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IN THE SUPREME COURT OF THE STATE OF FLORID

GEORGE TAPLIS,

Petitioner,

v.

CASE NO. 89,721
5TH DCA NO: 96-2467

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

On August 1, 1995, Chris Murphy of the Putnam County Sheriff's Office, and Doug McClure of the Putnam County Fire Service, responded to a vehicle fire in Putnam County, Florida. (App. F 11, 21-22). When they arrived, the men met with Petitioner, who admitted to being the driver of the vehicle. Petitioner was found alone at the scene.

The fire was extinguished. With the exception of the bulk of the front of the car, the vehicle **was** almost completely destroyed. The only additional damage was caused by Doug McClure when he pried open the trunk to put out the fire. McClure testified that the vehicle, as depicted in Polaroids taken on August 4, 1995, and in photographs taken on September 6, 1995, appeared to be in the same condition as it was when he saw the car on August 1, 1995. (App. F 21-34).

Chris Murphy testified that the car appeared to be in the same condition on August 4 and September 6, 1995, as when he saw the car on August 1, 1995. Officer Murphy then left the task of removing the inoperable vehicle to Petitioner, No arrests **were made at that** time since there was no suspicion that any crime had been committed. (App. F 11-21).

On August 4, 1995, Officer Cecil Manning of the Putnam County

Sheriff's Office was on routine patrol when he discovered the burned vehicle in the roadway. He was aware that Petitioner was to have moved the car. Officer Manning arranged for Palatka Auto Body to tow the vehicle from the site. Manning took three Polaroid pictures that day, prior to removing the car. He testified that the car as depicted in photos from August 4 and September 6, 1995, appeared to be the same as when he viewed the vehicle. (App. F 34-45).

Richard Carroll of Palatka Auto Body towed the burned car from the scene and testified that the car received no additional damage. Carroll did, however, shovel some of the car's debris, which was in the vicinity, into the car. The vehicle was taken to Palatka Auto Body's lot. Mr. Carroll testified that he lives on this lot. The lot is fenced in and is secured at night by locks and dogs. The only people with access to the car during the day are employees of Palatka Auto Body. (App. F 45-59).

Patrick Monegan, an investigator with American International Group (AIG), testified that the car remained on Palatka Auto Body's lot until August 25, 1995. At that time AIG had the car towed to a lot in Orlando, Florida. This was done with the permission of the owner, Edna Taplis, Petitioner's wife. Additionally, it was done after payment of the insurance claim was made by the insurer,

American International Insurance Company, a subsidiary of AIG. AIG routinely keeps cars at this facility. The premises are fenced in and have 24-hour security. Visitors to the lot must sign in to enter into the facility. (App. F 59-76).

About that time, AIG hired Wark & Associates, fire investigators from Tampa, Florida, to investigate the cause and origin of the fire in Petitioner's vehicle. On September 6, 1995, Mathew Wark went and signed onto the Orlando lot to inspect the vehicle. Mathew Wark visually inspected the car, inside and outside. Next, he photographed the car. Mathew Wark testified that the car appeared to be in the same condition as when it was first photographed on August 4, 1995. (App. F 76-112).

Only after photographing the car did Mathew Wark remove the fire debris from inside the passenger compartment of the vehicle. Mathew Wark obtained two samples from the car's carpeting and padding - one from the front passenger floorboard and one from the rear passenger floorboard. These samples were placed into sealed containers and stored in a secured manner at the offices of Wark & Associates. (App. F **76-112).**

Jim Wark, another professional fire investigator, explained that based upon the material of the car's carpeting, a "flashburn" would occur. This type of burn forms a hard shell on the car's

carpeting. As a result, any material in the carpeting and the padding beneath, would be sealed beneath the shell. (App. F 112-126).

