

ORIGINAL

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.

FILED

SID J. WHITE

MAR 12 1997

CLERK SUPREME COURT
By 
Chief Deputy Clerk

RESPONDENTS' BRIEF ON JURISDICTION

MONTGOMERY & LARMOYEUX
P. O. Drawer 3086
West Palm Beach, FL 33402-3086
and
CARUSO, BURLINGTON,
BORN & COMPIANI, P.A.
1615 Forum Place
Barristers Bldg. /Suite 3-A
West Palm Beach, FL 33401
Tel: (561) 686-8010
Attorneys for Respondents

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	i-ii
STATEMENT OF THE CASE AND FACTS	1-3
SUMMARY OF ARGUMENT	3-4
ARGUMENT	4-10
I. <u>The Fact That the Fourth District Struck St. Mary's Pleadings and Defenses as a Sanction Distinguishes This Case From Other Spoliation Cases</u>	4-5
II. <u>The Face of the Fourth District's Decision, the Third District Spoliation Cases and St. Mary's Admissions in its Brief Indicate There is No Conflict</u>	5
A) <u>Impairment of the Underlying; Lawsuit Is An Element of a Spoliation Cause of Action Which the Fourth District Found Was Proven Here</u>	5-6
C) <u>The Fourth District Followed the Third District's Spoliation Decisions</u>	7-9
III. <u>The Fourth District's Decision Does Not Conflict With Cases Requiring Consolidation of Underlying and Spoliation Cases</u>	9
A) <u>The Fourth District's Decision Does Not Conflict with Decisions Holding that Consolidation Should Not Deprive a Party of Substantive Rights</u>	9-10
B) <u>The Fourth District's Decision Does Not Conflict With NASH v. WELLS FARGO</u>	10
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

	<u>PAGE</u>
AIRVAC, INC. v. RANGER INS. 330 So.2d 467 (Fla. 1976)	3
BONDU v. GURVICH 473 So.2d 1307 (Fla. 3d DCA 1984), <u>rev. den.</u> 484 So.2d 7 (Fla. 1986)	5, 8
CONTINENTAL INS. CO. v. HERMAN 576 So.2d 313 (Fla. 3d DCA 1990), <u>rev. den.</u> 598 So.2d 76 (Fla. 1991)	5, 6
GULF COAST HOME v. HRS 503 So.2d 415 (Fla. 1st DCA 1987), <u>aff'd.</u> 515 So.2d 1009 (Fla. 1st DCA 1987)	3
HARLESS v. KUHN 403 So.2d 423 (Fla. 1981)	10
KYLE v. KYLE 139 So.2d 885 (Fla. 1962)	4
MILLER v. ALLSTATE INS. CO. 650 So.2d 671 (Fla. 3d DCA 1995)	1, 9
MILLER v. ALLSTATE 573 So.2d 24 (Fla. 3d DCA 1990)	5
MILLER v. ALLSTATE 650 So.2d 671 (Fla. 3d DCA 1995)	5
NASH v. WELLS FARGO 687 So.2d 1262 (Fla. 1996)	10

STATEMENT OF THE CASE AND FACTS

Plaintiffs' Underlying and Spoliation Lawsuits

Plaintiffs' "underlying lawsuit" was a medical malpractice lawsuit against St. Mary's for negligently placing the incorrect anesthesia into the vaporizer of an anesthesia machine, causing the wrongful death of Alonzette Brinson. Plaintiffs' spoliation lawsuit, which was consolidated with and tried with its medical malpractice lawsuit, was based on Plaintiffs' inability to prove their underlying medical malpractice lawsuit because of St. Mary's destruction of the vaporizer. The spoliation claim was not based on an inability to prove a product's liability claim against the vaporizer's manufacturer.

St. Mary's Attempts to Create a Conflict Where None Exists

St. Mary's attempts to create a conflict by relying on the Fourth District's statement that Plaintiffs' spoliation lawsuit alleged impairment of a claim against the "manufacturer and other responsible agents" because of St. Mary's destruction of the vaporizer. St. Mary's claims that since Plaintiffs never sued the manufacturer, the Fourth District's decision conflicts with *MILLER v. ALLSTATE*, 650 So.2d 671 (Fla. 3d DCA 1995) (*MILLER II*).

