IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 89,889

ST. MARY'S HOSPITAL, INC.,

Petitioner,

vs.

ALONZO BRINSON and WILLA BRINSON, natural parents and guardians of the Estate of ALONZETTE BRINSON, deceased, and ALONZO BRINSON and WILLA BRINSON, individually,

Respondents.
_____/

RESPONDENTS' BRIEF ON THE MERITS

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PREFACE

This case is before the Court in a discretionary proceeding to review a decision of the Fourth District Court of Appeal. The parties will be referred to as they stood in the lower court or by proper name The following symbols will be used:

(T)	-	Transcript of Trial
(R)	-	Record-on-Appeal
(D)	-	Deposition Testimony
		(JC-D) Dr. John Cooney's Deposition
		(CG-D) Chalmers Goodyear's Deposition
		(SS-D) Sharon Snyder's Deposition
		(MB-D) Marlene Brown's Deposition
(A)	-	Respondents' Appendix

STATEMENT OF THE CASE AND FACTS

The Incident

On **August** 4, 1992, Alonzette Brinson, a 19 month old Afro-American, underwent out-patient surgery at St. Mary's to correct a drooping eyelid. The anesthesiologist, Dr. Cooney, administered anesthesia to Alonzette through equipment owned and provided by St. Mary's (T622). He relied upon the machine to deliver the amount of anesthesia reflected on his dial setting (JC-D5). In fact, it emitted excessive anesthesia over the next 40 minutes, a fact Dr. Cooney had no way of knowing (T1002). When Dr. Friedman, the ophthalmologist, reported that he was not getting the correct blood flow from his incisions, signaling myocardial depression, Dr. Cooney administered drugs to increase Alonzette's blood pressure and heart rate. Her blood pressure fell to zero and her heart rate fell to 60. Alonzette suffered a cardiac arrest, the operation was terminated and Dr. Cooney called a code emergency (T494-95). Alonzette was resuscitated and placed on life support equipment. Tests ultimately indicated that she was brain dead. Alonzette was taken off life support on August 13, 1992 and pronounced dead.

St. Mary's Spoliation of the Vaporizer

St. Mary's lo-year-old anesthesia machine used in Alonzette's surgery was serviced by its manufacturer, Ohmeda (T748,945). The antiquated machine lacked the important safety features of St. Mary's more modern anesthesia machines, which features would have prevented Alonzette's death (T748,945,984-86). St. Mary's should have updated this old machine by adding a $2,500 gas monitor to inform Dr. Cooney whether the anesthesia emitted was in accord with his dial setting (T748-5 1). Each time the machine was used the patient was at risk because it could emit excessive anesthesia and there was no way of checking its output (T829,978,1127).

After this incident, Dr. Cooney directed St. Mary's anesthesia technician, Betty Russell,

to have Ohmeda check the machine (T864-66). When Russell called Ohmeda, she did not tell them the equipment had been involved in a patient incident (T868). Brian Pszeniczny , Ohmeda's service technician, checked the vaporizer and confirmed that it was delivering excessive anesthesia, i.e., 30% more than its dial setting (T755-56). He informed St. Mary's of that fact and that he was sending the vaporizer to Ohmeda's home office, through a written note in a notebook set up for him to communicate with the anesthesia technicians and through his Field Service Report which Russell signed (A1-2; T632,756,898). Russell informed Dr. Cooney, and her supervisor, Linda Boyum, of Pszeniczny's note (T700,874-75,900,902). Risk management received a copy of Pszeniczny's note and service report (T634-35,65,659-60,721).

Since St. Mary's withheld information from Ohmeda that the vaporizer had been involved in a patient incident, Ohmeda dismantled it over two months later, on October 15, 1992 (T817-18). Ohmeda was astounded when it finally learned of Alonzette's death (T552, Pltf's Ex#14). Chalmers Goodyear, Ohmeda's products safety manager, testified that federal law required St. Mary's and Ohmeda to report all patient incidents possibly involving hospital equipment to the Federal Drug Administration ("FDA") (CG-D10). If Ohmeda had been so notified, it would never have dismantled the vaporizer. Tests could have been performed to determine the reason the vaporizer had output excessive anesthesia, and/or the reason the vaporizer, which had been in calibration when it was installed, went out of calibration (T660,662,753-54,771,818; CG-D12,17,20-1).[1] Vaporizers only go out of calibration for some external reason, such as using an incorrect or contaminated anesthetic agent (CG-D20,31-32). Ohmeda's testing would have disclosed whether the vaporizer had been filled with the wrong or contaminated agent (CG-D58-59). St. Mary's silence had deprived Ohmeda of the opportunity to make that determination.

[1]/Ohmeda was required by 21 CFR $820.162 to investigate suspected equipment failure.

(CG-D49). Only general tests had been run on the vaporizer, but even those tests confirmed no internal cause of the vaporizer going out of calibration (CG-D24). Therefore, Goodyear's opinion was that the most probable cause was St. Mary's use of an incorrect or contaminated anesthesia agent, although that could never be conclusively demonstrated since the vaporizer had been disassembled without its agent being tested (CG-D24,28,34-35,49-50).

Plaintiffs' Malpractice Lawsuit Against St. Mary's

Plaintiffs' medical negligence claim had two bases: St. Mary's own negligence and its vicarious liability for Dr. Cooney's negligence (R4-5,10-12).[2] Before trial, Plaintiffs settled with and released Dr. Cooney for $675,000. Plaintiffs released St. Mary's for its vicarious liability for Dr. Cooney, but retained their claim against St. Mary's for its own negligence. St. Mary's admitted that this trial was not based upon anything Dr. Cooney did (T7).

Evidence of St. Mary's Malpractice

Boyum had been supervising the anesthesia technicians, including Betty Russell and Mary Robels who were responsible for filling the vaporizers with anesthesia agents, for only six months (T575,596-98,600,844-45,887). She was not familiar with the anesthesia equipment, its operation or maintenance, and did not know how the vaporizers operated or how to fill them (T600-01,693,716). On August 4, 1992, Russell was the only anesthesia technician working, and she had only been working in that position for three days (T607,847). She only had a general knowledge of the anesthesia machines and vaporizers (T885), having received her training from Robels (T844), who herself had only six months experience with very little

[2]/St. Mary's vicarious liability was based upon the fact that Dr. Cooney and his anesthesiologist group were the only anesthesiologists furnishing such services at St. Mary's under an exclusive contract (R10-12).

training (T1140-42,1150). Although Russell denied filling the vaporizer used in Alonzette's surgery, Boyum testified that Russell would have been the one to do so (T611,853,894).

St. Mary's used two anesthesia agents, Forane and Halothane (T614-15). Forane was not to be used for children because it depresses the heart too quickly and vigorously (T617-18,996). St. Mary's claimed that a color coded key system made it impossible to fill a vaporizer with the wrong anesthesia agent. The anesthesia technicians denied ever draining the agent from a vaporizer into a canister in order to re-use it (T803-08), thus rendering the color-coded key system useless. Pszeniczy testified that this was done at St. Mary's (T807-08,890,910,1168).

Plaintiffs' expert, Dr. Frost, an anesthesiologist, testified that Alonzette died from an anesthesia overdose because the vaporizer emitted 30% more anesthesia than the machine's dial indicated (T981-83,1122). Dr. Cooney agreed (JC-D9-10). In Dr. Frost's opinion, the anesthesia technicians did 'not have appropriate training to ensure that they filled the vaporizer with the proper anesthesia agent (T1009). Even if Dr. Cooney diverted his attention to insert an IV in Alonzette, that did not cause her death, which would not have occurred if the vaporizer had not emitted excessive anesthesia (T1099-1100,1120,1124). Also, if the outdated machine had a gas monitor, which flashes numbers and has audible alarms, Dr. Cooney would have been alerted to a problem even if his attention was diverted (T978,1016,1123). According to Dr. Frost, St, Mary's must bear the lion's share of the responsibility for Alonzette's death (T1137).

St. Marv's Defense of the Malpractice Lawsuit

St. Mary's admitted that its equipment had malfunctioned. However, St. Mary's claimed that its anesthesia technicians had not filled the vaporizer with the wrong agent, that the vaporizer had spontaneously malfunctioned for no reason, and that Dr. Cooney's negligence was the sole cause of Alonzette's death (T6-7,404,425,R442).

Plaintiffs' Spoliation Lawsuit Against St. Marv's

Plaintiffs' spoliation of evidence complaint alleged that St. Mary's failure to preserve the vaporizer impaired their ability to prove a case against the vaporizer's manufacturer, or "other responsible agents, " (R1073-75).[3] Both sides interpreted this language as including an impaired ability to prove medical malpractice against St. Mary's. When Plaintiffs' spoliation complaint was filed, the Florida appellate decisions on this new tort were evolving. As they did, so did this lawsuit. By the trial, St. Mary's was well aware that Plaintiffs' spoliation claim was confined solelv to an impaired ability to prove their underlying medical malpractice claim. . Mary's admitted this in pleadings. [See R190, "failed. . . to preserve evidence relating to Plaintiffs' underlying claim" ; and R225, "failed to. . .preserve evidence relating to the incident giving rise to their initial complaint"]. Moreover, regardless of the allegations, the only spoliation claim actually tried, with St. Marv's consent, was an impaired ability to prove medical malpractice against St. Mary's Counsel for St. Mary's conceded that in opening statement:

> MR. FULFORD: . . .In order to get to the lack of preservation of evidence claim, Plaintiffs has to be unable to prove their claim of medical malpractice. because if thev prove malpractice. the spoilage claim doesn't have anv bearing, or is totally irrelevant to anv of the issues in the case (T390).
>
> Additionally, . . .the spoilage claim.. . is their joinder of the lawsuit because they want to say, and the evidence will show that if they can't move their case against the hospital somehow, the hospital has to be held legally accountable for what happened to this vaporizer. (T431) (emphasis added)

Counsel's admission that the spoliation claim disappeared if Plaintiffs could prove medical malpractice, but that St. Mary's was liable for spoliation if they could not prove malpractice, was an admission that the **only** basis for the claim was the inability to prove

[3] St. Mary's states Plaintiffs' claim was for negligent spoliation. In fact, Plaintiffs' spoliation complaint was not limited to negligent spoliation and does not even mention negligence (R1073-75). The parties' Pretrial Stipulation does not limit the spoliation claim to negligence (R325). The spoliation was either negligent or intentional.

medical malpractice. The jury never heard any evidence or argument about an impaired products liability claim against Ohmeda because that was not an issue in this lawsuit.

A major portion of St. Mary's brief claims that a cause of action for spoliation should not be adopted in Florida. That argument is unpreserved.[4] St. Mary's motion to dismiss admitted Florida recognizes a tort for spoliation and simply claimed its elements were not sufficiently alleged (R1060-72). St. Mary's motions for directed verdict were based solely on an alleged failure to prove one element - a duty to preserve the vaporizer (T1294,R979).

Evidence of St. Maw's Spoliation

Pszeniczy's August 6, 1992 note and August 7, 1992 Field Report informed St. Mary's that calibration of the vaporizer was off by 30% (Al-2). Russell showed Pszeniczy's note to Dr. Cooney, Boyum, and Robels, and it was also given to the Hospital's Risk Manager, Larry Donovan (JC-D14,T646-47,651,1158). Pszeniczy's Field Report was signed by Russell and risk management received a copy (T634-35,721) Sharon Snyder, St. Mary's Assistant Risk Manager, admitted that St. Mary's is required to report equipment suspected of being involved in a patient injury to the manufacturer, the Food and Drug Administration (FDA) and the State of Florida, and is also required to secure the equipment (SS 1/14/94D14-17,24-25,29). She admitted filing an August 26, 1992, " 15 day report" with HRS reporting an unresolved question as to whether the anesthesia equipment was involved in Alonzette's death (A11-12)[5]:

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[4]/St. Mary's claim below that Plaintiffs should not be allowed to bring their spoliation lawsuit until after their malpractice lawsuit was concluded, a contention that was rejected in MILLER v. ALLSTATE, 573 So.2d 24 (Fla. 3d DCA 1990), is not the same argument raised in St. Mary's brief that Plaintiffs should never, at any time, be allowed to pursue an independent tort cause of action for spoliation of evidence. That issue was never raised below, and therefore has been waived.

