IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 89,889

ST. MARY'S HOSPITAL, INC.

Petitioner,

v.

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

Respondents.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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

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RECORD REFERENCES

The following references are used in this brief:

(1) record citations are shown as "(R. ___)";

(2) references to the supplemental record are shown as "(S.R. ___)"; and

(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. ___)."

INTRODUCTION

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 described as a Halothane vaporizer. Tragically, Alonzette died as a result of excessive anesthesia being administered.

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, and that it had a duty to preserve that piece of equipment but had instead allowed the manufacturer to disassemble and spoliate it.

Over St. Mary's continuous objections, the trial court consolidated the medical negligence and spoliation lawsuits for trial, and repeatedly refused to sever them. Consolidation created an impossible dilemma for St. Mary's: it had a statutory right protecting the confidentiality of its internal risk management records in the Brinsons' negligence lawsuit, but a need to use those materials in defense of their spoliation lawsuit. Consolidation for trial required St. Mary's either to abandon its statutory privilege in order to defend the spoliation suit, or to forego the use of materials needed for its defense of the spoliation suit. When St. Mary's declined to produce the materials, agreeing not to adduce evidence relating to them, the court sanctioned St. Mary's by striking all of its pleadings in both lawsuits, and it directed a verdict in the suit of the Brinsons' choosing, the spoliation lawsuit. The court then refused to allow St. Mary's to argue apportionment of Dr. Cooney's fault to the jury trying damages, on the ground that apportionment was an affirmative defense which had been stricken.

The Fourth District affirmed these actions and the jury's $9 million damages award, in a 2-1 decision that purported to adopt the Third District's tort of spoliation of evidence. The court reversed for a new trial on damages, to allow apportionment of fault. The dissent wrote that St. Mary's was entitled to separate trials on medical negligence and spoliation in order to preserve its

statutory privilege, and it viewed the striking of pleadings as a direct consequence of the improper, continuing consolidation of the two cases. On rehearing, and over the same dissent, the court applied the Court's decision in *Nash v. Wells Fargo Guard Services, Inc., 678 So.* 2d 1262 (Fla. 1996), to hold that St. Mary's had lost its affirmative defense of apportionment when its pleadings were stricken, and affirmed the damages judgment as well.

In jurisdictional briefing to this Court, St. Mary's argued that the spoliation tort adopted by the Fourth District was different from and in conflict with the one introduced into Florida's common law by the Third District. The Fourth District omitted elements of that new tort which the Third District deemed essential, including either a prerequisite suit by the Brinsons against the manufacturer of the vaporizer that they claimed had been despoiled by St. Mary's negligent loss of the vaporizer, or a showing that the lost vaporizer had so fatally impaired any suit against the manufacturer that to have brought one would be frivolous — the standard for a spoliation cause of action in the Third District. *Miller v. Allstate Ins. Co., 650 So.* 2d 671, 673 (Fla. 3d DCA), *review denied,* 659 So. 2d 1087 (Fla. 1995). The Brinsons had neither sued the manufacturer, nor shown that a product liability suit would be futile. The Brinsons countered by arguing that the spoliation claim they filed was based on losing a cause of action against St. Mary's itself, and not against the manufacturer. Their spoliation Complaint belies this assertion, but either way the Brinsons would have it the spoliation claim approved by the Fourth District for the Brinsons is fundamentally divergent from the elements for that tort identified by the Third District.

Reversal for a new trial is required because the consolidation of different causes of action into a single jury trial both compelled the loss of a substantive, statutory right, and led to the unwarranted sanction of striking St. Mary's pleadings and the lack of apportioned fault to Dr. Cooney.

STATEMENT OF THE CASE AND FACTS

I. Facts regarding the incident leading to the death of Alonzette Brinson.

Alonzette Brinson ("Alonzette") was the 19-month old daughter of Alonzo and Willa Brinson. (R. 472). On August 4, 1992, Alonzette was taken to St. Mary's Hospital for outpatient eye surgery, for which general anesthesia was required. (R. 48 1). The anesthesiologist in charge was Dr. John Cooney, a staff physician who was a member of a professional association called St. Mary's Anesthesia Associates. (R. 2; S.R. 4).

Dr. Cooney administered anesthesia to Alonzette using an anesthesia machine, containing as a component part a Halothane vaporizer. (T. 1066-67; S.R. 33-35). Dr. Cooney began with a 1% concentration of Halothane, which he increased to a 3% concentration. (S.R. 61). As the anesthesia was being administered, Dr. Cooney's attention was diverted from watching Alonzette's clinical signs for a period between five to eight minutes, due to the difficulties he experienced during numerous attempts to insert an intravenous line into the patient. (S.R. 60). Ultimately, Dr. Cooney noticed that Alonzette's vital signs were deteriorating, as a consequence of which he administered Atropine to increase her heart rate and blood pressure, and diminished the concentration of Halothane. (S.R. 66, 68).

Alonzette's vital signs continued downward. Dr. Cooney administered another dose of Atropine and then decreased, and ultimately stopped, the administration of Halothane. (S.R. 68-70). Dr. Cooney then administered additional medication (S.R. 73) and then cardiopulmonary resuscitation measures. (S.R. 74). These measures brought Alonzette's heart rate and blood pressure back to normal levels (S.R. 74), but Alonzette never regained consciousness. (T. 501-05). The surgical procedure was terminated. (S.R. 75). She was admitted to the pediatric intensive care unit of the hospital and placed on a life support respirator. (S.R. 75). On August 13, she died. (R. 510-14).

II. Facts regarding the anesthesia equipment.

St. Mary's had purchased a Unitrol anesthesia machine, with its vaporizer component, from its manufacturer, Ohio Medical Products, a division of the BOC Group, Inc. n/k/a Marker Downe Corporation. (T. 734, 1128-29). St. Mary's had entered into a field service agreement with BOC Healthcare, Inc., n/k/a Ohmeda, Inc., which called for periodic inspections, routine maintenance and servicing. (T. 733, 764-65, 1053, 1133). It had also entered into a Vaporizer Efficacy Testing and Exchange Agreement with Ohmeda, which provided for the servicing and calibration of the units. **(T. 751, 766-67, 1053-54).**

Ohmeda had tested the Halothane vaporizer's calibration prior to its installation at St. Mary's in December 199 1, at which time it was within the acceptable tolerance of Ohmeda's specification plus or minus 15%. (T. 768-69, 1070-72). At the time the Halothane vaporizer was installed at St. Mary's, it was tested by the service representative who also found that it met Ohmeda's specifications. (T. 770). The BOC Healthcare service representative responsible for servicing St. Mary's equipment, Brian Pszeniczny, had serviced the Unitrol anesthesia machine quarterly in December 1991, March 1992, and June 1992. (T. 781-85, 1053). Prior to Alonzette's death, there had been no prior incidents or field service reports at St. Mary's with respect to the anesthesia equipment that was used in connection with Alonzette's operation. (T. 703, 775; S.R. 79).

Following Alonzette's death, Dr. Cooney or his partner directed Betty Russell, an anesthesia technician, to contact Ohmeda with a request that the Unitrol machine and vaporizer be checked. (T. 866-69; S.R. 82-83). Ms. Russell had not been in attendance during the operation, and she had no knowledge of the incident involving Alonzette. (T. 861, 868). Dr. Cooney did not advise Ms. Russell why he wanted the machinery checked. (S.R. 83; T. 867-68). Additionally, Dr. Cooney did not advise Ms. Russell that the anesthesia equipment might have been a cause of an injury or death (T. 868-69), and did not advise Ohmeda or its service representative why he wanted the vaporizer checked. (T. 753-55).