There is no conflict. What St. Mary's fails to emphasize, although it admits such in one sentence of its brief, is that the spoliation lawsuit that was tried had absolutely nothing to do with a products liability claim against the manufacturer of the vaporizer. Plaintiffs' allegations were that St. Mary's destruction of the vaporizer "impaired the Brinsons' ability to prove a cause of action against the manufacturer and other responsible agents" of the vaporizer. "Other responsible agents" was always interpreted by the parties to include St. Mary's (A3). After discovery, Plaintiffs chose not to file a lawsuit against the manufacturer. Accordingly, Plaintiffs' spoliation lawsuit was necessarily limited to their inability to prove their sole underlying lawsuit, i.e., the medical malpractice case against St. Mary's.

St. Mary's argues that Plaintiffs' allegations of an impaired ability to prove their case against the "manufacturer and other responsible agents" could only mean the manufacturer or the servicing company for the anesthesia machine. In fact, St. Mary's is well aware that the spoliation claim that was tried was Plaintiffs' impaired ability to prove their medical malpractice lawsuit against St. Mary's, not an inability to prove a products liability claim against the manufacturer. This is apparent because at page 2 of its brief St. Mary's admits that Plaintiffs never attempted to prove in their underlying lawsuit that destruction of the vaporizer impaired any products liability claim against the manufacturer. The obvious reason that Plaintiffs did not present that proof is because that was not the basis for their spoliation claim, Its only basis was impairment of Plaintiffs' underlying medical malpractice claim against St. Mary's

After the Fourth District rendered its opinion, St, Mary's filed Motions for Rehearing attempting to convince even that 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 (AS):

Counsel for St. Mary's unequivocally conceded to the jury, time and time again during trial, that Plaintiffs' spoliation lawsuit was based on their inability to prove their medical malpractice claim against the Hospital:

MR. FULFORD: [in closing argument]. . .In order to get to the lack of preservation of evidence claim, Plaintiff has to be unable to prove their claim of medical malpractice, because if they prove malpractice, the spoilage claim doesn't have any bearing, or is totally irrelevant to any of the issues in the case. (R390)
* * *

Additionally, let me talk about the spoilage claim. The spoilage claim, as I mentioned earlier, is their joinder of the lawsuit because they want to say, and the evidence will show that if they can't prove their case against the hospital somehow, the hospital has to be held legally accountable for what happened to this vaporizer. (R43 1)

In addition, St. Mary's filed numerous pleadings in the trial court which admitted that Plaintiffs' spoliation claim was based on St. Mary's failure to take

the appropriate steps to preserve evidence which impaired Plaintiffs' ability to prove their underlying medical malpractice claim (A2, 5, 9, 12). (emphasis added)

The Fourth District denied rehearing and refused to certify a conflict with MILLER II since it was well aware that Plaintiffs' spoliation claim pertained to the underlying medical malpractice lawsuit. The Court was also aware that St. Mary's had previously admitted that fact in a prior proceeding filed with the Fourth District, where St. Mary's had stated (A13):¹

On November 22, 1993, the Respondents [Brinsons] filed a separate action seeking recovery of damages for alleged negligent destruction of evidence relevant to their underlying claim (A4). Brinson v. St. Mary's Hospital. Case No. CL 93-9728 AG. Specifically, the Respondents allege that Petitioner failed to exercise a duty to preserve evidence related to an underlying wrongful death action. . (emphasis d)

SUMMARY OF ARGUMENT

St. Mary's primary complaint is that since the Fourth District failed to discuss certain elements of spoliation, it failed to adopt those elements. That argument is contrary to language in the Court's opinion which adopts the same elements defined by the Third District's spoliation cases. St. Mary's claim that Plaintiffs' spoliation case was based on impairment of a products liability claim that was never filed is not only incorrect, but it is also 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. Here, the only underlying lawsuit was the medical malpractice action. A spoliation claim by definition cannot arise from potential claims never sued upon. Moreover, since the Fourth District found that Plaintiffs' spoliation claim was proper, the Court necessarily found proof of all the tort's elements, including impairment of the underlying medical

¹/Both the Fourth District and this Court can take judicial notice of the prior certiorari proceeding: GULF COAST HOME v. HRS, 503 So.2d 415 (Fla. 1st DCA 1987); AIRVAC, INC. v. RANGER INS., 330 So.2d 467 (Fla. 1976)

malpractice lawsuit as a result of destruction of the vaporizer

ARGUMENT

I. The Fact That the Fourth District Struck St. Mary's Pleadings and Defenses as a Sanction Distinguishes This Case From Other Spoliation Cases