[5]/Notice to the State of Florida of equipment possibly involved in a patient incident is (continued. , .)

(C) List equipment used if directly involved in the incident.
Continue to investigate, do not know if equipment was involved.

All of the above evidence demonstrated that St. Mary's was aware the equipment was suspected as a cause of Alonzette's death, and yet it did not subsequently rule out the equipment as a cause, which could have been done by either reporting Alonzette's death to Obrneda, or preserving the equipment for testing. It could easily be concluded that St. Mary's wanted the vaporizer dismantled so that the true cause of Alonzette's could never be determined.

St. Mary's Pretrial Defense of the Spoliation Lawsuit

St. Mary's claimed it had no notice the vaporizer was suspected in Alonzette's death; that it believed the only possible causes were Dr. Cooney's negligence or an allergic reaction; and so it had no duty to preserve the vaporizer. To support this defense prior to trial, St. Mary's claimed Russell, Robels and Boyum had not notified risk management of Pszeniczy's note (T648-49,878,1158). Although Russell and Robels claimed they had not done so because they were not aware of Alonzette's overdose, Boyum admitted it was known by St. Mary's employees, including Robels (T641,668-70). Boyum did not inform risk management of Pszeniczy's note, claiming risk management and Donovan were already aware of it (T651,659).

Consolidation of the Medical Malpractice and Spoliation Lawsuits

Plaintiffs moved to consolidate the medical malpractice and spoliation lawsuits pursuant to MILLER v. ALLSTATE, 573 So.2d 24 (Fla. 3d DCA 1990) which held that a plaintiff need not try his underlying lawsuit first and receive an adverse verdict before pursuing a spoliation claim. St. Mary's presented nothing to the court, in camera or otherwise, to demonstrate why

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[5](. . . continued)
required by Fla. Admin. Code, Rule 59A-10.0065.

the lawsuits should not be consolidated. The court granted consolidation without prejudice to St. Mary's demonstrating why it was necessary to try the lawsuits separately (R168). St. Mary's sought certiorari review, which was denied. St. Mary's then filed a Motion to Bifurcate, claiming that consolidation forced it to give up its risk management privilege in the medical malpractice lawsuit because it needed to use risk management materials to defend the spoliation lawsuit, i.e., prove that it had no reason to suspect or preserve the vaporizer (R3 19). St. Mary's also claimed that "disclosure of.. .risk management information could then be used against St. Mary's in the. . .medical malpractice action. " (R320-21). At the hearing on that motion, St. Mary's again failed to demonstrate that either of those claims was true. While the court denied the motion, it again did so without prejudice (T37). The court gave St. Mary's an easy solution. All it had to do was demonstrate to the court that it was necessary to waive its risk management privilege in order to defend the spoliation claim (T37), but St. Mary's failed to do so.

St. Maw's Voluntary Waiver of its Risk Management Privilege

Pre-trial, the court upheld St. Mary's risk management objections, including those made during Snyder's depositions. At the beginning of trial, however, St, Mary's counsel stated that after a long conference with the "powers to be" St. Mary's had decided to waive its risk management privilege (T57-58,93) and "open the door with regard to the risk management file," preserving an objection solely as to "documents and information in there that I've sent to them" (T316-17). Although counsel claimed this was a forced waiver, the only basis he gave for that claim was a "need" to present Snyder's testimony to defend the spoliation claim (T56-57). He did not proffer her testimony in camera to prove that his claim of a forced waiver was true. In fact, this brief will demonstrate that that claim was absolutely false. St. Mary's voluntarily waived its privilege and handed over what it represented to be its risk management file, except

for letters from its counsel (T316-17,283,286). In fact, when Plaintiffs objected to Snyder's "new" testimony, St. Mary's insisted that it had the absolute right to waive its risk management privilege if it wanted to, even at that late date (T45 1-59).

St. Mary's Opening: Statement

St. Mary's counsel told the jury during opening statement that St. Mary's defense of the spoliation claim was that Snyder had performed its risk management's investigation, and she was unable to determine that the anesthesia equipment was a cause of Alonzette's death (T390-91).

St. Mary's Refusal to Obey the Court's Order and the Striking of Its Pleadings

When Plaintiffs re-took Snyder's deposition during trial, she produced St. Mary's incident report, confidential screening form, and risk management form filed with HRS and her investigative notes (A3-12). Snyder testified that no one told her of Pszeniczny's note indicating the vaporizer emitted excessive anesthesia until months after the incident (SS 6/24/94 D116-17,122-23). Investigation of Alonzette's death, as part of her Assistant Risk Manager duties, did not reveal the vaporizer was suspected. Her investigation only revealed Dr. Cooney's negligence or an allergic reaction as suspected causes (Id. D12,61,64-5,67-8,110), so there was no reason to preserve the vaporizer. However, Snyder admitted that the equipment could have caused the overdose, no one told her the equipment was not involved, and she never "ruled out" the equipment. (Id. D67,77,105,131-32). When Snyder finally saw Pszeniczy's note, she realized the vaporizer might be connected with the overdose (Id. D133). Yet, St Mary's told her not to report that to the manufacturer or HRS, not to talk to any other witnesses, to "leave it as it was", to "let the attorneys handle it", and "don't.. .do any more on that", which she said "stifled" her investigation (Id. D127,134-5,139,147).

Snyder admitted that her investigation was limited to talking to three nurses (Id. D59,64-67,105, 109-10). She did not talk to Drs. Cooney or Friedman (Id. D72-73), Boyum, Robels, or Russell (until a month or so later) (Id. D109). Upon further questioning Snyder admitted that she had not actually investigated Alonzette's death. Donovan had Affiliated Risk Control Agency (ARCA) perform the investigation (Id. D22,24,42). Her responsibility to investigate the incident had been delegated to the ARCA investigator, Janet Baron, and Baron's reports (the "ARCA reports") were part of risk management's file (Id. D22,24,42). She had not duplicated Baron's efforts, but rather relied upon Baron's reports as part of risk management's investigation (Id. D19,22,24,42). Although St. Mary's produced Baron's handwritten notes (Id. D99,102; A6-8), St. Mary's refused to allow Snyder to discuss or produce the ARCA reports.

Plaintiffs asked the court to order St. Mary's to produce the ARCA reports since it had waived its risk management privilege (T1 189-93).[6] St. Mary's counsel argued that "risk management is the things Sharon Snyder did" (R1150), but it presented no testimony to the court to dispute Snyder's admissions that the ARCA reports were part of risk management's investigation. Counsel advised the court that even if it ruled the reports should be produced, St. Mary's had decided not to produce the documents (T1205-09); that he had been specifically instructed by "the powers that be" not to produce them (T1197), and not to hand them over "at any and all costs" (T1212), that "if the court determines that you need to sanction us in some form or fashion because of the decision that St. Mary's is going to continue to make regarding these documents.. .so be it" (T1205-06), and that "we are willing to take whatever sanctions the court decides to throw against St. Mary's" (T1197). The court advised counsel that an objection would preserve its right on appeal, but St. Mary's had no right to refuse to hand over the

[6]/Obviously, St. Mary's had not produced its entire risk management file, as it previously represented to the court.

documents if the court ordered it to do so (T1212).

After reviewing the ARCA reports in camera the court redacted certain portions and ordered St. Mary's to otherwise produce the reports since St. Mary's had waived its risk management privilege (T1299-1300).[7] The court made it clear that if St. Mary's did not produce the reports, the court would strike its pleadings, including its affirmative defenses (T1300-01). St. Mary's counsel asked for a recess to call to his client, after which he steadfastly refused to produce the reports stating: "My client has instructed me not to agree to the release of these records" (T1301-02). St. Mary's counsel asked to reassert the risk management privilege, but expressed doubt that he could do so after having waived it five days earlier (T1303). The court gave St. Mary's yet another chance to comply by putting the matter on the "back burner" during a two hour videotape deposition. (T1303, 13 18). The court then asked whether St. Mary's was still refusing to comply and St. Mary's counsel replied, "We are not going to produce it" (T1327). The court did exactly what it had forewarned it would do. It struck St. Mary's pleadings and affirmative defenses and directed a verdict against it on liability (T1327). The court sealed the ARCA documents and they are contained in the Record-on-Appeal as "Sealed documents filed by St. Mary's, sent separately".[8]

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[7]/St. Mary's states in footnote 5 that Baron's ARCA reports were "transmitted to trial counsel, with a copy to risk management", in an obvious attempt to claim they were accorded some sort of attorney-client privilege. Without question, the ARCA reports are risk management documents (St. Mary's counsel even admitted that, T1324-26) and when St. Mary's produced its risk management file, it did not preserve an objection to any documents risk management sent to its attorneys. Its only objection was to documents its attorneys sent to risk management (T316-17).

[8]/The documents in the sealed envelope should be Baron's ARCA reports and other documents given to and considered by Baron.

The ARCA Reaorts Demonstrated to the Trial Court and the Fourth District That St. Mary's Was Not Forced to Waive Its Risk Manaeement Privilege to Defend the Spoliation Claim And That it Was Attempting to Perpetrate a Fraud

The key to St. Mary's claim of a forced waiver of its risk management privilege lies in this Court's review of the ARCA documents. Plaintiffs believe that the only reason St. Mary's chose sanctions over production of those documents is because they showed that prior to the vaporizer being destroyed on October 15, 1992, St. Mary's was aware of Pszeniczny's note and his Field Report and/or was otherwise aware that the vaporizer was a suspected cause of Alonzette's death. Yet, St. Mary's not only did not preserve the vaporizer, but it also was defending the spoliation lawsuit by presenting Snyder's knowingly false "no notice therefore no duty to preserve" testimony. Plaintiffs believe that review of the ARCA documents convinced the trial court that St. Mary's had "notice". Plaintiffs believe they show Baron was given a copy of Pszeniczny's note and his Field Report, and that Baron's reports indicate St. Mary's was aware the anesthesia equipment was suspected as a cause right after the incident.[9] Therefore, whether Snyder's limited investigation revealed the vaporizer emitted excessive anesthesia was irrelevant because Baron conducted St. Mary's investigation and became aware that the vaporizer malfunctioned, [10] Accordingly, it can only be concluded that St. Mary's was never forced to waive its risk management privilege to present Snyder's testimony to defend the spoliation claim. There is never a "need" to present knowingly false testimony. St. Mary's voluntarily waived its privilege in an attempt to create a false impression that Snyder conducted risk management's investigation and determined the anesthesia machine was not suspected in Alonzette's death. The ARCA documents demonstrate that both Baron and St. Mary's had

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[9]/The court stated that one of the ARCA Reports was dated October 2, 1992 (T1300), which was still two weeks before the vaporizer was dismantled by Ohmeda.

[10]/Donovan was also aware of Pszeniczny's note (T651,659,722).

notice, that Snyder's "no notice" testimony was false, and St. Mary's knew it. St. Mary's got caught committing a fraud on the court and Plaintiffs - pure and simple.