Upon examination of the vaporizer on the hospital's premises, Pszeniczny determined that the Halothane vaporizer was delivering "a slightly higher than normal percentage of agent." (T. 802). In accordance with Ohmeda's rights under the Vaporizer Efficacy Testing and Exchange Agreement, he removed the vaporizer from the hospital and substituted another for the hospital's use. (T. 816). Pursuant to that contract with Ohmeda, St. Mary's had no right to object or insist that it keep the vaporizer. (T. 816).

The Halothane vaporizer was bench tested at the Ohmeda facility. (S.R. 172). Being unaware that it had been involved in a medical incident at the hospital, and having received no instructions from anyone to the contrary, Ohmeda followed its usual procedure of disassembling the vaporizer unit and recycling the components for use at other facilities. (S.R. 130). It made no effort to maintain the unit intact for further testing. (S.R. 130).

III. Pi-e-trial events.

A. The neplieence lawsuit.

The Brinsons brought a negligence suit in Palm Beach Circuit Court against St. Mary's, Dr. Cooney and his anesthesia group based on negligence (the "negligence suit"). Count I of the complaint charged St. Mary's with negligent care and treatment of Alonzette and the failure to have proper hospital procedures in place "concerning maintenance of anesthetic equipment, failure to follow those procedures and for the failure to provide properly maintained anesthetic equipment." (R. 4-5). Count IV asserted vicarious liability against St. Mary's for the negligence of the anesthesiologists involved with the surgery, including Dr. Cooney. (R. 10-12). Among its defenses, St. Mary's asserted apportionment of fault, under section 768.81, Florida Statutes (1993). (R. 14).

B. Dr. Cooney's settlement in the negligence lawsuit.

Before trial was to commence, the Brinsons moved to drop all defendants other than St. Mary's based on a settlement with Dr. Cooney and his group. (R. 51-52). The terms of

settlement included Dr. Cooney's release of St. Mary's from "any and all liability . . vicariously or by virtue of an 'ostensible agency theory."' (R. 378-82). The court granted the Brinsons' motion to drop other defendants. (R. 53-54).[1]

C. **The spoliation lawsuit.**

Following their settlement with Dr. Cooney, the Brinsons filed a second lawsuit against St. Mary's, this time for spoliation. (R. 1073-75). The language of this pleading, in which St. Mary's was identified by name in the numbered "factual" allegations five times, is particularly pertinent for review. The spoliation suit alleged that St. Mary's knew or should have known that the Halothane vaporizer "was relevant to a potential civil action for the injury and subsequent wrongful death of Alonzette . . ." (R. 1074). St. Mary's "had a duty to preserve said evidence because they knew Alonzette Brinson had been injured by an overdose of Halothane and were [sic] informed that the vaporizer delivering the anesthetic agent was out of calibration and was delivering thirty (30%) more anesthetic agent than was proper." (R. 1074). The complaint contended that, as a direct and proximate result of the vaporizer's destruction, the Brinsons' "ability to prove the cause of action ***against the manufacturer and other responsible agents including the servicing company for the equipment,*** has been impaired and that said cause of action has been lost." (R. 1073-75) (emphasis added).

The spoliation complaint made no express assertion that St. Mary's had acted ***intentional&*** in any way, and in their joint pretrial stipulation, the parties stated that one of the questions for trial was "[w]hether there was ***negligence*** on the part of St. Mary's Hospital [written in all capital letters in original] in spoliation of evidence." (R. 326) (emphasis added). St. Mary's moved to

[1] St. Mary's moved for summary judgment on various grounds, including (i) that the release of Dr. Cooney had the effect of releasing the hospital from negligence with respect to the administration of anesthesia, and (ii) that the Brinsons had stipulated that the hospital's responsibility with respect to anesthesia matters was no longer an issue in the case other than as regarded preservation of the vaporizer unit. (R. 68-72, 1022-59). The trial court granted partial summary judgment for St. Mary's in the negligence suit, based on the agreement of counsel that no claims would be pursued against the hospital for its post-operative care of Alonzette. All other aspects of the motion and the Brinsons' cross-motion for summary judgment (R. 79-80), were denied, including St. Mary's claim that it could not be held vicariously liable for the acts and omissions of Dr. Cooney. (R. 137).

dismiss the spoliation suit without prejudice, on the ground (among others) that the Brinsons were first obliged to establish that they had not prevailed in their negligence suit against the manufacturer and its agents, and had not in fact suffered an inability to recover for the alleged harm done them. (R. 1077). The motion was denied. (R. 1083-84). St. Mary's then filed its answer to the spoliation complaint, asserting as an affirmative defense that the negligence of third persons and parties, such as Dr. Cooney, required that fault be apportioned pursuant to Florida law. (R. 1085-88).

D. Consolidation of the two suits.

The Brinsons moved to consolidate the two lawsuits. (R. 1089). The motion was initially granted over St. Mary's objections "without prejudice for the Defendant to raise a motion for severance of the two cases, either before or during trial. . . ." (R. 168).[2] St. Mary's then filed a motion to bifurcate the trial, in order to try the negligence suit separately from and before the spoliation suit. The motion asserted that consolidation placed the hospital in the untenable position of having to choose between foregoing the statutory privilege accorded to risk management materials for purposes of the negligence suit, and being prohibited from using risk management information necessary to defend the spoliation lawsuit, including the testimony and records of the hospital's Assistant Risk Manager, Sharon Snyder. (R. 3 19).

The trial court denied St. Mary's motion to bifurcate, without prejudice. (R. 322). The trial court stated that St. Mary's could reconsider its position on the statutory risk management privilege during the course of trial, and that St. Mary's could, if it chose, waive the privilege to the extent required to defend the spoliation cause of action. (T. 38-40).[3]

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[2] St. Mary's sought review of the order granting the motion in the Fourth District by petition for writ of certiorari (Fourth District Case No. 94-00578), but that petition was denied without requiring a response from the Brinsons.

[3] Throughout the proceedings that followed, St. Mary's on many occasions renewed its motion to de-consolidate and its motion to bifurcate the two proceedings. (T. 33-38 (pre-trial), T. 59 (before jury selection); T. 33 1-33 (before opening arguments); T. 547 (after Chalmers Goodyear's deposition testimony); T. 944 (before "similar acts" testimony by the Brinsons' expert); and T. 1196-1202 (after St. Mary's stated that the litigation reports would not be produced)).

IV. Events and testimonv during the course of trial.

On the first day of the consolidated trial, St. Mary's renewed its motion to sever or to bifurcate the two cases. (T. 60). The motion was again denied. (rd.). Forced to try the two cases together, St. Mary's elected to waive its risk management privilege in order to be able to defend against the spoliation allegations. (T. 58). In conjunction with its waiver, St. Mary's agreed to make Ms. Snyder available for deposition by the Brinsons. (*Id.*).

The subject of Ms. Snyder's proposed testimony and the otherwise-privileged risk management documents coursed through the trial. (T. 88-94, 3 12). The Brinsons asserted that St. Mary's waiver of the privilege required that any documents withheld from disclosure should be submitted to the *court in camera,* to determine if any of the materials should be disclosed to the Brinsons. (T. 3 15). St. Mary's took the position that its waiver of risk management materials did not abandon other privileges such as the attorney-client and work product privileges (T. 3 16), but it did submit all materials to the *court* for *in camera* inspection. (T. 328). Following opening arguments, the court advised the parties that it had reviewed the materials submitted by St. Mary's, that the materials were subject to the attorney-client privilege, and that St. Mary's need **not** turn them over to the Brinsons. (T. 450). The same ruling was reiterated following when the Brinsons read into the record in their direct case portions of Dr. Cooney's deposition. (T. 546).

