IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 89,889

ST. MARY'S HOSPITAL, INC.

Petitioner,

v.

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

Respondents.

PETITIONER'S REPLY BRIEF ON THE MERITS

ON REVIEW OF A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL

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The following references are used in this brief:

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(3) references to the trial transcript pages, as marked by the clerk of the lower court and not the court reporter, are shown as "(T. ___)."

SUMMARY OF ARGUMENT

The spoliation cause of action described and approved by the Fourth District, and the quite different spoliation cause of action claimed by the Brinsons to have been tried in circuit court, lack material elements that the courts require as a foundation for such a lawsuit. Vacation of the Brinsons' spoliation judgment is required if a spoliation tort is available in Florida for situations such as existed in this case — a second, independent cause of action based on lost evidence which is brought against the defendant in a pending negligence suit. The Court should not approve a spoliation lawsuit in those circumstances, however, as Florida law has long provided adequate means to remedy a plaintiffs lack of essential evidence. Spoliation should be reserved, if approved at all, for claims of an intentional destruction of evidence or claims brought against a third party.

Consolidation of the Brinsons' two lawsuits purely for judicial convenience constituted reversible error when St. Mary's was faced with the loss or required waiver of substantive rights created by statute — the privilege against disclosure of risk management materials, and the apportionment of fault to the negligent Dr. Cooney. There was no voluntary waiver of the privileges in St. Mary's exercising a choice which was forced on it through the simultaneous trial of the Brinsons' two, separate causes of action.

The trial court erred in imposing a sanction of the harshest magnitude — striking St. Mary's defenses and directing a verdict on liability for the Brinsons — for the non-production of a small number of documents in mid-trial when the court had been requested by both sides, and knew, that a lesser sanction was suitable. In all events, the damage award was so ostensibly excessive that the court should have ordered remittitur or, alternatively, a new trial on damages.

ARGUMENT

The Court accepted jurisdiction of this case based on assertions of dual decisional conflicts among the district courts: the adoption of different versions of a new common law cause of action in tort called "spoliation of evidence"; and the consolidation of two lawsuits when substantive

rights are sacrificed for judicial convenience. The answer brief filed by the Brinsons (referenced as "AB at __") brings the conflict in both areas sharply into focus, and it highlights the importance of the Court's addressing these issues as an exercise of its responsibility to ensure the sound and practical administration of justice in Florida's courts.'

I. By affirming the Brinsons' spoliation judgment, the Fourth District approved different material elements for that tort than had been adopted by the Third District, and the Fourth District created an unneeded new cause of action in these situations that generates disharmony in the law and complexity in litigation.

The Brinsons have quite literally withdrawn all support for the Fourth District's decision, *as written,* on the issue of spoliation. In their answer brief, they knowingly abandon the decision accepted for review, to argue instead that their $9 million judgment for spoliation rests on a different lawsuit than the one described in the district court's decision. The Brinsons' disdain for the precedential effect of the district court's decision offers the Court an ideal opportunity to address the place of this new tort in Florida's jurisprudence, if any. Moreover, the Brinsons themselves have shown that, either on the basis of the district court's understanding of the Brinsons' lawsuit or their own, they never established the material elements of any such cause of action and, in fact, there was no need for a spoliation lawsuit at all.

The Brinsons' analysis of the tort they claim to have tried totally confirms St. Mary's contention that this new tort is not needed in Florida at all for the situation raised in this appeal: a second lawsuit brought against the defendant in a pending negligence lawsuit which asserts, as an

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[1] The Brinsons' answer brief contains a number of completely untenable assertions of law for which no authority is (or can be) provided. St. Mary's cannot possibly address all of these declarations in a reply brief, but has endeavored to highlight some of the most egregious. A prime example is the assertion that the major issues of spoliation and consolidation "cannot" be raised by St. Mary's, and are "moot," because the challenged rulings of the trial court on those issues preceded in time the directed verdict entered as a sanction. (AB at 18-19, 3 1, 44). This is patently untenable. The only opportunity provided a defendant to raise legal errors made prior to a sanction-caused direct verdict is on plenary appellate review following entry of a final judgment. *See Roofcraft Int'l, Inc. v. Thomas, 677 So.* 2d 39 (Fla. 4th DCA 1996); *Karr v. Sellers, 620 So.* 2d 1104 (Fla. 4th DCA 1993).