Plaintiffs also believe the trial court determined that production of the ARCA documents would not prejudice St. Mary's in the medical malpractice case. In other words, they did not demonstrate that St. Mary's employees filled the vaporizer with the incorrect anesthesia. Moreover, al of the witnesses had testified on deposition, without restriction, of their knowledge pertaining to the medical malpractice claim. Therefore, anything said to Baron regarding the medical malpractice claim was not privileged by being included in the ARCA documents.

The bottom line is that Plaintiffs believe the trial court saw from the ARCA documents that St. Mary's claim that it was forced to waive its risk management privilege to present Snyder's risk management testimony to defend the spoliation claim was false. Rather, St. Mary's voluntarily decided to waive that privilege to present Snyder's testimony that her investigation gave St. Mary's no reason to believe the vaporizer was connected to Alonzette's death. St. Mary's knew that Snyder had limited knowledge regarding this "notice" issue, because it also knew she had not investigated Alonzette's death for risk management, contrary to what St. Mary's counsel told the jury in opening statement. [11] Yet, St. Mary's made a tactical decision to waive its risk management privilege in order to rely upon Snyder's limited investigation in an attempt to create a false impression. That trial tactic backfired when Snyder admitted that ARCA had actually performed the investigation, and that the ARCA reports became part of St. Mary's risk management's file. Once the court ordered St. Mary's to produce those reports, St. Mary's realized it was "caught" in presenting a fraudulent defense to the spoliation lawsuit. The ARCA reports would demonstrate that Snyder's "no notice"

[11]/St. Mary's counsel was furnished the ARCA reports by Baron and thus he knew she had conducted risk management's investigation, and yet he told the jury Snyder had done so.

testimony was untrue. They would show that prior to the vaporizer being destroyed both Baron and St. Mary's had notice that it had emitted excessive anesthesia, and yet St. Mary's did nothing to preserve the vaporizer. The reports would prove to the jury that St. Mary's had attempted to perpetrate a fraud by presenting Snyder's testimony, which is the only reason St. Mary's refused to hand over the documents "at all cost".

The Fourth District also rejected St. Mary's argument that it was forced to waive its risk management privilege to defend the spoliation claim. The court's opinion states that "St. Mary's was not deprived of any substantive rights by virtue of the trial court's consolidation" and "consolidation did not compel St. Mary's to waive its risk management privilege". Despite the fact that both the trial court and the Fourth District rejected St. Mary's claim of forced waiver, St. Mary's brief still makes that same old claim. St. Mary's was never forced to present Snyder's testimony to prove "no notice" because St. Mary's knew she did not conduct risk management's investigation. St. Mary's knew Baron conducted the investigation and its attempt to represent that Snyder did so was an attempt to perpetrate a fraud. The ARCA documents show that both St. Mary's and Baron were aware the vaporizer had emitted excessive anesthesia, and yet St. Mary's silence caused the vaporizer to be destroyed, and also show that Snyder's testimony was false. That is why St. Mary's refused, steadfastly, to produce the ARCA reports.

Counsel for Plaintiffs' Closing Argument on Spoliation

Counsel's arguments that St. Mary's was obligated to disclose how Alonzette's death occurred, and that the vaporizer should have been tested so similar incidents would not occur, were not objected to and were based on the law and Snyder and Dr. Cooney's testimony (SS 6/24/94 D66; JC D12). That is the very reason for requiring risk management investigations under §395.0197(1)(d) and Administrative Rule 59A-10.0065, and notice to the manufacturer

and the FDA under 21 USCA §360(i)(b).[12] Counsel's statement regarding St. Mary's "attempting to hide the truth" was not objected to at T1390, and regarding St. Mary's "indifference" was only objected to at T1391 as being "outside the scope", not as being improper, prejudicial or inflammatory.[13] These statements were relevant to Plaintiffs' pain and suffering and represented a fair comment on the evidence. St. Mary's never told Plaintiffs, Ohmeda, the FDA or the State of Florida the truth regarding what happened to Alonzette.

Damages

Nineteen-month old Alonzette was brain damaged and died as a result of St. Mary's negligence. For 10 days her parents repeatedly asked St. Mary's physicians and nurses what happened to their child. They were lied to, treated disrespectfully, and callously. Even Snyder's risk management file indicated that the family was "handled poorly" (A14). They were never told Alonzette was administered excessive anesthesia, when St. Mary's knew that from day one. No one ever suggested that malfunctioning equipment or physician negligence was the cause (T495,498,500). Plaintiffs were told that Alonzette must have had an allergic reaction to the anesthesia, and that she was sleeping but that she would wake up and be fine (T487).

Plaintiffs stayed by Alonzette's bedside for 10 days waiting for her to awaken (T488).

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[12]/Counsel for Plaintiffs' unobjected-to statements referred to in footnote 7 of St. Mary's brief are taken out of context. Counsel praised the jury system and told the jury that it had a powerful role, that jurors are buffers of freedom, vigilante, and taking the law into one's own hands. Illustrating that thought, he stated that there would have been no Nazis in World War II if a jury system had existed to award damages for the wrongs caused. In no way were these comments prejudicial. Counsel did not say that Satan caused Alonzette's death. He argued that if there was a Satan, and if he set about to extract the most intolerable pain from parents, he would take their child because that is a parent's most precious possession (T1365). These comments were not objected to and were innocuous.

[13]/St. Mary's incorrectly suggests that this statement commented on its statutory privilege of nondisclosure. St. Mary's waived that privilege so there would be no reason to argue it was trying to hide behind its statutory privilege.

They refused to leave, and asked everyone if something had gone wrong and everyone gave them the same story - "They were waiting for the anesthesia to wear off and she would be fine" (T489-90). Plaintiffs were told that some children take longer than others to recover from anesthesia, but that she would wake up. Plaintiffs asked repeatedly if something had happened and were repeatedly told by St. Mary's doctors and nurses that they did not know (T502), and "they were just waiting for the anesthesia to wear off" (T496). When Alonzette still did not wake up, Plaintiffs were told that her reaction to the anesthesia might be "genetic", and so St. Mary's took tissue samples for testing (T528). Plaintiffs were finally told that Alonzette had sustained mild brain damage, but that she would wake up and recover over time (T498). After more waiting, Plaintiffs were told that Alonzette was severely brain damaged and that it could take weeks, months or years to recover (T499). Finally, much to Plaintiffs' shock and disbelief, on August 10, 1992, they were told that Alonzette was "brain dead" (T503). Plaintiffs could not believe what they were hearing. They had gone from waiting for the anesthesia to wear off to "brain dead" (T503). The next day, St. Mary's intensive care doctors insisted that Alonzette be disconnected from life support, and threatened to do it themselves stating "we do not care for dead patients" (T509-10), and we're "wasting time taking care of a dead baby" (A13).

Plaintiffs were forced to hire attorneys to prevent St. Mary's from disconnecting Alonzette's life support system (T5 10-11). Plaintiffs also hired a neurologist to test their daughter and he confirmed their greatest fear - that their child was brain dead (T5 12). Plaintiffs asked their family and church members to come see Alonzette for the last time (T5 13). They were then forced to make the hardest and most difficult decision of their life, i.e., to remove the life support system from their daughter and allow her to slowly die (T513). Before Plaintiffs walked out of the hospital, Mr. Brinson asked St. Mary's personnel one last time to please tell

him what caused Alonzette's death (T5 14). They all looked at each other and gave him the same response they had given him all along, they claimed they did not know (T514).

Plaintiffs learned for the first time during trial the truth regarding what had happened to their daughter. They learned that she had not had an allergic reaction to the anesthesia, that the genetic tests had come back negative, and that she had been given an excessive amount of anesthesia, which had never been disclosed to them as even a possibility in response to their repeated question to St. Mary's "what happened to our daughter?"

The jury awarded 3 million dollars to each parent for their past pain and suffering during the two year period from the day of the operation to the time of trial, and 1.5 million dollars each for future pain and suffering during their life expectancy of 44.5 years and 52.1 years, respectively. The jury awards were offset by the settlement with Dr. Cooney (R976).

SUMMARY OF ARGUMENT

The court did not abuse its discretion in striking St. Mary's defenses as a sanction. The severest of sanctions was justified since St. Mary's intentionally refused to comply with the court's order. The damage awards were supported by the evidence and were not excessive under these facts. Dr. Frost's testimony as to liability was relevant and was also harmless in light of the subsequent directed verdict on liability as sanctions. Counsel for Plaintiffs' arguments were either not objected to or were fair comments on the evidence.

The directed verdict on liability as a sanction makes moot St. Mary's Points I and II which challenge rulings made prior thereto. On the merits, St. Mary's never even claimed below that spoliation was not, or should not be, a viable tort cause of action in Florida. The Plaintiffs' proof at trial satisfied each element of their spoliation claim, but that proof became moot when the directed verdict was entered. St. Mary's had a duty to preserve the vaporizer

based upon Snyder's testimony as to a risk manager's standard of care, Federal and Florida Statutes and administrative regulations, and the Hospital's Manual of Accreditation. The jury would have determined whether St. Mary's breached that duty if St. Mary's had not opted for a directed verdict on liability as a sanction. The issue of whether the lawsuits should have been consolidated also became moot as a result of the imposition of the directed verdict as a sanction. In any event, there was no abuse of discretion in consolidating the lawsuits.

PRELIMINARY ARGUMENT

ST. MARY'S CANNOT NOW RAISE POINTS I AND II IN LIGHT OF THE DIRECTED VERDICT AGAINST IT AS A SANCTION

Plaintiffs have changed the order of the points raised in their answer brief. St. Mary's cannot challenge on appeal any rulings pertaining to liability, since those rulings were superseded and/or made moot by St. Mary's subsequent refusal to comply with the court's order and entry of sanctions directing a verdict against St. Mary's on liability. In other words, St. Mary's cannot claim Plaintiffs should not have been allowed to pursue a spoliation claim (St. Mary's Point I) or that their two lawsuits should not have been consolidated (St. Mary's Point II) because those issues became moot once the court directed a verdict on liability. St. Mary's cannot go behind the directed verdict imposed as a sanction and challenge rulings of the court prior in time. Additionally, St. Mary's brief does not even claim the trial court abused its discretion in entering a directed verdict on liability as a sanction. The issue raised in St. Mary's Point III is that the trial court erred in striking its affirmative defenses, in addition to directing a verdict. St. Mary's has thus conceded that the court correctly exercised its discretion in directing a verdict on liability as a sanction. Regardless of that concession, any ruling that occurred before the court sanctioned St. Mary's has been subsumed in the directed verdict on liability. Accordingly, this Court should not entertain St. Mary's Point I (spoliation issue) or

Point II (consolidation issue) since the imposition of sanctions made those issues moot.

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN STRIKING ST. MARY'S AFFIRMATIVE DEFENSES

The Trial Court Had Authority to Strike St. Mary's Affirmative Defenses: Rule 1.380(b)(2)

St. Mary's cannot legitimately argue that the court erred in imposing sanctions, because St. Mary's asked for them. St. Mary's must resort to arguing that the court should have imposed a "less severe" sanction, i.e., it should not have also stricken its affirmative defenses. St. Mary's acknowledges that this Court has held that the severest of sanctions for noncompliance with orders compelling discovery, is justified where there is a "deliberate and contumacious disregard of the court's authority" or "willful disregard or gross indifference to an order of the court. " MERCER v. RAINE, 443 So.2d 994 (Fla. 1983). Conduct that falls within this definition exists where the non-complying party has the ability to comply but refuses to comply, GOMEZ-BONILLA v. APOLLO SHIP CHANDLERS, INC., 650 So.2d 116 (Fla. 3d DCA 1995), and where the failure to comply is a refusal to obey, MITTLEMAN v. ROWE, INTERN., INC., 511 So.2d 766 (Fla. 4th DCA 1987). Here, St. Mary's had the ability to comply and simply flaunted the court's order. It refused to obey, and therefore the court did not abuse its discretion in striking St. Mary's affirmative defenses.

