IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

[redacted] as Administrator of the Estate of Larry Grigsby, Jr. and as Natural Guardian and Next Friend of E.G. and A.G., minors, Plaintiffs, v. **West Place Holdings, LLC d/b/a West Chase Apartments and LK Management, LLC**, Defendants.	Case No. 17-A-65909 **Plaintiff's Motion To Strike Defendants' Answer For Destruction of Evidence**

Larry Grigsby was driving his car inside Defendants' apartment complex. Mr. Grigsby's two children children—ages six and eight —were in the backseat. A bullet flew into the car and killed Mr. Grigsby. The two children watched their father die.

Defendants' Answer should be struck because after being instructed to preserve all evidence, Defendants destroyed every discoverable item they had. Defendants destroyed:

- Emails from employees to the owner about shootings and guns, drugs and drug-dealers, and how the property was dangerous and lacked proper security
- Daily activity reports about crime, dangerous activity, and lack of security
- Tenant files
- Correspondence from tenants
- Incident reports
- Security logs
- Police reports
- Advertisements
- Maintenance records
- Building/apartment repair records
- Building/apartment inspection records
- Financial records
- Budgets

- Employee files
- Correspondence from employees
- Training records
- Handbooks
- Policy manuals
- Employee schedules
- Work orders
- Contracts, bills, and receipts from vendors
- Correspondence from vendors
- Computers with documents and emails on them
- Many other documents that pertained to Defendants' apartment complex.

Because Defendants destroyed every important thing, it is impossible (or at least next to impossible) for Plaintiffs to fairly and successfully prosecute this case. The only just and reasonable remedy is for this Court to strike Defendants' Answer, and it should do just that.

1. Important facts.

1.1. On April 25, 2017, Defendants received notice to preserve evidence and contemplated litigation.

On April 21, 2017, Plaintiffs sent Defendants a "Request to Preserve Evidence." (Attached as Exhibit 1).

On April 25, 2017, Defendants received Plaintiffs' Request to Preserve via certified mail through their registered agent. (Return receipt and USPS tracking information, attached as Exhibit 2).

Defendants conceded they contemplated litigation on April 25, 2017, the day they received Plaintiffs' Request to Preserve:

> **INTERROGATORY NO. 34**
>
> When did you first contemplate litigation?

RESPONSE TO INTERROGATORY NO. 34

Defendants object to this interrogatory on the ground that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving this objection, defendants do not recall contemplating litigation until they received the letter plaintiff's counsel purportedly sent to West Place Holdings, LLC on April 21, 2017. Note that defendants are assuming that they received this letter; they do not recall actually receiving it and do not have a record of having received it.

1.2. On May 12, 2017, Defendants sold the property.

According to Defense Counsel, on May 12, 2017, Defendants sold the property:

Interrogatory No. 3: As noted in defendants' response, they do not have any of the details you are asking for. Defendants don't actually know the information provided in the response, but we decided to provide what Nicko Peace told us she could remember. As I've previously mentioned, West Place Holdings, LLC sold the property on May 12, 2017, and LK Management, LLC no longer employs any of the people who worked there, so we really don't have any sources of information.

(Daly to Rafi email on February 19, 2018, attached as Exhibit 3).

1.3. Defendants destroyed all documents in their possession when they sold the property.

In response to written discovery (Defendants' Responses to ROGs and RPDs are attached as Exhibits 4 and 5, respectively), Defendants failed to produce any meaningful documents. The only items Defendants produced were:

1. Police Report from Mr. Grigsby's shooting
2. 911 call logs from Mr. Grigsby's shooting
3. 911 audio records from 911 calls related to Mr. Grigsby's shooting

(See Defendants' response to ROG 19, identifying those 3 documents "as the only responsive documents Defendants have").

It did not take much analysis for Plaintiffs to realize the only documents Defendants produced were directly related to Mr. Grigsby's shooting and likely obtained by Defense Counsel after Mr. Grigsby's shooting.

