

In *Wilmoth v. Murphy*, 2019 WL 3728280 (W.D. Ark. Aug. 7, 2019), Judge Timothy L. Brooks barred the testimony of two defense witnesses and granted an adverse inference instruction as a sanction for the repeated failures of defendant and the defense witnesses to preserve photographs that plaintiff requested from the outset of the litigation.

In this civil rights litigation, plaintiff claimed that defendant, a correctional officer, used excessive force during an incident in plaintiff's cell. Id. at *1. Plaintiff sustained injuries during the incident and, pursuant to standard operating procedures, another correctional officer took photographs of the injuries using his personal cell phone.

From the beginning of the litigation, plaintiff requested that defendant produce the photographs of his injury. Id. at *3. He served several requests for production related to the photographs, to which defendant responded that "no photos have been located." Plaintiff referenced the photographs numerous times during his deposition. Id. at *4. Following the deposition, defendant reported as part of a notice of disclosures that he would attempt to locate the photographs upon plaintiff's request. Id. at *3. Thereafter, plaintiff filed four separate motions to compel related to the photographs.

Plaintiff moved for sanctions under Fed. R. Civ. P. 37(e) on the basis of defendant's failure to produce the photographs. Judge Brooks first found "abundant" proof that defendant had a duty to preserve the photographs because defense counsel issued a litigation hold, and the court had issued an order directing defendant to provide any reports and photographs related to the incident in plaintiff's cell. Id. at *2.

Judge Brooks next concluded that defendant failed to exercise reasonable diligence to preserve the photographs. Defendant and the other correctional officers involved admitted that the photographs existed but provided conflicting testimony about how the photographs were handled. Judge Brooks found that the photographs were either not uploaded to the jail's internal incident reporting system in a departure from usual practice or were uploaded and subsequently misplaced or deleted, suggesting that the witnesses did not take their obligation to preserve relevant evidence seriously. Id. at *1-*2. Likewise, defense counsel "buried her head in the sand" and "never fully committed to producing" the relevant evidence. Id. at *3. Notably, defense counsel stated at a hearing that took place over a year and a half after plaintiff began moving to compel that she first became aware of the issue that very day. Judge Brooks thus concluded that defense counsel had not conducted any sort of investigation after plaintiff began raising the issue of the photographs.

Moreover, there was evidence that but for defendant and defense counsel's failure, the photographs would have been produced. Id. at *4. Specifically, the cell phone that took the photographs became inoperable during the litigation, meaning it was likely the photographs could have been collected if defendant had promptly acted on the basis of plaintiff's numerous requests. Judge Brooks concluded that this was more than sufficient evidence of prejudice to plaintiff.

In terms of an appropriate remedy, Judge Brooks barred the testimony of the correctional officers who failed to preserve the photographs because the actions of the officers undermined their credibility and demonstrated bad faith. Id. at *4-*5. Plaintiff could call the officers as witnesses, but they would be generally barred from testifying on cross-examination about their recollection

of plaintiff's injuries. Judge Brooks also granted an adverse inference instruction because defendant acted willfully to prevent plaintiff from accessing evidence that, in plaintiff's view, would have supported his excessive force claim. *Id.* at *5.