St. Mary's cannot attempt to lessen the deliberate, intentional and flagrant character of its disregard of the court's order by arguing that its ruling was wrong. A party's perception of the correctness of a trial court's ruling is no excuse for disregarding the court's order. An order given during the course of a trial must be complied with promptly and completely; once the court has ruled, counsel and parties must abide by the ruling and comply with the court's order. U.S. v. DINITZ, 538 F.2d 1214 (CA Fla. 1976), reh. den. 542 F.2d 1174, cert. den. 97 S.Ct.

1133. It is imperative to the orderly conduct of any trial that a party and his counsel obey the rulings of the trial court and appeal any objectionable rulings. WARD v. STATE, 354 So.2d 438 (Fla. 3d DCA 1978). Parties are not free to ignore an order of a court simply because they believe it is wrong. FLORIDA COAST BANK v. MAYES, 433 So.2d 1033 (Fla. 4th DCA 1983). The remedy for a party who believes the court's rulings are incorrect is to challenge those rulings at the appellate level, not disobey them. SOVEN v. STATE, 622 So.2d 1123 (Fla. 3d DCA 1993). Once the trial court has made a ruling in a case, even if that ruling is wrong and is subject to reversal on appeal, counsel and parties are obligated to obey the ruling during the course of the trial. VIZZI v. STATE, 501 So.2d 613 (Fla. 3d DCA 1986), rev. den. 506 So.2d 1043; STATE v. SCHMIDT, 474 So.2d 899 (Fla. 5th DCA 1985).

Case law is clear that a party can ignore a court order only at his peril. JOHNSON v. ALLSTATE, 410 So.2d 978 (Fla. 5th DCA 1982); BESCO EQUIPMENT v. GOLDEN LONG BAKERY, 458 So.2d 330 (Fla. 5th DCA 1984). Cf. JAMESON v. STATE, 447 So.2d 892, 893 (Fla. 4th DCA 1983), aff'd 455 So.2d 380, where this Court stated: "The clear answer is that only if an order is entered in a matter concerning which the court has no jurisdiction may such an order be safely ignored. " There are avenues of redress by appellate review for orders which may be erroneous, but so long as such orders are entered by a court which has jurisdiction of both the subject matter and the parties, such orders cannot be ignored without running the risk that sanctions may be imposed. JOHNSON v. ALLSTATE, supra.

Based upon the above case law, St. Mary's cannot legitimately claim that its conduct was not a deliberate, willful or intentional disregard of the court's order. St. Mary's fall-back position, expressed in footnote 35, is that the court was required to enter a written finding of willful refusal to obey in order to impose the severest sanction. In fact, the cases merely hold

that where an order is entered imposing sanctions for discovery violations, the order must contain a finding of willful noncompliance. COMMONWEALTH FED. SAV. & LOAN v. TUBERO, 569 So.2d 1271 (Fla. 1990); STONER v. VERKADEN, 493 So.2d 1126 (Fla. 4th DCA 1986). Obviously, that is not required where no written order is entered because the refusal to comply occurs during trial, where the written record indicates that St. Mary's informed the court that it had made the decision not to do so.[14] St. Mary's conduct was deliberate, intentional, and willful, and St. Mary's counsel so indicated on the record. The record unequivocally demonstrates willful noncompliance. How can it be otherwise? St. Mary's counsel had the ARCA reports in his hand but St. Mary's refused to allow him to produce them.

The Court Also Had Inherent Authority to Strike St. Mary's Defenses As a Sanction

The purpose of reposing authority in a court under Rule 1.380(b) to impose sanctions is to ensure that litigants will feel compelled to comply with the court's discovery orders. STRASSER v. U.S. AUTO, 492 So.2d 399 (Fla. 4th DCA 1986). The trial court's authority to sanction a party is not limited to the civil procedure rules. Disobedience of a court order also constitutes a contempt of the court's authority. SANDSTROM v. STATE, 309 So.2d 17 (Fla. 4th DCA 1975). A party's statement to the court that he will not obey a court order is a contemptuous act. U.S. v. BALDWIN, 770 F.2d 1550 (11th Cir. Fla. 1985). The court has inherent power to impose sanctions as a disciplinary measure, i.e., to punish or penalize, in the interest of the orderly administration of justice. LOCAL 415 v. WILLIAM WERTZ, 141 So.2d 18 (Fla. 3d DCA 1962). Obviously, this power includes striking pleadings and defenses.

If parties can defy the court's authority during trial, as here, or pretrial or m-trial,

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[14]/In JAMESON v. STATE, supra, the party's refusal to comply with a court order was oral, but evidenced in a written record.

sheer bedlam will result in our judicial system. The orderly administration of justice and orderly workings of our court system will disappear. Trial judges will become powerless - totally impotent - if they cannot order parties to comply with their rulings, and then punish them for refusing to do so. For this reason alone, apart from the court's authority to impose discovery sanctions under the procedural rules, the striking of St. Mary's defenses should be affirmed.

The Standard of Review Is Abuse of Discretion

The decision to impose sanctions and the severity thereof are matters within the trial court's discretion. MERCER v. RAINE, supra. A court's decision to strike a defendant's affirmative defenses, in addition to entering judgment against him on liability for violating a discovery order, is a matter that lies within its sound judicial discretion in determining the severity of the sanctions imposed. HARLESS v. KUHN, 403 So.2d 423 (Fla. 1981). [15] Absent a clear abuse, such discretionary act will not be reversed on appeal. MERCER v. RAINE, supra. The test as to whether the court abused its discretion in imposing sanctions is whether reasonable persons could differ as to the propriety of the court's action. WALLRAFF v. TGI FRIDAY'S, 490 So.2d 50 (Fla. 1986).

The Striking of St. Mary's Affirmative Defenses Was Not An Abuse of Discretion

St. Mary's argues that the sanction should be commensurate with the misconduct punished, and that since there was no pattern of misconduct here, a less severe sanction should have been imposed. This is not a case where a party in good faith attempted to comply with a

[15]/The affirmative defense involved in HARLESS was comparative negligence, whereas the affirmative defense involved here was apportionment of negligence. Interestingly, counsel for St. Mary's here, then Justice England, dissented in HARLESS v. KUHN because he did not feel the trial court should have any discretion to allow the sanctioned party to still pursue his affirmative defenses.

discovery order but was unable to do so, or was late in doing so, or engaged in mere "foot dragging", or did not comply as a result of neglect or inadvertence, or there was confusion over what was to be produced, etc. Nor is this a situation where the attorney's negligent failure was visited upon his blameless client. Here, a deliberate decision was made by St. Mary's to disregard the court's order. The "powers that be" thumbed their nose at the court and have said: "We don't care what you order us to do, we're not doing it - so sanction us." The court forewarned St. Mary's that if it did not produce the documents, it was going to strike its pleadings, including its defenses. St. Mary's continued to refuse to comply with the court's order, electing instead imposition of the court's sanctions. Having chosen that course, St. Mary's has no right to now complain. St. Mary's failure to comply was solely a refusal to obey the court's order. For that reason, the court did not abuse its discretion in imposing the most severe sanction, and that fact distinguishes this case from those cited in St. Mary's brief.

St. Mary's argues that the trial court could not have known that the consequences of striking its affirmative defenses was that St. Mary's would be held responsible for such a large verdict. Both the court and St. Mary's understood very well that its affirmative defenses, of which apportionment of fault was one, were going to be stricken if it did not comply with the court's order. The court told St. Mary's counsel that it was going to strike St. Mary's "entire defenses" if it did not produce the reports, and it gave him an opportunity to place one last phone call to the "powers that be". . . "based on that ruling" (T1300-01). He reported back "my client has instructed me" not to comply with the court's order (T1302). The court gave St. Mary's yet another two hours to re-think the matter, after which St. Mary's still refused to produce the documents (T1303,13 18,1327). It was then and only then, after clearly forewarning St. Mary's that its defenses would be stricken, that the court directed a verdict against St.

Mary's on liability, and struck its defenses. St. Mary's knew the consequences of its obstinate refusal to produce the ARCA reports, and voluntarily chose to accept those consequences.

St. Mary's argues that a less drastic solution would have been to either prevent Snyder from testifying or prevent her from giving testimony regarding the risk management documents. It was much too late for that solution. What St. Mary's is suggesting is that it should have been allowed to reassert a risk management privilege already waived. However, once a privilege is waived, and the horse is out of the barn, it cannot be reinvoked. HAMILTON v. HAMILTON STEEL CORP., 409 So.2d 1111, 1114 (Fla. 4th DCA 1982). In this case, the horse was clearly out of the barn because Plaintiffs had already retaken Snyder's deposition regarding risk management matters, the risk management file had been produced except for the ARCA reports, and Janet Baron's handwritten notes had been produced. St. Mary's next argues that striking its defenses was too severe a sanction because it only refused to produce a few documents. However, it is not the number of documents withheld that is important. The issue under MERCER v. RAINE, supra, is whether the failure to comply with a court order was intentional and willful refusal to comply or obey, and if so the severest sanction is appropriate.

St. Mary's incorrectly argues that the Plaintiffs were not prejudiced by its refusal to produce the ARCA reports. The Plaintiffs were clearly prejudiced because they caught St. Mary's presenting a fraudulent defense to their spoliation lawsuit, i.e., Snyder's "no notice therefore no duty to preserve" the vaporizer. The ARCA documents proved that St. Mary's had notice, and yet it allowed the vaporizer to be destroyed. The court was also "prejudiced" because St. Mary's defied its authority by flagrantly refusing to obey its order.

St. Mary's complains that it is unfair that the striking of its defenses made it responsible for 100% of the verdict. St. Mary's should have thought about that when the court advised it

that it was going to strike its "entire defenses" if it did not produce the reports. Moreover, the affirmative defense which St. Mary's claims it should have been entitled to raise is "apportionment of fault" under §768.81 Fla. Stat. (1993) and FABRE v. MARIN, 623 So.2d 1182 (Fla. 1993), which by definition is an aspect of liability, not damages. The sanctions imposed by the trial court determined the liability issues leaving only damages to be resolved.

St, Mary's claims that NASH v. WELLS FARGO , 678 So.2d 1262 (Fla. 1996) merely held that the failure to plead apportionment as an affirmative defense constitutes a waiver of that defense. St. Mary's argues that since it pled apportionment it should have been allowed to seek apportionment. The importance of NASH as applied here is that it confirmed that apportionment of fault is an affirmative defense. [16] Once St. Mary's defenses were stricken, there was nothing for the jury to apportion. The sanctions imposed by the court determined the liability issues, including apportionment of fault, leaving only Plaintiffs' damages to be determined.

St. Mary's argues that there was evidence in the record that Dr. Cooney was at fault, and therefore it should have been allowed to pursue apportionment. St, Mary's overlooks the fact that the striking of its pleadings and affirmative defenses occurred after, and superseded, any evidence placed before the jury. Once St. Mary's affirmative defenses were stricken, any evidence that may have previously been placed before the jury became irrelevant.