In opening argument, counsel for the Brinsons argued that St. Mary's had a duty to disclose all information about the death of Alonzette, "[s]o that other families will not have to suffer, so that there will not be another Brinson case. . . ." (T. 369). He argued that the vaporizer should have been tested, "so that there are no other Brinson babies and no other Brinson families who have to suffer." (T. 382).

The Brinsons called as an expert witness Dr. Elizabeth Frost, chairman of the anesthesiology department of New York Medical College. (T. 956-63). She testified to a number of matters:

(1) that Alonzette had died of too much anesthesia and would not have had the equipment been "state of the art" rather than older, and had functioned properly (T. 981-82, 1124),

admitting on cross-examination, however, that a hospital has the right to rely on the doctor to a certain extent in the selection of anesthesia equipment (T. 1028), and that it is a *doctor's* duty to be aware of the equipment that is necessary to meet the minimum standards of safety (T. 1034);

(2) that Dr. Cooney did not exert all the attention and care that he could have in monitoring Alonzette adequately (T. 101 5), and took longer than what might have been necessary or appropriate to insert the I.V. into Alonzette (T. 1085, 1101);

(3) that inserting an I.V. into a baby can be difficult, and that a reasonably prudent anesthesiologist should have known that and arranged for extra assistance in starting the I.V. (T. 1090-1100); and

(4) that Dr. Cooney *had* deviated from acceptable standards of care (T. 1089-90).

Over objection, Dr. Frost also testified that she had been involved as a consultant in another case at St. Mary's where a patient had been injured due to allegations of malfunctioning equipment (although not anesthesia equipment), and the equipment was unavailable for the manufacturer to test. (T. 968). When the Brinsons concluded their consolidated cases, both as to liability and damages,[4] St. Mary's moved for directed verdicts in both cases. (T. 1289, 1294). The trial court denied both motions. (T. 1292, 1298).

During the first week of trial, the Brinsons took Ms. Snyder's deposition. In the course of her testimony, Ms. Snyder mentioned that she had in part relied on reports from an investigator for a consultant, engaged by the hospital's liability insurance carrier to evaluate the Brinson incident for purposes of the litigation (the "litigation reports").[5] (R. 801-03). These reports had been submitted along with other documents for review by the trial *court in camera,* and had been

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[4] Prior to and during the course of trial, a number of evidentiary rulings adverse to St. Mary's were made by the trial court. These included (1) the admissibility of expert witness testimony as to the *jury's* responsibility to determine relative degrees of fault (T. 1137-38), and (2) the denial of a motion in limine to exclude any mention of Dr. Cooney's employment/ agency relationship with the hospital, based on the Brinsons' release of St. Mary's from vicarious liability for acts and omissions of Dr. Cooney. (T. 70-77).

[5] The litigation reports, developed by Affiliated Risk Control Administrators, were transmitted to trial counsel, with a copy to the risk management department of the hospital. (T. 1194).

deemed to fall within the attorney-client privilege. (T. 449-50). The Brinsons nonetheless demanded copies of these documents during Ms. Snyder's deposition, but the hospital refused. (R. 798-80 1).

On Monday following the taking of Ms. Snyder's deposition, the issue of her proposed testimony came up when the Brinsons again demanded production of the litigation reports. After considerable back and forth between counsel, the court ruled that there was no privilege for the litigation reports, (T. 1196). So that it would not be forced in defense of the spoliation suit to produce evidence inadmissible in the negligence case, St. Mary's again moved to sever the two cases. (T. 1196-98). The court again refused. (T. 1202).

Thereupon, counsel for St, Mary's advised that he had been instructed not to relinquish the documents, and that St. Mary's would accept the consequences of declining production.[6] Counsel for the Brinsons asked for sanctions: either prohibiting Ms. Snyder from testifying about her investigation of the loss of the vaporizer, or having the court review the litigation reports *in camera* to see if certain portions could be redacted. (T. 1198-1201). When the court stated it had understood St. Mary's counsel to accept whatever sanction the court might elect to impose, counsel for the Brinsons, for the first time, demanded that a directed verdict for the Brinsons would be the right sanction. (T. 1201).

Defense counsel then stated that his comment was misunderstood, and that he would avoid asking any questions about the reports when he called Ms. Snyder to the stand. (T. 1202). At that point, counsel for the Brinsons injected:

> You just ordered them to produce the reports . . . . Strike the pleading, give us a directed verdict. Let's put this thing to the damage phase to this jury and let's get on with it.

(T. 1203). The court responded to the Brinsons' suggestion by saying:

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[6] In the context of the discussion regarding the scope of testimony by Ms. Snyder, counsel phrased his response to the court as St. Mary's willingness to take "whatever sanctions" the court ordered. (T. 1196).

> [t]he minimum sanction would be not let her testify, but why don't we do what they suggest, and I thought you suggested, seal it up and let me look at it . . . .

(T. 1206). St. Mary's immediately turned the litigation reports over to the court for its *in camera* inspection. The court then ruled that the litigation reports, with the exception of certain portions, should be turned over to the Brinsons. (T. 1299). The court indicated that if St. Mary's did not turn them over, the court would probably strike St. Mary's defenses. (T. 1299). Defense counsel declined to turn over the documents, but offered not to call Ms. Snyder to testify with regard to any of the risk management investigation that she had done. (T. 1324). The court struck St. Mary's defenses (T. 1326) and asked counsel for the Brinsons to select on which of the two lawsuits he preferred the directed verdict to be entered. (T. 1327). The Brinsons elected a verdict on the spoliation lawsuit (T. 1328), and they waived any recovery for the hospital's medical negligence, including the submission of a verdict form to the jury on the medical negligence lawsuit. (T. 1334).

The Brinsons then objected to the presentation of any evidence by St. Mary's on apportionment of damages, arguing that apportionment was an affirmative defense and that all of St. Mary's affirmative defenses had been stricken. (T. 1328-39). St. Mary's argued that the issue of apportionment was a statutory right and/or concerned damages, and that it was entitled to put on evidence in refutation of the Brinsons' case in chief. (T. 1328-29). The trial court disagreed, directed a verdict, and ruled that there would be no apportionment. (*Id.*).

After the court had ruled that St. Mary's defenses were stricken, St. Mary's proffered testimony that it would have presented in defense of the two lawsuits (T. 1339), including the deposition testimony of Ms. Snyder, the testimony of two expert witnesses for the defense, and a portion of the deposition of the *Brinsons'* expert witness, John Patton, M.D., an anesthesiologist at St. John's Hospital in Jackson, Wyoming, The critical features of these proffers follow.

A. Ms. **Snyder.** Ms. Snyder would have testified she was the only hospital employee assigned to investigate the Brinson incident (R. 785-86) but she reviewed and relied in part on the litigation reports prepared by the insurer's investigator (R. 798), and that all employees of St.

Mary's are trained in risk management matters and have a duty to report to the risk management department any adverse incident affecting a patient, including physicians (R. 718). She testified that when hospital equipment had been involved in a patient incident on prior occasions, she had personally followed up with the manufacturer of the equipment to inquire what might have gone wrong (R. 737), and that equipment known to have been involved in a patient incident is usually sequestered by the risk management department, or the user instructed not to continue its use until the manufacturer can inspect it. (R. 738-39).