independent cause of action, an impairment of that pre-existing suit by reason of the defendant's unintentional loss of relevant evidence. The Brinsons' very analysis of their combined spoliation and medical malpractice trial demonstrates conclusively that existing law has been, and was in their case, completely adequate to protect plaintiffs in that circumstance. The range of trial mischief and judicial confusion displayed in the Brinsons' trial provides empirical proof that there is far greater harm to the utilization of spoliation suits in these circumstances than there is benefit to plaintiffs in the position of the Brinsons.

As a preliminary matter, the Brinsons claim that St. Mary's failed to challenge the adoption of spoliation as an independent tort in the trial court, so that the issue is not preserved for Court consideration. (AB at 3 1). The district court rejected that argument in the belief that the parties had joined issue on that subject in the trial court — "Initially, we find that *the trial court* did not err in allowing the Brinsons to proceed on an action for the spoliation of evidence" (685 So. 2d at 35, emphasis added) — and the district court itself not only went on to evaluate the viability of that tort but to declare "we now expressly recognize a cause of action for the spoliation of evidence . . . ." *Id.*

A. The Brinsons failed to establish the essential elements of the tort of spoliation, both as that tort is addressed in the decision of the Fourth District and in the very different form that the tort is now described by the Brinsons.[2]

The Fourth District adopted the elements of a spoliation tort set out in the *Herman* case.[3] 685 So. 2d at 35. These elements include (i) a potential civil action, (ii) a preservation duty, (iii) an impairment of the potential suit, and (iv) a causal connection between the missing evidence and that potential lawsuit. Despite the district court's *saying* it was adopting the *Herman*

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[2] The district court can be forgiven for not addressing the spoliation tort which the Brinsons *now* claim they pursued. As the Brinsons themselves have stated, the very nature of their lawsuit was "evolving" as their suit progressed. (AB at 5). The evolution of their lawsuit explains as well why, at various stages of the litigation, St. Mary's counsel may not always have responded in argument to the suit that the Brinsons *now* claim was being tried by them *then.*

[3] *Continental Ins, Co. v. Herman, 576 So.* 2d 3 13, 3 15 (Fla. 3d DCA 1990), *review denied, 598 So.* 2d 76 (Fla. 1991).

elements, these elements do not exist in the lawsuit that the district court analyzed and described in its decision, Nor do they exist in the very different lawsuit that the Brinsons now claim they were pursuing. A failure to establish all of the essential elements of a cause of action is fatal to any recovery, of course, and a district court decision which is not supported by competent substantial evidence cannot stand. *Shevin v. Yarborough, 274 So.* 2d 505 (Fla. 1973).

1. **The Brinsons failed to establish the essential elements of the spoliation cause of action which is analyzed and described in the district court's decision.**

The district court's decision recites that the Brinsons had a "'potential civil claim against the vaporizer's manufacturer." 685 So. 2d at 34. In their answer brief, the Brinsons acknowledge St. Mary's contention that they elected ***not*** to bring or to pursue a claim against the manufacturer quite voluntarily, without any contention that the absent vaporizer in any way impaired their ability to do so.[4] Obviously, this acknowledgement by the Brinsons eliminates any possible argument that they met three of the indispensable, legal elements for the spoliation cause of action which the district court evaluated: a potential civil action against the manufacturer (they claim none); an impairment of that potential claim by St. Mary's (they do not claim that loss of the vaporizer impaired their ability to proceed against Ohmeda); and any causal connection between the impairment of that potential suit and the vaporizer (they do not assert that the unavailability of the vaporizer had anything to do with their decision not to sue Ohmeda). Patently, the district court erred in affirming a "spoliation" judgment based on a suit that the Brinsons themselves acknowledge they never brought or pursued.

