

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION**

ASHLEY DIAMOND,

Plaintiff,

v.

TIMOTHY WARD, *et al.*,

Defendants.

No. 5:20-cv-00453-MTT

NOTICE OF FILING JURY INSTRUCTIONS ON ISSUE OF SPOLIATION

Pursuant to letter instructions from this Court regarding the filing of jury instructions on the issue of spoliation, ECF 186, Plaintiff provides the attached instructions for the Court's consideration.

Because the only request properly before the Court for determination is Plaintiff's motion for sanctions, she provides the attached jury instructions only as to Defendants' spoliation. *See, e.g., Claussen v. PowerSecure, Inc.*, No. 318CV00607ALBSMD, 2019 WL 4941109, at *4 (M.D. Ala. Oct. 7, 2019) ("In the absence of a motion, the spoliation issue is not properly before the Court."); *Griffin v. New Prime Inc.*, No. 1:10-CV-1926-WSD, 2013 WL 6097893, at *6 (N.D. Ga. Nov. 20, 2013) (same); *Lewis v. New Prime Inc.*, No. 1:10-CV-1228-WSD, 2013 WL 6097568, at *6 (N.D. Ga. Nov. 20, 2013) ("Plaintiffs stated that they would file a motion for sanctions on this issue, and in the absence of one, the spoliation issue is not properly before the Court."); *Georgian v. Zodiac Grp., Inc.*, No. 10-CIV-60037, 2011 WL 3349573, at *7 (S.D. Fla. Aug. 3, 2011) ("Notably, Plaintiffs discuss Mr. Felger's alleged spoliation at great length, but have never moved for sanctions."); *Briggs v. Plichta*, No. 1:13-CV-1280, 2017 WL 4051694, at *2 (Aug. 11, 2017), *report and recommendation adopted*, 2017 WL 3981096 (W.D. Mich. Sept. 11, 2017) (denying

plaintiff's sanction request argued in response to defendant's summary judgment motion noting that "Plaintiff did not file a separate motion for sanctions and a supporting brief as required by [federal rules]. Burying his request for relief in the middle of a brief does not suffice. Thus, plaintiff's request for spoliation sanctions is not properly before the Court."); *Davis v. Pinterest, Inc.*, No. 19-CV-07650-HSG, 2021 WL 4941534 at *5 (N.D. Cal. Oct. 22, 2021) (recognizing plaintiff's argument in unrelated motion that defendants had "spoliated evidence" but denying it because plaintiff's "spoliation issues, however, are not properly before the Court"); *Garity v. Donahoe*, No. 2:11-CV-01805-MMD-PA, 2014 WL 547760, at *7 (D. Nev. Feb. 11, 2014) (same).

To the extent the Court denies her motion and finds that Defendants have somehow properly reserved the right to a jury instruction on spoliation, Plaintiff reserves the right to object to Defendants' proposed jury instruction on spoliation, as set out in the Proposed Pretrial Order, ECF 193, Att. F, and offer a revised jury instruction aligned with the federal rules and case law.

Respectfully submitted,

January 4, 2023

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PLAINTIFF'S REQUEST TO CHARGE NO. 19

Spoliation of Evidence

(Rule 37(e)(2) Mandatory Adverse Inference; Court Finds Bad Faith)

You have heard testimony that Defendants did not preserve video surveillance recordings of Plaintiff's dormitory from any of the days on which she alleged that she was sexually assaulted before this lawsuit was filed. Defendants had a duty to take reasonable steps to preserve those recordings while they still existed because litigation by Plaintiff was reasonably foreseeable when Defendants learned about those sexual assault allegations and those recordings were relevant to this litigation. Defendants failed to preserve those recordings with the bad-faith intent to deprive Plaintiff of the recordings' use in this litigation; therefore, you must presume that the recordings were unfavorable to Defendants because they supported Plaintiff's allegations.

Specifically, you must presume the recordings would have supported Plaintiff's allegations that she was sexually assaulted by showing: (1) a man follow Plaintiff into her cell, and others come to her aid after she was sexually assaulted, on July 3, 2020; (2) men entering Plaintiff's cell on September 19 and September 20, 2020, dates on which she alleged she was sexually assaulted in her cell; (3) men entering Plaintiff's cell after "lockdown" on October 5–8, and October 30, 2020, dates on which she alleged she was sexually assaulted in her cell; and (4) Plaintiff being led into a cell by her male assailant and escaping when count began on September 18, 2020, a date on which she alleged she was sexually assaulted.

[Fed. R. Civ. P. 37(e); *Ala. Aircraft Indus., Inc. v. Boeing Co.*, No. 20-11141, 2022 WL 433457, at *13–14 (11th Cir. Feb. 14, 2022)]