No. 21-6553

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GARY WALL,

Plaintiff-Appellant,

v.

E. RASNICK, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for
the Western District of Virginia

BRIEF OF APPELLEES

JASON S. MIYARES
Attorney General

CHARLES H. SLEMP, III
Chief Deputy Attorney General

M. Nicole Wittmann
Deputy Attorney General

ANDREW N. FERGUSON
Solicitor General

KEVIN M. GALLAGHER
Deputy Solicitor General

MARGARET A. O'SHEA
Assistant Attorney General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240 – Telephone
(804) 371-0200 – Facsimile

Counsel for Appellees

February 7, 2022

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-6553 Caption: Gary Wall v. E. Rasnick, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Defendants-Appellees Clarke, Collins, Deel, Dockery, Fleming, Franks, Gwinn, Hensley, Hess, Hicks,
(name of party/amicus)

Holbrook, Hughes, Large, Lyall, McCoy, Mullins, Ponton, Rasnick, Rose, Still, Taylor, and Testerman

who is Defendants-Appellees, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Margaret Hoehl O'Shea Date: 02/07/2022

Counsel for: Defendants-Appellees

Print to PDF for Filing

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

STATEMENT OF THE ISSUES

Plaintiff Gary Wall, an inmate within the Virginia Department of Corrections, assaulted two corrections officers, inflicting serious physical injury and sufficient emotional injury to make both leave their job as corrections officers. Two years later, Wall filed suit, contending that the two officers actually assaulted him for no reason, kicking him in the head while he lay unconscious on the prison floor and after he had meekly submitted to their unprovoked show of force. He also claimed that other officers deliberately drove his head into metal posts, shoved his head in a wall, failed to get him needed medical care, and violated his due process rights in connection with his resulting disciplinary charges. In answering the Plaintiff's allegations, the two corrections officers involved in the initial altercation—Officer Hicks and Officer Rasnick—filed a counterclaim against the Plaintiff, alleging that he had committed the common law torts of assault and battery.

During discovery, the Plaintiff sought video surveillance evidence from the recreation yard outside of his housing unit and from the housing unit he was taken to after the initial altercation. Although Defendants provided surveillance video from inside the housing unit

where the altercation occurred, no other surveillance video had been downloaded and saved by the facility. Accordingly, the Plaintiff sought spoliation sanctions against all Defendants, irrespective of their role (or lack thereof) in the preservation of video evidence at the facility.

Following a two-day evidentiary hearing, the magistrate judge issued an order denying the motion for spoliation sanctions, and she also issued a separate report and recommendation in which she expressly found that the Plaintiff's testimony was not credible. The magistrate judge recommended finding against the Plaintiff on all of his claims, and in favor of Officer Hicks and Officer Rasnick on their counterclaims. The Plaintiff objected to the report and recommendation, but never submitted a specific objection to the separate non-dispositive spoliation ruling.

Reviewing the totality of the evidentiary record, the district court judge adopted the magistrate judge's recommended findings of fact and conclusions of law, agreeing that the Plaintiff's testimony, when measured against the weight of the remaining evidence, was not credible.

The issues presented are:

1. Whether the Plaintiff waived his right to appeal the denial of his spoliation motion where he failed to file a timely and specific objection to the magistrate's non-dispositive discovery order, as required by F.R.C.P. 72(a).

2. Whether the Plaintiff failed to preserve his argument that the district court did not rule on his "objections" to the spoliation ruling, where he never brought that issue to the attention of the trial court.

3. Whether the district court abused its discretion denying the motion for spoliation sanctions where the Plaintiff failed to establish that the Defendants were aware of the potential for litigation (thereby triggering a duty to preserve), that the Defendants knowingly breached that duty, or that the Plaintiff was prejudiced by the failure to produce the requested evidence.

4. Whether the district court clearly erred by weighing competing evidence and testimony and ultimately concluding that the Plaintiff's version of events was not credible.

5. Whether the district court clearly erred by determining that the Plaintiff had committed the common law tort of battery during the altercation involving Officer Rasnick.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On appeal, this Court views the facts in the light most favorable to the Defendants, the parties prevailing below. *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 443 (4th Cir. 2000). So viewed, and as pertinent to this appeal, the evidence in this case establishes the following.

On August 14, 2015, Plaintiff Gary Wall was incarcerated at Red Onion State Prison (ROSP), where he was assigned to the general population. During pod recreation that afternoon, the Plaintiff crossed the red line bordering the pod floor to place an item outside his cell door, thereby violating a prison security rule. (JA 346) The control booth officer ordered the Plaintiff to "lock down," or return to his cell. (JA 348, 717) The Plaintiff initially refused, demanding to see a supervisor. (JA 361-62, 717, 821) Officers Hicks and Rasnick, who were on the top floor of the housing unit, came down to the floor of the housing unit when they heard "some screaming," specifically, when the Plaintiff "told the officer in the booth to fuck himself, that he wasn't doing anything, to get a sergeant." (JA 819) Officer Rasnick gave the Plaintiff a direct order to lock down, and "he turned around and looked

at [them] and said, 'Fuck y'all.'" (JA 819) At that point, Officer Hicks gave another direct order for the Plaintiff to lock down, and he responded, again, "Fuck you." (JA 819)

Officer Hicks ordered all of the other inmates to return to their cells. (JA 348, 819) As Officer Hicks and Officer Rasnick began to come down the stairs, the Plaintiff "stepped over to his cell door," but Officer Hicks determined that this was "too late," because he was going to take the Plaintiff "to talk to the sergeant and see what the sergeant wanted to do with him." (JA 819) The two officers approached the Plaintiff, and Officer Hicks gave the Plaintiff an order to go to the vestibule. The Plaintiff responded, "Fuck you." (JA 820) Officer Hicks repeated his order, and the Plaintiff began walking towards the vestibule, followed closely by the two officers. (JA 820)

As they approached the vestibule door, Officer Hicks told the Plaintiff to "get on the wall," and Officer Rasnick ordered the Plaintiff to "cuff up." (JA 823) The Plaintiff stood, motionless, facing away from them with his hands by his sides. (JA 824) As Officer Rasnick reached for the Plaintiff's right hand, the Plaintiff stated, "Get the [fuck] off of me," "jerked away," swung around, and tried to punch Officer Hicks.

(JA 391, 395, 820, 1180) Officer Rasnick then grabbed the Plaintiff around the waist, and, along with Officer Hicks, took the Plaintiff to the ground. (JA 392, 824) They hit the ground with a "pretty good impact" because the Plaintiff "was still fighting very hard" and "it took some force to get him down." (JA 863)

After the Plaintiff was on the ground, "[h]e was fighting, trying to get loose, anything he could to get away," and was being "very disruptive." (JA 415, 824) While they were on the ground, the Plaintiff was able to strike Officer Hicks above the right eye, opening a cut that required three sutures to close. (JA 830-31, 855)

Sergeant Large, the building supervisor, was in his office in the vestibule when he heard the gun post officer make the 10-33 call for assistance over the radio. (JA 936) Sergeant Large immediately went over to the pod floor, where he saw the Plaintiff "squirming side to side trying to get loose from the officers," and "swinging [his] fists and elbows." (JA 937, 944) His "arms were making contact with the officers." (JA 950) Once Officer Large had a clear view as to what was going on, he bent over and sprayed O.C. pepper spray by the Plaintiff's face, in an attempt to "bring him under control so he could be

restrained." (JA 937, 943, 953) Lieutenant Lyall, who entered the pod area just after Sergeant Large, also witnessed the Plaintiff being "very combative," it being apparent that he "wouldn't allow himself to be restrained." (JA 877) After Sergeant Large used the O.C. spray, Lieutenant Lyall and Sergeant Large got down on the floor to help the other two officers, and, collectively, these four officers were ultimately able to place handcuffs on the Plaintiff. (JA 877-78, 944)

After the Plaintiff had been restrained, he was lifted to his feet, but he "was still being combative, still struggling." (JA 879, 944) The Plaintiff was escorted out of the housing unit, but on his way out, he "went to the floor once, maybe twice as he was refusing to walk with the officers, pushing back against them." (JA 944-45, 1204) As the Plaintiff was escorted across the compound on his way to housing unit B, he made threats that he was going to continue harming staff members. (JA 888-89, 917, 1202, 1203) At that point, Lieutenant Collins, the building lieutenant, contacted the Warden to obtain approval for the Plaintiff to be placed in five-point restraints. (JA 889) That approval was given. (JA 890, 1194)

The Plaintiff and escorting officers arrived in the B-building shortly after 4:00 p.m., at which point a hand-held camera was provided and turned on. (JA 893) The Plaintiff was placed in five-point restraints, where he remained for a few hours before being released and transported to a different prison.[1]