Plaintiffs sent Requests for Admission to Defendants to confirm Defendants truly had no discoverable documents other than documents presumably collected by Defense Counsel. Defendants' responses confirmed Defendants had no documents of any kind from before Mr. Grigsby was shot. (Defendants' Responses to Second RFAs, attached as Exhibit 6).

So, the $64,000 question is this: ***what <u>should</u> Defendants have produced?*** According to Defendants' former Regional Property Manager, [redacted], and former Property Manager, [redacted], as of May 12, 2017—the date Defendants sold the property—Defendants had the following:

- Emails from employees to the owner about shootings and guns, drugs and drug-dealers, and how the property was dangerous and lacked proper security
- Daily activity reports about crime, dangerous activity, and lack of security
- Tenant files
- Correspondence from tenants
- Incident reports
- Security logs
- Police reports
- Advertisements
- Maintenance records
- Building/apartment repair records
- Building/apartment inspection records
- Financial records
- Budgets
- Employee files
- Correspondence from employees
- Training records
- Handbooks
- Policy manuals
- Employee schedules
- Work orders
- Contracts, bills, and receipts from vendors
- Correspondence from vendors
- Computers with documents and emails on them

- Many other documents that pertained to Defendants' apartment complex

(Affidavits of [redacted] and [redacted], attached as Exhibits 7 and 8, respectively).

So, if we up the ante, the $1,000,000 question is this: ***why have Defendants <u>not</u> produced these documents?***

Defendants' former Regional Property Manager and Property Manager answer this too—Defendants did not make any copies of the documents they had and left everything, including computers, at the property when they sold it:

> 7. When West Chase Apartments was sold and LK Management, LLC left the property, LK Management, LLC left behind all the documents listed in Paragraph 8 and did not make any copies of those documents.
> 8. As of May 12, 2017, LK Management, LLC had computers with documents and emails on them.
> 9. When West Chase Apartments was sold and LK Management, LLC left the property, LK Management, LLC left behind all computers and hard drives and did not make any copies.

([redacted] Affidavit, Ex. 7).

> 9. When West Place/West Parc Apartments was sold and LK Management, LLC left the property, LK Management, LLC left behind all the documents listed in Paragraph 8 and did not make any copies of those documents.
> 10. As of May 12, 2017, LK Management, LLC had computers with documents and emails on them.
> 11. When West Place/West Parc Apartments was sold and LK Management, LLC left the property, LK Management, LLC left behind all computers and hard drives and did not make any copies.

([redacted] Affidavit, Ex. 8).

As a result, Defendants are not able to produce any of the documents they had on May 12, 2017—which was ***after*** Plaintiffs requested Defendants to preserve evidence and ***after*** Defendants admit they contemplated litigation. Plaintiffs now file this Motion, because Defendants' destruction of evidence prevents Plaintiffs from being able to make a case against Defendants.

2. This Court should strike Defendants' Answer because they have destroyed all important documents in this case.

2.1. *Law*: this Court has broad discretion to strike Defendants' Answer for destroying evidence.

"Spoliation refers to the destruction, failure to preserve, or significant alteration of evidence that is necessary to pending or contemplated litigation." *Bridgestone/Firestone N. Am. Tire, LLC v. Campbell Nissan N. Am.*, 258 Ga. App. 767, 769 (2002). Georgia law allows a finding of spoliation if the loss of the evidence occurs at a time when there is "contemplated or pending litigation." *Bouve & Mohr*, 274 Ga. App. 758, 762 (2005).

The party bringing forth a spoliation allegation has the initial burden to produce evidence of spoliation. *See Flores v. Exprezit! Stores 98-Georgia LLC*, 314 Ga. App. 570, 574 (2012). Proof of spoliation raises a rebuttable presumption against the spoliator that the evidence favored the spoliator's opponent. *R & R Insulation Servs., Inc. v. Royal Indemnity Co.*, 307 Ga. App. 419, 436 (2010).

