IN THE SUPREME COURT
STATE OF FLORIDA

CASE No. 97-
FOURTH DISTRICT COURT OF APPEAL CASE No. 94-2130

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 BRIEF ON JURISDICTION

DISCRETIONARY PROCEEDING TO REVIEW A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS[1]

Alonzo and Willa Brinson took their daughter, Alonzette, to St. Mary's Hospital for outpatient eye surgery. Dr. John Cooney administered a general anesthesia, using an anesthesia machine owned by St. Mary's that contained a component part known as a halothane vaporizer. Alonzette died as a result of the surgical procedure.

The Brinsons filed a medical malpractice action against St. Mary's and Dr. Cooney. Before trial, the Brinsons settled with Dr. Cooney and dismissed him from the lawsuit. After the settlement and brief discovery, the Brinsons filed a separate "spoliation of evidence" lawsuit against St. Mary's, alleging that it knew of their potential claim against the manufacturer of the vaporizer, that it had a duty to preserve it, but it allowed the manufacturer to disassemble the machine thereby impairing their ability to prove a "product defect" claim.

Over St. Mary's repeated objections, the trial court consolidated and continuously refused to sever the separate negligence and spoliation lawsuits. Consolidation created a Hobson's choice for St. Mary's: an inability to use statutorily privileged materials to defend the spoliation suit unless it waived that privilege in the negligence suit. When St. Mary's declined to produce those privileged materials, the court struck all of St. Mary's pleadings in both lawsuits and directed a verdict on spoliation. The court refused to allow St. Mary's to argue apportionment of fault on the ground that apportionment is an affirmative defense, which was stricken. The district court affirmed over a dissenting opinion on the error in consolidating the two suits, purporting to adopt the Third District's tort of spoliation.

SUMMARY OF ARGUMENT

The Fourth District created an express and direct conflict with the Third District concerning the tort of spoliation by omitting the following elements deemed essential by that court: (1) a legal or contractual duty to preserve evidence; (2) significant impairment in the ability to prove the lawsuit for which the lost evidence was essential; (3) a causal relationship

[1] All subsequent quotations without citation in this brief refer to the opinion of the district court. *St. Mary's Hospital,* Inc. *v. Brinson,* 685 So. 2d 33 (Fla. 4th DCA 1996).

between the destruction of evidence and the inability to prove the lawsuit; and (4) damages measured by the value of that lost cause of action. ***Miller v. Allstate Ins. Co., 650 So.*** 2d 671, 673 (Fla. 3d DCA), ***review denied,*** 659 So. 2d 1087 (Fla. 1995) ***("Miller ZZ"); Continental Ins. Co. v. Herman,*** 576 So. 2d 313, 315 (Fla. 3d DCA 1990), ***review denied, 598 So.*** 2d 76 (Fla. 1991). The Fourth District's formulation of negligent spoliation of evidence shifts liability from the ***primary wrongdoer*** — here the manufacturer — to the person who lost or destroyed the evidence necessary to prove that action, regardless of whether the evidence is relevant to a cause of action against the ***primary wrongdoer*** and regardless of whether its loss impaired the plaintiff's ability to pursue that lawsuit.

The Fourth District caused express and direct conflict with ***Miller*** II, in which the Third District demanded that the action alleged to have been significantly impaired — in both cases a products liability suit — be pursued before or with the spoliation suit, that pursuit only to be excused if the plaintiff proved that "the loss of evidence has so fatally impaired the products liability claim that to bring a products liability action would be frivolous. " The Brinsons never sued the manufacturer and never proved that loss of the vaporizer "fatally impaired" that suit and hence that it would have been frivolous to pursue. The districts' disparate requirements for the spoliation tort, coupled with its increasing use as an adjunct to traditional negligence lawsuits, offers compelling reason for the Court to create statewide uniformity for the elements of this relatively new, judicially developed cause of action.

The Fourth District's decision also conflicts with Third District decisions recognizing that consolidation for trial cannot abrogate any substantive right present in either independent action. Contrary to ***Shores Supply Co. v. Aetna Casualty & Sur. Co., Inc., 524 So.*** 2d 722 (Fla. 3d DCA 1988), the Fourth District established an unfettered right to consolidate a spoliation claim with an independent negligence action, regardless of its negation of a substantive right of privilege in the independent, but consolidated, lawsuit. This case also conflicts with the concept of apportionment of fault among tortfeasors guaranteed by ***Fabre v. Marin,*** 623 So. 2d 1182 (Fla. 1993).