St. Mary's cannot show a conflict of such magnitude that if the Fourth District's decision and the spoliation cases cited by St. Mary's for conflict were rendered by the same court, the Fourth District's decision would have the effect of overruling those other cases. *KYLE v. KYLE*, 139 So.2d 885 (Fla. 1962). Unlike those cases, judgment was entered against St. Mary's on Plaintiffs' spoliation claim as a result of St. Mary's flagrant and intentional violation of court orders, after the court had repeatedly forewarned St. Mary's that if it did not produce certain documents required by the court's discovery orders, its pleadings and affirmative defenses would be stricken. The Fourth District affirmed the ruling, finding:

Counsel for St. Mary's... claimed the attorney/client privilege and informed the trial court that he was instructed by "the powers that be" not to produce the reports. Once the trial court forewarned St. Mary's that it might strike its defenses if it willfully refused to produce the reports, the reports were relinquished for an in-camera inspection. The trial court inspected the ARCA reports, excepted certain portions under the attorney/client privilege, and ordered St. Mary's to produce the remainder. St. Mary's again refused, even after the trial court warned that it was "probably" going to strike its entire defense. After brief argument wherein St. Mary's refused anew to produce the documents, the trial court struck St. Mary's defenses and entered a verdict in favor of the Brinsons on the spoliation claim.

* * *

... [t]he trial court did not abuse its discretion in striking St. Mary's pleadings and directing a verdict in favor of the Brinsons. When a party fails to comply with an order, the trial court has a broad spectrum of sanctions to impose, although the sanction chosen must be commensurate with the offense, ... Although striking a party's pleadings is the most severe sanction, it is appropriate where the offending conduct is flagrant, willful, or persistent. Kelley, 613 So.2d at 919 by the supreme court:

A deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions, as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness.

Mercer v. Raine, 443 So.2d 944, 946 (Fla. 1983). . . .St. Mary's consciously and deliberately refused to follow the trial court's order regarding the ARCA documents, even though it was forewarned that its pleadings would be struck. This intentional disobedience is the essence of contemptAs such, the trial court did not abuse its discretion in striking St. Mary's defenses and directing a verdict for the Brinsons on the spoliation count.

Therefore, St. Mary's claim of conflict with other spoliation cases is a red herring.²

Unlike those cases, liability was entered against St. Mary's on Plaintiffs' spoliation claim **solely** as a sanction because of its refusal to comply with the court's discovery orders. St. Mary's cannot show a direct and express conflict with other spoliation cases since they do not involve entry of judgment on a spoliation claim as a sanction, as here. That fact distinguishes this case from other spoliation cases, and supersedes or renders irrelevant or moot any deficiencies in the spoliation cause of action that St. Mary's claims existed when the sanctions were imposed.

II. The Face of the Fourth District's Decision, the Third District Spoliation Cases and St. Mary's Admissions in its Brief Indicate There is No Conflict

A) Impairment of the Underlying Lawsuit Is An Element of a Spoliation Cause of Action Which the Fourth District Found Was Proven Here

The Third District cases, which the Fourth District followed, all hold that a spoliation cause of action is based on the impairment of an underlying lawsuit because of destruction of evidence, which gives rise to a tort cause of action against the spoliator for destroying the evidence. CONTINENTAL INS. CO. v. HERMAN, 576 So.2d 313 (Fla. 3d DCA 1990); MILLER v. ALLSTATE, 573 So.2d 24 (Fla. 3d DCA 1990); BONDU v. GURVJCH, 473 So.2d 1307 (Fla. 3d DCA 1984); MILLER v. ALLSTATE, *supra*. In other words, the very definition of a spoliation cause of action is that the destruction of the evidence caused the impairment of proof in an underlying lawsuit. There is no cause of action for spoliation if a

²/St. Mary's does not claim that the striking of its pleadings and defenses conflicts with any other Florida appellate decisions.

party suffers no significant impairment in an ability to prove the underlying lawsuit.³ In order to recover on a spoliation claim “it was clear that the plaintiff had to demonstrate that she was unable to prove her underlying action owing to the unavailability of the evidence.” CONTINENTAL INS. CO. v. HERMAN, supra at 315. Therefore, the Third District case law, which the Fourth District followed, makes it clear that there is no spoliation claim unless the destruction of evidence impairs the Plaintiffs’ ability to prove the underlying lawsuit.