Finally, St. Mary's reliance upon Y .H. INVESTMENTS, INC. v. GODALES, 690 So.2d 1273 (Fla. 1997) is misplaced. That case merely held that a party defendant can apportion liability to a non-party parent who is immune from liability to his child. This Court had

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16/See also FSJI 3.8(f) which makes apportionment of fault an affirmative defense, and Model Verdict Form 8.6 which reflects that the jury is to apportion fault, not damages, under $768.81 Fla. Stat. [See also CHESTERTON v. FISHER, 655 So.2d 170 (Fla. 3d DCA 1995)]. Thereafter, the court, not the jury, apportions damages according to the jury's apportionment of fault. See §768.81(3). This procedure is set forth in FSJI 6.1(c) p.3].

previously held the same to be true with regard to apportionment of fault to an employer who enjoys immunity from being sued by his employee. ALLIED-SIGNAL, INC. v. FOX, 623 So.2d 1180 (Fla. 1993). Neither case concerned the striking of the party-defendant's defense of apportionment as a sanction, as here. Essentially, St. Mary's is arguing that since §768.81 provides that a defendant should only be liable for its percentage of fault, nothing can prevent a defendant from being able to apportion fault. However, apportionment of fault is a statutory right which can be waived or forfeited. This Court has already held in NASH v. WELLS FARGO, supra, that the right to apportionment is waived if a defendant does not plead it as an affirmative defense and specifically identify the non-party. Obviously, there is also a waiver or forfeiture of apportionment by a defendant who willfully refuses to obey a court's discovery order and as a result its defenses are stricken after being warned of that consequence if there is continued noncompliance. This Court has previously decided that affirmative defenses, including comparative negligence, can be stricken as a sanction. HARLESS v. KUHN, supra.

St. Mary's asks this Court to rule that a trial court lacks authority to strike a defendant's apportionment defense as a sanction, even if the defendant flatly refuses to obey the court's discovery order. St. Mary's thinks it should be able to flagrantly refuse to obey a court order, have the court inform it that if it does not do so its pleadings and "entire defenses" will be stricken, still refuse to comply telling the court to go ahead and sanction it, and then ask the appellate courts to reverse the striking of the apportionment defense. The Fourth District did not buy that argument and neither should this Court. St. Mary's got exactly what it asked for.

POINT II

THE VERDICT WAS FULLY SUPPORTED BY THE EVIDENCE AND WAS NOT EXCESSIVE

A) Past Damages

St. Mary's incorrectly argues that the jury's verdict was excessive claiming it is outside the range within which a jury can reasonably operate. [17] The trial court did not find that to be true, and neither did the Fourth District. The jury knew exactly what it was doing in making its award. While St. Mary's repeatedly refers to the verdict as a "9 million dollar verdict", it ignores the fact that the award was made up of 3 million dollars to each parent for their past pain and suffering during the two-year period from the day of Alonzette's operation to the time of trial. The jury had before it evidence of what the parents had experienced not only during the ten days that Alonzette lay in the Hospital, but also the two-year period prior to trial. For ten days, Alonzette's parents were lied to and deceived in regard to what had happened to Alonzette. From day one St. Mary's knew Alonzette had been administered excessive anesthesia, the only issue was the cause. Yet, during the ten days Alonzette remained in a vegetative state, St. Mary's repeatedly told her parents that Alonzette was merely sleeping, that she would wake up and would be just fine. When it was obvious that was not going to happen, St. Mary's tried to blame Alonzette by claiming she had an allergic reaction, but tests proved otherwise. When asked what had happened to Alonzette, St. Mary's employees simply shrugged their shoulders and falsely said that they did not know. As Mr. Brinson explained in his trial

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[17] St. Mary's also argues that the damages awards were not in proportion to the harm it caused because St. Mary's did not knowingly allow the vaporizer to be destroyed. Plaintiffs beg to differ. St. Mary's knowingly allowed destruction of the critical piece of evidence and then knowingly presented evidence to the contrary and refused to produce documents demonstrating its fraudulent defense. Without question, the jury awards are in proportion to St. Mary's misconduct. Notwithstanding, however, since the awards are one of compensatory damages, Plaintiffs do not believe proportionality is the issue here.

testimony, he learned for the first time, while sitting through the trial, what had happened to Alonzette. He and his wife had not known the truth during the two long years since her death. Dr. Platt, Plaintiffs' grief expert, explained that not knowing or understanding why a child has died in an unexpected way intensifies the parents' grief and makes the acceptance of the death even more impossible.[18] It was because of St. Mary's deception that the Plaintiffs did not begin the healing process for two years. It is clear that the jury came to this conclusion because the majority of its award for pain and suffering was for past pain and suffering. Dr. Platt explained that one of the most painful death experiences is the sudden, unexpected death of a child. It is not only important for a parent to accept the fact that their child has died of a sudden unexpected death, but it is equally important to understand how and why (T1249). It is the failure to understand that fact which intensifies the parents' grief (T1249). And, if the parents feel that the death could have been prevented, the grief process in terms of accepting the death is even more difficult (T1250). Dr. Platt explained that two years after Alonzette's death, the Plaintiffs were still experiencing intense grief over the loss of their daughter (T1239-58).

Dr. Platt's testimony was confirmed by the testimony of Marlene Brown, St. Mary's own certified death educator and grief counselor (MB D4-6), and the "grief packet" Brown mailed to Plaintiffs to educate them about their feelings of loss and grief after Alonzette died (A19-24;Pltfs Ex#11 ,T1279). The grief packet supported both Dr. Platt's testimony and the damages

[18]/At the beginning of trial, counsel for St. Mary's Motion in Limine as to Dr. Platt's testimony was raised and not ruled upon, with counsel advising the court that "if need be I will re-raise it" (T86). St. Mary's never subsequently raised an objection to Dr. Platt's testimony. St. Mary's obviously determined his testimony was proper because during voir dire, the jurors acknowledged they had no death experiences with young children (T68,79-80,87,107), and no sudden and unexpected death experiences (T104,132,175). None of the jurors had been involved with the decision to remove life support from a young child (T188). The jurors themselves felt that a grief expert could be helpful in helping them understand the grief Plaintiffs experienced as a result of the death of their child (T87-88,120-21).

awarded For example, it stated "You will think you cannot bear the pain, but you can. Suppressed grief will follow you, influence you or even control you for as long as it takes to work through it -- 5 years, 10 years, or 50 years;"(A21), and "It may take two years or more before YOU are able to wake up in the morning and look forward to a day without sadness. The more unexpected your loss, the more time you will need to grieve." (emphasis added, A22). Brown testified without objection that being told the truth about the cause of death is important to grief counseling (MB D13-14). She confirmed that it is important for the family of someone who has died suddenly and unexpectedly to understand why and how the death occurred, and that St. Mary's had the obligation to inform Alonzette's parents of the truth (MB D20).

The jury obviously agreed with St. Mary's grief packet's reference to a two-year period of intense grief, which also coincided with the two-year period before trial in this case. Because of what these parents had been put through for two years, the jury valued each parent's past pain and suffering at three million dollars. That was based on what the jury heard and saw, and what it determined the Plaintiffs had gone through, and the impact of Alonzette's death on their lives. The jury's valuation of the Plaintiffs' past pain and suffering was solely within its discretion, and the award did not exceed the maximum limit of a reasonable range within which the jury could properly operate based upon the facts of this case. BOULD v. TOUCHETTE, 349 So.2d 1181 (Fla. 1977). Case law provides that the facts in each case are determinative and a court should not sit as a seventh juror with veto power simply because it feels that the verdict is more than it would have awarded. BOULD v. TOUCHETTE, supra.

St. Mary's presented no damages evidence, and counsel for St. Mary's simply told the jury that the award was "solely within your discretion" (T1388). The jury decided, within its discretion, that each parent's pain and suffering for the past two years was valued at 3 million

dollars. Obviously, both the trial court and the Fourth District determined that for it to pick a different number for the Plaintiffs' past pain and suffering would simply place the court in the position of a seventh juror with veto power, substituting their opinion for that of the jury. The award of past damages was clearly for the jury to determine based on the evidence of this horrible tragic incident and the impact 'that it had had on Plaintiffs' lives, One moment Alonzette was alive and well and 10 days later she was brain dead. How much is it worth to have lived the agony of those 10 days, and the following two years, not understanding what had happened, and being lied to about what happened? How much is it worth to live the reality and agony of being forced to give the order to withhold life support from your own child? As this Court acknowledged in WINNER v. SHARP, 43 So.2d 634 (Fla. 1949):

> Those who have not brought a child into the world and loved it and planned for it, and then have it suddenly snatched away from them and killed can hardly have an adequate idea of the mental pain and anguish that one undergoes from such a tragedy. No other affliction so tortures and wears down the physical and nervous system....

Here, based on the evidence before it, the jury determined that the Plaintiffs' past pain and suffering was greater than their future pain and suffering, and the jury's valuation of the Plaintiffs' past pain and suffering was clearly supported by the evidence. The imposition of some different figure would be nothing more than usurping the jury's discretion in determining intangible damages such as pain and suffering.

Future Damages

Each parent was awarded 1.5 million dollars for future pain and suffering during the balance of their life expectancy of 44.5 years and 52.1 years respectively. Those awards on their face are not excessive.

POINT III

THIS ISSUE IS MOOT AND THE SPOLIATION TORT APPROVED BY THE FOURTH DISTRICT SHOULD BE APPROVED BY THIS COURT

The Court need not, and should not, reach this issue because it became moot when a liability verdict was directed against St. Mary's as a sanction. Moreover, the argument was not preserved. St. Mary's never challenged the adoption of spoliation as an independent tort in its Motion to Dismiss (R1060-72), Motion for Summary Judgment (R68-72,1022-59), Motion for Directed Verdict (T1248-53) and post-trial Motion for Directed Verdict (R978-83).

The Onlv Spoliation Claim Tried Was an Impaired Abilitv to Prove Medical Malpractice

St. Mary's argues that Plaintiffs' spoliation lawsuit alleged impairment of a claim against the vaporizer's manufacturer. St. Mary's conveniently ignores the fact that the spoliation lawsuit was tried solely on Plaintiffs' inability to prove the claim of medical malpractice against St, Mary's. Regardless of the state of the pleadings, that was the only spoliation issue tried with St. Mary's consent, St. Mary's did not object to that issue being tried, did not claim surprise that that was the spoliation issue being tried, and in fact admitted that impaired ability to prove medical malpractice was the sole basis for the spoliation claim. St. Mary's trial counsel informed the jury in opening statement that Plaintiffs' spoliation claim was based on their inability to prove medical negligence [not products liability] (T389), and that in order to recover on the spoliation claim Plaintiffs had to prove an inability to prove their medical malpractice claim against St. Mary's (R390,431). See counsel's quotes at pages 5-6, supra. In addition, St. Mary's filed pleadings admitting that the "impaired claim" was Plaintiffs' underlying claim or the claim stated in Plaintiffs' initial medical malpractice complaint (R190,225,1068).

Counsel for St. Mary's explanation of the spoliation claim to the jury in opening

statement conclusively demonstrated that the only spoliation claim tried was impairment of the medical malpractice lawsuit. Therefore, despite the language St. Mary's so strongly relies upon in the spoliation complaint, under Rule 1.190 "issues tried by the express or implied consent of the parties shall be treated in all respects as if they had been raised in the pleadings. " A legal issue not raised in the pleadings may be decided where the issue, although not pled, is tried by the consent of the parties . HART PROPERTIES, INC., v . SLACK, 159 So. 2d 236 (Fla. 1963). Here, even if impairment of the medical malpractice claim was not alleged, that was the only spoliation claim tried. St. Mary's cannot successfully argue that impairment of a products liability claim was also tried in light of St. Mary's Counsel's comments in opening statement. [19]

St. Mary's states that the Fourth District's decision viewed this spoliation case as one based on impairment of a products liability claim against the vaporizer's manufacturer. As support for this argument, St. Mary's cites to the Fourth District's recitation in its opinion of the allegations in Plaintiffs' complaint. As previously stated, everyone, including the Fourth District, was well aware of the fact that the only spoliation case which was actually tried, with St. Mary's consent, was an inability to prove Plaintiffs' underlying medical negligence claim.[20] St. Mary's argument to the contrary is an attempt to distort the very definition of a spoliation cause of action. One of the tort's elements is impairment of an underlying lawsuit which is pursued prior to, or together with the spoliation lawsuit. CONTINENTAL INS. CO. v.