As a result of this incident, the Plaintiff had scattered bruising over his body and a bloody nose, which was consistent with "an offender rolling around on a concrete floor with two corrections officers [and] struggling with them." (JA 496, 498, 967, 985) During the altercation, Officer Rasnick twisted his right knee and tore the meniscus, and he required surgery to correct that injury. (JA 401-02) Officer Hicks broke his hand, and the cut over his eye required three sutures to close. (JA 852, 855) He still has a visible scar over that eye. (JA 855) Officer Hicks was also diagnosed with complex PTSD, and his trial appearance marked "some of the only times in the past six to seven months that I've been out of my house." (JA 867) This incident played a significant role

[1] The Plaintiff received multiple disciplinary infractions as a result of his conduct on this date, each of which was heard by an institutional hearings officer and resulted in a conviction. The outcome of those disciplinary hearings is not at issue in this appeal.

in both Officer Hicks and Officer Rasnick deciding to leave their employment at VDOC. (JA 321, 866)

A. Retained Video Footage

Surveillance video from inside the housing unit was retained and made a part of the record of this case. (JA Vol. IV) The altercation began in a blind spot for the camera system; the first image indicating that a fight was occurring is reflected in the "A123 Vestibule" video, at 4:00:51 p.m. The video shows an inmate and two officers in an apparent struggle. As the door opens, the inmate (pictured in a white shirt) is still upright. (A123 Vestibule at 4:00:58).[2] As the inmate moves out of the frame, a corrections officer goes down on one knee, and then the individuals temporarily go out of view of the camera. (A123 Vestibule at 4:01:00 to 4:01:01). At 4:01:05, the parties come back into the frame, and the video shows the inmate being taken to the floor with one officer around his waist, and the other officer hunched over above them. (A123 Vestibule at 4:01:05) After that, the inmate is moving

[2] Although Plaintiff contends that the view depicted at 4:00:59 shows an officer with his fist raised, it is far from clear that the "raised arm" actually belongs to an officer—that "arm" (assuming it is an arm) could just have easily belonged to the Plaintiff, considering the relative positioning of the bodies in that image.

around on the floor, and the officers are struggling to gain control. (A123 Vestibule at 4:01:05 to 4:01:12) At 4:01:11, another officer enters through the open vestibule door, and he hunches down and appears to administer OC spray near the inmate's face. (A123 Vestibule at 4:01:14) A fourth officer then enters, approaching the other three individuals, who are all on the ground. (A123 Vestibule at 4:01:16). The grouping of bodies continues moving around as though there is an active struggle. (A123 Vestibule at 4:01:16 to 4:01:36)

By this point, an administrator outside of the housing unit has taken control of one of the surveillance camera, focusing it towards the ongoing struggle. (A1PodPTZ at 4:01:30). A K9 officer approaches the door and enters the pod, but does not otherwise intervene. (A123 Vestibule at 4:01:36 to 4:01:39; A1PodPTZ at 4:01:39) Four additional corrections officers can be seen approaching the altercation, but they do not immediately intervene, either. (A123 Vestibule at 4:01:39 to 4:01:46). None of the officers are seen punching or kicking the inmate in this video. A few seconds later, some of the officers take over for the officers on the floor, and the initial officers are seen leaving the pod floor. (A123 Vestibule at 4:01:57 to 4:01:59) One officer, being helped

by two others, has blood streaming from a cut above his right eye. (A1PodPTZ at 4:01:54; A123 Vestibule at 4:01:59)

The inmate is brought to his feet at 4:02:20, but he appears to be actively resisting efforts to take him off of the pod floor. At 4:02:36, the inmate appears to charge head first out of the housing unit, and then his momentum carries him to the ground. (A123 Vestibule at 4:02:41) The inmate appears in the "A123Entrance" surveillance video by 4:02:46, and he is brought out of the building by several officers. (A123Entrance at 4:02:54 to 4:02:58). It is not clear from that video whether he is walking, bent over and taking large strides, or being physically carried to the door.

Although there is no additional surveillance video footage, the court also admitted a handheld video recording that began after the Plaintiff entered the B housing unit. (JA Vol. IV) At the start of the video, the inmate is standing against a wall surrounded by several officers. (Ex. 14, Handheld Video, at 00:21). A nurse arrives at approximately 1:51 into the recording. At 5:22, the inmate is brought off the wall, and he is seen walking while being escorted by several officers. The group of officers surrounding the inmate begins walking

across the floor of the housing unit, pausing briefly around 5:55, and then continuing forward. The inmate is taken into a cell, where the officers apply restraints and remove his clothing. Around 16:09, two nurses enter the cell to check those restraints, and then the inmate is left alone.

B. Procedural History

Two years later, the Plaintiff filed suit, claiming that excessive force had been used against him both inside the housing unit and during the escort from housing unit A to housing unit B. He also included alleged due process violations, medical indifference claims, a conspiracy claim, and various state law allegations. (JA 16-32) As to the excessive force claims, the Plaintiff alleged that Officers Hicks and Rasnick "punched at [his] face and head," for no apparent reason, after assaulting him and tackling him to the floor. (JA 19) He further alleged that, after he had been handcuffed and was "offering NO resistance," he was "viciously kicked in the head," and then repeatedly punched and kicked in the head, causing him to lose consciousness. (JA 20) With respect to the escort from one housing unit to another, the

Plaintiff alleged that he "was repeatedly led into poles on the recreation yard" by the escorting officers. (JA 20)

Defendants answered the complaint, denying the Plaintiff's allegations and additionally asserting, on behalf of Officers Hicks and Rasnick, state-law counterclaims alleging that the Plaintiff assaulted and battered them during the altercation. (JA 35-52) The Plaintiff then submitted a second amended complaint, largely unaltered from the initial complaint (JA 58-73), to which Defendants filed an answer. (JA 76-82)

The Plaintiff filed various discovery motions requesting, *inter alia*, production of retained surveillance video recordings. (JA 87) These motions were referred to a magistrate judge for disposition. (JA 90) In response to one order, Defendants certified that the Plaintiff had previously viewed "all available retained video footage," and that Defendants were unaware of any retained footage that had not already been made available. (JA 96, 101, 126-27)

The Plaintiff then submitted a motion for sanctions, arguing that he had not been provided with surveillance video footage from the recreation yards or inside the B building. (JA 106) He followed up on

this argument by filing a "Motion for Holding of Spoliation Sanctions by Defendants for Associated Relief," again arguing that he had not been provided with the opportunity to view surveillance video from the exterior recreation yards, or from inside the B building. (JA 110)

The magistrate judge conducted a two-day evidentiary hearing on January 23-24, 2019, taking the Plaintiff's pre-trial discovery motions under advisement and allowing the presentation of evidence on his spoliation argument. (JA 175) During that hearing, the Plaintiff testified that he was approaching the vestibule when Officer Rasnick "assault[ed] him at the door" by "grabb[ing] [his] left arm" and swinging at him, striking him "on the top of [his] head." (JA 181) The Plaintiff asserted that he was tackled to the ground and placed in handcuffs, after which Lieutenant Lyall and Sergeant Large entered the housing unit. (JA 181-82) The Plaintiff claimed that he was "gassed and kicked and repeatedly hit in the back of [his] head" until he lost consciousness, and that he did not "come to" until he was "outside." (JA 182, 183) He further testified that the escort officers were "bending his left hand . . . backwards" and telling him to "walk." (JA 184) The Plaintiff claimed that he was bent over, and that the escort officers were "ramming [him]

into poles, every pole," which were "steel fence pole[s] "erected throughout like every 10 or 15 feet." (JA 185, 186) The Plaintiff further testified that, after he arrived in the B building, he stood against the wall. After "somebody asked [his] name," an officer smashed his face into the wall, and the other officers then took turns punching him. (JA 187-89)

The Plaintiff called various Defendants as part of his case-in-chief, and each denied having engaged in the alleged misconduct. The control booth officer confirmed that he had called the 10-33 for assistance, after he stepped back and witnessed the ongoing altercation through the glass on the floor of the control booth. (JA 353, 354) Defendants uniformly denied having either kicked or punched the Plaintiff, or having witnessed other officers doing so. (JA 416, 857, 880, 919-20) The witnesses agreed that the Plaintiff remained conscious at all times (JA 864, 877, 927, 971), and Officer Rasnick specifically denied having "butted" heads with Officer Hicks. (JA 396) Two Defendants testified that the Plaintiff was not run into any metal poles while being escorted across the yard. (JA 895-96, 1002-03) They similarly testified that no officer "smashed" the Plaintiff's face into the wall or otherwise

assaulted him after they arrived inside the B building. (JA 919-20, 1005) The Plaintiff introduced multiple incident reports indicating that the escort across the recreation yards occurred without incident. *See, e.g.*, JA 1212 ("No force was used."); JA 1205, 1208, 1210.