A cause of action for spoliation against the manufacturer additionally would have lacked the element of "duty." The Fourth District never identified a duty running from St. Mary's to the Brinsons. It simply declared that one was alleged. The Brinsons now endeavor to identify two.

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[4] AB at 6 ("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"), 3 1, 32, 33 ("Plaintiffs never argued or proved impairment of a products liability case at trial"), 39.

They first argue, in cart-before-the-horse fashion, that a "duty" was recognized by two employees of St. Mary's in the course of testimony and a deposition (AB at 34, 35), apparently asking the Court to hold that in-trial testimony can itself constitute the predicate element of "duty" for a cause of action. That is not the law, obviously. Evidence adduced in a trial can only provide evidentiary support for a duty that is found to exist elsewhere. W. PROSSER, LAW OF TORTS, 206 (34th ed., 1971); RESTATEMENT OF TORTS, § 328B (1965); *57 AM.* JUR. 2D *Negligence* § *34* (1971).

They next argue that federal and state statutes have created a duty — the requirement to report to governmental agencies and to a manufacturer that medical equipment may have been involved in a death. As St. Mary's had pointed out, however, neither of these sources identify a duty running from St. Mary's ***to the Brinsons,*** and both of these statutes have been held ***not*** to create a private cause of action. See St. Mary's initial brief at 26, n.20. The Brinsons nowhere address, let alone counter, the decisions which construe these statutes to deny a cause of action to private parties.

2. The Brinsons never proceeded on the very different, $9 million spoliation judgment which they now claim they pursued, but even if they did they still failed to establish the essential elements of a spoliation lawsuit.

The Brinsons contend that the spoliation claim they pursued was based on losing a potential cause of action against St. Mary's itself, and not against the manufacturer. (AB at 5). There are two reasons why this contention cannot support the district court's decision. First, this contention is manufactured for appeal; it is not borne out by the record of the trial court proceeding. Second, even if the Brinsons had proceeded on the claim they now assert, it is even more clear that such a suit could never meet the elements essential of a spoliation cause of action, and that the Brinsons' suit certainly did not.

The record on appeal is crystal clear that the Brinsons' spoliation suit was based on an inability to proceed against Ohmeda, the manufacturer of the missing vaporizer. This is unmistakable from the spoliation complaint, a copy of which is attached to St. Mary's initial brief

as Appendix 2.[5] This is also unmistakable from their representation to the trial court when they were explaining their position to the court at a hearing on St. Mary's motion to dismiss the spoliation lawsuit:

> [BRINSONS' COUNSEL]: I mean we have lost our cause of action against the manufacturer; there is no question about that . . . . We have lost the ability to prove a products liability case because they allowed the evidence to be destroyed in this case. If you will read specifically the damages, there's no question that we have lost the ability to prove a cause of action against the manufacturer.
>
> THE COURT: So the cause of action you have lost, allegedly, is not against St. Mary's. Your claim is against St. Mary's because of the loss of cause of action against —
>
> [BRINSONS' COUNSEL]: The manufacturer.
>
> THE COURT: — the manufacturer of the machine. Okay.
>
> [BRINSONS' COUNSEL]: If you will look to the way that is set forth, there is going to be evidence in this case that we have lost our ability to prove a products liability case against the manufacturer. There is no question that this is the case.

(T. at 13).

The Brinsons' assertion that their spoliation suit was actually tried by consent on the basis of a lost cause of action against St. Mary's, not the manufacturer (AB at 5, 3 1-33), rests entirely on one comment made by St. Mary's counsel in the course of opening argument in the Brinsons' ***consolidated*** trial.[6] This assertion not only explains how far these proceedings have been led from

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[5] Their exact language was "manufacturer and other responsible agents including the servicing company." (R. 1075). Although they argued that St. Mary's was the manufacturer's "agent" in an effort to have the Court deny review of the district court's decision (Jurisdictional Brief at 1), they have now abandoned that argument in the face of St. Mary's demonstration of the impossibility of that claim. (St. Mary's initial brief at 19-20).