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[19]/St. Mary's counsel did not move for a directed verdict arguing that Plaintiffs had failed to prove impairment of a products liability claim because he knew the trial did not involve that issue (T1294-99).

[20]/After the Fourth District rendered its opinion, St. Mary's filed Motions for Rehearing attempting to convince the court that Plaintiffs' spoliation claim was based upon impairment of a products liability claim that was never filed. Plaintiffs' Response showed that St. Mary's counsel had conceded otherwise in the trial court in pleadings and opening statement to the jury. The Fourth District denied rehearing and refused to certify a conflict with MILLER II since it was well aware that the spoliation claim was solely based on Plaintiffs' inability to prove their underlying medical malpractice lawsuit.

HERMAN, 576 So. 2d 313 (Fla 3d DCA 1990); MILLER v. ALLSTATE INS. CO., 650 So.2d 671 (Fla. 3d DCA 1995). In other words, proof of spoliation requires proof that the destruction of evidence impaired proof in an underlying lawsuit. Id. Here, the only underlying lawsuit was the medical malpractice action. Plaintiffs' spoliation claim by definition could not arise from a potential products liability claim that they never pursued.[21] Plaintiffs never argued or proved impairment of a products liability case at trial. Since the Fourth District found that Plaintiffs were correctly allowed to proceed on their spoliation claim, the Court necessarily found that they proved impairment of their ability to prove the medical malpractice claim.

At Trial Plaintiffs Proved Each Element of Spoliation

St. Mary's argues that Plaintiffs' Complaint failed to allege the necessary elements of spoliation. Once again, St. Mary's ignores the fact that a trial occurred, and that each element of the tort was proven at trial. The proof subsequently became irrelevant when a directed verdict was entered against St. Mary's as a sanction, a fact St. Mary's continues to overlook.

1) Plaintiffs Proved a "Potential Civil Action"

Counsel for St. Mary's admitted in opening statement that Plaintiffs' spoliation case was based upon an inability to prove their medical malpractice claim.

2) Plaintiffs Proved a Duty to Preserve

St. Mary's continues to make the shocking argument that, even if it had knowledge that the vaporizer emitted excessive anesthesia to Alonzette, it had no duty to her or her parents to preserve the vaporizer. That duty, which can be either legal or contractual, clearly existed.

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[21] Plaintiffs could not be forced to sue Ohmeda for products liability. In fact, St. Mary's filed a third-party complaint against Ohmeda alleging that if St. Mary's was found liable in the medical malpractice case, Ohmeda was liable to it for contribution or indemnification (R221-34). St. Mary's had the court sever that claim from this lawsuit (R298-300,309-10).

A) Risk Management's Own Standard of Care Imposed a "Duty"

Snyder testified that the standard of care of St. Mary's risk manager was to sequester and secure any equipment which may have caused patient injury or death (SS 1/14/94 D29-33). This standard of care was independent of any duty imposed by Florida and Federal Statutes or administrative regulations. Boyum also testified that St. Mary's risk management was required to preserve the vaporizer (T722). The Accreditation Manual for Hospitals, PL 3.3, required St Mary's to identify and document equipment failures that may have caused an adverse effect on a patient (A15-16). Under this evidence, St. Mary's had a duty to preserve the vaporizer until it was affirmatively eliminated as a cause of Alonzette's death. The 15 day report filed by St. Mary's with HRS indicated that it had not eliminated the vaporizer as a cause of the incident, and yet it failed to preserve the vaporizer in order to do so.

B) A Duty Existed Under 21 U.S.C.A. §360(i)(b)

Snyder admitted that if St. Mary's suspected equipment of causing patient injury or death, it was required to report it to the manufacturer and the FDA and further required to secure and sequester the equipment (SS 1/14/94 D14-17,24-25,29). Her testimony is a clear expression of the duty imposed upon hospitals by 21 U.S.C.A. §360(i). That statute requires manufacturers of a device intended for human use to report to the FDA information suggesting that one of its devices may have caused or contributed to a death or serious injury. The federal statute also imposes a duty upon hospitals [which are included in the definition of "device user facility", under Subsection (b)(5)] to report equipment suspected of causing patient injury:

> (b)(l) (A) Whenever a device user facility receives or otherwise becomes aware of information that reasonably suggests that a device has or may have caused or contributed to the death of a patient of the facility, the facility shall,. . .report the information to the Secretary [FDA] and, if the identity of the manufacturer is known, to the manufacturer of the device.. .

> (D) . . .a device user facility shall be treated as having received or otherwise become aware of information with respect to a device of that facility when medical personnel who are employed by or otherwise formally affiliated with the facility receive or otherwise become aware of information with respect to that device in the course of their duties.

Under the above provisions, St. Mary's had a duty to report the incident to the FDA and Ohmeda.[22] St. Mary's was deemed to have notice of information reasonably suggesting that the vaporizer may have caused Alonzette's death if its medical personnel became aware of that information. A number of St. Mary's employees were aware of such information. Russell became aware of Pszeniczy's note indicating the vaporizer had emitted excessive anesthesia[23] and showed it to her supervisor, Boyum, who admitted she realized the significance of the note (A1;T587,632,646-7,700,898,902). Donovan saw Pszeniczy's note and risk management received a copy of the note on or about August 6, 1992 (T651,659,721). Russell also signed Pszeniczy's Service Report which indicated the vaporizer had emitted 30% more anesthesia than its dial setting indicated, and risk management received a copy of that report (A2,T634-35,659-660). This testimony clearly required St. Mary's to comply with 21 U.S.C.A. §360(i).

The above evidence imposed a duty upon St. Mary's as a matter of law to report

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[22]/St. Mary's has abandoned an argument made to the Fourth District that its duty under 21 USCA §360(i), and under Florida Statutes and Administrative Regulations, was at best a duty to report the adverse incident, not a duty to preserve the vaporizer. That argument is directly contrary to the testimony of Snyder and Boyum. Obviously, St. Mary's failure to report to the manufacturer that the vaporizer was involved in an adverse patient incident was the proximate cause of the vaporizer being destroyed. See STANTON BY BROOKS v. ASTRA PHARMACEUTICAL PRODUCTS, supra, at 565-69, where the court found that the jury could determine that the negligent failure to comply with the FDCA reporting requirements was the proximate cause of the plaintiff's injury. Here, the testimony of Goodyear demonstrated that it was St. Mary's failure to report the patient incident to the manufacturer that caused the vaporizer's destruction. Had St. Mary's not refused to produce the ARCA reports, resulting in the striking of its pleadings, the jury would have determined that causation issue.

[23]/Russell claimed she did not understand the significance of Pszeniczy's note when she read it (T874). That fact was irrelevant because the standard established by 21 U.S.C.A. §360(i) is an objective, not subjective, one.

Alonzette's overdose to both Ohmeda and the FDA. St. Mary's only defense, i.e., that Snyder's limited investigation did not give it reason to suspect the vaporizer, was legally insufficient. Under 21 U.S.C.A. §360(i), St. Mary's duty arose if its medical personnel became aware of information bringing the vaporizer into question. And, the medical personnel had an affirmative duty to report that information to risk management (SS 1/14/94 D7,9,14-15,17-18; Fla. Admin. Code Rule 59A-10.003(3)). The fact that they might not do so would not excuse St. Mary's duty under the FDCA. St. Mary's was bound by its employees' knowledge, not exonerated by their failure to report it to Snyder. At the very least, as the trial court ruled, a jury question existed in regard to whether St. Mary's had a duty to report that the vaporizer had possibly injured a patient and to preserve the vaporizer (T1299). The jury never got to decide that issue because of the sanctions imposed upon St. Mary's for refusing to comply with the court's order.

St. Mary's argues that since case law holds that the FDCA does not create a private cause of action, Plaintiffs could not use St. Mary's violation of 21 U.S.C.A. §360(i) to establish a duty to preserve the vaporizer. St. Mary's fails to acknowledge a distinction between the creation of a private cause of action and using the violation of a statutory duty as evidence of common law negligence. ORTHOPEDIC EQUIPMENT CO. v. EUTSLER, 276 F.2d 455, 460-62 (4th Cir. 1960). This distinction is clearly recognized in the case law. In GROVE FRESH DISTR'S v. FLAVOR FRESH FOODS, 720 F.Supp. 714 (M.D. Ill. 1989), the court rejected the argument that the plaintiff's lawsuit was nothing more than an attempt to recover damages for violation of the FDCA, stating:

> Although courts have held that there is no private cause of action under the FDCA, Grove Fresh has not brought suit directly under the FDCA or its accompanying regulations. Grove Fresh relies on the FDA regulation merely to establish the standard or duty which defendants allegedly failed to meet. Nothing prohibits Grove Fresh from using the FDCA or its accompanying regulations in that fashion.

In KEIL v. ELI LILLY & CO., 490 F.Supp. 479 (E.D. Mich. S.D. 1980), the court stated that even though there was no private cause of action under the FDCA, a violation of the Act nonetheless gave rise to a rebuttable presumption of negligence under Michigan's common law.[24] One final case, STANTON BY BROOKS v. ASTRA PHARMACEUTICAL PRODUCTS, 718 F.2d 553 (3d Cir. 1983), is similar to this case. It involved a negligence and products liability action brought against the manufacturer of an anesthetic by the mother of a child who suffered brain damage from the anesthetic. The Third Circuit held that the manufacturer's noncompliance with the FDCA's reporting requirements of all adverse reactions to its drugs was admissible, and sufficient, to support a finding of negligence on its part. The court found that under Pennsylvania law, the FDCA violation was negligence per se.

As in the above cases, St. Mary's violation of the FDCA by failing to report this adverse incident to the manufacturer and the FDA was at least evidence of negligence under Florida law. Violation of statutes in Florida may be either negligence per se or evidence of negligence. Violation of a statute is negligence per se where the statute is designed to protect a particular class of persons from their inability to protect themselves, or where the statute establishes a duty to take precautions to protect a particular class of persons from a particular injury or type of injury. RELIANCE ELECTRIC COMPANY v. HUMPHREY, 427 So.2d 214 (Fla. 4th DCA 1983). Violation of safety provisions, including federal regulations, are negligence per se, DEL RISC0 v. INDUSTRIAL AFFILIATES, 556 So.2d 1148 (Fla. 3d DCA 1990); FLORIDA FREIGHT TERMINALS v. CABANAS, 354 So.2d 1222 (Fla. 3d DCA 1978). Violation of the FDCA is at least evidence of negligence in Florida. BURKE PEST CONTROL v. JOSEPH

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[24]/Just as the failure to comply with the FDCA is evidence of negligence, it has also been held that a defendant's compliance is admissible as evidence of the exercise of reasonable care. Cf. SILKWOOD v. KERR-McGEE CORP., 485 F.Supp. 566, 578 (W.D. Oklahoma 1979).

SCHLITZ BREWING 438 So.2d 95 (Fla. 2d DCA 1983).