She was first notified of the Brinson incident the day it occurred, based on a telephone call and incident report from Ardie Davis, the nurse manager of the operating suite. (R. 794). No physician filled out such a report (R. 8 13), although Ms. Snyder made several attempts to reach the vacationing Dr. Cooney. (R. 814-17). She never had any contact with Ohmeda regarding the Brinson incident, and did not direct anyone at St. Mary's to contact Ohmeda. (R. 764-65). She first saw a note that had been left by the Ohmeda service representative for Ms. Russell, the anesthesia technician who was directed by Dr. Cooney to contact Ohmeda, about a month or so after the incident, during the course of her investigation. (R. 769). She did not thereafter contact Ohmeda for a report, or instruct anyone else to do so (R. 770-72), but she did speak to Ms. Russell and to the director of the anesthesia department regarding the matter. (R. 772, 775). Ms. Snyder did not duplicate the work that went into the litigation reports, but did talk about the incident to the investigator who wrote those reports. (R. 801-04, 806). The author of the litigation report prepared reports for trial counsel about the Brinson incident, which were also transmitted to Ms. Snyder. (R. 802).

B. **St. Maw's medical expert, Dr. Modell.** Dr. Modell, an anesthesiologist on the faculty of the University of Florida College of Medicine (R. 447), would have testified that St. Mary's did not breach the standard of care with regard to its service contracts on the equipment at issue (R. 477); that Dr. Cooney was negligent in that, among other things, he was not sufficiently attentive to the child's vital signs, did not do the appropriate things to remedy the overdose of Halothane, should not have spent as much time starting the I.V. without paying attention

to the child's ventilation and vital signs, and did not start resuscitation early enough. (R. 483-88). He stated that any slightly excessive Halothane output levels delivered by the anesthesia machine were not clinically significant, and were not causative of the injuries or death of Alonzette (R. 442), and that there was no breach of duty in the failure to report to the manufacturer or the Food and Drug Administration under the circumstances of this case. (R. 441).

C. **St. Marv's biomedical engineering** expert, **Dr. Raemer.** Dr. Raemer, the Director of Clinical Engineering at Brigham and Women's Hospital in Boston, heads a department responsible for selection, servicing, preventive maintenance and testing of hospital medical equipment, including anesthesia equipment and vaporizers. (R. 505-07). Dr. Raemer would have testified that because St. Mary's had a full service contract on their vaporizers, which were inspected according to Ohmeda's protocol, the hospital did what was expected of it in maintaining the vaporizer (R. 539), and that St. Mary's did not breach applicable standards of care relating to the maintenance of the anesthesia equipment. (R. 442). The doctor testified that there was a total lack of evidence to suggest that further inspection of the equipment would have revealed the nature and/or cause of the delivery of any slightly excessive Halothane. (R. 442).

D. The Brinsons' medical expert, Dr. Patton. Based on a review of the records at St. Mary's Hospital, Dr. Patton opined that the anesthesiologist in a surgical setting, and not any of the ancillary personnel, has responsibility to assure that all equipment is functioning within normal parameters (R. 614), and that Dr. Cooney's conduct of the Brinson incident fell below the standard of care in a number of specifics, including not obtaining assistance in administering the X.V. to Alonzette and not monitoring adequately the depth of her submersion from the anesthesia as it was being administered. (R. 609, 623, 650). Dr. Patton testified that many experts caution against exceeding a 2% administration of Halothane (R. 632), that when Halothane vaporizers are out of calibration they are invariably in error on the low side (R. 654), that without any prior complaint, a hospital would not be in a position to know that anesthesia equipment might be out of tolerance (R. 653), that the technicians, operating room personnel, and ancillary personnel who assisted Dr. Cooney at St. Mary's acted in accordance with the acceptable standards of care

(R. **612-13);** and that it is the primary responsibility of an ***anesthesiologist*** to notify the hospital if there has been a medical incident or a possible malfunction of any equipment, so that the equipment can be isolated and immediately examined. (R. 652-53, 688-90).

In closing argument, and over defense objections, which were ultimately sustained, counsel for the Brinsons chastised the hospital for its conduct "in attempting to hide the truth" — apparently a comment on St. Mary's assertion of the statutory privilege of non-disclosure. (T. 1391).[7]

The Brinsons asked the jury for a "floor" of $5 million in computing the pain and suffering of Alonzette's parents. (T. 1400). The jury returned verdicts of $3 million for each of the Brinsons as to past pain and suffering, and another $1.5 million for each as to future pain and suffering — for a total award of ***$9*** million. (T. 1413).[8]

St. Mary's motion for a new trial was denied by the court (R. 1008), as was a motion for a remittitur of the damages awards on the ground of excessiveness. (R. 1006). On appeal, the Fourth District, on rehearing, affirmed the judgment. ***St. Mary's Hospital, Inc. v. Brinson, 685*** So. 2d 33 (Fla. 4thDCA 1996).

SUMMARY OF ARGUMENT

A new tort cause of action has been accepted into Florida's common law by two district courts of appeal. This tort, designed to impose liability for an unintentional spoliation of evidence, has been applied with fundamentally different essential elements in the Third and Fourth District Courts of Appeal. This case asks the Court to decide if, and to what extent, this new and independent cause of action should be made a part of Florida's common law.

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[7] In closing argument,, other references were made to the "Nazis," describing juror citizens as "buffers" against such "vigilante" conduct (T. 1352-53), and later to the possible existence of "Satan" to bring such evil into the world. (T. 1364). Subsequently, the Brinsons' counsel discussed indifference by St. Mary's to the needless death of Alonzette and that "that indifference had been magnified because of the conduct of the defendant in this case of attempting to hide the truth." (T. 1390). Defense objection was sustained to this latter argument. (*Id.*).

[8] The jury award against St. Mary's was offset by the $675,000 payment made by Dr. Cooney. (R. ***976-77).***

In this case, a tort of spoliation was approved for plaintiffs who claimed that evidence was negligently, not intentionally, rendered unavailable by a hospital-defendant they had already sued for medical negligence. In that situation, however, unlike cases in which a spoliation tort is brought against someone outside an existing lawsuit who has lost evidence necessary to pursue the pre-existing suit, and cases involving an ***intentional*** destruction of evidence, it is neither necessary nor appropriate to provide the plaintiff with a separate, second lawsuit.

To do so subverts existing precedents that provide complete relief for the plaintiff prejudiced by missing evidence, through the powerful presumption approved in ***Public Health Trust of Dade County*** *v. Valcin*, 507 So. 2d 596 (Fla. 1987), through the invaluable adverse inference approved in ***New Hampshire Ins. Co. v. Royal Ins. Co,, 559 So.*** 2d 102 (Fla. 4th DCA 1990), and through intra-suit sanctions. To do so also creates conflict with the policies adopted by the Court to prevent duplicative tort lawsuits, and damages verdicts dependent on speculative and unreliable evidence. The Court should disapprove any use of an independent spoliation cause of action in the form of a second suit against an alleged spoliator who is already the defendant in an existing tort lawsuit, as redundant, inharmonious with existing precedents, and pregnant with troublesome implications for the trial of civil claims.