"[A] trial court has wide discretion in adjudicating spoliation issues, and such discretion will not be disturbed absent abuse." *Delphi Comm. In. v. Advanced Computer Tech. Inc.*, 336 Ga. App. 435, 436 (2016); *Phillips v. Harmon*, 297 Ga. 386, 397 (2015). Importantly, a finding of bad faith or malice is <u>not</u> required before a trial court may sanction a party for spoliation. *See id; Wal-Mart Stores, Inc. v. Lee*, 290 Ga. App. 541, 446 (2008).

Factors that Georgia courts consider when fashioning an appropriate spoliation remedy, include, but are not limited to the following:

> (1) whether the [party seeking sanctions] was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the [party who destroyed the evidence] acted in good or bad faith; and (5) potential for abuse.

R.A. Siegel Co., 246 Ga. App. at 180 (*quoting Chapman*, 220 Ga. App. at 542) (brackets in original) (internal citations omitted). An analysis of each of these factors leads to the natural conclusion that Defendants' Answer should be struck.

Courts find spoliation where a party is instructed to preserve evidence and fails to do so and when a party fails to preserve evidence after contemplating litigation. *See, e.g., Delphi Communications Inc. v. Advanced Computing Technologies Inc.*, 336 Ga. App. 435 (2016) (spoliation where former employees failed to preserve hard drives after lawsuit was filed); *Kitchens v. Brusman*, 303 Ga. App. 703 (2010) (trial court abused its discretion in *not* finding spoliation where defendants failed to preserve evidence after contemplating litigation); *Wal-Mart Store, Inc. v. Lee*, 290 Ga. App. 541 (2008) (trial court properly found Wal-Mart failed to preserve videotape evidence after contemplating litigation); *AMLI Residential Properties, Inc. v. Georgia Power Co.*, 293 Ga. App. 358 (2008) (trial court properly found defendant apartment complex spoliated evidence); *Bouve*, 274 Ga. Ap. 758 (same).

A trial court may strike an answer or enter judgment for the defendant where a party failed to preserve important evidence after contemplating litigation. *See, e.g.*, *Delphi.*, 336 Ga. App. 435 (trial court properly struck defendant's answer for failing to preserve computer hard drives); *Howard v. Alegria*, 321 Ga. App. 178 (2013) (trial court properly struck defendant's answer for failing to preserve a vehicle's black-box); *Flury v. Daimler Chrysler*, 427 F.3d 939 (11th Cir. 2005) (applying Georgia law and holding district court properly dismissed case because plaintiff failed to preserve his vehicle).

In *Howard*, a plaintiff sued a truck driver and its owner after a crash. Despite anticipating litigation, the defendants destroyed the truck's black-boxes and made repairs to the vehicle after the crash. *Id.* at 184. The trial court found the destroyed information was "the highest and best evidence of vehicle defects, system malfunctions, and brake problems and of what actually occurred immediately prior to and during the [collision]," and accordingly, plaintiff had been prejudiced. *Id*. at 184-85. The court struck defendant's answer. *Id.* at 178. The appeals court affirmed. *Id.* at 185.

In *Delphi*, the plaintiff accused Delphi of improperly soliciting customers and copying software products without consent. *Delphi*, 336 Ga. App. at 435. Delphi presumably received notice of the lawsuit upon service of the complaint, but then did not save "mirror images" of the computer hard drives in the state they were in as of the date Delphi was served. *Id.* The trial court found Delphi had a duty to preserve the hard drives and its failure to do so harmed the plaintiff. *Id.* Specifically, the trial court found "a meaningful link between [plaintiff's claims] and the spoliation existed, as a mirror image

of [Delphi's] hard drives from the time frame of the filing of the complaint *could have* revealed evidence relevant to the critical issue of whether the software on [Delphi's] computers was copied from [Plaintiff's] computers." *Id.* at 438-39. As a result, the trial court struck Delphi's answer. *Id.* at 439. The appeals court agreed with the trial court's analysis and decision to strike Delphi's answer. *Id.*

2.2. *Application*: Plaintiffs are prejudiced because Defendants' destroyed extremely important information.

