

Ross C. Anderson (#0109)  
Walter M. Mason (#16891)  
LAW OFFICES OF ROCKY ANDERSON  
The Judge Building  
Eight East Broadway, Suite 450  
Salt Lake City, Utah 84111  
Telephone: (801) 349-1690  
Fax: (801) 349-1682  
rocky@andersonlawoffices.org  
walter@andersonlawoffices.org  
*Attorneys for Plaintiff*

---

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION**

---

CALVIN DONALD OSTLER, as personal  
representative of the Estate of Lisa Marie  
Ostler,

Plaintiff,

v.

HOLLY PATRICE HARRIS, ZACHARY  
PAUL FREDERICKSON, TODD ALLAN  
BOOTH, RONALD PAUL SEEWER, JR.,  
BRENT LEE TUCKER, and SALT LAKE  
COUNTY, a political subdivision of the  
State of Utah,

Defendants.

**PLAINTIFF'S MOTION FOR  
SANCTIONS AGAINST  
DEFENDANT SALT LAKE  
COUNTY FOR FAILURE TO  
PRESERVE  
ELECTRONICALLY STORED  
VIDEO RECORDINGS OF LISA  
OSTLER**

Case No. 2:18-cv-00254-001

Judge Bruce S. Jenkins

---

Pursuant to Fed. R. Civ. P. 37(e)(1), Plaintiff respectfully moves the Court to sanction Defendant Salt Lake County (“County”) for the violation of its duty to preserve electronically stored video recordings of Lisa Ostler (“Lisa”).

**I. FROM AT LEAST APRIL 7, 2016, THE COUNTY HAD A DUTY TO PRESERVE ALL VIDEO RECORDINGS OF LISA.**

By letter sent April 6, 2016, Cal Ostler referenced the death of his daughter Lisa and directed Sheriff James M. Winder to “maintain all records, including any video records, in this matter.”<sup>1</sup> Almost immediately thereafter, the Salt Lake County District Attorney’s Office (“D.A.’s Office”) sent a litigation hold letter to several Jail officials, including Rocky Finocchio (“Finocchio”).<sup>2</sup>

That letter was titled (in all capital letters, bolded and underlined): **“REQUEST FOR PRESERVATION OF EVIDENCE (Calvin Ostler v Salt Lake County, in-custody jail death of Lisa Ostler, April 3, 2016).”** The letter stated, in part, as follows (bolding and underlining in original; italics added):

**Duty to Preserve Documents and Information**

In litigation, the opposing party is generally entitled to obtain documents from the County relating to his or her claims. The County’s duty to preserve documents and information arises once the County

---

<sup>1</sup> See Deposition of Rocky Finocchio (“Finocchio Depo.”), 133:7–16 and Exhibit 4, Exhibit “A” to Declaration of Ross Anderson, Exhibit 1 hereto (“Anderson Decl.”).

<sup>2</sup> *Id.*

reasonably anticipates that litigation may occur. . . . **Please take immediate and affirmative steps (described below) to retain all documents and information, whether in hard copy or electronic form, relating to Ms. Ostler or her claims.**

\* \* \*

The term “documents and information” includes . . . *video recordings* . . . .

\* \* \*

Please preserve all relevant information . . . . It includes . . . *videos* . . . .

As of at least April 7, 2016, as the D.A.’s Office explained, the County and Jail staff had a duty to preserve the video recordings of Lisa. *See Russell v. Nebo School Dist.*, No. 2:16-CV-00273-DS, 2018 WL 4627699, \*2 (D. Utah September 26, 2018) (unpublished) (“A litigant has a duty to preserve evidence that it knows or should know is relevant to imminent or ongoing litigation.” [sic] and this duty to preserve evidence extends to electronically stored information.”); *First American Title Ins. Co. v. Northwest Title Ins. Agency, LLC*, No. 2:15-cv-00229, 2016 WL 4548398, \*3 (D. Utah August 31, 2016) (unpublished) (“Defendants knew or reasonably should have known that litigation was imminent shortly after receipt of the preservation demand . . . .”).

**II. IN VIOLATION OF ITS DUTY TO PRESERVE ALL VIDEO RECORDINGS RELATING TO LISA, THE COUNTY FAILED TO PRESERVE, AND DESTROYED, HIGHLY RELEVANT VIDEOS, TO THE SUBSTANTIAL PREJUDICE OF PLAINTIFF, ENTITLING PLAINTIFF TO SIGNIFICANT SANCTIONS NECESSARY TO CURE THAT PREJUDICE.**

“As a general rule, ‘[s]poliation sanctions are proper when (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence.’” *Equal Emp’t Opportunity Comm’n v. Jetstream Ground Servs., Inc.*, 878 F.3d 960, 964 (10th Cir. 2017) (alteration in original) (citation omitted).

