

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
CHATTANOOGA**

SHANDLE MARIE RILEY,

Plaintiff,

~v~

HAMILTON COUNTY
GOVERNMENT,

DEPUTY DANIEL WILKEY,
In his capacity as a deputy sheriff
for Hamilton County Government and
in his individual capacity,

DEPUTY JACOB GOFORTH,
In his capacity as a deputy sheriff
for Hamilton County Government and
in his individual capacity,

Defendants.

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No. 1:19-cv-304

JURY DEMAND

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ORDER REQUIRING
DEFENDANT HAMILTON COUNTY GOVERNMENT TO PRESERVE ELECTRONIC
EVIDENCE AND DATA AND FOR AN ORDER ALLOWING THE PLAINTIFF TO
CONDUCT A FORENSIC EXAMINATION OF ALL COMPUTERS AND DATA
PRESERVING DEVICES INVOLVED IN ANY WAY WITH THE TRANSMISSION
AND PRESERVATION OF IN-CAR VIDEO CREATED BY HAMILTON COUNTY
DEPUTIES AND OTHER LAW ENFORCEMENT PERSONNEL OF
HAMILTON COUNTY GOVERNMENT**

Plaintiff, through counsel, submits the following Memorandum in support of her motion for an order requiring the defendant, Hamilton County Government (“County”), to preserve all electronic devices used to transmit or preserve video footage created by its deputies and officers in the course of their duties, and all electronic data and the devices that the County used to obtain, gather, store, and disseminate audio and video, including, but not limited to computers, servers, and recording devices of any nature used by the County’s law enforcement personnel

and for an order to allow Plaintiff to make a forensic examination of all of the devices used for the transmission and storage of all such data and all devices used to detect and investigate the loss of video data.

Discussion:

Plaintiff filed this Court in the Circuit Court for Hamilton County, Tennessee alleging various actions by Defendant Daniel Wilkey (“Wilkey”). (Doc. 1-1). The Defendants removed this matter from the state court to this Court. (Doc. 1).

Shortly after filing this action, Plaintiff, through counsel, delivered a spoliation demand to the Hamilton County Attorney. (Ex. Letter dated 10-2-10, with green card). This demand required the County to preserve, in-part, materials gathered by and maintained by the County on electronic devices. The County acknowledged the demand. (Ex. Email from County Attorney).

At the same time, the Plaintiff delivered to the County a request for production pursuant to the Tennessee Rules of Civil Procedure. (Ex. RFP to County). Included in the request was the following:

any and all *video* and *audio* footage from any source, including, but not limited to body camera, on-board vehicle camera, cell phone, or any other recording device in the possession of the individual defendants, Wilkey and Goforth.

(Id.).

As of the date of this memorandum, the County has not responded to this and other state rule discovery.

Plaintiff is aware from other lawsuits involving Wilkey that there are other matters record by other deputies with video equipment in their patrol cars while stopping, investigating and arresting persons believed to have committed crimes. Plaintiff also believes all such video is stored by the County. Some of these videos, and in particular in this matter, depict Wilkey’s

stops and arrests of various plaintiffs, the instant Plaintiff, and even class members in an unrelated lawsuit.¹ These videos are the most crucial evidence in this matter. In fact, the State of Tennessee, through its Attorney General, have blocked release of video of the “baptism” at the center of this action.

On February 28, 2020, counsel for Plaintiff learned of a letter written by the Hamilton County Sheriff’s office giving notice, in an unrelated state court case², that in-car video footage has been lost. (Ex. undated letter). The letter indicates that “a server containing in-car video has had a software failure and the HCSO has experienced unrecoverable data loss of in-car footage. The video footage lost falls within the following date range: October 25th, 2018 – January 23, 2020 and includes all footage.”

Plaintiff filed her state suit September 31, 2019. (Doc. 1-1). The video lost includes data as to this and other Plaintiffs currently before this Court. This data is critical evidence in this matter.

Fed. R. Civ. P. 37(e) states:

- (e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
 - (2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.

¹ Jarnigan v. Daniel Wilkey, et al., United States District Court, Eastern District, Tennessee No. 1:20-cv-44.

² State of Tennessee v Hinds, Criminal Court of Hamilton County, Tennessee at Chattanooga, Case No. 307487.

In addition to the authority granted to this Court by the Federal Rules of Civil Procedure, this Court has the inherent power to control discovery, the preservation of evidence and sanctions. “[A] federal court’s inherent powers include broad discretion to craft proper sanctions for spoliated evidence.” Adkins v. Wolever, 554 F.3d 650, 651 (6th Cir. 2009) (en banc). This power “arises not from substantive law, but, rather, ‘from a court’s inherent power to control the judicial process.’” Id., at 652, quoting, Silvestri v. Gen Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001).

This Court recently noted in its Order denying a motion by Wilkey to stay this case the following:

Delay is particularly harmful to a plaintiff when the risk of spoliation of evidence, failed memories, or witness unavailability is high.

(Doc. 47, PageID#: 315).

Here, this data appears to have been lost for more than a month yet no notice of its loss has ever been provided to the Plaintiff, notwithstanding her spoliation demands and her properly served discovery demands. The only way this loss came to Plaintiff’s attention today (February 28, 2020) was when counsel was reviewing the Hinds matter and saw the undated letter attached to a state court pleading filed on the same day. The letter indicates that the Sheriff’s Office *has been working on this problem for “several weeks”* and it may be inferred that the loss occurred on or about January 23, 2020, the last date for which the data was lost.

Conclusion:

The irony here is palatable. This Court, in its denial of Wilkey’s motion for a stay, foresaw this very event. Plaintiff moves the Court for an order requiring the County, through its Sheriff, to maintain all electronic devices used for the storage and transmission of in-car video, all devices used to detect that the video was lost and all devices used to investigate the loss. The Plaintiff also asks to be allowed to hire a forensic investigator to investigate the electronic devices

involved in order to determine what data was lost, how it was lost, who was responsible for the loss and to determine if any of the lost data can be retrieved or re-created.

Respectfully submitted,

By: s/ Robin Ruben Flores

ROBIN RUBEN FLORES

TENN. BPR #20751

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CERTIFICATE OF SERVICE

I certify that I have delivered a copy of this motion to all persons noted on the electronic filing receipt and so delivered on the date and time shown on the same receipt.

By: s/ Robin Ruben Flores