ARGUMENT

I. The Fourth District has adopted the tort of "spoliation of evidence" lacking elements deemed essential to that tort by decisions of the Third District.

The Fourth District has announced that it "now expressly recognize[s] a cause of action for the spoliation of evidence and adopt[s] the Third District's characterization of this tort's necessary elements" (citing to ***Continental Insurance Co. v. Herman).*** The court did **not** adopt the elements of a spoliation tort defined by ***Herman,*** however. It omitted four of those traditional tort elements: (1) a legal or contractual duty to preserve evidence that is relevant to the potential civil action; (2) significant impairment in the ability to prove the lawsuit; (3) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (4) damages. ***Herman, 576*** So. 2d at 315.

In contrast to every Third District decision, the Court will find **nothing** in this decision which suggests, or even hints, at what constituted St. Mary's "duty" to preserve the vaporizer so the Brinsons could sue its manufacturer,[2] to what degree, if any, their suit against the manufacturer was impaired by its loss,[3] whether its loss was the proximate cause of their inability to sue the manufacturer, or what relationship existed between St. Mary's failure to

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[2] ***Bondu v. Gurvich, 473 So.*** 2d 1307 (Fla. 3d DCA 1984), ***review denied sub nom., Cedars of Lebanon Hosp. Care Ctr., Inc.*** v. ***Bondu,*** 484 So. 2d 7 (Fla. 1986), involved a duty imposed by a statute and administrative regulations. ***Herman*** and ***Miller*** involved duties imposed by contract. ***Sponco Mfg., Inc. v. Alcover, 656*** So. 2d 629 (Fla. 3d DCA 1995), ***review dismissed,*** 679 So. 2d 771 (Fla. 1996), noted in the Fourth District's decision as recognizing the spoliation tort, only did ***so*** in ***dicta*** as there was no spoliation claim presented.

[3] The Third District said "the plaintiffs burden is to show that the defendant's interference cost her an opportunity to prove her lawsuit. " ***Miller v. Allstate Ins. Co. (Miller*** I), 573 So. 2d 24, 30 (Fla. 3d DCA 1990), ***review denied,*** 581 So. 2d 1307 (Fla. 1991). In Bondu, the court said the lack of records caused the plaintiff damage because "she lost 'a medical negligence lawsuit when [she] could not provide expert witnesses.'" 473 So. 2d at 1313 (footnote omitted). In ***Herman,*** the court insisted that the plaintiff demonstrate "significant impairment in the ability to prove the lawsuit," as well as a "causal relationship between the evidence destruction and the inability to prove the lawsuit, " 576 So. 2d at 315, neither of which was established by Herman's contention that her verdict in a personal injury action would have been greater but for the destruction of certain evidence.

preserve and the probable financial recovery against that manufacturer (if any).[4] Moreover, the Court will find nothing in the district court's decision which suggests that the Brinsons even attempted to sue the manufacturer. The decision states only that they "then filed a second complaint *against St.* Mary *'s."* (emphasis added).

These omissions are not accidental. They acknowledge the Fourth District's peculiar foundation for the scope and range of spoliation — its tort does **not** require that the Brinsons either sue the vaporizer's manufacturer or prove that that cause of action was fatally impaired by St. Mary's failure to preserve the vaporizer, as the Third District decisions uniformly require. Rather, the Fourth District premised recovery solely on mere ***allegations*** in the Brinsons' spoliation complaint that

> St. Mary's knew of the potential civil claim against the vaporizer's manufacturer . . . .

(emphasis added). The Fourth District relieved the Brinsons of the "necessary elements" of a spoliation claim, allowing them to succeed solely on the basis of ***St. Mary's knowledge*** that they had a potential product defect suit. Yet, loss of the vaporizer ***did not*** prevent the Brinsons from suing or pursuing a claim against its manufacturer. ***They elected not to sue.***

The Brinsons merely combined their medical malpractice lawsuit against St. Mary's with what amounts to nothing more than a second unrelated claim of abstract, negligent behavior: "the negligent and/or intentional destruction of the vaporizer. " The Fourth District's conclusion that the Brinsons' second suit was a manifestation of the Third District's new tort of spoliation is a hollow legal fiction. Spoliation in the Fourth District lacks all the elements deemed essential by the Third District, and by traditional tort law, constituting nothing more than an elevation to "tort" status of the former rebuttable presumption or adverse inference that can be drawn against a party who withholds or destroys material evidence.

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[4] ***Miller*** II states that "the entire liability should not shift from the manufacturer to the person who lost the evidence unless the loss of evidence has so fatally impaired the products liability claim that to bring a products liability action would be frivolous, " *650* So. 2d at 674.