The carpet samples retrieved from Petitioner's car were sent to Investichem Laboratories for analysis. There, Dr. Bertsch, an expert in chemistry, analyzed both carpet samples. After testing, Dr. Bertsch concluded that the sample taken from the front floorboard contained gasoline. The testing was performed by opening the sealed container, taking a sample of the air over the sample (also known as the "headspace"), heating the air and having it pass through a small piece of charcoal. The sample is then taken out of the piece of charcoal and tested by gas chromatography and mass spectrometry. These tests are highly sensitive and able to detect even minute amounts of gasoline in the sample, even though there would be much more in the sample can itself. This is based merely on the amount of tested material extracted from the sample. Although he was unable to determine the precise age of the gasoline, the doctor was able to state that the gasoline was not fresh and had undergone some evaporation, consistent with the conditions to which Petitioner's vehicle was exposed. The sample taken from the rear passenger compartment did not contain gasoline. (App. 126-136).

Both samples were then returned, in their sealed containers, to Wark & Associates. They remained secured and sealed until such time as they were introduced into evidence at the hearing on Petitioner's Second Motion in Limine (App. B) . (App. F 128).

The vehicle continues to remain at the lot in Orlando, available for inspection by Petitioner. (App. F 62).

On December 1, 1995, Petitioner was charged by information with burning to defraud an insurer. (App. A). A hearing on Petitioner's Second Motion in Limine was held on May 29, 1996. (App. C) . At this hearing, Petitioner asserted that the physical evidence obtained from the vehicle should be excluded because the State had failed to properly preserve the evidence and allowed it to possibly be damaged prior to the taking of the carpet samples. He also argued the probative value of such evidence was outweighed by its prejudicial value, and that since Petitioner could no longer examine the car in its original state any evidence which might have negated his guilt could have been destroyed, therefore, he was being deprived of his due process rights. The trial court entered an order deferring ruling on Petitioner's motion until a proffer was made at trial. (App. D) . The trial began on August 5, 1996, with jury selection. The State responded to Petitioner's Second Motion in Limine by filing a memorandum of law. (App. E). On

August 7, 1996, the trial court conducted a proffer with the State presenting several witnesses as outlined above. At the conclusion of the proffer, the trial court granted Petitioner's motion and concluded that the physical evidence was inadmissible. (App. F 139-140). The trial court entered an order stating that the "risk of contamination/tampering (intentional or unintentional) renders the admission an intolerable risk of prejudice." (App. H).

The State moved for rehearing. (App. I). A hearing was held on this motion. (App. G). The trial court denied the State's motion. (App. J). The state requested a continuance (App. K) which the trial court granted to allow for appellate review (App. L).

On appeal, the Fifth District Court of Appeal quashed the order of the trial court and ruled that the physical evidence taken from the burned vehicle was admissible since Petitioner did not demonstrate a likelihood or probability of tampering with the evidence in this case. (App. M). See State v. Taplis, 684 So. 2d 214 (Fla. 5th DCA 1996). Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court. This Court entered an order accepting jurisdiction. The parties' briefs on the merits follow.

SUMMARY OF ARGUMENT

Certiorari review of this non-final order is not necessary since Petitioner has plenary review available to him if he is convicted. In any event, the appellate court properly ruled that the samples taken from the burned vehicle were admissible. The Petitioner cited only examples of possible opportunities for tampering, he did not show any evidence demonstrating a probability of tampering. Mere possibilities, no matter how many can be thought of, are not enough to prevent admitting the evidence in question.

The vehicle can be identified by its vehicle identification number to demonstrate that it is what the proponent claims it is. The carpet samples come from this car. An adequate chain of custody has been established. Petitioner has never claimed the car was not his or that the carpet samples did not come from his car. A break in the chain of custody goes to the weight of the evidence, not its admissibility,

At the time of the fire the police were unaware a crime had taken place. They had no reason to preserve the car at that time. Petitioner has not been deprived of his due process rights. He can still challenge the test results at trial.

The linking of the gasoline to Petitioner is an issue for

trial, it ♦♋♦ not necessary for the state to offer such proof at a hearing on a motion in limine. This is especially true since Petitioner's motion did not raise such a claim. Petitioner was the only person found with the burning car and admitted being the driver.

The decision of the appellate court follows the law. The decision of the Fifth District should be upheld.