If a cause of action for the unintentional spoliation of evidence is to be recognized as a suit that can parallel a suit already in litigation between the parties, the elements should be clearly defined. The Fourth District purported to approve a spoliation tort with elements that had previously been listed by the Third District, but it did so in name only. The Brinsons' spoliation lawsuit lacked fundamental elements for any tort cause of action, and 4 of the 6 elements that the Third District had identified as essential. A delineation of the elements for a spoliation tort will necessitate vacating the Brinsons' judgment on their spoliation claim.

The forced consolidation for trial of the Brinsons' two lawsuits caused St. Mary's to lose its statutory right to maintain the privacy of medical incident reports generated for use within the hospital. The loss of that right was not justified by any consideration of judicial efficiency. Moreover, the production of its legislatively-guarded work product material had never been

shown by the Brinsons to be necessary and unavailable from any other source, as required by Rule 1.280(b)(3). As a sanction for not producing a handful of privileged materials, the trial court struck all of St. Mary's affirmative defenses and directed a verdict of liability in the Brinsons' spoliation lawsuit. This sanction was completely out of proportion to St. Mary's conduct, and was totally unnecessary in light of lesser sanctions that were available and acceptable to St. Mary's The effect of the sanction was taken beyond any plausible legal bound when the trial court later prevented any apportionment of damages to the physician whose negligence was the primary cause of both the death of the Brinsons' daughter and the loss of the anesthesia equipment that was claimed to be indispensable to the Brinsons' spoliation lawsuit.

The jury's award of $9 million solely for the Brinsons' grief was legally excessive, constituting $8 million more than the highest previous such award, and roughly 10 times more than the average verdict in like circumstances in Florida.

ARGUMENT

I. The independent tort of spoliation approved by the Fourth District (i) contains different essential elements from those approved by the Third District in its *Herman* decision, (ii) creates disharmony with established common law doctrines applicable in Florida's existing tort law, and (iii) leads to endless litigation,

The common law evolves incrementally to satisfy the jurisprudential national notion that we are a "just" society. Legislation is the traditional, accepted route for the establishment of new causes of action, but the Court has occasionally, when compelling circumstances arise, provided a common law cause of action to fill a needed gap.' This case asks the Court to address the nature and scope of a cause of action in tort, totally independent of any contract or other form of tort cause of action, that two district courts have created where there has been a negligent loss or destruction of evidence.

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[9] ***E.g., West v. Caterpillar Tractor Co.,*** 336 So. 2d 80 (Fla. 1976), authorizing strict tort liability in tort for product manufacturers.

St. Mary's suggests that the Fourth District misapplied principles that undergird this relatively new tort of negligent behavior. The tort of spoliation in proper configuration could not possibly have been applied on the facts of this case, and the lower courts should have rejected the Brinsons' path to recovery by means of an independent cause of action for spoliation when there exists well-established, intra-suit presumptions and inferences that aid a plaintiff whose evidence has been lost by the defendant. The Court should not, and need not in this case, approve the Brinsons' utilization of this new tort cause of action. It was an unnecessary and duplicative route to recovery for a singular injury to the Brinsons. The acknowledged foundational elements for a spoliation tort cause of action do not exist in this case. The approval of a spoliation cause of action in this case will create unbounded and uncontainable mischief in the litigation of personal injury and wrongful death claims.[10]

A rational discussion of the nature of this common law cause of action can only be made from a clear understanding of the record facts (as to which the Brinsons are not in agreement with the district court), and from an analysis of the case law from the Florida district courts that have already addressed this new cause of action.

A. Analysis of the Brinsons' spoliation lawsuit.

The district court decided this case in the belief that the Brinsons brought a spoliation suit alleging the loss of a "potential civil claim *against the vaporizer's manufacturer,*" and that St. Mary's failure to preserve that unit "impaired the Brinsons' ability to prove a cause of action *against the manufacturer and other responsible agents of the vaporizer unit." 685 So.* 2d at 34 (emphasis added). The Brinsons claim their spoliation suit was entirely different -that it was based on a lost suit *against St. Mary's Hospital,* and not against the manufacturer.[11]

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[10] St. Mary's suggests that approval of a cause of action for spoliation by the Brinsons on the facts of this case will assure that the question recently posed in the title of a bar journal article will become the by-word for future personal injury trials: *Spoliated Evidence: Better than the Real Thing?,* FLORIDA BAR JOURNAL 22 (July/August 1997).

[11] In the jurisdictional brief filed with the Court, on pages 1 and 2, the Brinsons state:

> Plaintiffs spoliation lawsuit . . was based on Plaintiffs' inability to prove their

(continued . . .)

St. Mary's believes that the record supports the district court's understanding that the potential defendant in the civil suit the Brinsons claimed they were unable to pursue without the vaporizer was the vaporizer's manufacturer, not St. Mary's. While it is important to the Court's decision that it comprehend the nature of the Brinsons' spoliation suit, it really doesn't matter to the outcome of this appeal. A spoliation suit under either of the Brinsons' scenarios was legally deficient.

The Brinsons' original suit, a standard medical malpractice lawsuit brought against the hospital and the treating anesthesiologist, contained as Count I a claim against St. Mary's Hospital for "negligence." (R. 4). A copy of the Complaint is attached to this brief as Appendix 1. Two assertions in Count I were directed squarely at St. Mary's failure to have proper procedures to *maintain* anesthetic equipment, or to follow procedures concerning the *maintenance* of anesthetic equipment. (R. 4-5).

The Brinsons' second suit (for spoliation) was a 3-page document which alleged that St. Mary's knew of "a potential wrongful death action" due to an overdose of anesthesia to their daughter, that St. Mary's knew or should have known that anesthesia equipment was "relevant to a potential civil action" for injury and wrongful death, and that because of its failure to preserve that equipment "the Plaintiffs ability to prove the cause of action *against the manufacturer and other responsible agents including the servicing company for the equipment,* has been impaired

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(. . continued)
underlying medical malpractice lawsuit [against St. Mary's] 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.

* * *

After discovery, Plaintiffs chose *not* to file a lawsuit against the manufacturer. (Emphasis in original).

* * *

. . . 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. (Emphasis in original).

and that *said* cause of action has been lost." (R. 1074-75) (emphasis added). A copy of this Complaint is attached as Appendix 2.[12]

The Brinsons never filed a product liability lawsuit against the vaporizer's manufacturer, BOC Group, Inc., or its affiliated servicing company, BOC Healthcare, Inc., because "after discovery [they] made the decision not to do so."[13] They interpret the phrase "other responsible agents" in their spoliation Complaint as always being interpreted by them "to include St. Mary's."[14] This theory for their spoliation claim, however, does not comport with the record, in several regards.

First, St. Mary's had purchased this anesthesia equipment from its manufacturer, BOC Group, Inc. (T. 737, 1128-29). As the acknowledged outright owner of the anesthesia equipment, St. Mary's could never have been considered by the Brinsons to be BOC's "agent." Second, the language of the spoliation claim is completely inconsistent with the notion that St. Mary's was the target of the potential civil action that was impaired by a loss of the vaporizer. St. Mary's is identified by name five times in the course of the 3-page Complaint, yet the Brinsons now suggest they meant "St. Mary's" when they asserted a lost cause of action against "other responsible agents including the servicing company." The very specificity of "including the servicing company" as a modifier of the word "agents" provides a linkage at odds with a suit against St. Mary's,

Third, the spoliation suit was based on a "cause of action [that] has been *lost*" (R. 1075, emphasis added), but the Brinsons clearly had not "lost" any cause of action against St. Mary's as they were in fact pursuing a vaporizer-related claim against St. Mary's in Count I of their then-pending negligence suit. Fourth, the Brinsons representation to the Court that they decided not to

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[12] The Court will note that the district court's recitation of the Brinsons' allegations tracks the language of the Brinsons' spoliation Complaint precisely.