Public Health Trust of Dade County v. Valcin, 507 So. 2d 596 (Fla. 1987) (rebuttable presumption); ***New Hampshire*** Ins. Co., *Inc.* v. ***Royal Ins.*** Co., 559 So. 2d 102 (Fla. 4th DCA 1990) (adverse inference).

The direct conflict that grounds the Court's jurisdiction is evident from a comparison of this case with the Third District's watershed spoliation decision in ***Bondu.*** In both cases, the plaintiff alleged that the defendant lost evidence necessary to a cause of action against the primary wrongdoer. Mrs. Bondu sued a hospital alleging that it lost medical records necessary to prove a medical malpractice case against the hospital. (473 So. 2d at 1312). The court allowed Mrs. Bondu to proceed only because statutory and administrative regulations created a duty that overcame Prosser's injunction that no such cause of action should lie unless it is

> 'clear that the plaintiffs interests are entitled to legal protection against the conduct of the defendant,' that is, there is a duty owed to the plaintiff by the defendant which the law recognizes.

(*Id.*). The statute and administrative regulations imposed a legal duty on the hospital to preserve and furnish the lost medical records.

This case lacks that indispensable foundation of "duty. " The district court nowhere suggested the existence of a statute, an administrative regulation, or a contract that created a duty requiring St. Mary's to preserve the vaporizer. The decision merely repeats, circularly, the Brinsons' allegation that St. Mary's knew of their potential claim against the manufacturer and hence had a duty to preserve the vaporizer. Any resemblance between the duty in ***Bondu*** and the "tort" used to provide a recovery for the Brinsons is unrecognizable.[5]

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[5] ***Bondu's*** acceptance of this California tort has not been repeated in a majority of jurisdictions. A recent tally from Connecticut found that 17 of 23 jurisdictions have declined to recognize, or not chosen to recognize, a cause of action for spoliation of evidence. ***Regency Coachworks, Inc. v.*** *General Motors Corp.,* 1996 WL 409339 (Conn. June 26, 1996). California's Supreme Court has never expressly adopted the tort. That court has accepted review in two pending cases involving the pleading requirements for punitive damages in spoliation cases. ***Cedars-Sinai Medical Ctr. v. Bowyer,*** 917 P.2d 625 (Cal. 1996); ***Temple Comm. Hosp. v. Ramos,*** 917 P.2d 625 (Cal. 1996).

The Fourth District's decision also expressly and directly conflicts with the Third District's *Miller II* decision,[6] which arrived in that court after the trial court construed *Miller I* to require the plaintiff to sue the manufacturer as a prerequisite to a spoliation action. *Miller* ***never brought the products liability action*** (650 So. 2d at 673), leading the Third District to hold that her spoliation claim was not viable because she had failed to prove that the loss of evidence "has so ***fatally*** impaired the products liability claim that to bring a products liability action would be ***frivolous."*** (*Id.*) (emphasis added). In contrast, the Fourth District relieved the Brinsons of that essential predicate.

The Fourth District's opinion reveals that the panel misunderstood which suit is the required condition precedent to a spoliation claim under *Miller II*. In condoning the legally errant consolidation of the medical negligence and spoliation claims against St. Mary's, the court stated:

> There is little reason to wait for final judgment *in the underlying lawsuit* before bringing an action for spoliation of evidence.

685 So. 2d at 35 (emphasis added). But the basis for the Brinsons' spoliation claim was the products liability case, not the medical malpractice action against St. Mary's.[7] The Fourth District correctly identified the Brinsons' allegation that they were impaired in proving "a cause of action ***against the manufacturer*** and other responsible agents of the vaporizer unit."[8] (emphasis added).' It is small wonder that the Fourth District's decision dispensed with the

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[6] This case also patently conflicts with ***Herman,*** where among other conditions to a genuine spoliation claim, the Third District required "that the plaintiff had to demonstrate that she was unable to prove her underlying action owing to the unavailability of the evidence." 576 So. 2d at 315.

[7] St. Mary's does not contend that a plaintiff cannot bring a spoliation action when the destroyed evidence is essential to the negligence action against the spoliator itself. See *Bondu* (spoliation for hospital's loss of records fatally impaired plaintiff's medical malpractice action against hospital). The four corners of the district court's opinion expressly reflect that was not the circumstance in this case, notwithstanding the Brinsons' attempt to argue in their response opposing St. Mary's motion to recall mandate that the fatally impaired lawsuit was the medical malpractice action. (Response at 8).