ARGUMENT

THE DISTRICT COURT PROPERLY DETERMINED THAT THE PHYSICAL EVIDENCE FROM THE BURNED VEHICLE COULD BE INTRODUCED INTO EVIDENCE.

Petitioner asserts that the District Court erred in ruling that the trial court had improperly excluded certain physical evidence from trial. Respondent first asserts that this Court lacks jurisdiction to entertain the instant appeal. The decision of the Fifth District Court of Appeal in State v. Taplis, 684 So. 2d 214 (Fla. 5th DCA 1996), is a decision which grants the state's petition for certiorari and quashes the non-final order of the trial court barring the admission of certain evidence at trial. This Court has held that certiorari review of a trial court's non-final order may not ordinarily be had because the party has available to it an eventual plenary appeal of the final judgment. Fieselman v. State, 566 So. 2d 768, 770 (Fla. 1990).

Most notably, this appeal would become moot should Petitioner be acquitted at trial. Martin-Johnson v. Savage, 509 so. 2d 1097, 1100 (Fla. 1987). In any event, Petitioner could still challenge his conviction, as well as the degree of probable tampering needed to be shown to exclude the admission of physical evidence, on direct appeal of his final judgment. Jurisdiction was

improvidently granted in this matter.

Proceeding to the merits, Petitioner currently attacks the appellate court's ruling on five grounds. Respondent, while addressing each argument, maintains that the appellate court properly quashed the trial court's order granting Petitioner's motion in limine. The district tour-t's ruling that the physical evidence should be admitted should be upheld.

Petitioner seeks to keep out the physical evidence obtained from the burned car because he claims the state failed to properly preserve the evidence - the burned vehicle. This alleged failure allowed the car and its contents to remain open to the elements and any potential passers-by. Additionally, the car was moved from the side of the roadway to a towing company's lot. It was then moved to an automobile lot by the then proper owner, the insurance company, While all of this does suggest a potential for a change in the evidence, it does not indicate probable tampering.

"Relevant physical evidence is admissible unless there is an indication of probable tampering." Peek v. State, 395 So. 2d 492 (Fla. 1980), cert. denied, 451 U. S. 964 (1981) . See also Helton v. State, 424 So. 2d 137 (Fla. 1st DCA 1982); Beck v. State, 405 so. 2d 1365 (Fla. 4th DCA 1981). Tampering is defined in Black's Law Dictionary as:

> to meddle so as to alter a thing, especially to make illegal, corrupting or perverting changes; as to tamper with a document or test, to interfere improperly; to meddle; to busy oneself rashly; to try trifling or foolish experiments.

While it is possible to imagine how tampering could have occurred in this scenario, Petitioner has made no demonstration that any tampering probably occurred.

First Petitioner points to the water being sprayed on the car to douse the fire. This does not constitute tampering as it was not done with "the knowledge that a criminal trial or an investigation by law enforcement was about to commence." §913.13, Fla. Stat. (1995). The water was merely used to extinguish the fire. The dousing of the flames is, in fact, what sealed the carpeting and in effect preserved the gasoline contained in the layers beneath it.

Petitioner also refers to the times the car was moved and its exposure to the elements due to the windows having been destroyed by the fire as potential times or reasons for tampering to have occurred. Again, while the possibility of tampering may have existed, Petitioner only offers speculation as to how something might have happened. He does not offer a probability that gasoline somehow flowed from the tank to the sealed area of the carpet and

padding. Petitioner asserts that heavy rains could have "splashed and swirled" around the vehicle's interior carrying any gasoline that might have been in there throughout the car. While this may have been possible, Petitioner offered no evidence that it probably happened. Petitioner did not introduce rainfall statistics for the time in question, did not offer an analysis of the remaining contents of the car or offer substantive evidence of any kind indicating anything more than a theory of contamination. Neither did Petitioner explain how all the "splashing and swirling" failed to also contaminate the rear passenger floorboard. Petitioner's argument goes to the weight of this evidence, not its admissibility.