The Defendants unanimously testified that any force used in connection with this particular incident was for the subjective purpose of bringing the Plaintiff under control. As Sergeant Large explained, "[t]hese are offenders at Red Onion, the worst prison, the worst inmates in the state of Virginia," and "[y]ou're fighting for your life when you're fighting with these guys." (JA 946-47)

With respect to his motion for spoliation sanctions, the Plaintiff called Intel Officer Bentley, who testified that the RapidEye Surveillance Video System could retain approximately 90 days worth of recorded video footage, but if the video footage was not pulled and saved into a permanent format during that time period, it would be recorded over in the ordinary course of business. (JA 791-92) Officer Bentley confirmed that the surveillance video that had been saved from the A-1 housing unit on August 14, 2015 corresponded to all available camera angles from the housing unit at that time. (JA 798) He additionally

testified that RapidEye video is saved off of the system, but apart from that, he did not know whether or how it could be altered, post-download. (JA 807)

Officer Bentley testified that access to the RapidEye system was limited, and that apart from the intel department, he did not know who else might have access. (JA 798, 809) He was never asked, and therefore did not confirm, whether the other surveillance video sought by the Plaintiff—from the exterior cameras in the recreation yard and from inside the B building—actually existed, and, if so, what angles or areas that video would have encompassed.

C. Magistrate Judge's Rulings

By order dated May 13, 2019, the magistrate judge denied the Plaintiff's pre-trial motions for discovery sanctions. As to the request for spoliation sanctions, the court ruled that "the video evidence which the plaintiff had requested"—specifically, the surveillance video depicting the altercation and its immediate aftermath—"was preserved and presented at trial." (JA 1223) The magistrate judge further held "that the plaintiff did not provide timely specific requests that the defendants preserve additional video recording evidence," such as any

surveillance video that might have captured the Plaintiff being escorted from one housing unit to another. (JA 1223) The magistrate judge also noted that the Plaintiff failed to "produce any evidence at trial that the defendants purportedly disposed of any video recordings in an effort to prevent their use at trial." (JA 1223) For this reason, the magistrate judge denied the Plaintiff's motion for spoliation sanctions.

By report and recommendation issued May 17, 2019, the magistrate judge separately recommended that the district court judge rule against the Plaintiff. (JA 1224-1291) As pertinent to this appeal, the magistrate judge was "persuaded that the force used was not excessive," despite the Plaintiff's injuries, because the force was applied "in a good-faith effort to maintain or restore discipline." (JA 1278) The magistrate judge expressly found that the Plaintiff's "version of being attacked without provocation" was "not credible." (JA 1278) The magistrate judge also found, as a factual matter, that the Plaintiff "provoked the initial use of force by Hicks and Rasnick . . . by his aggressive act when they attempted to restrain him." (JA 1279) She expressly found that the Plaintiff's "claims that responding officers continued to kick and punch him even after he was restrained and

removed from the pod" were not credible, citing both the video evidence and the testimony of the officers at trial. (JA 1279-80) The magistrate further held that she did "not find credible [the Plaintiff's] testimony that the officers purposefully ran him into fence posts and door frames as they escorted him to the B Building." (JA 1280)

The magistrate judge recommended that the district court find in favor of Officers Hicks and Rasnick on their state-law counterclaims. Based on the evidence presented, the magistrate judge found that the Plaintiff "struck Hicks in the eye, causing a cut in Hicks's eyebrow area that had to be closed with sutures and has left a permanent scar," and that "Hicks suffered a fracture to a bone in his right hand near his wrist during the scuffle." (JA 1284) She additionally found that, during the altercation, "Rasnick tore the meniscus in his right knee, requiring surgical repair." (JA 1284) The magistrate judge noted that "Hicks suffers from post-traumatic stress disorder as a result of this incident," crediting his testimony "that his psychological injury was so severe that his appearance at trial was the first time he had left home in several months." (JA 1284-85)

D. Plaintiff's Objections

On or about May 29, 2019,[3] the Plaintiff submitted a pleading titled "In re: Plaintiff's Written Objections in Accordance with F.R.C.P. Rule 72, Within 14 Days Concerning the May 17, 2019 Magistrate Judge's Proposed Findings of Fact and Conclusion of Law in Report & Recommendation." (JA 1292-1297) (emphasis in original) In this document, the Plaintiff objected to various proposed findings of fact and conclusions of law in the May 17, 2019 report and recommendation. At the end of the document, the Plaintiff included a section titled "Plaintiff Also Object to Denial of ECF No. 75 & 77, Motions for Appellate Review." (JA 1296-1297) In this section, he contended that the preserved video evidence had been "ALTERED!!!" (JA 1297) He did not reference or otherwise challenge any of the magistrate judge's conclusions pertaining to the denial of his motion for sanctions. (JA 1297)

The Plaintiff then submitted a separate motion seeking reconsideration of the magistrate judge's ruling on his pre-trial discovery motions, titled "In Re: Motion for Reconsideration Under Rule

[3] This is the date at which the Plaintiff's pleading is marked stamped and received in the prison mailroom. (JA 1298)

60(a)," with the corresponding subheading "Affidavit in Support of Motion for Relief from the May 13, 2019 Order at ECF No. 86." (JA 1313) (emphasis in original) In the text of this motion, the Plaintiff evidently objected to the magistrate judge's ruling that he was not entitled to receive various VDOC operating procedures in response to his motion to compel. The video evidence and motion for spoliation sanctions were not referenced. (JA 1313) By order dated May 18, 2020, the magistrate judge denied the motion for reconsideration. (JA 1316) Plaintiff took no further action on this ruling.

E. District Court Opinion

The district court judge adopted the magistrate judge's recommended dispositions on the substantive allegations of the complaint. (JA 1317-1330) Noting that the Plaintiff had submitted objections "under Federal Rule of Civil Procedure 72(b)," the Court conducted a *de novo* review of four findings in the report and recommendation, including (1) "the magistrate judge's factual findings with respect to his Eighth Amendment claims," and (2) the "factual findings and legal conclusions with respect to the counter-plaintiffs' suit for battery." (JA 1322-1323)

As relevant here, the district court judge agreed that the Plaintiff's "account of his altercation with the prison guards is simply not credible in light of the overwhelming conflicting evidence." (JA 1325) The district court judge summarized that conflicting testimony, and further noted that the video evidence "corroborates the officers' account," for even though "there is no video of the start of the fight, video shows Wall on his feet and actively resisting when the vestibule door opens," in contrast to the Plaintiff's testimony that "he was cuffed and compliant by the time the vestibule opened." (JA 1325-1326). Considering all of the evidence, the district court judge agreed that the Plaintiff's "version of events was not credible," for it was "contradicted by four credible witnesses and the video recordings of the incidents." (JA 1326)

As also relevant to this appeal, the district court agreed that the Plaintiff "battered officers Hicks and Rasnick under Virginia law," reasoning that the Plaintiff "initiated the altercation with the officers by resisting their attempts to restrain him and escalated the conflict by striking both officers," which "is assault and battery in its plainest form." (JA 1328)

The Plaintiff did not file any subsequent motions for reconsideration or otherwise re-assert the spoliation argument he made at trial, instead noting his appeal. (JA 1332)

SUMMARY OF ARGUMENT

By neglecting to file a timely and specific objection to the magistrate judge's spoliation ruling, the Plaintiff waived his right to seek further appellate review of that decision. Moreover, because the Plaintiff failed to file any motion or otherwise notify the district court judge of any outstanding "objection" to the non-dispositive order, he has not adequately preserved this issue for appeal. Allowing substantive consideration of these issues would defeat the fundamental rule that district court judges should have meaningful opportunity to consider and correct potential errors in the district court record before those errors are pressed on appeal. Litigants, even those proceeding *pro se*, should not be able to leapfrog that process and ask this Court to rule on issues not adequately preserved below.

The Plaintiff did not carry his burden of proving sanctionable spoliation of evidence. Even if VDOC, in a general sense, was aware of the Plaintiff's request to save video footage other than that made

available at trial, that alone is insufficient for purposes of awarding sanctions under F.R.C.P. 37(e). That rule requires a finding that "a party" failed to preserve evidence—not that a party's employer or colleague or supervisor failed to preserve evidence. Although the caselaw might support the imputation of a duty to preserve from a principal to an agent (e.g., allowing an employer to be held liable for an employee's spoliation of evidence), the same should not work in reverse. An agent is not liable for the misconduct of a principal, and allowing imputation from a principal (VDOC) to an employee (correctional officer) would result in the employee being unjustly sanctioned for conduct over which he had no control.