[8] The "other responsible agents" must mean the servicing company for the equipment. In their response to St. Mary's motion to recall mandate, the Brinsons previewed their

(continued . . .)

Third District's requirements for the spoliation tort, since it mistook the "underlying lawsuit" to be the independent action for medical negligence against St. Mary's.

The *Miller* decisions are designed to prevent spoliation from shifting blame from the alleged primary wrongdoer — in this case the manufacturer of the allegedly defective and spoliated product — to the person who lost the evidence, ***unless the loss of evidence has fatally impaired the action against that primary wrongdoer.*** ***Miller II, 650 So.*** 2d at ***673; Miller I,*** 573 So. 2d 24. This goal cannot be accomplished unless the "underlying claim" which satisfies the condition precedent to a spoliation claim is either pursued, or demonstrated to be frivolous to pursue. The Fourth District lost sight of that defensive safeguard when it ignored that the Brinsons ***never even brought the products liability claim*** that was the predicate for the spoliation claim. The express and direct conflict between this decision and those of the Third District is inescapable.

II. The district court has set parameters for the consolidation of separate lawsuits that infringes on substantive rights.

Spoliation is based on the principle that the individual who negligently lost or destroyed evidence that was essential to the plaintiffs lawsuit should be responsible for that harm. Miller sued Allstate alleging its failure to preserve an accelerator pedal impaired her lawsuit against the car's manufacturer. ***Miller I,*** 573 So. 2d 24. Herman sued Continental alleging its failure to preserve an automobile for examination impaired her lawsuit. ***Herman, 576 So.*** 2d 313. In both cases, the alleged spoliator was not the "primary wrongdoer, " and the spoliation claim was not joined to an independent claim against the defendant.

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lack of conflict position by arguing that the spoliation claim actually alleged that they were unable to prove their medical malpractice claim against St. Mary's without the vaporizer. (Response at 7). This argument is not only found nowhere within the four corners of the opinion, it is also contradicted by the Fourth District's accurate understanding, which ***does*** appear in the four corners of the opinion, that the spoliation claim rested on the "Brinsons[']alleg[ation] that . . . St. Mary's knew of the potential claim against ***the vaporizer's manufacturer*** . . . . " (emphasis added).

St. Mary's is not the primary wrongdoer in a claim for defective product. But unlike ***Miller*** and ***Herman,*** the Brinsons also sued St. Mary's for its alleged malpractice, a cause of action that did not rely on the spoliated evidence. The consequence of that happenstance was legally devastating to St. Mary's. Notwithstanding St. Mary's initial and repeated objections to consolidation of those two separate lawsuits, the court found no error despite St. Mary's loss of two substantive rights: its statutory risk management privilege and apportionment of fault to an admittedly negligent Dr. Cooney.

A. Loss of St. Mary's "risk management" privilege.

The district court noted St. Mary's repeated assertion that consolidation placed it in "an untenable position" of being forced to choose between a statutory privilege in the negligence suit, and its need for the privileged materials to defend the separate spoliation suit. The district court acknowledged the principle that St. Mary's should retain its rights in each suit despite consolidation. But it then ruled that consolidation didn't compel the loss of privilege because "St. Mary's made a conscious decision to waive its privilege in order to defend the spoliation claim. " The Hobson's choice between losing the spoliation lawsuit because of the inability to rely on privileged materials, and the impact on the defense of a negligence lawsuit by the production of those privileged materials, is ***of course*** a "conscious" decision. But it is no justification for an erroneous consolidation.

The district court perceived no harm in causing St. Mary's to be forced to choose between its right to defend the spoliation lawsuit and asserting its statutory risk management privilege in the separate medical malpractice action in order to achieve judicial efficiency by consolidating the Brinsons' spoliation claim with their independent negligence action. The Third District adopted a conflicting approach to such a consolidation conundrum in ***Shores Supply*** Co. v. ***Aetna Casualty &*** Sw., 524 So. 2d 722 (substantive right to attorney's fees for prevailing in claims under statutes cannot be defeated by a larger award under a consolidated counterclaim). [9]

[9] Both the Third and Fifth Districts acknowledged in similar settings that abatement of (continued . . .)

The impact of the Fourth District's lenient attitude toward consolidation goes beyond this case and defines its framework in the universe of spoliation lawsuits. It ***defines the parameter*** for cases in which an alleged spoliator is also alleged to be negligent toward the plaintiff in a manner independent of the spoliation claim — which could end up being every ***tort lawsuit in which a plaintiff can assert that some piece of evidence was not preserved for use in a suit against a third party.*** This Court is respectfully requested to take note of the conflict and the potential for harm.