The Fourth District adopted the elements of the spoliation tort previously defined by the Third District. Part-and-parcel of that definition is the destruction of evidence which impairs the ability to prove the plaintiffs’ underlying lawsuit. The Fourth District’s opinion found that Plaintiffs’ only underlying lawsuit was for medical malpractice against St. Mary’s, and also found that Plaintiffs were properly allowed to proceed on their action for spoliation. Therefore, the Court necessarily found that Plaintiffs proved that destruction of the vaporizer impaired their ability to prove their underlying lawsuit for medical malpractice against St. Mary’s.

B) Plaintiffs Were Not Required to File a Products Liability Lawsuit Where Their Spoliation Lawsuit Only Pertained To Impairment of the Medical Malpractice Lawsuit

As indicated, supra, Plaintiffs’ spoliation lawsuit that was consolidated with and tried along with its underlying medical malpractice lawsuit against St. Mary’s had nothing to do with impairment of a products liability claim. Although the allegations of Plaintiffs’ spoliation claim would have allowed them to also sue the manufacturer, after discovery Plaintiffs made the decision not to do so. By definition, the failure to sue the manufacturer limited the basis for Plaintiffs’ spoliation claim to their only underlying lawsuit, i.e., their medical malpractice

³/ As stated in CONTINENTAL INS. CO, v. HERMAN, supra at 3 15, “Mrs. Herman had no cause of action for destruction of evidence in this case because she suffered no significant impairment in an ability to prove the underlying lawsuit”.

lawsuit. Moreover, **St. Mary's has admitted** (p.2) that the spoliation case did not involve any proof that loss of the vaporizer fatally impaired a products liability claim.

What St. Mary's is really contending is that Plaintiffs should have been required to file a products liability lawsuit against the manufacturer, in addition to its medical malpractice lawsuit against St. Mary's. Certainly St. Mary's cannot require Plaintiffs to sue other defendants as a prerequisite to pursuing a spoliation claim, when by definition Plaintiffs' spoliation claim is self-limiting to a claim of impairment of proof against only those defendants actually sued by Plaintiffs in an underlying lawsuit.

C) The Fourth District Followed the Third District's Spoliation Decisions

On its face, the Fourth District's decision indicates there is no conflict with the Third District's spoliation decisions. The Fourth District adopted the very elements of the spoliation tort defined in the Third District's decision:

. . . we.. expressly recognize a cause of action for the spoliation of evidence and adopt the Third District's characterization of this tort's necessary elements. See Herman, 576 So.2d at 315.

The elements set forth in CONTINENTAL INS. CO. v. HERMAN at p.3 15 are:

We hold now that the elements of a cause of action for negligent destruction of evidence are: (1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the [underlying] lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the [underlying] lawsuit, and (6) damages. (emphasis added)

St. Mary's claim that the Fourth District did not adopt the above elements of spoliation is nothing more than a disagreement with what is reflected on the face of the Fourth District's opinion. Not only did the Fourth District not omit any of the elements of the spoliation tort as defined in HERMAN, supra, such claimed "omission" cannot create a conflict because the face

of the opinion reflects no omission.

St. Mary's claims that nothing in the Fourth District's decision suggests there was a duty to preserve the vaporizer. A duty clearly existed.⁴ The Fourth District was not required to discuss each element of the cause of action for spoliation. The Court found that Plaintiffs' spoliation claim was proper under the elements in HERMAN which includes "a duty" to preserve the evidence. Therefore, this alleged omission cannot demonstrate a conflict.

St. Mary's next states that Plaintiffs elected not to sue the manufacturer in their underlying lawsuit (p.4), and further states that at the trial of their spoliation claim Plaintiffs did not attempt to prove impairment of a products liability claim (p.2). Thus **St. Mary's has admitted** that neither Plaintiffs' underlying lawsuit nor their spoliation lawsuit concerned a products liability claim,

St. Mary's states that Plaintiffs combined their medical malpractice lawsuit with an unrelated spoliation claim against the manufacturer. How St. Mary's can make that statement in light of the fact that it has otherwise admitted that no claim against the manufacturer was pursued at trial (p.2) is amazing. St. Mary's attempts to distinguish BONDU v. GURVICH, supra, which is identical to this case, by arguing that in BONDU the plaintiff's spoliation case was based on the fact that the hospital lost evidence necessary to the plaintiff's underlying medical malpractice case against the hospital. That is exactly what occurred here. St. Mary's argues that in BONDU the hospital had a legal duty to pursue medical records, whereas here the Fourth District **failed to discuss** what created St. Mary's duty to preserve the anesthesia machine. In fact, the Fourth District adopted the elements of HERMAN, one of which is a duty