**A. The County Failed to Preserve the Highly Relevant Video Recordings of Lisa’s Transfer from Unit 5C to 8C, to the Tremendous Prejudice of Plaintiff.**

Finocchio, who was in charge of records for the Sheriff’s Office from 2013 to 2019,<sup>3</sup> including the retention of video recordings at the Jail,<sup>4</sup> testified that housing units and the hallways in the Jail are routinely video-recorded, and that he is not aware of any hallways that are not routinely recorded.<sup>5</sup> Yet, *after* the non-spoliation

---

<sup>3</sup> Finocchio Depo., 9:10–14, Exhibit “B” to Anderson Decl.

<sup>4</sup> *Id.*, 7:3–6.

<sup>5</sup> Finocchio Depo., 11:1–6, 10–12, Exhibit “B” to Anderson Decl.

letter addressed to Sheriff Winder from Lisa's father, and *after* the litigation hold letter from the D.A.'s Office, the County *failed to preserve* video recordings<sup>6</sup> that would have presented the best evidence of Lisa's visibly obvious serious medical condition less than 24 hours before she was found unresponsive and not breathing. Plaintiff has no means of obtaining access to the missing video through discovery or otherwise.

Why was crucial video evidence destroyed? Two shocking and frank, yet mutually-contradictory, explanations have been offered:

(1) Finocchio stated, in connection with the unpreserved videos of Lisa: "Well, I failed that portion of it [to "take immediate and affirmative steps to retain all documents and information, relating to Ms. Ostler"]."<sup>7</sup> "I didn't do it. I failed to

---

<sup>6</sup> Finocchio Affidavit [ECF 57], (unpaginated), ¶¶ 22–23; Transcript of Hearing, January 7, 2019, 7:20–9:10, Exhibit "C" to Anderson Decl. (Ms. Ramos: "Unfortunately, when they made the video they went off the jail log to pull those videos, and what Mr. Anderson is complaining about is the video in the hallway when she was being transported which we don't –" The Court: "Do you have such a video?" Ms. Ramos: "We do not.") *See also* Transcript of Hearing, January 22, 2019, [ECF 54], 9:1–19; 62:9–19.

<sup>7</sup> As she was endeavoring to block the deposition of Finocchio by Plaintiff's counsel, Defendants' counsel, Jacque Ramos, misrepresented to the Court that Finocchio had *not* received the litigation hold letter from the DA's Office, even as the Court noted the letter was addressed to Finocchio, among others. Transcript of March 12, 2019, Hearing [ECF 133], 10:9–22.

get it.” “I made a mistake. I didn’t get it.” “I blew it.” “I didn’t even think about it.”

Not retaining the video of Lisa in the hallway “was an oversight.” “I missed it.”<sup>8</sup>

(2) Through its 30(b)(6)-designated deponent, Zelma Farrington, who was designated to testify about the County’s policies, patterns, practices, customs, procedures, and governing methods applicable to the recording, storage, retention

---

Paragraph 20 of Finocchio’s Affidavit states: “I had no request to retain all video footage of the entire time Ms. Ostler was in the jail.” Affidavit of Rocky Finocchio [ECF 57] (unpaginated), ¶ 20. Finocchio’s statement in his Affidavit—presented to him by Defendants’ counsel—was *false*, as he admitted in his deposition.

Q: So paragraph 20 is not true?

A: It is inaccurate.

Q: How would you change paragraph 20 to make it accurate?

A: *I received as per the Salt Lake County District Attorney’s Office request for preservation of evidence in the case of. . . I received a request to retain audio video footage of the entire time Ms. Ostler was in the jail.*

Finocchio Depo., 137:1–9, Exhibit “B” to Anderson Decl. *See also id.* at 136:19; 137:10–15; 138:11–139:4; 139:17–21; 140:5–9, 19–20.

At several points during the Finnochio deposition, Mr. Finnochio admitted that portions of his Affidavit, offered by the County to explain what happened with the missing video recordings, were untrue. *See id.*, 129:21–130:4; 136:16–19; 137:1–9; 177:16–19; 139:17–140:20. Mr. Finocchio’s Affidavit was not written by him and was presented to him by Defendants’ counsel. *Id.* at 36:15–37:9.