Because the Plaintiff did not present sufficient evidence from which it could be determined that these individual parties had knowledge of the potential relevance of surveillance video other than that contained in housing unit A, he has not carried his burden of establishing that these Defendants had a duty to preserve that evidence. Also, because the Plaintiff did not produce any evidence as to the general contents of the missing video evidence, he did not carry his

burden of showing that he was prejudiced by the failure to preserve this evidence. The motion for spoliation sanctions was properly denied.

Although the Plaintiff advances numerous claims challenging the district court's interpretation of the evidentiary record, an appellate court considering a district court's factual conclusions should not reweigh the evidence and substitute its judgment as though the appellate court is the initial finder of fact. Rather, this Court should ask whether there is evidence in the record from which the district court could plausibly have arrived at its factual conclusions. Here, considering the express credibility findings of the magistrate, the testimony of the witnesses, and the documentary record, there is evidence in the record that would support the district court's factual conclusions that the Plaintiff initiated the altercation, struggled with the officers, and otherwise did not testify credibly at trial. There being no clear error in the record, the judgment below should be affirmed.

STANDARD OF REVIEW

Whether an appellant has waived his right to appeal the findings of a magistrate judge is a question of law that is reviewed *de novo*. *Solis v. Malkani*, 638 F.3d 269, 273 (4th Cir. 2011).

Evidentiary matters, including decisions to grant or deny a motion seeking discovery sanctions, are reviewed on appeal for abuse of discretion. *Silvestri v. GMC*, 271 F.3d 583, 590–91 (4th Cir. 2001).

And this Court reviews "a judgment following a bench trial under a mixed standard of review—factual findings may be reversed only if clearly erroneous, while conclusions of law . . . are examined *de novo*." *Roanoke Cement Co. v. Falk Corp.*, 413 F.3d 431, 433 (4th Cir. 2005).

ARGUMENT

I. Because the Plaintiff Failed to Properly Object to the Magistrate Judge's Separate Ruling on the Spoliation Motion, He Has Not Preserved this Argument for Appeal.

A district judge may designate a magistrate judge to hear and determine non-dispositive pretrial motions, including motions to compel and motions seeking the imposition of discovery sanctions. 28 U.S.C. § 636(b)(1)(A). Where the magistrate makes a determination on a pretrial matter under section (b)(1)(A), the district court judge may reconsider or revise that decision if clearly erroneous, but only if the objecting party complies with the provisions of F.R.C.P. 72(a):

> When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the

> required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. *A party may not assign as error a defect in the order not timely objected to.* The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

Fed. R. Civ. P. 72(a) (emphasis added).

This Court has repeatedly held that failure to file timely and specific objections to a magistrate judge's order on a non-dispositive issue constitutes a waiver of the party's right to appeal that issue. *See Kitlinkski v. Dep't of Justice*, 994 F.3d 224, 233 (4th Cir. 2021); *see also United States v. Hill*, 849 F.3d 195, 201–02 (4th Cir. 2017); *Solis v. Malkani*, 638 F.3d 269, 274 (4th Cir. 2011); *Wadley v. Park at Landmark, LP*, 264 F. App'x 279, 281 (4th Cir. 2008). This rule applies equally to *pro se* litigants. *Gupta v. Freddie Mac*, 823 F. App'x 225, 226 (4th Cir. 2020) (per curiam); *Mvuri v. Am. Airlines, Inc.*, 776 F. App'x 810, 810-11 (4th Cir. 2020) (per curiam).

In his opening brief, the Plaintiff concedes that his motion for spoliation sanctions was a non-dispositive motion referred to the magistrate judge under 28 U.S.C. § 636(b)(1)(A) and subject to review

under Rule 72(a). *See, e.g.*, Plf. Opening Br. at 26. The magistrate judge's denial of the spoliation motion is commemorated in a separate order (JA 1223), issued several days before the report and recommendation on the substantive claims raised in this case (JA 1224-1291). The spoliation ruling was therefore properly set forth as a discrete ruling on a non-dispositive motion, rather than as a report and recommendation. To adequately preserve his objections to that discovery ruling for purposes of appellate review, the Plaintiff therefore needed to lodge objections with the district court judge that were both timely and specific. Fed. R. Civ. P. 72(a). He did neither.

Although the Plaintiff mailed an objection to the May 17 report and recommendation (JA 1298), that objection is defective because it is neither timely, nor specific, as to the magistrate's May 13 spoliation ruling. As to timeliness, the magistrate judge issued her ruling on the non-dispositive discovery motions on May 13, 2019. (JA 1223) Under Rule 72(a), the Plaintiff had fourteen days to submit objections to that ruling. The Plaintiff mailed a document on May 29, 2019, entitled "Written Objections in Accordance with Fed. R. Civ. P. Rule 72 within 14 days Concerning the May 17, 2019 Magistrate Judge's Proposed

Findings of Fact & Conclusions of Law in Report & Recommendation" (JA 1292) (emphasis in original). Even if the objections raised in this submission were construed—despite the explicit title of that document—to also encompass the separate discovery order, it was untimely as to the May 13 ruling.

Even if this Court were to consider the Plaintiff's May 29 submission a timely "objection" to the magistrate's separate discovery ruling, the Plaintiff failed to raise his spoliation objection with sufficient specificity. Although he included a subsection entitled "Plaintiff Also Object to Denial of ECF No. 75 & 77, Motions For Appellate Review," the sole argument raised in that subsection centered around the Plaintiff's contention that the "video footage provided was ALTERED!!!" (JA 1297) The Plaintiff did not argue that the Defendants failed to preserve other relevant video evidence, despite having a duty to do so, nor did he argue that he was prejudiced by the absence of other video evidence at trial. Moreover, as evidenced by the very title of that pleading, the Plaintiff was objecting to the May 17 report and recommendation, with no reference whatsoever to the separate May 13 discovery order.

The specificity requirement "preserves the district court's role as the primary supervisor of magistrate judges, and conserves judicial resources by training the attention of both the district court and the court of appeals upon only those issues that remain in dispute after the magistrate judge has made findings and recommendations." *United States v. Midgette*, 478 F.3d 616, 621 (4th Cir. 2007). By neglecting to raise, with any degree of specificity, any aspect of his spoliation argument (apart from his speculation that the video played at trial must have been altered), the Plaintiff failed to adequately notify the district court judge of the objection he now raises on appeal—his contention that he is entitled to spoliation sanctions because surveillance video from cameras outside of the housing unit where the incident occurred was not preserved.

For these reasons, the May 29 submission does not constitute a timely and specific objection to the magistrate judge's separate discovery order. Because the only other filing submitted by the Plaintiff relative to the discovery order was a motion for reconsideration (JA 1313), the denial of which was not appealed or otherwise brought to the attention of the district court judge, the Plaintiff has failed to

adequately preserve the spoliation issue upon which he now seeks appellate review. *See* Fed. R. Civ. P. 72(a).

Requiring a prospective appellant to raise a timely and specific objection to a magistrate judge's non-dispositive ruling is analogous to the contemporaneous objection rule. After all, a district court judge cannot be faulted for failing to substantively consider an issue that is not sufficiently brought to the attention of the court. As this Court has so aptly noted, "[d]istrict judges are not mind readers." *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

For these reasons, the Plaintiff has waived appellate review of his objections to the magistrate judge's non-dispositive discovery order.

II. The Plaintiff Has Not Properly Preserved His Argument that the District Court Judge Erred in Failing to Rule on His "Objections" to the Spoliation Ruling.

Relatedly, the Plaintiff has not sufficiently preserved his argument that the district court judge erred by failing to adequately consider his "objections" to the magistrate judge's discovery order. As this Court has expressly held, "a party has a duty to make clear, after a court's ruling that does not mention a contention briefed and argued, that the party regards the point as still open and undisposed of, and

still presses it." *Malbon v. Pa. Millers Mut. Ins. Co.*, 636 F.2d 936, 941 (4th Cir. 1980). "Otherwise, unaware of the party's position, the court is deprived of the opportunity to remedy any omission if one, in fact, exists." *Id.* Accordingly, where an appellant "never made, by motion or otherwise, any point to the lower court that [an] argument was totally ignored (rather than that it was considered but found wanting)," that issue is not adequately preserved for appellate purposes. *Id.*

Here, even assuming the Plaintiff adequately made a timely and specific objection to the magistrate judge's spoliation ruling, he never notified the district court judge that the court had not ruled on the merits of that objection. And he was not without options—the Plaintiff plainly knew how to submit a motion seeking reconsideration or alteration of a judgment, *see, e.g.*, JA 1313, but simply elected not to file one.[4] Under the rule announced in *Malbon*, because the Plaintiff never notified the district court judge of the "missing" ruling, he is precluded from raising this argument for the first time on appeal. *See Malbon*, 636 F.2d 940-41; *accord Skippy, Inc. v. CPC Int'l, Inc.*, 674 F.2d 209,

[4] *See, e.g.*, Fed. R. Civ. P. 52(b); Fed R. Civ. P. 59(e); Fed. R. Civ. P. 60(b)(6).