⁴/The Hospital employees and risk manager knew the vaporizer had emitted excessive anesthesia, resulting in Alonzette's death. The Hospital employees admitted that this knowledge imposed a duty on the Hospital to preserve the vaporizer. So did Florida's administrative regulations, federal statutes and the Hospital's accreditation manual.

to preserve the destroyed evidence, and also found that Plaintiffs were properly allowed to pursue their spoliation claim. Accordingly, the Fourth District found that Plaintiffs proved that St. Mary's had a duty to preserve the vaporizer.

The Fourth District's decision also does not conflict with MILLER II. That case did nothing more than hold that the underlying lawsuit must be decided prior to or along with the related spoliation lawsuit. It just so happened that the underlying lawsuit in MILLER II was a products liability lawsuit. Here, the underlying lawsuit was a medical malpractice claim against St. Mary's. Since it was tried along with the spoliation claim, MILLER II was satisfied.

III. The Fourth District's Decision Does Not Conflict With Cases Requiring Consolidation of Underlying and Spoliation Cases

The Fourth District's decision affirming consolidation of Plaintiffs' underlying medical malpractice case with their spoliation case is fully in accord with MILLER II. St. Mary's claims this case differs from MILLER II because here Plaintiffs' medical malpractice claim "did not rely upon spoliated evidence" (p.8). In making this argument, St. Mary's ignores the fact that the Fourth District found that Plaintiffs' spoliation claim was proper, which necessarily means there was proof of all elements of the cause of action, including proof that the destruction of the vaporizer impaired the underlying medical malpractice lawsuit. In fact, the evidence established that if St. Mary's had not destroyed the vaporizer, testing would have conclusively proven whether St. Mary's had filled it with the wrong anesthesia. Therefore, Plaintiffs' spoliation lawsuit was properly consolidated with their medical malpractice lawsuit against St. Mary's

A) The Fourth District's Decision Does Not Conflict with Decisions Holding that Consolidation Should Not Deprive a Party of Substantive Rights

There was no Hobson's choice here. St. Mary's was not forced directly or indirectly to

choose between its right to defend the spoliation lawsuit and asserting its risk management privilege. St. Mary's simply ignores the Fourth District's ruling (p.3)

Importantly, St. Mary's was not deprived of any substantive right 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.

B) The Fourth District's Decision Does Not Conflict With NASH v. WELLS FARGO

NASH v. WELLS FARGO, 687 So.2d 1262 (Fla. 1996) did not alter the law. It merely held that apportionment of fault under §768.81(3) Fla. Stat. is an affirmative defense. St. Mary's was already aware of that fact since it raised the issue as an affirmative defense. The Fourth District's ruling that the trial court was well within its discretion in striking St. Mary's pleadings and defenses since it intentionally and blatantly refused to comply with the court's discovery orders is in accord with, not contrary to, Florida law. In HARLESS v. KUHN, 403 So.2d 423 (Fla. 1981) this Court ruled that a trial court's decision to also strike a defendant's affirmative defenses, in addition to entering liability against him, is a matter that lies within its sound judicial discretion in determining the severity of the sanctions to be imposed upon the defendant. The Fourth District correctly found no abuse of discretion here.

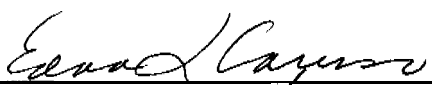
CONCLUSION

St. Mary's has failed to demonstrate that the Fourth District's decision directly and expressly conflicts with any other Florida appellate decision. Accordingly, the Court should deny St. Mary's request for discretionary review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 11th day of MARCH, 1997, to: ARTHUR J. ENGLAND, JR.,[✓]ESQ., CHARLES M. AUSLANDER,[✓]ESQ., and ALISON MARIE IGOE,[✓]ESQ., Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Ave., Miami, FL 33131.

Robert M. Montgomery, Jr., Esq. [✓]
MONTGOMERY & LARMOYEUX
P. O. Drawer 3086
West Palm Beach, FL 33402-3086
and
CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
1615 Forum Place
Barristers Bldg./Suite 3-A
West Palm Beach, FL 33401
Tel: (561) 686-8010
Attorneys for Respondents

By: 
EDNA L. CARUSO [✓]
Florida Bar No. 126509