<sup>8</sup> *Id.*, 75:12–76:21; 77:11–20; 78:1–5; 83:14–21; 138:13, 20–21; 139:3–4, Exhibit “B” to Anderson Decl.

and deletion of video records and, specifically, about “[t]he preservation, and failures to preserve, video recordings . . . pertaining to Lisa . . . ,”<sup>9</sup> the County admitted that *no one did anything to preserve video in response to the litigation hold letter* provided to several Jail officials.

Q: So do you understand that Mr. Finocchio’s request to retain video records relating to Lisa Ostler didn’t have anything to do with the Litigation Hold Letter sent by the District Attorney’s Office?

A: Correct.<sup>10</sup>

Q: *And does the county have any evidence that anything was done in response to the Litigation Hold Letter to ensure that all video of Lisa Ostler was preserved?*

The Witness: *No.*<sup>11</sup>

---

<sup>9</sup> Notice of Salt Lake County’s 30(b)(6) Designees, Exhibit “D” to Anderson Decl.

<sup>10</sup> Deposition of Zelma Farrington (“Farrington Depo.”), 17:16–21, Exhibit “E” to Anderson Decl.

<sup>11</sup> Farrington Depo., 74:3–7 (emphasis added), Exhibit “E” to Anderson Decl.

Some very poor-quality video of Lisa in 5C and 8C was preserved by the County and its staff,<sup>12</sup> but the far-better-quality<sup>13</sup> and far more elucidating video recording of Lisa as she was transferred from Unit 5C to 8C was *not* preserved. That missing video is crucial—more important and far better quality than any video of Lisa in 5C and 8C that *was* preserved—in demonstrating the clear manifestation by Lisa of her continuing torturous pain and anguish as she was dying, over the course of many hours, of peritonitis.

Lisa never exited her cell in 8C, and is not reflected at all in the video of Unit 8C, except for (1) a brief time for mandatory clothing exchange during the evening (about 11 p.m.) on April 1—the evening when, even according to some of the defendants, she was screaming out in pain for hours, repeatedly begging for medical attention, pushing the emergency button in her cell many times and communicating to Central Control that she was in pain and in need of help, with other inmates

---

<sup>12</sup> The policy of the Jail is to retain all video footage for 120 days. If the video is retained with a Litigation Hold classification, it is preserved for a minimum of four years. Farrington Depo., 78:20–25, Exhibit “E” to Anderson Decl. The video preserved by the County was for *certain* periods of time during March 30–April 2, 2016, but does not include the time Lisa was being transferred from Unit 5C to 8C at approximately 10:02 a.m. on April 1, 2016, or her entry into 8C on that same morning. *See* Affidavit of James Bryant [ECF 56-2], ¶ 22, Exhibit “B” and *supra* footnote 6.

<sup>13</sup> *See* Anderson Declaration, ¶ 15.

communicating to Jail staff their deep concerns about Lisa and her need for medical help<sup>14</sup>—and (2) after she had been found unresponsive and not breathing.<sup>15</sup>

Other inmates in 8C have testified that when Lisa was transferred to 8C at approximately 10 a.m. on April 1, 2016, she was “really frail, sickly looking,” “[t]here wasn’t really an expression on her face,”<sup>16</sup> and she “looked dead,” “it was kind of scary,” “she looked just like a skeleton,” her skin was “gray,” she was “hunched over,” “she didn’t come out of her cell,” she was “rocking” on her bed, and the other detainees in the unit were talking about the fact that “she needed help.”<sup>17</sup> *That* is what the missing video would show.

The video of Lisa walking from 5C to 8C and entering 8C would provide unassailable, vivid visual evidence that Lisa, when she was transferred from 5C to 8C, was obviously suffering from a serious medical condition, which Jail staff

---

<sup>14</sup> Deposition of Holly Harris, 83:6–85:1, Exhibit “F” to Anderson Decl.; Deposition of Zachary Frederickson, 100:21–101:6, Exhibit “G” to Anderson Decl.; Zachary Frederickson’s Responses to Plaintiffs’ Request for Interrogatories, Answers to Interrogatories No. 2, 22, Exhibit “H” to Anderson Decl. *See also* Deposition of Scott Sparkuhl, 40:18–50:5, Exhibit “I” to Anderson Decl.

<sup>15</sup> Anderson Decl., ¶ 16.

<sup>16</sup> Deposition of Nicole Bates, 45:20–46:2, Exhibit “J” to Anderson Decl.

<sup>17</sup> Deposition of Alisha Woodruff, 7:16–8:22, Exhibit “K” to Anderson Decl.

deliberately ignored during the entire time she was in 8C. Yet the County has wrongly destroyed the video, in grave dereliction of its duty to preserve.