215 (4th Cir. 1982) ("In the absence of exceptional circumstances, questions not raised and properly preserved in the trial forum will not be noticed on appeal.").[5]

The district court judge cannot be found to have erred in failing to rectify an issue that was never brought to his attention in the first instance. Because the Plaintiff never sought correction from the district court, this assignment of error is procedurally barred.

III. The Motion for Spoliation Sanctions Was Properly Denied.

Even if this Court were to reach the merits of the Plaintiff's spoliation argument, the lower court did not err in denying his motion for sanctions. Evidentiary rulings by the district court judge are reviewed by this Court under an abuse of discretion standard. *Turner v. United States*, 736 F.3d 274, 281 (4th Cir. 2013); *Silvestri v. GMC*, 271 F.3d 583, 590–91 (4th Cir. 2001). If this Court were to determine that the district court judge impliedly considered and overruled the

[5] The Plaintiff has not argued that there is good cause to excuse any procedural default, and he has therefore waived that argument. *See Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 604 n.4 (2010) (arguments not raised in opening brief are waived).

Plaintiff's objections to the May 13 discovery order, that decision should be affirmed because it did not constitute an abuse of discretion.

The Plaintiff contends that the Defendants spoliated evidence because no one saved surveillance video from cameras located outside of the housing unit where the altercation occurred. "[A]s the party disputing the district court's ruling," the Plaintiff "bears the burden of establishing spoliation." *Turner*, 736 F.3d at 282. Because the Plaintiff has not carried his burden of proving spoliation of evidence, attributable to a party to this litigation, that resulted in prejudice to him, the judgment below should be affirmed.

Generally speaking, "[s]poliation refers to the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Silvestri*, 271 F.3d at 590. Although federal courts previously relied on their inherent authority or state law when determining whether spoliation sanctions should be awarded, Federal Rule 37(e), as amended, "authorizes and specifies measures a court may employ if [electronically stored] information that should have been preserved is lost, and specifies the findings necessary to justify those

measures." Fed. R. Civ. P. 37, Advisory Committee Notes to 2015 Amendments. Accordingly, for purposes of electronically stored information, the amended rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used." *Id.*

Under Federal Rule 37(e), "[i]f 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 that information "cannot be restored or replaced through additional discovery," the court, "upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice." Fed. R. Civ. P. 37(e)(1). Additional sanctions, such as default judgment, are warranted "only upon finding that the party acted with intent to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e)(2). However, "[c]are must be taken . . . to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are [only] permitted under subdivision (e)(2)," Fed. R. Civ. P. 37, Advisory Committee Notes to 2015 Amendments—such as inferring that missing

video evidence would have been adverse to the party against whom sanctions are sought.

Rule 37(e), however, "does not apply when information is lost before a duty to preserve arises." Fed. R. Civ. P. 37, Advisory Committee Notes to 2015 Amendments. When determining whether "a duty to preserve arose," courts "should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant." *Id.*

Also, and critically, any spoliation analysis should focus on the knowledge and actions of the individuals who are named as Defendants to the specific legal claim associated with the allegedly missing evidence. Where, as here, a party has sued multiple individuals under multiple legal theories arising out of separate, discrete events, the court should carefully parse out the claim(s) and defendant(s) to which that missing evidence is allegedly relevant. Otherwise, the court may end up imposing sanctions upon individuals who are not themselves the actual "wrongdoers."

Under the circumstances of this case, Plaintiff's Claim #2, which alleges that excessive force was used during the escort from one housing

unit to another, is the only legal claim with a conceivable tie to the allegedly missing evidence. The Defendants named in that claim are Defendants Lyall, Large, Akers, Collins, Taylor, Bishop, Testerman, Addington, Dockery, Gwinn, and Mullins ("relevant Defendants"). *See* JA 1272 (listing claims). Rather than considering the generalized or potential knowledge of all of the parties to this litigation, it is the actions and knowledge of these Defendants, specifically, that should be weighed when determining whether the Plaintiff has satisfied his burden of proving spoliation of evidence.

A. The Plaintiff Failed to Prove that the Relevant Defendants Had a Duty to Preserve.

"A party seeking sanctions based on the spoliation of evidence must establish, *inter alia*, that the alleged spoliator had a duty to preserve material evidence." *Turner*, 736 F.3d at 281; Fed. R. Civ. P. 37, Advisory Committee Notes to 2015 Amendments. "This duty arises 'not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.'" *Id.* (quoting *Silvestri*, 271 F.3d at

591). Generally, however, "it is the filing of a lawsuit that triggers the duty to preserve evidence." *Id.*

Plaintiff produced no evidence tending to establish that any of the relevant Defendants were aware that the Plaintiff was going to claim, at a later date, that they repeatedly rammed his head into metal poles during that escort. Although the Plaintiff filed an informal complaint and regular grievance soon after the incident, the informal complaint simply stated that the "unnecessary use of force . . . continued until I reached Bravo-300 pod where I was placed in five point restraints." (JA 1178) The informal complaint contained no specifics, no allegations of being "rammed" into walls and poles, and no other details that would have notified anyone reviewing the complaint that the exterior surveillance video—assuming it existed—was relevant to anticipated litigation. The regular grievance suffers from the same deficiency. (JA 1179)

More critically, the Plaintiff adduced no evidence that any of the defendants involved in the escort were ever made aware of the generalized contents of those complaints. Nor do their reports reflect any unusual incident having occurred during that escort that (1) would

have been captured by external surveillance video, and (2) which they reasonably could have anticipated as giving rise to a claim against them. *See* JA 1202-05.

A duty to preserve must be tied to some awareness of the potential for litigation. Fed. R. Civ. P. 37; *see also Turner v. United States*, 736 F.3d 274 (4th Cir. 2013). Here, the relevant Defendants were not on notice of the Plaintiff's potential excessive force claims regarding that escort, and, thus, they had no pre-litigation duty to preserve.

For reasons discussed in more detail below, *see* Part III(C), *infra*, the Plaintiff cannot carry his burden by simply alleging that VDOC had some generalized "duty to preserve" which should be imputed to the relevant defendants. And even setting aside the question of imputation, neither the informal complaint nor the regular grievance contained sufficient details to trigger a duty to preserve as to the exterior surveillance video. Although *perhaps* VDOC officials could have anticipated potential litigation regarding the escort from one housing unit to another, that is not the appropriate inquiry. The question, rather, is whether the reviewing individual "reasonably should have known" that the Plaintiff was intending to file suit, and that the

exterior surveillance video would be relevant to that lawsuit. Fed. R. Civ. P. 37. Although the grievances reference a request for review of the exterior surveillance footage, arguably creating an obligation for VDOC to have retained that footage under its own policies, "[t]he fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case." Fed. R. Civ. P. 37, Advisory Committee Notes to 2015 Amendments.

Because the informal complaint and regular grievance, alone, did not provide adequate notice that the exterior surveillance video would be relevant to anticipated litigation, the Plaintiff failed to carry his burden of establishing that they had a duty to preserve that video.

B. The Plaintiff Failed to Prove that the Relevant Defendants Knowingly Breached A Duty to Preserve.

To find spoliation of evidence, the moving party must also establish that the alleged spoliator engaged in conduct leading to the loss of the evidence. *Blue Sky Travel & Tours, LLC v. Al Tayyar*, 606 F. App'x 689, 697-98 (4th Cir. 2015). As embodied in Rule 37(e), specific to

loss of electronically-stored evidence, this inquiry is modified, slightly, to question whether the loss of evidence occurred because a party failed to take reasonable steps to preserve it. This is a separate question from whether the duty to preserve exists in the first instance, focusing instead upon whether that duty was breached. Because spoliation does not occur when a loss of evidence is attributable to simple negligence, *Turner*, 736 F.3d at 282, any breach of duty must be amount to more than mere negligence, but instead constitute a knowing breach of a duty to preserve—in other words, that the party knew the evidence should be saved, and yet failed to take reasonable action to preserve it.

In the context of this particular case, the "reasonableness" of any failure to preserve the exterior surveillance video evidence must therefore be assessed from the viewpoint of the defendants directly involved in that escort. As referenced above, the Plaintiff failed to put forward evidence that any of the relevant defendants—prior to the filing of this lawsuit—were aware of his claim that he had been rammed into metal poles during the escort from one housing unit to another. Nor did he produce any evidence that the relevant defendants had any ability to

access or otherwise preserve surveillance video from the prison's RapidEye system.