Essentially, St. Mary's argues that the duty imposed by 21 U.S.C.A. §360(i) was not designed to protect Plaintiffs. Clearly it was as to Plaintiffs' cause of action for spoliation. Goodyear testified that if this patient incident had been reported to Ohmeda, the vaporizer would have been retained and tested, not dismantled. Therefore, the reporting requirements were not only to prevent future patients from being injured, but also to disclose, through testing, the cause of the patient incident reported. However, even if Alonzette and her parents were not within the class of persons the statute was designed to protect, that would only mean that St. Mary's violation of the statute was evidence of negligence, rather than negligence per se. DeJESUS v. SEABOARD C.L.R. CO., 281 So.2d 198 (Fla. 1973).

Even the cases cited by St. Mary's are not contrary to the above case law. They merely hold that the FDCA does not create a statutory federal cause of action for damages in a private citizen, but that a violation of the statute can create a rebuttable presumption of negligence in a state tort action. Likewise, STATE EX REL BROWARD COUNTY v. ELI LILLY, 329 F. Supp. 364 (S.D. Fla. 197 1) indicated that an early version of the bill creating the FDCA included a provision for a federal cause of action for damages. Later versions omitted that provision as creating an unnecessary federal remedy duplicative of state remedies. 329 F. Supp. at 365. In footnote 3, the court stated that a plaintiff's common law theories of recovery based upon a violation of a duty owed under the FDCA must be brought in Florida's state court system, which would have to decide whether violation of the FDCA constituted negligence per se or evidence of negligence under Florida law. Id. at 366.

C) A "Duty" Also Existed Under State Statutes and Administrative Regulations

Snyder testified that St. Mary's was required to file a report with the State within 15 days

Of a patient injury or death, and was also required to make a thorough investigation into all probable and possible causes. (SS 6/24/94 D131). HRS's 15 day report specifically inquired as to whether any hospital equipment was involved (Id. Dl l l-12). Snyder admitted that in order to answer that question, part of risk management's responsibility was to investigate and determine whether the equipment was so involved (Id. D112). Accordingly, as part of its risk management duties, St. Mary's had a duty to preserve the vaporizer under $395.0197 Fla. Stat. and Fla. Admin. Code Rule 59A-10.0065, at least until it had affirmatively eliminated the vaporizer as a cause of Alonzette's death. St. Mary's did not do that here, and its failure to comply with these requirements was at least evidence of negligence. ALFORD v. MEYER, 201 So.2d 489 (Fla. 1st DCA 1967); SCOTT v. MIDYETTE-MOOR, INC., 221 So.2d 178 (Fla. 1st DCA 1969); DeJESUS v. SEABOARD C.L.R., supra.

3) **Plaintiffs Proved Impairment of Their Medical Malpractice Claim**

St. Mary's claims Plaintiffs did not prove that destruction of the vaporizer impaired a products liability case against Ohmeda. The obvious reason Plaintiffs did not present that proof is because the only spoliation claim tried was impairment of the underlying malpractice claim. Plaintiffs presented ample evidence that their ability to prove that claim was impaired. If Ohmeda had been notified of Alonzette's death, it could have performed tests to determine the cause of the vaporizer's malfunction. The Plaintiffs were prevented from proving what Goodyear said was the most probable explanation of the vaporizer's malfunction, i.e., St. Mary's anesthesia technician's placing the wrong agent in the vaporizer. That proof would have been important in light of St. Mary's contention that it was impossible for its employees to fill the vaporizer with an incorrect agent because of the color-coded key system, and therefore the vaporizer had simply spontaneously malfunctioned. Whether St. Mary's impaired Plaintiffs'

ability to prove their malpractice claim would have been a jury issue if St. Mary's had not agreed to the striking of its pleadings and defenses instead of producing the ARCA documents.

4) Plaintiffs Proved a Causal Connection

Plaintiffs proved at trial impairment of their ability to prove medical malpractice because the vaporizer was destroyed. If Ohmeda had been told the vaporizer was suspected in Alonzette's death, it could have run tests that would have proven why it malfunctioned. Without that testing, Chalmers could only render his best opinion as to the cause of the malfunction. St. Mary's claims that his opinion was sufficient proof of medical malpractice without the vaporizer. But Chalmers admitted that he had no evidence to support his opinion except the elimination of other causes (CG D35). Whether his opinion was sufficient or not was an issue the jury would have determined if St. Mary's had not chosen sanctions over production.

Florida's Common Law Is Inadeauate

Destruction of evidence has become an increasingly serious legal problem. Since the mid-1980's, spoliation of evidence has moved from relative obscurity to prominence as a legal issue.[25] Today, courts are frequently asked to deal with the loss, alteration or destruction of evidence. This is evidenced by the increasing number of cases in Florida regarding destruction of evidence. Because of this increasing problem, courts are becoming more aggressive and imposing sanctions in one form or another against the party responsible for the loss of evidence. Courts have utilized various methods of dealing with evidence destruction: evidentiary inferences or presumptions, criminal sanctions, civil discovery sanctions and now the tort of spoliation. Unlike many states, Florida does not have a statute imposing criminal liability for

[25]/For example, in high profile cases, A.H. Robbins was accused of intentionally destroying documents relevant to Dalcon Shield litigation. 20 U. RICH. L.R. 191. Eastman-Kodak Company admitted destroying documents in an antitrust suit. Id.

destruction of evidence in civil actions. Even in the majority of states which do, it is only a misdemeanor, which is a minimal deterrence where a party to a civil action stands to gain substantial monetary benefit by destroying evidence. SMITH v. SUPERIOR COURT, 15 1 Cal. App.3d 491, 198 Cal. Rptr. 829, 835 (Cal.App.2 Dist.1984). Also, there are no reported cases of any criminal convictions for spoliation of evidence in civil litigation. And, finally, even if criminal sanctions have a deterrent effect, they fail to compensate the victim in a civil suit.

The imposition of discovery sanctions is also inadequate because they generally do not reach instances where the evidence was destroyed prior to the lawsuit being filed. In order to impose discovery sanctions, most states require that the destruction of evidence occur after litigation is filed and/or a violation of a court order occurs. The final remedy, a spoliation inference or rebuttable presumption that the destroyed evidence would be unfavorable to the party who caused it to be destroyed, is also inadequate and does not effectively deter spoliation. The jury is not required to infer the spoliator's liability; rather, it is merely permitted to do so. Consequently, a defendant faced with the possibility of a potentially large liability may choose to spoliate damaging evidence and risk explaining his conduct to the jury. He may decide to take his chances that he can rebut the inference or presumption in light of the plaintiff's lack of evidence. Therefore, an inference or rebuttable presumption of negligence does not effectively deter destruction of evidence. Note, "Smith v. Superior Court": A New Tort of Intentional Spoliation of Evidence, 69 Minn. L. Rev. 961, 980 (1985); Comment, "Spoliation: Civil Liability For Destruction of Evidence", 20 U. Rich L. Rev. 191, 207 (1985).

As society evolves, individuals necessarily sustain new injuries that require courts to fashion appropriate remedies. Tort law is always responding to the increasing need to protect litigants' rights. In recognizing a cause of action for spoliation for the first time, the SMITH court, supra, relied upon the reasoning of Professor Prosser (198 Cal Rptr at 832):

> New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before . . . .The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interest are entitled to a legal protection against the conduct of the defendant, the mere fact that the claim is novel will not operate as a bar to a remedy.

St. Mary's argues that this Court should not follow the Third District's lead in adopting spoliation as a tort because of possible "speculation" and "judicial mischief". However, as stated in the Minnesota Law Review, 69 Minn. L.Rev 961, 972 (1985):

> The benefits of recognizing a tort cause of action for.. . spoliation of evidence outweigh any burdens that may result to potential defendants. The new tort promotes both public interests, by enhancing the administration of justice and deterring the destruction of evidence, and private interests, by providing an injured plaintiff with a realistic opportunity to receive compensation for injuries. Any burden imposed on potential defendants would be minimal and may be largely avoided.

The Trend is Towards Adoption of the Tort of Spoliation

Courts in twelve states have adopted the tort of spoliation: Alaska, California, Florida, Illinois, Kansas, New Jersey, Ohio, Texas, New Mexico, Pennsylvania (See cases listed on A17). It is untrue that 17 of 23 jurisdictions have "declined to recognize the spoliation tort," as St. Mary's claims. The reason most of those courts did not adopt the tort had to do with various deficiencies particular to the case before them. In other words, the majority of those courts simply found that the facts of the case before them would not support a spoliation cause of action. (See cases listed on A18). If the Court even reaches this issue, it should follow the lead of those courts that have adopted a spoliation tort.

The Economic Loss Rule Does Not Bar Recovery for Spoliation

This argument was not raised in the trial court or before the Fourth District, and therefore is unpreserved. Additionally, the parties have no contract under which Plaintiffs could recover. The economic loss rule does not apply to torts independent of a contract. BANKERS RISK MANAGEMENT v. AV MED MANAGED CARE, 697 So.2d 158 (Fla. 2d DCA 1997).

The Spoliation Proven At Trial was Intentional

Plaintiffs' Complaint alleged both intentional and negligent spoliation. At trial, proof was presented that would have allowed the jury to find intentional [as well as negligent] spoliation. Because of the directed verdict on liability as sanctions, the jury never got to determine whether the spoliation proven was intentional or negligent.

A Rebuttable Presumption Would Place St. Mary's In No Different Position

St. Mary's argues that Plaintiffs' spoliation claim should have been tried as a rebuttable presumption of negligence under PUBLIC HEALTH TRUST OF DADE CO. V. VALCIN, 507 So.2d 596 (Fla. 1987). Under VALCIN, before a rebuttable presumption would apply, the jury would first have to determine whether St. Mary's intentionally or negligently caused destruction of the vaporizer. Relevant to that issue would be evidence as to whether St. Mary's should have preserved the vaporizer. Therefore, St. Mary's would have been in the same position, with the same choices, vis-a-vis its risk management privilege if the case had been tried with a rebuttable presumption. Trying the case under a spoliation theory was harmless at best, particularly in light of the directed verdict on liability and the fact that the jury only determined damages.

POINT IV

THIS ISSUE IS MOOT AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONSOLIDATING THE LAWSUITS

The Court should not entertain this point since it was rendered moot by the directed verdict on liability entered against St. Mary's as a sanction.

St. Mary's states that incident or investigative reports are protected from discovery under §395.097(4) Fla. Stat. (1993), and under work product and attorney-client privileges. In this case, the trial court repeatedly upheld St. Mary's risk management privilege in pre-trial discovery. St. Mary's chose to waive that privilege on the first day of trial. It agreed to "open the door with regard to the risk management file," and preserved an objection solely as to "documents and information in there that I've sent to them with regard to this case" (T316-17).

The Consolidation Did Not Require St. Maw's to Waive its Risk Management Privilege

St. Mary's claims that consolidation forced upon it the "impossible choice" of "either restricting its defense of the spoliation suit by not using risk management materials, or using those materials at the cost of relinquishing its statutory privilege in the medical malpractice lawsuit." The fallacy in St. Mary's argument is that consolidation in this case, unlike the cases cited by St. Mary's, did not deprive St. Mary's of its risk management privilege. That privilege was lost solely as a result of St. Mary's voluntary decision to waive the privilege. After it made that decision, and produced its risk management file, and allowed the deposition of Snyder to be taken regarding risk management matters, and produced Baron's handwritten notes, St. Mary's realized it had made a tactical mistake. It wanted to reassert the privilege, but it was too late, and thus St. Mary's should have handed over the ARCA documents.[27]

[27]/The trial court never even ruled that the ARCA documents were admissible, only that they were discoverable because the privilege had been waived.