To follow Petitioner's argument through to its logical conclusion leads to absurd results. Under his argument, anytime an abandoned car which has been used in a crime is located after the crime has been committed, whether the crime is murder, rape, robbery, battery, arson or some other crime, the evidence found in the car would not be admissible because something might have happened to it between the time the crime was committed and the time the vehicle was found. See Branch v. State, 685 So. 2d 1250 (Fla. 1996) (blood evidence admitted after being discovered in car abandoned in airport parking lot); Cherry v. State, 544 So. 2d 184

(Fla. 1989) (blood and fingerprint evidence admitted after being discovered in car abandoned in a wooded area). If an axe-murderer killed a person in a car, abandoned the car deep in the woods with the windows down, under Petitioner's theory, no evidence found in the car could be used since the evidence might have been affected in some manner between the abandonment of the car and its discovery. This is not a reasonable or workable manner for either the police or the courts to proceed under.

Petitioner also argues that the state has failed to demonstrate a chain of custody for the vehicle. A chain of custody is required in order to authenticate or identify that the matter in question is what its proponent claims it to be. Here, the State is claiming that the carpeting is that of a car registered in Petitioner's wife's name and that was being driven by him at the time of the fire. The vehicle itself is identifiable by its vehicle identification number. Such a unique identifier is sufficient to establish that the vehicle is what the State purports it to be. No chain of custody is required in this type of circumstance.

In any event, Petitioner has never claimed the car is not the one registered to his wife or that it was not the one driven by him on August 1, 1995, that it was not the car the Putnam Fire

Department was called to extinguish on that same day, or that the carpet sample came from a different vehicle. Rather than being a chain of custody claim, Petitioner is, instead, raising a claim of contamination of the evidence contained in the car. The alleged contamination goes to the weight of the evidence, not toward its admissibility. See United State v. Kubiak, 704 F. 2d 1545 (11th Cir. 1983) (failure to establish a chain of custody of a marijuana sample affects only the weight of the evidence, not the admissibility).

Additionally, Petitioner asserts that since the State cannot show that the car was in substantially the same condition on the day the samples were taken as it was the day of the fire the evidence taken from the car should not be admissible. Petitioner is arguing that the State failed to adequately preserve the evidence in this case, namely the car. In making this assertion, Petitioner raises a claim similar to that in Arizona v. Youngblood, 488 U. S. 51 (1988), regarding the area of "constitutionally guaranteed access to evidence." Id. at 55.

In Younsblood, a young boy was sexually assaulted. After the assault, the boy was taken to a hospital where a doctor collected semen samples through the use of a rape kit. The police also collected the boy's clothing, which they failed to refrigerate.

Later testing was unsuccessful in obtaining information about the assailant. Respondent asserted that he might have been completely exonerated by the timely performance of tests on properly preserved semen samples. The Supreme Court held that the failure of police to preserve the potentially useful evidence was not a denial of due process of law since the defendant was unable to show bad faith on the part of the police. Id.

In reaching its decision, the Court noted its "unwillingness to read the 'fundamental fairness' requirement of the Due Process Clause (citation omitted) as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution," Id. at 58. See also Merck v. State, 664 So, 2d 939 (Fla. 1995). The same should be true in this case.

At the time of the fire, the police did not suspect that a crime had been committed. Therefore, no reason existed at that time to preserve the car or the contents of its passenger compartment. Based on the facts, the police did not have reason to believe a crime had been committed until after the results had been obtained from Investichem's analysis of the carpeting samples. Since there was no bad faith on the part of the police demonstrated, any failure to preserve potentially useful evidence

does not constitute a denial of due process of law.

Furthermore, it is not the evidence which has value at trial, but instead the result of the test performed on the evidence. The proper question then becomes whether Petitioner has had sufficient opportunity to question the results of the tests. Houser v. State, 474 So. 2d 1193 (Fla. 1985). As demonstrated in the hearing and in the subsequent appeals, the answer is yes. Petitioner is free to question the tests and the expert at trial. He may also examine all the other witnesses as well as bring in his own to demonstrate any questionableness of the test results. Again, Petitioner's argument goes to the weight to be given the evidence, not toward its admissibility. The district court's ruling was proper.

