the first place. Since the Plaintiffs' deadlines for expert reports have come and gone, Defendants should not be allowed to tell the court that (1) they have too much going on to answer this motion within the 10 day time limit, (2) that they are the only party prejudiced, and (3) that the requested extension in this situation will not cause any further harm. The Defendants have had plenty of time to prepare for their expert report deadline because they had almost a year to start them because they knew who almost all the Plaintiffs' experts were since January 2008 (and the other two since July and October 2008), and they also knew the general areas in which Plaintiffs' experts would opine. Needless to say, Defendants are in a much better position than Defendants normally are. Further, the Defendants knew Plaintiffs were denied numerous pieces of evidence that severely prejudiced the Plaintiffs, that Plaintiffs were not happy with that situation, that the issue would only fester with time, and that a motion for sanctions was coming at any time. Defendants cannot, in good faith, say that this motion took them by surprise. They knew it was a matter of when, not if.

Defendants' next allegation is that they also have to respond to other pending discovery requests around the same time that they would have to prepare a response to Plaintiffs' Motion for Sanctions. However, the Defendants have already had about 30 days to answer these requests they mention, and the pending discovery requests do not require a substantial amount of time and effort. To explain, Plaintiffs' Third Set of Interrogatories to Morris includes only four interrogatories, Plaintiffs' Third Set of Interrogatories to Remus includes five interrogatories, and both were served on November 3, 2008, by hand delivery. (*See* composite Exhibit 29 attached to Doc. 44). Plaintiffs Amended Fourth Set of Interrogatories to Eslinger includes eight interrogatories and was served by hand delivery on November 14, 2008. (*See id.*). Plaintiffs Ninth and Tenth Requests to Produce include eleven total requests for documents, and were

served on November 5, 2008 (by hand delivery, making the response due on December 5, 2008), and November 6, 2008 (by U.S. Mail, making the response due by December 9, 2008), respectively. Therefore, responding to Plaintiffs' Motion for Sanctions (Doc. 44) should not be an unbearable situation seeing as how the Defendants have already had ample time in which to respond to the majority of these named discovery requests.

Furthermore, Defendants' argument is not accurate that the outcome of Plaintiffs' Motion for Sanctions is "not particularly important for purposes of the upcoming discovery deadline of January 16, 2009, or dispositive motion deadline of March 2, 2009, so an enlargement of time to respond to Plaintiffs' motion will have no impact on these deadlines." (Doc. 45 at p. 3, ¶7). Indeed, if Plaintiffs are awarded adverse inferences based on their Motion for Sanctions (Doc. 44), it very well may affect Defendants' ability to successfully move for summary judgment and will certainly affect the Plaintiffs' discovery efforts. The adverse inferences the Plaintiffs seek include: that the emails on Remus' laptop would have been incriminating of the Defendants' actions; that the SCSO's pre-June 2007 emails that no longer exist would have been incriminating of the Defendants' actions; that the bullet cartridges that the Deputies used were either 127 or 115 grain; that Deputy Morris' gun was tampered with by Deputy Morris or the SCSO Armorer at his request in violation of SCSO policies; that it was impossible for Mr. Swofford to recognize the Deputies as law enforcement officers due to their non-typical uniforms; that the Deputies' radios were both vox-enabled and vox-activated; and that Strike was not adequately trained as a tracking dog. As discussed above, Richard Ernest's deposition will be directly affected by a ruling from this Court on the issues regarding the gun and unspent bullet cartridges.

Moreover, if this Court finds that adverse inferences are appropriate in this instance, several issues arise for Defendants on dispositive motions. For example, if an adverse inference is granted based on the missing uniforms, then Defendants' allegation that Mr. Swofford was comparatively negligent in that he should have known that Morris and Remus were police officers in the dark on the basis of their non-typical uniforms would virtually eliminate one of the Defendant's affirmative defenses and arguments. Further, if an adverse inference is granted based on the canine training records, the allegation that Strike gave the officers probable cause to enter the Swoffords' property would be placed in even further doubt, which is also relevant for summary judgment purposes. Contrary to what Defendants suggest, these issues *directly* effect the dispositive motions that will be filed in this case and the future discovery that will be sought pursuant to these issues. Therefore, the quicker these issues are settled, the quicker the entire process can proceed. Discovery cut-off is currently January 16, 2009, and depositions are about to begin in this case, in earnest.

Finally, Defendants argue that an extension in this matter will not prejudice the Plaintiffs. The point behind Plaintiffs' Motion for Sanctions (Doc. 44) is that the Plaintiffs have *already* been prejudiced by the Defendants' spoliation in this case. Crucial evidence has disappeared and Plaintiffs' experts were not able to examine such evidence in preparation of their reports as is discussed, for example, by Richard Ernest as to the guns and unspent bullet cartridges. (Ex. 26 to Doc. 44 at pp. 10-11). Additionally, Defendants' experts now may be able to attack Plaintiffs' experts based on this inability to examine certain pieces of evidence in his deposition. If this is not prejudice, Plaintiffs do not know what is. Allowing an extension of time in this case is allowing Defendants to continue to reap the benefits of this missing evidence.

WHEREFORE, Plaintiffs request that this Honorable Court deny Defendants' Motion for Extension of Time (Doc. 45) and direct that they serve their response to Plaintiffs' Motion for Sanctions for Spoliation of Evidence (Doc. 44) immediately.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of December, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

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