[6] By combing through documents in the record for any remote evidence of support of their position, the Brinsons have come up with statements made in three documents which they now assert show St. Mary's awareness that the spoiled suit was against St. Mary's itself They direct the court to "R. 190,225 and 1068." (AB at 5, 31). The documents referenced and quoted by the Brinsons, however, are anything but evidence of a trial by consent on a spoliation suit different from the one that was pled. The first and second documents they cite and quote — one a motion by St. Mary's to stay proceedings during an appellate challenge to the spoliation

(continued . . .)

any semblance ofjudicial rectitude, but surely tells the Court the lengths to which the Brinsons will go to preserve their judgment.

There is no authority for the proposition that a phrase spoken in an opening argument of defense counsel constitutes consent to a trial on a cause of action different from that which the plaintiff has both pled and represented to the trial court, to prevent dismissal, is going to be tried. Rule 1.190 requires far, far more, and heaven help the judicial system if the position of the Brinsons were to be acknowledged. *See, for example, Raimi v. Furlong, 22* Fla. L. Weekly D2184, 2189 (Fla. 3d DCA Sept. 17,1997), where the court observed:

> Rule 1.190 . . . was never intended to allow one party to catch the opposition party off guard and inject new unpled issues that are relevant and related to other issues properly before the court.

Even the lawsuit below had been a claim by the Brinsons that they were impaired in pursuing a lost cause of action against St. Mary's, and not the manufacturer, the Brinsons have nonetheless failed to establish the essential, *Herman* elements of such a suit. A lost, "potential" suit against St. Mary's could never be established because the Brinsons were already pursuing an *actual* suit against St. Mary's based on virtually identical allegations as to the hospital's negligent loss of the vaporizer. The very pendency of the duplicative claims in that negligence suit would demonstrate that no "potential" suit existed.

Additionally, in the Brinsons' hypothetical case neither the "impairment" or the "causation" element of the tort was ever established. They certainly have never claimed futility in pursuing their medical malpractice negligence suit against St. Mary's, as the *Miller* decisions require.[7]

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suit, and the other St. Mary's third party complaint against Ohmeda — contain an utterly ambiguous description by St. Mary's *of the allegations of the Brinsons ' spoliation claim.* The third document is St. Mary's memorandum of law in support of dismissal, filed *before* the Brinsons' counsel clarified for the court that the lost cause of action was against the manufacturer, in which the referenced page merely discusses the absence of essential elements for a spoliation cause of action.

[7] *Miller v. Allstate Ins. Co., 573* So. 2d 24 (Fla. 3d DCA 1990), *review denied, 58* 1 So. 2d 1307 (Fla. 1991); *Miller v. Allstate Ins. Co., 650 So.* 2d 671, 673 (Fla. 3d DCA), *review* (continued . . .)

Indeed, they put considerable evidence before the jury in an effort to establish St. Mary's liability for medical malpractice,[8] and counsel for the Brinsons even began their case by arguing to the jury that it was completely unnecessary for them to have the machine for their negligence lawsuit against St. Mary's.

> [With the vaporizer,] I could stand before you and tell you with 100 percent certainty what caused that machine to malfunction, but folks . . . I don't have to stand before you and tell with 100 percent certainty. . . . We know it was the malfunction of the machine that caused the death. How do we know that'? The chief of anesthesia at St. Mary's who had the contract and still has the contract told us. What caused the machine to malfunction? Well, also fortunately for us, Ohmeda, I guess, takes pride in their product . . . [and] they ruled out the machine . . . .

(T. 378, 380). Causation, admittedly, could never be shown.