Next, Petitioner complains that the State has failed to link the physical evidence to him. This argument is flawed in that the relation of the evidence to him is separate from that of the evidence's admissibility based upon possible tampering. Any linking of the gasoline to Petitioner would be done during the trial itself, not during a motion in limine.[1]

In any event, the evidence at the hearing demonstrated that Petitioner was the only person found with the burning car which was

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[1]This claim was not made in Petitioner's Second Motion in Limine heard by the trial court. (App. B).

located in a remote area. Moreover, Petitioner admitted he was the driver of the car at the time of the fire. This establishes a sufficient link between the vehicle and Petitioner. (App. F).

Finally, Petitioner asserts that the decision of the Fifth District Court of Appeal ties the hands of the trial courts to only exclude evidence based upon tampering when there is absolute proof of intentional tampering. This is simply not so. The appellate court's decision merely properly utilizes the standard set forth in Peek v. State, supra. Petitioner did not put on any evidence of tampering, He merely cited to many scenarios which might have or could possibly have occurred. Petitioner is trying to impermissibly stack inferences. His argument tends to follow the line that if there were enough possibilities for someone to tamper with the evidence, then surely someone must have done so. This is not the law. Out of Petitioner's many possible tampering theories, he did not demonstrate that even one probably occurred.

In Dodd v. State, 537 so. 2d 626 (Fla. 3d DCA 1988), the court did state that a mere reasonable possibility of tampering would be sufficient to require proof of the chain of custody. Respondent suggests that the term "a reasonable possibility" should be interpreted as requiring at least a modicum of proof. The court could not have meant that a possibility which is based entirely

upon supposition requires a demonstration of the chain of custody. It is possible in any situation to come up with a scenario which could demonstrate a possibility of tampering. The burden should shift to the proponent of the evidence to demonstrate a lack of tampering when, as held in Peek, that there is a probability of tampering.

The arguments set forth by Petitioner are all viable arguments to be made to a jury during trial. Petitioner's theories go to the weight a trier of fact might give the evidence in question. Since there has been no evidence demonstrating a probability of tampering, Petitioner's arguments do not affect the admissibility of the evidence in question. The decision of the Fifth District Court is correct and should be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable court affirm the ruling of the Fifth District Court of Appeal in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief of Respondent and Index to Appendix has been furnished by U.S. mail to Michael W. Woodward, Keyser & Woodward, Post Office, Box 92, Interlachen, Florida 32148, this 7th day of July, 1997.

Ann M. Childs
Of Counsel

Defendants also assert the defense of payment, contending that plaintiffs have already been compensated for the bedsore in Lawsuit I. Again, the statutes are dispositive. Defendants in Lawsuit II "are entitled to a credit for any amounts paid to the claimant in settlement for the injury." ***Price v. Beker,*** ***629*** So.2d at 912 (citation omitted); see §§ 768.041(2), 768.31(5), Fla. Stat. (1991). While defendants are entitled to credit, they are not entitled to a summary judgment which dismisses the action.

The summary final judgment is reversed and the cause remanded for further proceedings consistent herewith.

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Mindy R. KEESAL, as Personal Representative of the Estate of Rosalyn R. Barsky, on behalf of the Estate and Mindy R. Keesal, Petitioner,

v.

FIRST HEALTHCARE CORPORATION, d/b/a East Manor Medical Care Center, Respondent.

No. 96–04152.

District Court of Appeal of Florida, Second District.

Nov. 13, 1996.

Petition for Writ of Certiorari to the Circuit Court for Sarasota County; Becky Titus, Judge.

Kevin A McLean, Tampa, for Petitioner.

Thomas Saieva, Tampa, for Respondent.

The *Rucks court* went on to discuss issues of assignment and subrogation, none of which are involved in the present appeal.