Defendants destroyed every single piece of evidence they had—again, every single piece. Plaintiffs will not list the categories of documents that Defendants destroyed (the list is twice above), but the highlights are: Defendants destroyed emails from employees to the owner about shootings and guns, drugs and drug-dealers, and how the property was dangerous and lacked proper security; daily activity reports about crime, dangerous activity, and lack of security; security logs; police reports; incident reports; tenant files; handbooks; training records; and every other kind of document that an apartment complex would have. *These documents are the case; said in the reverse, there is no case without these documents.*

Defendants' destruction of all evidence it had is much more egregious than the defendant in *Howard* and *Delphi*. Here, Defendants literally destroyed everything they had. In *Howard*, the defendant did not destroy everything—just the truck's black-boxes and made repairs to the vehicle. In *Delphi*, Delphi did not destroy all its discoverable information—it only failed to preserve mirror images of its computers. Accordingly, the case for striking Defendants Answer in this case is far stronger than the cases against the spoliating parties in *Howard* and *Delphi*.

Even with the most optimistic outlook, Plaintiffs' chances of proving their case without the information Defendants destroyed is less likely than Barcelona transferring Lionel Messi to Real Madrid tomorrow—theoretically it is possible, but it will not happen[1]. By destroying all of its documents, Defendants destroyed any realistic chance of Plaintiff winning this case on the merits. This analysis strongly supports the Court striking Defendants' Answer.

[1] Plaintiff notes that by the time the Court considers this motion, "tomorrow" has already passed and Lionel Messi is of course still on Barcelona.

2.3. *Application*: the prejudice to Plaintiffs cannot be cured.

The prejudice to Plaintiffs cannot be cured because the documents are destroyed; gone; not saved. Neither Defendants nor Plaintiff can make the documents reappear. Even if Defendants did locate some documents (Defendants say they are looking for employee files, but it has been months and they have not found anything), we would have no idea what else Defendant did *not* locate.

The prejudice to Plaintiffs also cannot be cured by the Court crafting a more narrowly tailored sanction than striking Defendants Answer. There is simply no jury instruction or other sanction that can provide Plaintiffs fair redress. Under this reasoning, the Court should strike Defendants' Answer.

2.4. *Application*: Plaintiff does not know whether Defendants acted in bad faith, but nevertheless, the potential for abuse is high.

Plaintiff does not know whether Defendants destroyed all their evidence intentionally or in bad faith. Plaintiff does know it sent Defendants specific instructions to preserve evidence; Defendants received the instructions; Defendants, at minimum, ignored the instructions; and now, Plaintiffs case is now probably unwinnable. "The spoliation of critical evidence—for whatever reason—may result in trial by ambush. And permitting parties to engage in such a tactic undermines the integrity of the judicial process." *Bridgestone/Firestone North American Tire, LLC v. Campbell*, 258 Ga. 767, 771 (2002).

If this Court does *not* strike Defendants' answer, then Defendants will benefit from their misconduct. If that was to happen, parties throughout Georgia would rely on this Court's decision as a crutch to excuse themselves after destroying evidence—whether done in bad faith or otherwise. As per this analysis, the Court should strike Defendants' Answer.

3. *Conclusion*: if there is any case for striking a defendant's answer for spoliation, this is it.

After Plaintiffs specifically told Defendants to save all their documents, Defendants destroyed every document they had. The documents Defendants destroyed were very

important—they were essential to Plaintiffs' case. Defendants have harmed Plaintiffs and the harm cannot be cured except by striking Defendants' Answer.

Submitted on March 8, 2018, by:

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