B. No second, independent cause of action for the negligent spoliation of evidence is necessary in Florida against a party/defendant in a pending negligence lawsuit.

St. Mary's has asked the Court to eschew a spoliation cause of action for Florida in the situation presented in this case, and in so doing to disapprove the Third District's split decision in *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. 3d DCA 1984), *review denied, 484 So.* 2d 7 (Fla. 1986). See St. Mary's initial brief at 30-39. The Brinsons' answer brief demonstrates the soundness of that request.

The Brinsons tell that the Court that the complaint in their spoliation suit, and the pretrial stipulation, were not limited to negligent spoliation, and therefore St. Mary's conduct was either negligent "or intentional." (AB at 5, n.3).[9] They also say that, in fact, their complaint alleged

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denied, 659 So. 2d 1087 (Fla. 1995).

[8] The Brinsons were unimpeded in presenting this evidence, and unimpaired in attempting to demonstrate St. Mary's negligence in relation to the vaporizer, even *though they had no access* to *the vaporizer itself for testing.* (See AB at 1-4). By their own description of their trial evidence, the Brinsons have demonstrated any underlying suit against St. Mary's could never have met the *Herman* element of an inability to prove the underlying action "owing to the unavailability of the evidence." 576 So. 2d 3 13 at 3 15.

[9] The Pretrial Stipulation, which one would think is designed to *narrow the* issues for trial, states only that the trial would determine whether "there was *negligence* on the part of St.

(continued . . .)

both. (AB at 43). The complaint says no such thing, and the absence of an affirmative allegation in a complaint does not mean, as the Brinsons' imply, that everything unsaid is available to be tried. Indeed, the law is exactly to the contrary. A cause of action is framed by and limited to the allegations in the complaint, and the adequacy of the complaint is construed against the pleader. ***Hart Properties, Inc. v. Slack, 159 So. 2d 236*** (Fla. 1963); ***Drady v. Hillsborough County Aviation Authority***, 193 ***So.*** 2d 201 (Fla. 2d DCA 1966), ***cert. denied,*** 210 So. 2d 223 (Fla. 1968). A contention of the same ilk was specifically addressed and rejected in ***Bondu*** where, as here, intentional spoliation was never pled.[10]

The Brinsons' attempt to create the possibility that St. Mary's intentionally destroyed the vaporizer is designed to circumvent the dual problems that inhere in any spoliation suit brought against the same defendant who is being sued for otherwise negligent behavior toward the plaintiff: (1) the fact that Florida law already adequately addresses lost evidence, without dual suits against the same defendant for merely negligent behavior; and (2) the fact that, with the exception of ***Bondu,*** the tort of spoliation has been confined nationwide to either an intentional tort or a suit against a third-party spoliator.[11]

There is no merit to the Brinsons' ominous suggestion that spoliation suits are needed to deter the rampant destruction of evidence by defendants in general. (AB at 41). No data supports that thesis, and certainly that problem does not exist in Florida where the courts have established completely adequate remedies to address evidence destruction when and if it occurs. *E.g., Valcin v. Public Health* ***Trust of Dade County, 507 So.*** 2d 596 (Fla. 1987); ***New Hampshire***

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Mary's in spoliation of the evidence." (R. 326, emphasis added).

[10] In ***Bondu,*** the court held that, "[s]ince Mrs. Bondu's complaint does not allege that the records were intentionally removed or destroyed, the hospital need not prove otherwise." ***Bondu, 473 So.*** 2d at 1313, n.5.

[11] The Florida spoliation cases are ***Miller I*** and ***II*** (third party), ***Herman*** (third party), and ***Brown*** (third party). See St. Mary's initial brief at 21-23. The California cases ***are Williams*** (third party), ***Velasco*** (third party), ***Reid*** (intentional and third party), ***Smith*** (intentional and third party), ***Cedars-Sinai*** (intentional) and ***Temple*** (intentional and third party). See St. Mary's initial brief Table of Citations.