[13] Brinsons' Jurisdictional Brief at 6. *And* see *id.* at p. 1.

[14] Brinsons' Jurisdictional Brief at 1, citing to the Brinsons' own Response to St. Mary's motion for rehearing in the district court which in turn cites to the Brinsons' own motion for rehearing.

pursue the manufacturer "after discovery" can only mean that they had engaged in discovery *with a view to suing the manufacturer,* not St. Mary's.

Fifth, the Brinsons made no allegation in their spoliation Complaint that St. Mary's had "intentionally" lost or destroyed the vaporizer. They described St. Mary's conduct as a "negligent" spoliation of evidence. Yet Count I of the Brinsons' prior, original suit for negligence was also grounded on negligent, non-intentional conduct related to maintenance of the anesthesia equipment. The Brinsons essentially ask the Court to believe that, through extensive trial proceedings, they were simply fighting to consolidate and try together two separate and supposedly independent lawsuits against St. Mary's for negligent acts relating to the *same* equipment.

B. The Florida district court decisions on the tort of spoliation.

There are 7 decisions from the Florida district courts that adopt, approve or apply the independent tort of spoliation, and one decision from this Court that establishes the countervailing theme that prompted the only dissent in the district courts to the adoption of an independent spoliation lawsuit. A snapshot overview of these 8 decisions here will set the stage for the more complete discussion that follows.

1. In *Bondu v. Gurvich, 473 So.* 2d 1307 (Fla. 3d DCA 1984), *review denied, 484 So.* 2d 7 (Fla. 1986), a divided court held that, after summary judgment was awarded to the defendant doctors and hospital in a medical malpractice lawsuit, a separate lawsuit could be maintained against the hospital for its loss of the evidence (in this case, medical records) that caused her to lose her negligence suit. The court approved that separate tort claim on the rationale that, since claims against third-parties who lose evidence are cognizable "then, a fortiori, an action should lie against a defendant which , . . stands to benefit" from the plaintiffs inability to muster evidence for successful litigation. 473 So. 2d at 1312.

Chief Judge Schwartz dissented in *Bondu*, saying that "what the court characterizes as an 'a fortiori' situation is instead a complete non-sequitur," since there is no cognizable independent action for improper conduct in an existing lawsuit and, were the rule otherwise, "every case

would be subject to constant retrials in the guise of independent actions." 473 So. 2d at 13 14. Judge Schwartz suggested that a defendant's loss of key evidence has been addressed by way of a presumption that benefits the plaintiff, as developed in the Third District's then-pending-on-rehearing decision in *Valcin v. Public Health Trust of Dade County, 473 So.* 2d 1297 (Fla. 3d DCA 1984).

2. *Public Health Trust of Dade County v. Valcin, 507 So.* 2d 596 (Fla. 1987), was this Court's approval of a "presumption" mechanism for aiding a plaintiff whose lawsuit is impaired by the defendant's loss of critical evidence. The Court held that a plaintiff handicapped in pursuing a medical malpractice claim by the defendant's loss or destruction of evidence (medical records in this case, too) will have the benefit of a very special rebuttable presumption in that lawsuit — one that goes to the jury (as opposed to vanishing), and one which completely shifts the burden of proof by requiring the defendant to prove that the loss of evidence did **not** cause the plaintiff to lose the ability to prevail in its negligence claim.

3. *Miller v. Allstate Ins.* Co., 573 So. 2d 24 (Fla. 3d DCA 1990), *review denied,* 581 So. 2d 1307 (Fla. 1991) (often called *Miller* I), was a breach of contract lawsuit brought by an insured against her insurance carrier following an auto accident, based on the insurance company's failed promise to return her wrecked automobile so that she could bring a products liability suit against the auto manufacturer. Based on the court's prior recognition in *Bondu* of a **tort** cause of action for destruction of evidence, the court held that a prospective products liability lawsuit was a valuable "probable expectancy" for which a **contract** action would as well lie. 573 So. 2d at 26.

4. In *Miller v. Allstate Ins, Co.,* 650 *So.* 2d 671, 673 (Fla. 3d DCA), *review denied, 659* So. 2d 1087 (Fla. 1995) (called *Miller II*), the court refined its *Miller* I decision to specify that the plaintiff must initiate a separate products liability suit, which would then either be tried before or simultaneously with the negligence lawsuit that the injured insured claims cannot be successfully pursued due to the loss of evidence. 650 So. 2d at 673-74. The court established that the spoliation cause of action is not a means to shift a plaintiffs entire loss to the person who lost the evi-

dence, unless that loss "has so fatally impaired" the products liability claim that bringing it "would be frivolous." (*Id.* at 674).

5. *Continental Ins. Co. v. Herman, 576 So.* 2d *3* 13 (Fla. *3d* DCA 1990), *review denied,* 598 So. 2d 76 (Fla. 1991), was another case in which an insurance company failed to preserve an accident automobile in which its insured was injured. After a trial on its negligence claim resulted in a net arbitration award of $860,000 and the injured insured settled its claim for that figure during the confirmation/vacation proceeding, the plaintiff brought a separate, new cause of action based on the insurance company's broken promise to have preserved the automobile.[15] The district court held that this cause of action was barred by the insured's recovery in the personal injury arbitration proceeding, since she could not demonstrate as an essential predicate for her spoliation suit "that she was unable to prove her underlying action owing to the unavailability of the evidence." 576 So. 2d at 3 15. The court went on to define with precision the elements of a cause of action for "negligent destruction of evidence" (Id.), providing the definition that has been quoted and adopted in subsequent decisions.

6. *Brown* v. *City of Delray Beach,* 652 So. 2d 1150 (Fla. 4th DCA 1995), was a breach of contract suit alleging the City's failure to keep, as promised, evidence of an accident in which the plaintiff had been injured. The plaintiff had lost his suit against the motorist who may have caused his injuries due to the absence of the evidence that the City had lost. The court approved the contract-based cause of action for destruction of evidence, and adopted the ***Herman*** elements for such a suit.

7. *Sponco Mfg., Inc. v. Alcover, 656 So.* 2d *629* (Fla. 3d DCA 1995), *review dismissed,* 679 So. 2d 771 (Fla. 1996), involved the entry of default judgment of liability against a ladder manufacturer in a products liability lawsuit, as a sanction for losing the ladder which caused the

[15] In *Herman,* the court addressed only one issue raised by the parties: whether the plaintiff was deprived of her spoliation cause of action by reason of the recovery she received in settlement of her successful arbitration case. 576 So. 2d at 3 15. Although the court labeled the spoliation suit as one "for negligent destruction of evidence" (576 So. 2d 3 14), it also described the suit as a contract action in which the insurer "agreed" that accident automobile would be preserved. *(Id.).*

plaintiffs injuries. The court upheld the sanction, and in a footnote referenced the *Brown* and the *Herman* decisions for the proposition that under certain circumstances the destruction of evidence could confer a separate cognizable claim. The Court accepted review of this case, but after hearing argument determined that review was improvidently granted and dismissed the petition.