B. Loss of St. Mary's right to apportionment of fault.

The snowball effect of consolidating the Brinsons' separate spoliation and medical malpractice lawsuits gained added momentum when the trial court barred apportionment of fault between the admittedly negligent Dr. Cooney and St. Mary's alleged fault in failing to preserve the vaporizer. [10] The district court affirmed," a result that caused the district court's novel parameters for the tort of spoliation to resound even further.[12]

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bad faith claims was necessary to allow the issue of coverage to be decided without disclosure of the privileged claim file. ***Allstate Ins. Co. v. Lovell, 530 So.*** 2d 1106 (Fla. 3d DCA 1988) (insurer need not produce privileged claims file until coverage issue resolved) and ***Allstate Ins.*** Co. v. ***Melendez,*** 550 So. 2d 156 (Fla. 5th DCA 1989) (recognizing abatement of one suit ***avoids*** privilege loss that would result from consolidation). Both districts recognized that a decision of this Court later superseded the need for abatement by determining that the attorney/client and work product privileges continued in both settings. ***See Royal Ins. Co. of America v. Zaya's Men's Shop, Inc.,*** 551 So. 2d 553, 554 (Fla. 3d DCA 1989). The point remains, of course, that procedural consolidation should not abrogate a party's substantive right, which would be available were the cases tried independently. See ***also Kingsley v. Kingsley,*** 623 So. 2d 780 (Fla. ***5th*** DCA 1993), ***review denied,*** 634 So. 2d 625 (Fla. 1994) (termination of parental rights and adoption petitions should not be tried together because natural parents have substantive right in termination proceeding not to be compared to prospective adoptive parents).

10 Trial on damages was conducted only on the Brinsons' spoliation lawsuit when, after St. Mary's pleadings and defenses were stricken, the trial court directed a verdict for the Brinsons on the spoliation count.

11 In its original, withdrawn opinion, the district court had ***reversed*** the trial court's denial of apportionment of fault, held that the jury should have been instructed regarding Dr. Cooney's fault, and remanded for a new trial on damages. ***St. Mary's Hospital, Inc. v. Brinson,*** 21 Fla. L. Weekly D1187 (Fla. 4th DCA May 22, 1996).

12 A defendant has the absolute right to have a jury evaluate the relative fault of "all of the other entities who contributed to the accident." ***Fabre, 623 So.*** 2d at 1185. That (continued . . .)

This Court's decision in ***Nash v. Wells Fargo,*** which declared apportionment of fault to be an affirmative defense, has drastically altered the principle that requires that a penalty reflect the degree of misconduct. Where apportionment of fault has been pled, a defendant whose defenses are stricken will be held responsible for 100% of the non-economic damages, without regard to the ultimate severity of that sanction relative to the contemptuous conduct. The trial court, when it imposes the sanction, will lack the ability to gauge the severity of its punishment because it will be unaware of what damages the jury will return and what percentage of fault it would have attributed.

By striking St. Mary's affirmative defenses, which included apportionment of fault, the court held St. Mary's liable for the full amount of a ***$9*** million verdict for non-economic damages before it knew what ramification that sanction would have. That result conflicts with the principle that the sanction, at the time of its imposition, should be proportionate to the conduct that led to its imposition. St. Mary's conduct, which was attributable to the trial court's foundationally flawed consolidation, was anything but an "extreme circumstance" that should require St. Mary's to bear the economic burden for Dr. Cooney's admittedly negligent actions, ***Mercer*** v. ***Raine***, 443 So. 2d 944 (Fla. 1984), particularly where the function of sanctions is traditionally to remove the ability to defend against liability, not hold a defendant responsible for non-economic damages that it did not cause.

CONCLUSION

The conflict of decisions between the Third and Fourth Districts presents an important opportunity for the Court to shape the scope of the cause of action for spoliation of evidence, a tort it has never addressed.

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right, now embodied in section 768.81(3), Fla. Stat. (1995), would have otherwise required the jury to apportion fault between Dr. Cooney and St. Mary's, The district court denied apportionment, however, because the trial court's striking of St. Mary's affirmative defenses eliminated apportionment under this Court's decision in ***Nash v. Wells Fargo Guard Services, Inc.,*** 687 So. 2d 1262 (Fla. 1996). ***That striking of defenses was the result of St. Mary's being forced to deal with the Hobson's Choice on privilege, however, which was the result of the trial court's repeated refusal to sever the spoliation and negligence causes of action.***

Respectfully submitted,

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