Ins. Co. *v. Royal Ins.* Co., 559 So. 2d 102 (Fla. 4thDCA 1990).

The Brinsons have flatly acknowledged that two lawsuits against St. Mary's were really unnecessary. They say the facts of both "arose out of the same incident, transaction or occurrence," and the "damages were identical under each . . . ." (AB at 48). That, in a nutshell, is St. Mary's point. For the multiple reasons identified in St. Mary's brief, not the least of which are the absence of need and the inevitable litigation mischief and complexity, the Court should reject spoliation as an independent cause of action in situations such as this case presents.

II. By forcing the consolidation of two independent lawsuits solely for judicial convenience when statutory rights of privilege and apportionment of fault were necessarily impaired, the Fourth District decision departs from established law on absolute immunity for medical incident reports and on judicial authority for convenience consolidation.

The Brinsons make three arguments in defense of consolidation. They first say that consolidation did not deprive St. Mary's of any privilege or right, and that the loss of substantive rights was solely the result of St. Mary's voluntary decision to waive the privilege. They then assert that St. Mary's opposition to consolidation was unnecessary and untruthful because of what the Brinsons "believe" certain documents they've never seen might contain. (AB at 12-14, 45). They lastly assert that no evidentiary basis exists for the testimony of St. Mary's assistant risk manager because the hospital had a duty to report the Brinson incident to Ohmeda and the federal government. (AB at 44-49). None of these arguments justify the calamitous, "convenience" consolidation that occurred in this case.[12]

Without consolidation, St. Mary's would have had an unchallengeable privilege in the medical malpractice lawsuit not to disclose any medical incident report relating to the Brinsons, ***irrespective of what it contained.***[13] Every district court in the state (including the Fourth District)

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[12] The ***only*** record explanation for the Brinsons' pursuit of consolidation appears in their motion, where they state that "it would be the best use of judicial economy to consolidate these cases." (R. 1089).

[13] A plaintiff has no right to judge the scope of the defendant's exercise of a non-disclosure privilege, or by hindsight "I believe" speculation to challenge whether the use of any (continued . . .)

has enforced that privilege with absolute immunity, in the absence of an "undue hardship" showing by the plaintiff pursuant to Rule 1.280(b)(3). See St. Mary's initial brief at 40-41. Consolidation here, as the trial court was repeatedly told, *forced* St. Mary's either to abandon its privileges, or to curtail its defense of the spoliation suit ***irrespective of what the Brinsons might believe was efficacious for that defense.*** [14] To argue that St. Mary's voluntarily waived its risk management privileges as the Brinsons do, and to assert that St. Mary's waiver was a "conscious decision" as the district court did, is like saying that Socrates didn't have to take his life with an administration of hemlock after the Greek Senate had imposed a death sentence on him.[15] That, too, was both a voluntary and conscious choice by the condemned.

Similarly, consolidation directly resulted in St. Mary's loss of the statutory right to have fault apportioned to Dr. Cooney, the prime (if not only) cause of the Brinsons' loss. That substantive right was taken from St. Mary's, according to the Brinsons, when the trial court struck St. Mary's affirmative defenses as a sanction.[16] The sanction itself, however, was directly attributable to St. Mary's "no win" choice regarding its privileges, which in turn was directly

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particular item by the defense would or would not provide proof on a particular point in the lawsuit (such as the "notice" claim of the Brinsons). ***See Healthtrust, Inc. — The Hospital Co. v. Saunders,*** 651 So. 2d 188, 189 (Fla. 4th DCA 1995), rejecting plaintiffs' claim for production of a medical incident report protected by statute on the conclusion, "based on established case law, that . . . [plaintiffs'] need for the report to prosecute their lawsuit, and inconsistencies in testimony and discrepancies are not a basis to compel production. The fact that the incident report may contain additional information of the incident is likewise an insufficient basis to compel production."