8. The district court's decision in this case — *St. Mary's Hospital, Inc. v. Brinson, 685* So. 2d 33 (Fla. 4th DCA 1996) — is the only other decision in Florida to address an independent cause of action for spoliation of evidence. Like *Herman,* Miller and *Brown,* the court viewed the suit as being brought by the Brinsons not to vindicate a potential lawsuit against St. Mary's, **but against someone** else — "the potential civil claim against the vaporizer's manufacturer." 685 So. 2d at 34. The court expressly said it was adopting the *Herman* elements for a spoliation cause of action, in order to protect the valuable "probable expectancy" that inheres in that prospective civil action. (*Id.* at 35).[16]

C. The Brinsons' spoliation cause of action does not contain the recognized essential elements for a suit of that nature.

The district court's decision here expressly recognizes and adopts a spoliation cause of action having the elements identified in the *Herman* decision. (*Id.*). Yet the Brinsons' spoliation suit did *not* contain those essential elements. The *Herman* elements are:

(1) the existence of a potential civil action;
(2) a legal or contractual duty to preserve evidence that is relevant to that potential suit;
(3) destruction of the evidence;
(4) a significant impairment in the ability to prove that lawsuit;
(5) a causal relationship between the destroyed evidence and the inability to prove that lawsuit; and
(6) damages.

[16] The district court's description of the Brinsons' spoliation claim as grounded on a "potential" or a "prospective" civil suit reinforces the point that the court did not contemplate a spoliation suit against St. Mary's, since the Brinsons were already in court pursuing an *actual* civil suit against the hospital.

576 So. 2d at 315. *And see Miller II, 650 So.* 2d 671, 673 n.1; *Brown,* 652 So. 2d at 1153. Four of these six elements for a spoliation cause of action are completely absent from the Brinsons' lawsuit.

1. **The Brinsons' had no "potential civil action".** The Brinsons' spoliation lawsuit claimed that St. Mary's negligent loss of the vaporizer spoiled their potential lawsuit against BOC Croup, Inc. and BOC Healthcare, Inc., the manufacturer and servicing agent for that anesthesia equipment. The Brinsons' never brought such a suit, and never demonstrated that it would be frivolous to pursue one. Their claim of a "potential" second suit against the manufacturer was a sham. [17]

2. **St. Mary's had no preservation duty.** A spoliation cause of action, whether in tort or in contract, is grounded on a legal "duty" to preserve the evidence that has been lost or destroyed. [18] In *Bondu,* the preservation duty was found in an administrative regulation that required the defendant hospital to maintain medical records (the evidence that was lost), and in a statute that required the hospital to furnish those records to a patient's personal representative (who was the plaintiff) upon request. 473 *So.* 2d at 13 12. In *Miller, Herman* and *Brown,* the three cases in which a third party possessed but lost key physical evidence from an accident that the injured plaintiff needed, the preservation duty arose from express contractual representations. *Miller I, 573 So.* 2d at 26; *Herman, 576 So.* 2d 3 14; *Brawn, 652 So.* 2d at 115 1-52.

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[17] If the Court were to accept the Brinsons' configuration of their spoliation lawsuit as one in which the potential civil claim was intended to be against St. Mary's, the result is identical. The "separate" suit in that case would be a carbon copy of their negligence suit, serving only as a basis to defeat St. Mary's statutory right not to produce or disclose risk management materials.

[18] Unremarkably, the decisions in other jurisdictions also predicate a spoliation cause of action on a *duty* to preserve evidence. *See, e.g., Koplin v. Rosel Well Perforators, Inc., 734* P.2d 1177, 1181 (Kan. 1987); *Murphy v. Target Products,* 580 N.E.2d 687,688 (Ind. Ct. App. 1991). *See also Parker v. Thyssen Min. Const., Inc.,* 428 *So.* 2d 615, 617 (Ala. 1983); *Wilson v. Beloit Corp., 725* F. Supp. 1056, 1058 (W.D. Ark, 1989), *aff'd,* 921 F.2d 765 (8th Cir. 1990); *Velasco v. Commercial Building Maintenance Co.,* 215 Cal. Rptr. 504 (Cal. Ct. App. 1985); *Fox v. Cohen,* 406 N.E.2d 178 (Ill. App. Ct. 1980); *Panich v. Iron Wood Products Corp., 445* N.W.2d 795, 797 (Mich. Ct. App. 1989); *Coley v. Arnot Ogden Memorial Hospital, 485* N.Y.S.2d 876, 878 (App. Div. 1985); *Burns v. Cannondale Bicycle Co.,* 876 P.2d 415 (Utah Ct. App. 1994).

There was no legal duty for St. Mary's to preserve the Halothane vaporizer. The district court never identified one, although the point was argued extensively in the parties' briefs.[19] The Brinsons had identified at trial what they considered to be two sources for St. Mary's alleged legal duty to preserve the vaporizer. One was a provision in the federal Food, Drug and Cosmetic Act that requires a hospital to report to the Food and Drug Administration, and to the manufacturer of any medical device, any information that suggests that the device may have caused a patient's death. 21 U.S.C.A. § 360i(b). The other was a Florida statute, implemented by administrative regulations, that required a hospital to implement an incident reporting system creating a responsibility of hospital agents and employees to report adverse patient incidents to a risk manager, a responsibility of the risk manager to report to the state any incidents that result in a death, and a responsibility that all patient care equipment be maintained in a clean, properly calibrated and safe operating condition. Sections 395.0197 and .0197(6), Fla. Stat. (1993); Rule 59A-3.173, Fla. Admin. Code.

In briefs filed in the district court, St. Mary's pointed out that these reporting provisions of federal and state law were enacted under the general police power, in order to provide information to governmental agencies and to equipment manufacturers, and that none created a private right of action.[20] The Brinsons countered that the absence of a private right of action was

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[19] The court stated only that the Brinsons *alleged* a "duty to preserve." 685 So. 2d at 34.

[20] *See, e.g., United States v. An Article of Drug. . . Bacto-Unidisk,* 394 U.S. 784 (1969) (the purpose of the FDCA is to protect public health); *Merrell Dow Pharmaceuticals Inc. v. Thompson,* 478 U.S. 804 (1986) (no private action for violation of FDCA); *Florida ex rel. Bruward County* v. *Eli Lilly & Co.,* 329 F. Supp. 364 (SD. Fla. 1971) (Congress did not intend to allow private rights of action under the FDCA). See 21 U.S.C.A. §§ 337 (providing that all proceedings for enforcement of the FDCA shall be by and in the name of the United States); 360i(b)(3) (required reports shall not be "admissible into evidence or otherwise used in any civil action involving private parties").

Similarly, see § 395.001, Fla. Stat. (1993) (legislative intent for the statute regulating hospital licensure and implementing rules is the protection of the public health); *Murthy v. N. Sinha Corp.,* 644 So. 2d 983, 986 (Fla. 1994) ('a statute that does not purport to establish civil liability but merely makes provision to secure the safety or welfare of the public as an entity, will not be construed as establishing a civil liability"), The enforcement of the state law provisions relied on by the Brinsons is assigned exclusively to state agencies. See sections 20.42, 395.1055, 395.1065(2), 395.1065(3), Fla. Stat. (1993); Rule 59A-3.050, Fla. Admin. Code. Risk management incident reports to state officials are inadmissible in court. Sections 395.0197(4) and (continue d . . .)

irrelevant, since the statutes imposed a "reporting" duty on St. Mary's and, in any event, the Brinsons would have been entitled to use St. Mary's alleged violation of a statutory duty as evidence of common law negligence. St. Mary's pointed out three fatal fallacies in these contentions.