This Court may fashion the appropriate sanctions. Plaintiff urges the Court to order the following sanctions as being necessary to at least somewhat cure the prejudice caused to Lisa's Estate by the County's blatant violation of its duty to preserve the video recordings:

- Plaintiff should be permitted to present evidence to the jury regarding the litigation hold letter, the failure of Defendants' counsel to follow up on the need to preserve videos,<sup>18</sup> and the spoliation of the video recordings and to argue any inferences it wants the jury to draw. (The jury will not, however, be specifically instructed regarding any presumption or inference regarding the destruction of those video recordings.)<sup>19</sup>

---

<sup>18</sup> "Counsel for the parties have a continuing responsibility [beyond sending a litigation hold letter] to ensure that the parties preserve relevant information." *Browder v. City of Albuquerque*, 187 F.Supp.3d 1288, 1295 (D. N.M. 2016).

<sup>19</sup> This sanction is nearly identical to a sanction permitted in *McQueen v. Aramark Corp.*, No. 2:15-CV-492-DAK-PMW, 2016 WL 698820, \*4 (D. Utah November 29, 2016) (unpublished). *See also First American Title*, 2016 WL 4548398 at \*6.

- Plaintiff should be permitted to argue to the jury the effect of the loss of the video.<sup>20</sup>
- Defendants shall not be permitted to present evidence conflicting with Plaintiff's contention that the video would have reflected that Lisa was obviously severely ill on the morning of April 1, 2016, requiring immediate medical attention and treatment, as described by other inmates and consistent with the testimony of Plaintiff's expert witness physician regarding the obvious signs and symptoms manifested by patients with an undiagnosed and untreated perforated gastrointestinal ulcer or peritonitis.
- Plaintiff shall be permitted to present evidence and argument to the jury regarding the Finocchio Affidavit, the admissions of Finocchio that certain statements in his Affidavit were not true, and that he was presented the Affidavit by Defendants' counsel. (There must be a consequence for the gamesmanship of parties and counsel who submit false sworn testimony in purporting to explain the circumstances of destroying highly relevant evidence.)

---

<sup>20</sup> That sanction was among those allowed in *Coward v. Forestar Realty, Inc.*, No. 4:15-CV-0245-HLM, 2017 WL 8948347, \*10 (N.D. Ga. November 30, 2017) (unpublished).

- The County should be ordered to present to the Court, in open court, for its consideration of further sanctions, an explanation as to why nothing was done by the County in response to the litigation hold letter from the District Attorney to preserve all video recordings of Lisa Ostler while she was in the Jail. (The Court earlier ordered Defendants to provide a sworn statement explaining what occurred, but the Court and the Plaintiff received, instead, the Finocchio Affidavit, with false material statements that conflicted with later sworn deposition testimony of Finocchio and conflicted with the testimony of the County's 30(b)(6) designee, who testified that *nothing* was done by anyone in response to the litigation hold letter.)
- The County shall pay to Plaintiff a reasonable attorneys' fee in connection with (1) the efforts by Plaintiff's counsel to obtain the videos and to obtain information regarding the failure of the County to preserve the video recordings and (2) the filing of this motion and memorandum.<sup>21</sup>

---

<sup>21</sup> The burden of fees in this matter should fall squarely on the County, the party responsible for the destruction of the highly relevant video recording under the suspicious circumstances in this matter. This Court previously granted fees in favor of a party seeking spoliation sanctions. *McQueen*, 2016 WL 698820 at \*4; *FatPipe Networks India Ltd. v. XRoads Networks, Inc.*, No. 2:09-CV-186 TC DN, 2012 WL 192792, \*\* 6, 7 (D. Utah January 23, 2012) (unpublished).

Respectfully submitted this 13th day of January 2020:

LAW OFFICES OF ROCKY ANDERSON

/s/ Ross C. Anderson

Ross C. Anderson

*Attorney for Plaintiff*

**CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT**

In compliance with the word-count limit of DUCivR 7-1(a)(3)(C), I certify that the foregoing *Plaintiff's Motion for Sanctions Against Defendant Salt Lake County for Failure to Preserve Electronically Stored Video Recordings of Lisa Ostler* contains 2,485 words, excluding the items that are exempted from the word count under DUCivR 7-1(a)(3)(C).

DATED this 13th day of January 2020:

LAW OFFICES OF ROCKY ANDERSON

/s/ Ross C. Anderson  
Ross C. Anderson  
*Attorney for Plaintiff*