The trial court repeatedly asked St. Mary's to demonstrate how it was being prejudiced by the consolidation, i.e., why it was necessary for St. Mary's to waive its risk management privilege to defend the spoliation claim (T37). The court was not required to rely upon St. Mary's unsupported claim in that regard. The court determined that St. Mary's claim that it needed Snyder's testimony regarding her investigation to show no notice was false. First, St. Mary's was attempting to use her testimony to perpetuate a fraud. St. Mary's knew it had instructed Snyder not to investigate and yet it was going to use her limited investigation to show no notice. Second, St. Mary's knew Baron had conducted risk management's investigation and the ARCA documents showed that Baron and St. Mary's were aware of Pszeniczy's note, his Field Report, and the vaporizer's malfunction. That is obviously the only reason St. Mary's refused to produce the ARCA documents and opted for the imposition of sanctions instead. St. Mary's knew that if it produced those documents everyone would see that it was not only guilty of spoliation, but it was also knowingly presenting a fraudulent defense to that claim.

Third, whether Snyder had "notice" was not only factually irrelevant since Baron conducted the investigation, it was also legally irrelevant. As demonstrated, St. Mary's duty to report the incident to the FDA and Ohmeda arose when its medical personnel became aware of information reasonably suggesting the vaporizer may have caused Alonzette's death. If its medical personnel had that information, St. Mary's was deemed to have that information. Clearly there was evidence St. Mary's employees, Russell and Boyum, (T300,587,632,646,898,902), were aware of Pszeniczy's note indicating the vaporizer had emitted too much anesthesia. Donovan was also aware of Pszeniczy's note (T651,659,722), which Snyder admitted suggested that the vaporizer may have been a cause of Alonzette's death (SS 6/24/94 D133). Therefore, St. Mary's had a duty to report the incident to Ohmeda and the FDA, and preserve the vaporizer. Since Russell, Boyum, and Donovan were aware of

Pszeniczy's note, the fact that Snyder did not learn of it until much later was irrelevant[28] and would not have excused St. Mary's failure to secure the vaporizer.

St. Mary's Chose to Voluntarily Waive Its Risk Management Privilege

St. Mary's voluntarily waived its risk management privilege because it wanted to place before the jury the result of Snyder's limited investigation, all the while representing that it was risk management's investigation. What St. Mary's did not anticipate was that Snyder would divulge the truth, i.e., that Baron actually performed risk management's investigation (Id. D19-27,42). It was then that St. Mary's realized that if it produced the ARCA documents, they would show that its "no notice therefore no duty" defense was fraudulent. The fact that St. Mary's was willing to waive its privilege when it thought it could get away with only disclosing Snyder's investigation is itself evidence that the waiver was voluntary. As long as St. Mary's thought it could produce only a portion of its risk management documents, and escape producing the real portion, the ARCA reports, it voluntarily waived its privilege. When Snyder disclosed that the ARCA reports were also risk management documents, St. Mary's wanted to renege on its waiver. However, the waiver was a complete waiver by which St. Mary's agreed to "open the door with regard to the risk management file" (T3 16).

Moreover, contrary to St. Mary's contention, the ARCA reports would not prejudice it in the malpractice claim. St. Mary's employees had fully disclosed on deposition everything they knew about the malpractice issue. Therefore, there could be nothing in the ARCA reports that proved that St. Mary's employees negligently filled the vaporizer with the wrong anesthesia agent, that is unless St. Mary's employees gave false testimony on their depositions.

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[28]/Even when she learned of the note, and possible malfunctioning equipment, St. Mary's told her not to notify the manufacturer or HRS (Id. D134-35).

The Standard of Review is Abuse of Discretion

Consolidation/severance issues are matters left to the broad discretion of the trial court, BRODY v. CONSTR., INC. v. FABRI-BUILT STRUCTURES, 322 So.2d 61 (Fla. 4th DCA 1975), which is only limited where the proceedings are not related or where a party will be deprived of substantive rights. WAGNER v. NOVA UNIVERSITY, INC., 397 So.2d 375 (Fla. 4th DCA 1981) and Fla.R.Civ.P. 1.270. Neither factor is involved here.

1) No Loss of Substantive Rights

The substantive right that St. Mary's claims it was deprived of was its risk management privilege because it was "forced to choose between a statutory privilege in the negligence suit, and its need for the privileged materials to defend the separate spoliation suit" . And while St. Mary's continues to make that claim, it refused to prove that claim in camera to the trial court because it could not support the claim. As a matter of fact, when the trial court reviewed the ARCA reports, Plaintiffs believe it discovered that St. Mary's did not "need" Snyder's testimony to defend spoliation because the presentation of her testimony constituted a fraud on the court and Plaintiffs, and the ARCA documents demonstrated that. And the Fourth District, after obviously reviewing the ARCA reports, also agreed that there was no forced waiver:

> St. Mary's was not deprived of any substantive rights by virtue of the trial court's consolidation.. .Contrary to its claim, consolidation did not compel St. Mary's to waive the risk management privilege. Instead, St. Mary's made a conscious decision to waive the privilege in order to defend the spoliation claim.

Because St. Mary's voluntarily gave up its risk management privilege, the cases cited by St. Mary's for the proposition that Plaintiffs had to demonstrate an undue hardship to obtain the ARCA reports, and cases involving a deprivation of substantive rights are inapplicable.

2) Similarity of Claims

St. Mary's incorrectly argues there are no common questions of law or fact in this case.

Obviously the damages were identical in both the malpractice and spoliation cases. Before sanctions and a directed verdict were entered against St. Mary's, there were two issues before the jury: (1) whether Plaintiffs proved that St. Mary's was negligent in filling the anesthesia machine, and if so their damages, and; (2) if Plaintiffs did not prove St. Mary's negligence, whether St. Mary's spoliation had impaired their ability to do so, and their damages. The damages were identical under each claim. Additionally, the facts of both lawsuits arose out of the same incident, transaction or occurrence. Furthermore, while counsel for Plaintiffs filed a separate lawsuit when he learned of the spoliation, he obviously could have simply amended his pending malpractice lawsuit against St. Mary's to state an additional count for spoliation. A plaintiff may set up in the same action as many causes of action he has against a defendant, even though they do not have common questions of law or facts. Fla.R.Civ.P. 1.1 10(g).

There was no abuse of discretion in consolidating Plaintiffs' malpractice and spoliation lawsuits. In MILLER v. ALLSTATE INS. CO., 573 So.2d 24 (Fla. 3d DCA 1990), the Third District held that a plaintiff need not try his underlying lawsuit first and receive an adverse verdict before pursuing a spoliation claim. The court stated at 573 So.2d at 28, f.7:

> For reasons of judicial economy, and to prevent piecemeal litigation, we see no reason to wait for a final judgment in the underlying lawsuit before bringing an action for the destruction claim. We agree with the reasoning in Smith v. Superior Court,. . that a jury trying the concurrent claims in a single proceeding may be in the best position to determine issues of causation and damages.

There is also the possibility of inconsistent verdicts if the cases are tried separately.

St. Mary's argues that this Court's affirmance will eliminate the statutory risk management privilege completely in medical malpractice cases. The effect of joinder in future cases is irrelevant. It is clear that in this case St. Mary's was not compelled to offer risk management evidence to defend against the spoliation claim. It chose to do so, but that choice was not a Hobson's choice. It was a voluntary one that backfired. St. Mary's also claims it was

prejudiced because Dr. Frost was allowed to give testimony relevant to the spoliation case that was inadmissible in the malpractice case, i.e., that St. Mary's had failed to produce malfunctioning equipment in a prior malpractice case. The admissibility of that testimony was not only proper,[29] but it also became moot and harmless as a result of the directed verdict on liability against St. Mary's as a sanction. The only issue decided by the jury was damages.

St. Mary's complains that counsel made statements pertinent to the spoliation claim which prejudiced its right to a fair trial on the negligence claim. First, the court directed a verdict on liability so the jury never got to decide the negligence claim. Second, none of the statements were objected to. Third, statements about St. Mary's not disclosing the truth to the Plaintiffs were based on the evidence. The Plaintiffs never learned until trial what had happened to Alonzette because St. Mary's never bothered to tell them the truth. Mr. Brinson testified that "up to today" they had not known what had happened to Alonzette (T514). He finally found out the truth by sitting day-in and day-out in the courtroom listening to the trial testimony. Before then, the Plaintiffs had not known, nor understood, why Alonzette died (T514).

Counsel for Plaintiffs did not make a "send a message" comment, nor was it objected

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[29]/Dr. Frost's testimony was properly admitted as to the issue of spoliation, i.e., whether St. Mary's knew that it should preserve the malfunctioning vaporizer and intentionally or negligently failed to do so. Dr. Frost's testimony was relevant under §90.404(2) Fla. Stat. Evidence of similar acts is admissible when it is probative to show intent. Evidence of similar acts which contradict an innocent explanation of the defendant's act is admissible. WORDEN v. STATE, 603 So.2d 581,583 (Fla. 2d DCA 1992); STATE v. EVERETTE, 532 So.2d 1124, 1125 (Fla. 3d DCA 1988); SAMPSON v. STATE, 541 So.2d 733, 735 (Fla. 1st DCA 1989); UNITED STATES v. NICKERSON, 606 F.2d 156 (6th Cir. 1979), cert. denied, 444 U.S. 994, 100 S.Ct. 528, 62 L.Ed.2d 424. The more frequently an act is done, the less likely it is that it was done innocently. JENSEN v. STATE, 555 So.2d 414, 415 (Fla. 1st DCA 1989); DUCKETT v. STATE, 568 So.2d 891 (Fla. 1990). Evidence that a number of similar acts occurred is probative of the lack of a defendant's innocence and the presence of the necessary intent. UNITED STATES v. WINKLE, 587 F.2d 705 (5th Cir. 1979), cert. den. 100 S.Ct. 51. Ehrhardt, Florida Evidence 1995 Edition $404.12, p. 174-177.

to.[30] The remark did not ask the jury to punish St. Mary's The remark simply told the jury that it was important for St. Mary's to have the vaporizer tested to prevent this type incident from recurring. Only testing could have conclusively demonstrated what had gone wrong, thus allowing precautions to be taken to prevent a recurrence. This argument was based on the evidence. Dr. Cooney testified that whenever an anesthetic event goes other than planned, the equipment should be examined "so that similar events do not occur" (JC D12). Snyder also testified that part of risk management's function is to rule out the cause of patient injuries in order to prevent future injuries (SS 6/24/94 D66).

No Abuse of Discretion

The trial court did not abuse its discretion in consolidating the lawsuits under MILLER v. ALLSTATE INS. CO., supra, because St. Mary's refused to demonstrate why it would be forced to waive its risk management privilege to use risk management materials in defense of the spoliation case. In fact, its claim in that regard was false, St. Mary's voluntarily waived its risk management privilege. Testimony presented and statements made relevant to the spoliation case could not have prejudiced St. Mary's in the medical malpractice lawsuit in light of the directed verdict on liability and the fact that the only issue the jury ultimately determined was damages. Accordingly, consolidation of the two lawsuits was harmless, at best.

CONCLUSION

The Final Judgment entered in favor of Plaintiffs should be affirmed.

[30/A] "send a message" or "conscience of the community" argument is not fundamental error and must be objected to or it is waived. BLUE GRASS SHOWS v. COLLINS, 614 So.2d 626 (Fla. 1st DCA 1993).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 9TH day of OCTOBER, 1997, to: ARTHUR J. ENGLAND, JR., ESQ., Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Ave., Miami, FL 33131

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