[14] A statutory privilege invokes the ***status*** of privileged material, not any particular factual content. Nowhere in section 395.0197(4) or (11) did the legislature impose on the privilege holder an affirmative obligation to prove anything regarding the ***content*** of risk management materials in order to invoke the privilege. Indeed, to have done so would have totally destroyed the very premise for the statutory protection: to guarantee candid and honest cooperation in the investigation of medical incidents.

[15] PLATO, *Phaedo, in* THE COLLECTED DIALOGUES OF PLATO 40, 44-46 (Edith Hamilton & Huntington Cairns eds., 196 1).

[16] St. Mary's has shown that it was entitled to an apportionment of fault irrespective of the loss of its affirmative defenses, however. See St. Mary's initial brief at 48.

attributable to consolidation. To assert that consolidation was not the cause of St. Mary's loss of privileges is to disregard reality, and to ignore one lesson from history.

> A little neglect may breed great mischief. . . for want of a nail the shoe was lost; for want of a shoe the horse was lost; and for want of a horse the rider was lost.

BENJAMIN FRANKLIN, POOR RICHARD'S ALMANAC (1746), *reprinted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 3 10 (16th ed., 1992).

The Brinsons' entire discussion of Ms. Snyder's testimony, the ARCA reports, and St. Mary's attempts to prevent consolidation are predicated on what the Brinsons "believe" those reports might show as a factual counter to St. Mary's claim that risk management materials were needed to defend the spoliation suit.[17] As a legal matter, it is inconsequential what they believe, or what the ARCA reports show. St. Mary's fought consolidation early and often — long before any issue concerning Ms. Snyder's testimony or the ARCA reports came to light or became a concern of the Brinsons — in order to prevent a loss of privileges not only as to the production of incident materials, but also to avoid the Brinsons' affirmative use of prejudicial evidence and argument that related solely to spoliation (which St. Mary's would have had to refute in order to defend that second, distinctive suit). (T. 33-38 (pre-trial); T. 59 (before jury selection); T. 33 1-33 (before opening arguments); T. 547 (after Goodyear's deposition); T. 944 (before Dr. Frost's testimony)).

The Brinsons' third justification for consolidation is a repeat of their contention that St. Mary's had a reporting duty to the federal government and to Ohmeda. The existence of that duty has no bearing on a trial court's exercise of discretion, when faced with a request for consolidation, in weighing judicial convenience against the loss of statutory privileges.

In describing the tort of spoliation, the Third District has addressed the situation where no third party suit has been initiated by the plaintiff, as is admittedly the case here. In *Miller v.*

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[17] In a reprise of their motion to unseal the ARCA reports, which the Court denied, the Brinsons repeatedly assert what *they* believe those reports would show. (AB at 12-13).

Allstate, 650 So. 2d 671, 673 (Fla. 3d DCA 1995), the court held that a spoliation suit which lacks an underlying third party suit is not appropriate.

III. The district court erred by approving the loss of substantive rights through imposition of the harshest possible sanction.

The Brinsons defend the severity of the trial court's sanction in relation to the conduct that prompted its imposition by arguing that St. Mary's, in effect, "asked for" the harsh sanction it received. (AB at 19 and 26). The context of events that were taking place at the time of imposition, however, shows a quite different scenario. Before St. Mary's affirmative defenses were stricken and a directed verdict on liability was ordered, counsel for the Brinsons had advised the court that the more modest sanction of limiting Ms. Snyder's testimony was perfectly fine with them. (T. 1198-99) ("The appropriate sanction [is] that if they are not going to produce the information, then don't let Sharon Snyder get up and say what her investigation revealed."). St. Mary's acknowledged ***that*** possible sanction, even while continuing to argue that consolidation forced the loss of privileges it was unwilling to give up. (T. 1202-1203). The trial court knew a bar to Ms. Snyder's testimony was within his power as a solution for the situation. (T. 1206) ("I say the minimum sanction would be not let her testify . . . .").