Even if broadened to consider the actions of VDOC, generally, the Plaintiff has not established that the conduct of any VDOC official was unreasonable. Although the Plaintiff referenced multiple video cameras in his informal complaint and regular grievance, he provided no details tending to indicate that the exterior video footage would be relevant to anticipated litigation. Any failure to preserve the additional surveillance video footage was negligent, at best. Because it is the Plaintiff's burden to show both a duty to preserve, and a corresponding breach of that duty, the Plaintiff's motion for spoliation sanctions was properly denied.

C. Any Duty to Preserve and Breach of Duty by Other Persons Within VDOC Cannot Be Imputed to the Relevant Defendants.

The Plaintiff argues that because VDOC, generally, failed to save video evidence, that alleged wrongdoing should be imputed to the individual defendants here. He is incorrect.

Even if there were some wrongdoing, or failure to preserve, by VDOC generally, it would be inappropriate to impute that wrongdoing

to these individual defendants. There is no indemnification relationship between VDOC and the defendants—such as that between an insured and his insurance company. Rather, all that exists is the general employer-employee relationship. This Court, although allowing an employer to be found responsible for an employee's failure to save evidence, has never allowed the imputation to go in the opposite direction—exposing an employee's pockets to liability for something that his employer has done (or, more on point, has failed to do).

This Court has, however, upheld a district court's refusal to impute VDOC's failure to preserve a surveillance video to a corrections officer. *See Boone v. Everett*, 751 F. App'x 400 (4th Cir. 2019) (per curiam). In *Boone*, the Plaintiff filed a motion for spoliation sanctions based on VDOC's failure to save surveillance video depicting a physical altercation between the Plaintiff, an inmate, and the Defendant, a corrections officer. *Boone v. Everett*, No. 1:14cv1619 (E.D. Va.) (ECF No. 133). Following briefing and oral arguments, which included the Plaintiff's argument that VDOC's failure to save the video was imputable to the Defendant corrections officer, the magistrate judge denied the motion. *Boone v. Everett*, No. 1:14cv1619 (E.D. Va.) (ECF

No. 149). The Plaintiff objected to the magistrate's ruling, contending, *inter alia*, that "in light of VDOC's involvement in this case, the law allows VDOC's preservation duty (and corresponding spoliation) to be imputed to [the Defendant corrections officer]." *Boone v. Everett*, No. 1:14cv1619 (E.D. Va.) (ECF No. 165, at p. 2). The district court judge, however, found that argument unpersuasive, determining that the magistrate's order was not clearly erroneous or contrary to the law. *Boone v. Everett*, No. 1:14cv1619 (E.D. Va.) (ECF No. 188).

On appeal, this Court affirmed. *Boone v. Everett*, 751 F. App'x 400 (4th Cir. 2019). *Boone* noted, first, that "[i]t is undisputed that the video surveillance systems at the correctional institution captured the relevant altercation between [the inmate and the officer], but, because no one in the Virginia Department of Corrections saved the video, the video surveillance system recorded over the footage before discovery in this case." *Id.* at 402. The defendant officer "viewed the video once," but "did not have the ability to access the video himself, and he never asked any of his supervisors to preserve the video." *Id.* The inmate "never saw the video," but "demanded to see it in the institutional grievances he filed," and he "asserted that the video would corroborate his claims."

Id. As in this case, although "[t]here [was] no evidence in the record that [the defendant officer] or anyone acting on his behalf took any active steps to erase the video," neither was there evidence that anyone took affirmative steps to save it. *Id.*

Based on those circumstances, which are on all fours with the present case, this Court agreed that the Plaintiff "has not established that [the defendant officer] committed an act or omission that led to spoliation of the video evidence and was either willful or done with the intent to deprive [the Plaintiff] of the use of the evidence," and therefore affirmed the denial of spoliation sanctions. *Id.* In doing so, the *Boone* court plainly focused on the culpability of the individual officer—not that of an executive-branch agency as a whole. That decision applies equally here.

Boone also corresponds to the advisory committee notes accompanying Federal Rule 37(e), which note that the Rule does not impose a duty to preserve where the lost information is not "in the party's control." Fed. R. Civ. P. 37, Advisory Committee Notes to 2015 Amendments. Allowing imputation of wrongdoing from VDOC to these individual officers would therefore be at odds with the Advisory

Committee notes and the plain language of Federal Rule 37(e), which allows for sanctions only when "***a party***" has failed to preserve relevant ESI.[6]

Defendants recognize that, in *Pettit v. Smith*, 45 F. Supp. 3d 1099 (D. Ariz. 2014), decided prior to the amendments to Federal Rule 37(e), a district court in Arizona elected to impute an agency's failure to save evidence to individual state employees. *Pettit*, though, has not been universally accepted outside of its jurisdiction; to the contrary, its rationale has been squarely rejected by other federal district courts, including those in its own circuit. *See, e.g.*, *Peters v. Cox*, 341 F. Supp. 3d 1192 (D. Nev. 2018).

Nor does *Silvestri v. GMC*, 271 F.3d 583 (4th Cir. 2001), compel a different result. In *Silvestri*, a plaintiff filed suit against the manufacturer of a vehicle involved in an accident. The Plaintiff

---

[6] Prior to the enactment of amended Rule 37(e), federal courts considering spoliation motions often considered the relevant evidentiary law of the forum state. Although state law no longer serves as a controlling source of authority, it is notable that the Virginia Supreme Court has held that destruction of evidence by a party's expert witness—certainly someone in a "special relationship" with that litigant—could not serve as a basis for a spoliation finding. *See Gentry v. Toyota Motor Corp.*, 252 Va. 30, 31-32 (1996).

retained an attorney, and that attorney, in turn, immediately retained two accident reconstruction experts who were allowed to freely inspect the vehicle, which belonged to a third party. One expert suggested that the vehicle be maintained in its post-accident condition and the manufacturer notified of the potential litigation. *Id.* at 586. Nonetheless, neither the Plaintiff nor his attorney notified the manufacturer of the vehicle or the potential for litigation, and a few months later, the vehicle was repaired. *Id.* at 587. The manufacturer later filed a motion for spoliation sanctions, requesting dismissal of the Plaintiff's action.

The district court, sitting in diversity and applying New York law, concluded that the plaintiff had breached his duty to either preserve the vehicle or notify the manufacturer that it was available and was the subject of potential litigation. *Id.* at 589. The district court therefore granted judgment in favor of the defendants, and the plaintiff appealed. Reasoning that the plaintiff had access to the evidence, the plaintiff was aware that he intended to file suit, and the plaintiff had been informed that he needed to make the manufacturer aware of the vehicle so they could perform an independent assessment, this Court affirmed,

concluding that the plaintiff, his attorneys, and his experts—collectively—failed to adequately discharge the plaintiff's duty to prevent spoliation of evidence. *Id.* at 592.

Although *Silvestri* therefore concerned evidence that was not physically in the possession of a party to the litigation, it was undisputed that the evidence was accessible and within the Plaintiff's control, at least for a period of time. *Silvestri* did not, then, conclude that the third party had a duty to preserve evidence, and that the third party's failure to preserve could be imputed back to a litigant for purposes of assessing sanctions. Rather, *Silvestri* focused on the litigant's ***own*** failure to preserve evidence to which he had access, and his ***own*** corresponding duty to preserve and breach of duty. *Id.* at 593 ("We agree with the district court that [the Plaintiff] failed to preserve material evidence in anticipation of litigation or to notify [the defendant manufacturer] of the availability of this evidence, thus breaching ***his*** duty not to spoliate evidence." (emphasis added)).

Silvestri is therefore distinguishable in at least two respects. First, there was no evidence that any of these Defendants failed to preserve material evidence—accessible to them even though not in their

physical possession—in anticipation of litigation. And *Silvestri* does not stand for the proposition that a third party's failure to preserve evidence should be imputed to a party who was not aware of the litigation in sufficient time to take meaningful steps to save that evidence.

Second, and relatedly, the Plaintiff has produced no evidence that any of these Defendants had custody, control, or even access to the surveillance video that was not preserved. And *Silvestri* does not support Plaintiff's argument that this Court should superimpose a third party's independent duty to preserve on a litigant who did not have knowledge of the pending litigation and, therefore, did not have a corresponding duty of his own.