For present purposes it is sufficient to distinguish *Rucks* because it did not deal with the release statutes which *control* the case now before us. We note, however, that the United States Court of Appeals for the Eleventh Circuit has held that *Rucks* is inconsistent with a controlling decision of the Florida Supreme Court. *Williams v. Arai Hitvrake, Ltd.,* 931 F.2d 755, 759 n. 4 (11th Cir.1991), *cited* in *Chester v. Keys Hospital Foundation.* Inc., 677 So.2d 421 (Fla. 3d DCA 1996).

PER CURIAM.

This court has before it a petition for' writ of certiorari which seeks review of a trial court order prohibiting counsel from engaging in ex parte contact with former employees of First Healthcare Corporation, d/b/a East Manor Medical Care Center, who cared for and treated the decedent whose estate is a party to this case. Pursuant to this court's holding in *Barfuss* ***v. Diversicare Corp. of America,*** 656 So.2d 486 (Fla. 2d DCA 1995), the petition is denied. We certify direct conflict with the holdings of ***Reynoso v. Greynolds Park Manor, Inc.,*** 659 So.2d 1156 (Fla. 3d DCA 1995), and ***Estate*** *of Schwartz v. H.B.A. Management,* ***Inc., 673*** So.2d 116 (Fla. 4th DCA 1996).

Petition denied; direct conflict certified.

PARKER, AC.J,, and PATTERSON and LAZZARA, JJ., concur,

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STATE of Florida, Petitioner,

v.

George TAPLIS, Respondent.

***No.* 96–2467.**

District Court of Appeal of Florida, Fifth District.

Nov. 15, 1996.

Rehearing Denied Dec. 12, 1996.

Defendant, charged with burning to defraud an insurer, filed motion to prevent introduction of samples taken from burned automobile. The Circuit Court, Putnam County, Steven L. Boyles, J., suppressed evi-

dence on basis of insufficient chain of custody. State filed petition for certiorari review. The District Court of Appeal, Harris, J., held that: (1) burden of one attempting to bar otherwise relevant evidence based on gap in chain of custody is to show likelihood, or probability, of tampering, and (2) there was no indication that vehicle had "probably' been tampered with.

Certiorari granted, and order granting motion in limine quashed.

1. Criminal Law -404.20

One attempting to bar otherwise relevant evidence on basis of gap in chain of custody bears burden to show likelihood, or probability, of tampering.

2. Criminal Law ⇐404.55

Evidence did not establish probability, or likelihood, that vehicle had been tampered with, and thus samples taken from burned vehicle should not have been excluded from evidence, baaed on gap in chain of custody, in prosecution for burning to defraud an insurer, where officers who assisted in putting out fire, two deputy sheriffs, employees of secure lots at which vehicle was stored, and fire investigator all testified that no material changes occurred to vehicle prior to obtaining samples.

Steve Alexander, State Attorney, and Gary L. Wood, Assistant State Attorney, Palatka, Petitioner.

Michael W. Woodward of Keyser & Woodward, PA., Interlachen, for Respondent.

HARRIS, Judge.

[1] The primary issue in this case is whether one must show a probability (as opposed to a mere possibility) of tampering in order to exclude relevant physical evidence when there is a gap in the chain of custody. If so, a subsidiary issue remains as to whether the facts of this case reveal evidence of a probability of tampering. We hold that the burden of one attempting to bar otherwise relevant evidence is to show a likelihood of tampering (probability) and that the evidence in this case does not meet that test. We therefore grant certiorari and quash the trial court's order that bars the introduction of samples taken from the burned vehicle.

George Taplis had been driving his wife's vehicle when it was reported that the vehicle was on fire. When the Putnam County officials responded to the scene, the vehicle was almost completely destroyed by fire. A member of the Fire Service pried open the trunk to extinguish the fire. When the owner had failed to have the car removed from the street within three days, the County had the vehicle towed to the Palatka Auto Body lot. After paying the insurance claim and after obtaining the consent of the owner (Taplis' wife), the insurance company had the vehicle towed to a secure lot in Orlando. Fire investigators from Tampa were then employed to examine the vehicle in order to determine the cause of the fire. Photographs were taken and samples of fire debris were taken from inside the passenger compartment. These samples were sent to a private lab for analysis. As a result of these tests, Taplis was charged with burning to defraud an insurer.