The record demonstrates no need for a judicial imposition of liability on St. Mary's, halfway through the jury trial, when the only event in controversy was whether St, Mary's ***own*** witness would be allowed to testify for the defense. In the light of the circumstances at the time the court acted, it cannot be said that St. Mary's invited a directed verdict on its liability. It certainly cannot be shown that ***anyone*** in the courtroom, even the judge, foresaw the loss of apportioned fault as a further consequence of the sanction. The trial court simply did not make a well-considered decision, and abused its discretion, by imposing the most severe form of sanction when a completely adequate, lesser sanction was available. ***Kelley v. Schmidt,*** 613 So. 2d 918 (Fla. 5th DCA 1993).

IV. The district court approved non-economic damages in an amount far in excess of the maximum ever found reasonable by a Florida court.

The Brinsons were given the highest jury award ever recorded in the State of Florida for grief alone, exceeding by a factor of **nine** all prior verdicts that have been found not to be excessive. (IB at 50, n.38). They defend this $9 million award on the ground that two lower courts did not find it to be excessive, on a contention that it was proportional to the harm because St. Mary's allowed the vaporizer to be destroyed "knowingly" (AB at 27, n. 17), and on a claim that it is really not a $9 million award but rather two $3 million awards and two $1.5 million awards. They do not dispute that the aggregate non-economic recovery for the Brinsons is vastly beyond the maximum non-economic damage award ever approved in Florida — obviously far beyond the range of reasonableness ever approved in Florida, and clearly excessive by the standards that have heretofore been applied by the Florida courts.

Approval of a $9 million award for grief by the trial court and the Fourth District is hardly a gauge to the correct result here. Both were wrong in allowing the Brinsons to proceed on a spoliation lawsuit, let alone one that lacked the essential elements of that cause of action; both were wrong in allowing the consolidation of two lawsuits at the expense of St. Mary's statutory rights to privilege and apportionment; and both were wrong in approving a disproportionate and unwarranted sanction that stemmed directly from mis-consolidation. There is no reason to give deference to the approval by those courts of a disproportionately large, conscience-shocking dollar sum awarded out of prejudice and passion for non-recurrent conduct.

The Brinsons' suggestion that the harm was proportional because St. Mary's "knowingly" allowed the vaporizer to be destroyed is absolutely without record foundation. Intentionality was never pled or tried. Comments of the Brinsons' counsel that implied anything more than a completely unintentional loss of the vaporizer were precisely the type of emotional argument that led the jury to penalize the hospital with this unprecedented award.

As regards the dollar sum that the jury gave the Brinsons, St. Mary's is not indifferent to what the Brinsons suffered when they lost their daughter. The issue, however, is whether a

verdict of this magnitude is lawful, irrespective of whether there is one $9 million award or four smaller awards each of which by itself exceeds the maximum ever given for grief alone. No matter into how many time frames the jury was persuaded to compartmentalize the Brinsons' grief, at the end of the day they are defending the right to collect $9 million in pure non-economic damages from St. Mary's.

A remittitur of considerable size should have been ordered. St. Mary's suggests that the trial court should be instructed when the final judgment is vacated, and when the case is remanded for a new trial, that it has a responsibility to review any new award that might emerge both for proportionality and for reasonableness under *Bould v. Touchette, 349 So.* 2d 1181 (Fla. 1977). If the Court does not vacate the judgment, at a minimum it should order a remittitur.

CONCLUSION

The Court is respectfully requested to disapprove *Bondu v. Gurvich,* to hold that independent spoliation suits for merely negligent conduct are not available in Florida against persons against whom the plaintiff already has a valid cause of action for negligence, to vacate the decision of the Fourth District, and to remand this case with instructions to dismiss the Brinsons' cause of action for spoliation and to direct a retrial on both liability and damages for St. Mary's negligence, *other than* vicariously and *other than* as to the treatment and care of Alonzette Brinson following surgery (as stipulated).

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing reply brief on the merits was mailed on November 21, 1997 to:

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