Turning, then, to whether there is an appropriate standard allowing for the "vicarious" imposition of spoliation sanctions, Defendants recognize that some courts have allowed imputation of a duty to preserve where the "destroying party is the 'agent' of [the] party [against whom sanctions are sought]." *Gemsa Enters., LLC v. Specialty Foods of Ala., Inc.*, No. CV13-00729, 2015 U.S. Dist. LEXIS 189302, at *27 (C.D. Cal. Feb. 10, 2015). For this reason, "[a]n employer may be

responsible for the spoliation of its employee," *id.*, although the reverse is not necessarily true: it is one thing to find a principal liable for the misconduct of its agent; it is another thing entirely to find an agent liable for the misconduct of its principal (or, more on point, the misconduct of a different agent, imputed up to the principal, and then imputed down to a new agent, himself innocent of wrongdoing). *See id.*[7]

For this reason, *Pettit* aside, the overwhelming majority of district courts to have considered this issue have concluded that corrections officers should not be subjected to spoliation sanctions for an agency's failure to retain surveillance video that was never within that officer's custody or control.[8] Particularly considering the Eleventh Amendment concerns raised when a federal court attempts to levy sanctions against an individual state employee based on conduct by the agency itself, *see*

---

[7] *See also Am. Builders & Contrs. Supply Co. v. Roofers Mart, Inc.*, No. 1:11cv19, 2012 U.S. Dist. LEXIS 101842, at *18 (E.D. Mo. July 20, 2012); *accord Edifecs, Inc. v. Welltok, Inc.*, No. C18-1086, 2019 U.S. Dist. LEXIS 194858, at *9 (W.D. Wash. Nov. 8, 2019); *Vohra v. City of Placentia*, No. 11-1267, 2017 U.S. Dist. LEXIS 223883, at *8 (C.D. Cal. Dec. 29, 2017).

[8] *See, e.g.*, *Bush v. Bowling*, No. 19-cv-00098, 2020 U.S. Dist. LEXIS 165577, at *21-23 (N.D. Okla. Sept. 10, 2020); *Thomas v. Butkiewicus*, No. 3:13cv747, 2016 U.S. Dist. LEXIS 57163, at *40-41 (D. Conn. Apr. 29, 2016); *Latimer v. Smith*, No. 16-4004, 2018 U.S. Dist. LEXIS 141792, at *19-20 (D. Minn. July 20, 2018).

Peralta v. Dillard, 744 F.3d 1076, 1084 (9th Cir. 2014) (en banc), these later cases state the more appropriate rule, and one that dovetails with this Court's precedent, including the ruling in *Boone*. *See, e.g.*, *Adkins v. Wolever*, 692 F.3d 499, 506 (6th Cir. 2012) (affirming denial of spoliation sanctions against defendant corrections officer with no control over surveillance video that was not saved).

Because the Plaintiff has not established that any of the relevant Defendants had custody or control over the missing surveillance video, it would be improper to take the actions of other VDOC employees, impute their alleged wrongdoing to the principal (VDOC), and then impute VDOC's vicarious "wrongdoing" back down the chain of command to these individual employees. Rather, the spoliation inquiry is appropriately focused on the relevant defendants before the Court, what those defendants knew or should have known, and that they did (or failed to do). Considering all of the evidence presented, the Plaintiff failed to prove that these specific defendants possessed a duty to preserve, and breached that duty, leading to the loss of relevant evidence. The judgement below should therefore be affirmed.

D. The Plaintiff Failed to Carry His Burden of Establishing that the Missing Evidence Was Prejudicial to Him.

As discussed above, under the appropriate standard of review, the district court, to the extent it may be deemed to have considered and ruled upon the Plaintiff's spoliation motion, did not abuse its discretion by declining to find a duty to preserve and corresponding breach of that duty. Because the Plaintiff also failed to sufficiently establish that he was prejudiced by the missing evidence, there is no error in the judgment below. *See* Fed. R. Civ. P. 37(e)(1) (allowing imposition of sanctions only "upon finding prejudice to another party from loss of the information").

Generally, "[t]he prejudice inquiry looks to whether the [spoiling party's] actions impaired [the non-spoiling party's] ability to go to trial or threatened to interfere with the rightful decision of the case." *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006). A party therefore suffers prejudice if the spoliation substantially denies the party the ability to support or defend its claim.

Although the Plaintiff speculated at trial that the missing video evidence would have shown whether he was or was not run into the metal poles, he failed to present any evidence to support this supposition. Despite the presence of an intel officer with knowledge of

the RapidEye camera system, the Plaintiff never inquired into how many cameras were on the recreation yard, what angles those cameras may have shown, or whether they were even operational on the listed date. Absent some evidence tending to establish what, precisely, those video cameras would have been positioned to show, the Plaintiff cannot claim that the absence of the corresponding surveillance video was prejudicial to him. Because it is the Plaintiff's burden to establish prejudice, and because he presented no evidence from which any court could meaningfully weigh the potential impact of the allegedly missing evidence, he failed to sustain his burden of proof.

As to the absence of surveillance video from the B Building, the Plaintiff was provided with handheld video footage from that specific date. As with the exterior surveillance footage, the Plaintiff failed to meaningfully identify what cameras are inside the B building, where those cameras are placed, what they would have shown, and why that video footage would have been superior to the handheld footage (which at least contains an audio component).

For these reasons, the Plaintiff neglected to present sufficient evidence to support a finding that the absence of this surveillance video prejudiced him. Absent prejudice, spoliation sanctions are unavailable.

IV. The Factual Findings of the District Court, Including Express Credibility Determinations, Are Not Clearly Erroneous.

The Plaintiff argues at length that the district court erred in resolving the credibility of the witnesses and reaching various factual conclusions. Plf.'s Opening Br. at 38-60. The arguments raised throughout this portion of the brief represent the very type of cherry-picking and second-guessing that appellate courts should disavow. Giving proper deference to the credibility determinations of the lower court, the district court did not err in determining that the Plaintiff failed to carry his burden of demonstrating a constitutional violation.

Factual findings, such as those challenged here, are reviewed on appeal for clear error. "A finding is clearly erroneous if 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *First Professionals Ins. Co. v. Sutton*, 60 Fed. App'x 276, 288 (4th Cir. 2015) (quoting *Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 379 (4th Cir. 1995)). But "[t]his standard plainly does not entitle a

reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *United States v. Heyer*, 740 F.3d 284, 292 (4th Cir. 2014). Thus, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety," this Court "may not reverse it even though convinced that had [the Court] been sitting as the trier of fact, [this Court] would have weighed the evidence differently." *Id.* Moreover, "[i]n cases in which a district court's factual findings turn on assessments of witness credibility or the weighing of conflicting evidence during a bench trial, such findings are entitled to even greater deference." *FTC v. Ross*, 743 F.3d 886, 894 (4th Cir. 2014); *see also Benner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1234 (4th Cir. 1996) ("On review, we may neither weigh the evidence nor judge the credibility of witnesses.").

Great deference should therefore be shown to credibility determinations of a factfinder who has witnessed live testimony. The Supreme Court has expressly admonished that "courts must always be sensitive to the problems of making credibility determinations on the cold record." *United States v. Raddatz*, 447 U.S. 667, 679 (1980). A

written record often "fail[s] to convey the evidence fully in some of its most important elements," for "[i]t cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration," and therefore merely constitutes a "dead body of the evidence, without its spirit." *Id.* (internal quotations omitted).

Considering all of the evidence presented—not just the surveillance video evidence and the handheld video, but also the written incident reports and the testimony of all the witnesses (who were called *by the Plaintiff* as part of his case in chief)—the magistrate judge and, later, the district court judge, determined that the Plaintiff's version of events was simply not credible. For example, the surveillance video plainly showed that the Plaintiff was not passively lying on the floor of the housing unit being hit and kicked in the head by multiple officers, as he testified. Despite Plaintiffs' argument to the contrary, he is clearly up and struggling with the officers while he is on his feet—not standing with his palms turned out, compliant, and then unjustly attacked. Although there are certainly portions of the altercation that

were not clearly captured on camera, the segments that were recorded tend to support Defendants' testimony, not that of the Plaintiff.

Yet, by repeatedly and selectively attempting to interpret still images from the surveillance video, the Plaintiff encourages this Court to engage in the very type of factfinding and second-guessing that would upend the appropriate standard of review. For example, the Plaintiff argues that Officer Hicks must have sustained the cut above his eye in an alleged collision with Officer Rasnick—but ignores Officer Rasnick's express testimony that this collision did not happen. The Plaintiff contends that the video evidence shows that he is "restrained on the ground" when Lieutenant Lyall and Sergeant Large enter the housing unit—but it certainly does not. Rather, the video clearly shows that the Plaintiff was not placed in handcuffs until after these Defendants arrived, and that corresponds with Sergeant Large's testimony that it was his handcuffs that ultimately were used to secure the Plaintiff.