Taplis moved to prevent the introduction of the evidence taken from the examination of the vehicle on the basis that the vehicle had not been properly preserved and therefore the results of the examination "may well be" the product of contamination or tampering; further, that by failing to properly preserve the vehicle, exculpatory evidence important to the defense may have been lost, The trial court, after taking testimony, granted the motion, stating:

> Baaed on these findings, this Court concludes that there was an insufficient (if any) chain of custody to preserve the condition and integrity of the swath and belt for evidentiary purposes. The risk of contamination/tampering (intentional or unintentional) renders the admission an intolerable risk of prejudice.

It is evident from the above, and from other statements in the record, that the trial court was of the opinion that the mere possibility of contamination or tampering was sufficient to bar the introduction of the evidence. This belief may have been baaed on

dictum in Dodd v. State, 537 So.2d 626, 627–628 (Fla. 3d DCA 1988), in which the court stated: "Notwithstanding the testimony on redirect, a mere reasonable possibility of tampering is sufficient to require proof of the chain of custody." We believe that this statement is dictum because under the facts of *Dodd*, there *was* a *probability of* either mistake or tempering. In *Dodd*, the issue was the quantity of cocaine. A container and its contents weighing a combined 317.5 grams went to the lab where a contraband scale registered a combined weight of only 249.5 grams. The *Dodd* court observed that the "gross discrepancies" in the weight indicated "probable tampering." *Id.* at 628. We do not have that situation before us.

[2] It is true that the vehicle was left unattended at the scene of the fire for three days, It was then towed to a secure lot and later towed to another secure lot. It is also true, even in these secure lots, that the public had access to the vehicle at least during business hours. But there is no indication in the record that tampering "probably" happened. The Fire Service officer who assisted in putting out the fire, two deputy sheriffs, employees of the secure lots, and the fire investigator all testified at the hearing on the motion and their testimony suggests that no material changes occurred to the vehicle prior to obtaining the samples.

Taplis urges that the fact that water was sprayed on the vehicle, that the vehicle had been twice towed along the highway, and that the interior had been exposed to the weather for some time are themselves sufficient to create a probability of contamination. Under the facts of this case, we think not. The fire investigator testified that the heat of the ignited gasoline in the passenger compartment caused the top of the carpet to melt which sealed unburned gasoline in the padding underneath, It is difficult to conceive how the movement of the vehicle or the vehicle's exposure to the elements could affect the analysis of the padding. And **even if** gasoline were somehow brought into the passenger compartment by the water **used to** extinguish the fire, how it got under the sealed carpet is unexplained.

While the weight that the jury should give this evidence because of the matters raised by defense is certainly subject to argument, the evidence should not be ruled inadmissable merely because there is a possibility that tampering might have occurred. See *Peek v.* State, 395 So.2d 492 (Fla.1980), cert. denied 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981).

Certiorari granted and order granting the second motion in limine is quashed.

COBB and GRIFFIN, JJ., concur.

VIE-A-MER, LTD., a Florida Limited Partnership; Murray Klauber, Individually; and the Travelers Indemnity Company, Appellants,

v.

S. TOUR & ASSOCIATES, INC., Appellee.

No. 95–02877.

District Court of Appeal of Florida, Second District.

Nov. 16, 1996.

Rehearing Denied Dec. 17, 1996.

Action was brought to enforce lien. After final judgment was entered in their favor, prevailing parties filed motion to tax costs that requested attorney fees pursuant to statute. The Circuit Court, Sarasota County, Becky A. Titus, **J., denied** motion. Prevailing parties appealed. The District Court of Appeal, Campbell, Acting **C.J.,** held that prevailing parties were not entitled to statutory attorney fees, requested for first time after entry of **final** judgment, inasmuch as nothing in the record indicated that **nonprevailing party** had notice of prevailing parties' intent to seek fee award.,