Considering the totality of the evidence in the record, the district court's factual determinations—that the Plaintiff instigated the altercation with Officer Hicks and Officer Rasnick, that the Plaintiff was combative with the officers rather than compliant (or unconscious),

and that the Plaintiff was not rammed unceremoniously into multiple metal poles while being escorted across the recreation yards—are plausible. These factual findings are supported by evidence in the record—specifically, the testimony of each of the Defendants and the incident reports the Plaintiff elected to submit as exhibits at trial.

Nevertheless, the Plaintiff appears to argue that the district court is required, as part of the factfinding process, to identify each and every potential inconsistency in the testimony and expressly weigh and resolve those inconsistencies in order to have correctly engaged in the factfinding process. The Plaintiff's position puts too great a burden on the trial courts. Where a factfinder has expressly determined that a witness has testified credibly (or incredibly), that finding is entitled to substantial deference on appeal, and more is needed to upend that credibility determination than a selective interpretation of a grainy surveillance video image.

The factual findings of the district court were not against the weight of the evidence. Weighing the express credibility findings of the magistrate judge, who heard the live testimony of the witnesses, along with the remaining evidence in the case, a reasonable jurist could

plausibly conclude that the Plaintiff simply was not telling the truth. He was not attacked without provocation and then repeatedly assaulted while he lay on the floor, prostrate and fading in and out of consciousness while being kicked in the head by numerous officers. The district court did not clearly err in determining that this version of events was not credible, in light of all of the competing evidence in the record. The district court's decision to dismiss the Plaintiff's excessive force claim should therefore be affirmed.

Similar reasoning applies to the Plaintiff's argument that the district court erred in dismissing his medical indifference claim. The Plaintiff argues again that the testimony of the witnesses and the district court's credibility determinations should be supplanted because his own subjective interpretation of the surveillance video shows that he must have been unconscious for most of the relevant time period. For example, the Plaintiff includes a still image from the surveillance video in his brief, claiming that it shows him "being carried in a horizontal position out of the Alpha Building pod." Plf's Opening Br., at 55. Yet, the images from the video that follow directly after that image are equally—if not more—consistent with the Plaintiff charging head-

first out of the housing unit, rather than being carried. Similarly, the Plaintiff argues that the handheld video "does not show Mr. Wall moving or speaking," but neglects to reference the portion of the video where he is sitting upright and, at one point, appears to shake his head. (Handheld Video at 10:23 to 11:23).

As with the excessive force claim, the video surveillance evidence and handheld video evidence do not so clearly and unambiguously refute the Defendants' testimony as to make the district court's credibility findings without support in the evidentiary record. The dismissal of this claim was not plain error, and the judgment of the lower court should be affirmed.

Setting aside the credibility question, Defendants further note that the Plaintiff failed to present sufficient evidence to establish the objective requirements of his medical indifference claim. As this Court has recently noted, "[m]ere delay" in the provision of medical care—including decontamination from the use of O.C. spray—is "not enough." *Moskos v. Hardee*, No. 19-7611, 2022 U.S. App. LEXIS 1711, at *17, ___ F.4th ___, ___ (4th Cir. Jan. 20, 2022). "A commonplace medical delay such as that experienced in everyday life will only rarely suffice to

constitute an Eighth Amendment violation, absent the unusual circumstances where the delay itself places the prisoner at 'substantial risk of serious harm,' such as where the prisoner's condition deteriorates markedly or the ailment is of an urgent nature." *Id.* Where an inmate experiences "the usual transitory effects of pepper spray," and does not "testify to any serious medical reaction or to any pain beyond the normal discomfort of pepper spray," that "short delay in decontamination, without any aggravating factors such as a serious medical reaction," is not sufficiently serious to constitute an Eighth Amendment deprivation. *Id.* at *17-18.

Here, at most, the Plaintiff testified that he was not provided water to decontaminate after being exposed to pepper spray—although he does not challenge the uncontroverted testimony that he was exposed to fresh air, which is the "first step" of the decontamination process. He did not testify as to any additional or serious injury he incurred as a result of not having further decontamination, nor did he provide any evidence tending to establish that his injuries worsened during the few hours that elapsed before he was transferred to a different prison. Because the Plaintiff did not produce sufficient

evidence to establish the objective prong of a medical indifference claim, any other error relative to this claim is harmless.

V. Officer Rasnick Presented Sufficient Evidence to Support a Finding of Common Law Battery.

The Plaintiff further contends that the district court committed clear error in determining that the Plaintiff "struck" Officer Rasnick, concluding that there is insufficient evidence in the record to support a finding of common law battery. The Plaintiff is incorrect.

Common law battery is simply "an unlawful touching of another." *Adams v. Commonwealth*, 33 Va. App. 463, 468 (Ct. App. 2000). "It is not necessary that the touching result in injury to the person," and the touching may be accomplished "by the party's own hand, *or by some means set in motion by him*." *Id.* (emphasis added).

To sustain a finding of common law battery, then, it is not necessary to produce evidence establishing that a certain degree of force was used. A punch or a kick or a forceful strike is not required. Rather, "[t]he slightest touching of another," if "done in a rude, insolent, or angry manner, constitutes a battery for which the law affords redress." *Crosswhite v. Barnes*, 124 S.E. 242, 244 (Va. 1924); *see also Koffman v. Garnett*, 574 S.E.2d 258 (Va. 2003); *Pugsley v. Privette*, 263 S.E.2d 69

(Va. 1980); *Pike v. Eubank*, 90 S.E.2d 821 (Va. 1956). And "[w]here there is a physical injury to another person, it is sufficient that the cause is set in motion by the defendant." *Banovitch v. Commonwealth*, 83 S.E.2d 369, 374 (Va. 1954).

The testimony presented in this case established that, while standing by the vestibule door, Officer Rasnick reached for the Plaintiff's right hand to begin the process of restraining him. The Plaintiff jerked away, spun around, and swung at Officer Hicks. To bring the Plaintiff under control, as required by their jobs, Officer Rasnick and Officer Hicks grabbed the Plaintiff, and all three fell to the floor of the housing unit. During that process, the Plaintiff was actively struggling with both officers—in other words, he was deliberately and intentionally "touching" them in an attempt to evade their grasp. Moreover, once on the ground, the Plaintiff was twisting around and trying to get away from the officers, and his hands—even if not "punching"—were deliberately making contact with them. In the course of that altercation, Officer Rasnick was injured.

Even if he was not swinging "punches" at the officers, the Plaintiff clearly set in motion the altercation that resulted in Officer Rasnick's

injuries. And once that altercation began, the Plaintiff continued to forcefully and deliberately touch both officers.[9] This is battery in its simplest form. Officer Rasnick was not required to present proof that the Plaintiff intended to injure his knee. *See Pike*, 90 S.E.2d at 827 ("Proof that the injury was 'wilfully' inflicted was not necessary to make out a *prima facie* case."). One the Plaintiff set in motion the events that resulted in Officer Rasnick's injury, he became liable for all natural consequences of his conduct—including the damage to Officer Rasnick's knee. *R.G. Lassiter & Co. v. Grimstead*, 132 S.E.2 709, 712 (Va. 1926).

Because common law battery may be established by proof of the slightest touching, and because the evidentiary record—and all reasonable inferences that may be drawn from that record—provide support for the factual conclusion that the Plaintiff unlawfully "touched" Officer Rasnick, the district court did not clearly err by finding in favor of Officer Rasnick on his state-law counterclaim.

CONCLUSION

The judgment of the district court should be affirmed.

---

[9] As the party who initiated the struggle, the Plaintiff cannot claim the excuse of mutual combat. *See Smith v. Commonwealth*, 17 Va. App. 68, 72-73 (Ct. App. 1993).

Respectfully submitted,

HAROLD CLARKE, L. COLLINS, J. DEEL, C. DOCKERY, L. FLEMING, C. FRANKS, E. GWINN, W. HENSLEY, E. HESS, J. HICKS, C. HOLBROOK, B. HUGHES, T. LARGE, J. LYALL, K. MCCOY, A. MULLINS, H. PONTON, E. RASNICK, O. ROSE, D. STILL, S. TAYLOR, AND J. TESTERMAN

By: /s/ *Margaret A. O'Shea*
Margaret A. O'Shea
Assistant Attorney General

JASON S. MIYARES
Attorney General

ANDREW N. FERGUSON
Solicitor General

CHARLES H. SLEMP, III
Chief Deputy Attorney General

KEVIN M. GALLAGHER
Deputy Solicitor General

M. Nicole Wittmann
Deputy Attorney General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7704 – Telephone
(804) 371-0200 – Facsimile

Counsel for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 12,927 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

/s/ *Margaret A. O'Shea*

Margaret A. O'Shea

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2022, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *Margaret A. O'Shea*

Margaret A. O'Shea