First, the "reporting" duty of these statutes did not run to the Brinsons, but solely to governmental agencies and equipment manufacturers. The legal duty that supports a spoliation tort, however, is a duty that is owed "*to the plaintiff* by the defendant." *Bondu, 473 So.* 2d at 13 12 (emphasis added). Second, the use of a statutory violation as evidence of common law negligence would avail the Brinsons nothing, since the evidentiary benefit of asserting that St. Mary's violated a statute does not itself *create* the "duty" that underpins a spoliation suit, and since they chose to relinquish any recovery or judgment on their suit for common law negligence in exchange for a directed verdict on their spoliation lawsuit. (T. 1334). Although aware of these contentions by the parties, the district court never identified a preservation-of-vaporizer duty running from St. Mary's **to the Brinsons.** St, Mary's respectfully suggests that there was no such duty to the Brinsons. No court which has adopted or approved the independent cause of action for spoliation has expanded the "duty" element to encompass duties to entities or persons *other than* the spoliation plaintiff. An expansion of "duty" in that manner would remove from a spoliation cause of action the most fundamental common law underpinning of tort law — a duty to the party claiming injury.

3. **No impairment of the Brinsons' potential lawsuit.** To establish a viable cause of action for spoliation, a plaintiff must demonstrate an inability "to prove her underlying action owing to the unavailability of the evidence." *Herman,* 576 So. 2d at 315. That principle was applied in *Bondu,* where the underlying suit had already been lost when the spoliation suit was initiated, and in *Miller II,* where a directed verdict for the defendant was affirmed based on the plaintiffs failure to bring the product liability suit that was allegedly impaired by a loss of

(. . . continued)
(6) , Fla. Stat. (1993).

evidence. In *Miller II*, the court held that the spoliation suit could have been tried before or along with the underlying negligence suit that would allegedly suffer from the absence of the lost evidence, but having failed to bring that suit the plaintiffs spoliation claim would only be viable if she could prove that the loss of evidence had "so fatally impaired the products liability claim that to bring a products liability action would be frivolous." 650 So. 2d at 673.

The *Miller* decisions establish that a spoliation lawsuit is not a vehicle for shifting the entire blame from the alleged primary wrongdoer — in that case, the manufacturer of the allegedly defective but lost automobile — to the person who lost the evidence, unless the loss of evidence has *fatally* impaired an action against that primary wrongdoer. *Miller* II, 650 So. 2d at 673; *Miller I*, 573 So. 2d 24.[21] This goal cannot be accomplished unless the "underlying claim," as the condition precedent to a spoliation claim, is either pursued or demonstrated to be frivolous to pursue. The Brinsons, however, never brought their product liability suit against the vaporizer's manufacturer. Nor did they ever suggest that the loss of the vaporizer so impaired their potential suit against the manufacturer that filing a suit would have been frivolous. In direct conflict with this key element of the spoliation tort established in the Third District, the Fourth District excused the Brinsons from either suing or claiming the futility of suing the manufacturer.**

4. **No causal connection.** The Brinsons have never pled that, without access to the vaporizer, they could not proceed against its manufacturer, and they never brought such a suit to find out. Thus, another essential element missing from their spoliation suit is the absence of any causal connection between the vaporizer's absence and their inability to prove a product liability claim against the manufacturer.

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[21] That principle was a feature of *Bondu*, where the court emphasized that the underlying medical negligence claim had been lost on account of the spoliation (473 So. 2d at 13 12), and of *Herman*, where the court ruled as a matter of law that the underlying action had not been significantly Impaired so as to result in the loss of an underlying cause of action. 576 So. 2d at 3 16.

[22] The result is no different under the Brinsons' interpretation of their spoliation suit as an impairment of their ability to sue *St. Mary's*. The Brinsons never claimed futility in pursuing their medical negligence suit; they voluntarily dropped it.

The result is the same under the Brinsons' view that the potential defendant of their spoliation claim was St. Mary's itself. In fact, far from proving that it would be frivolous to pursue their medical negligence suit against St. Mary's as a predicate to spoliation, the Brinsons mustered considerable evidence in support of their medical negligence suit, including extensive evidence and argument regarding the lost vaporizer.[23]

According to the Brinsons, they proved that the vaporizer was out of tolerance following the surgery on Alonzette. (T. 755-56). According to the Brinsons, they proved that St. Mary's nurse manager of post-anesthesia care was not familiar with the operation of vaporizers or how to fill them (T. 600-01, 693, 716), and that the anesthesia technician working on the day of the surgery had been in that position for only three days and had received on-the-job training from another individual who had been trained only to open the vaporizer and put a hose in it. (T. 607, 847, 885, 1140-42, 1150). According to the Brinsons, they proved that St. Mary's anesthesia technicians would sometimes drain the agent out of a vaporizer into another canister for re-use (T. 803-08), creating the implication (the Brinsons argued) that this would defeat the color-coded key system that St. Mary's maintained to prevent incorrect anesthetic agent from being used during surgery.

The Brinsons brought forward the servicing agent's product safety manager, who maintained that the vaporizer had been properly calibrated when installed, that a vaporizer does not lose that calibration except when an incorrect or contaminated agent is used (Goodyear Deposition at D58-59), and that general tests run on the vaporizer confirmed that there was no internal reason that it had gone out of calibration, meaning that the most probable cause of the vaporizer's failure was that an incorrect or contaminated anesthesia agent had been utilized. (D24, 34-35). The product safety manager was convinced that the excessive output of anesthetic was caused for these reasons which were under St. Mary's control. (D24, 35).

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[23] The fact summary that follows in the text is taken from the Brinsons' answer brief to the Fourth District, including their citations to the record.

The Brinsons' anesthesiologist expert, Dr. Frost, opined that St. Mary's anesthesia technicians did not have appropriate training and did not know what they were doing (T. 1009), that Alonzette's death was proximately caused by the malfunctioning of the equipment rather than Dr. Cooney's negligence (T. 1099-1100, 1120, 1124), and had the anesthesia machine been equipped with a gas monitor then Dr. Cooney would have been alerted to a problem in the administering of the anesthesia. (T. 978, 1016, 1123).

In short, according to the Brinsons, they had amassed a potent presentation of facts and inferences to argue that St. Mary's had been medically negligent in its maintenance of the anesthesia equipment, *even in the absence of having the vaporizer available to them.* Under the *Miller II* standard for validating a spoliation case — that the loss of evidence has so fatally impaired the underlying claim as to render its pursuit frivolous -there is no argument open to the Brinsons that St. Mary's should be liable for *spoliation* (the suit in which it obtained judgment) because the Brinsons were unable to prove their *medical negligence* claim against the hospital. This case proves the wisdom of Chief Judge Schwartz' dissent in *Bondu,* that separate spoliation claims against an existing defendant are not only unnecessary, but will generate dual lawsuits in personal injury and wrongful death cases "in the guise of independent actions." 473 So. 2d at 1314.

D. The independent tort of spoliation approved by the Fourth District creates disharmony with established common law doctrines applicable in Florida.

When the Third District first elected to recognize an independent tort for the spoliation of evidence in the *Bondu* case, it did so in a 2-1 split decision. The primary objection raised by Chief Judge Schwartz in dissent was the lack of necessity for inventing a new tort, given the adequacy of existing common law remedies for a defendant's unintentional loss of evidence needed in situations faced by a plaintiff such as Mrs. Bondu. This case shows that creation of a second, new, negligence cause of action against a defendant who is already in litigation generates far more jurisprudential disharmony than Chief Judge Schwartz envisioned.

For one thing, inconsistency and conflict is created with long-standing precedents that provide remedies for such a plaintiff through presumptions, inferences, and sanctions. For another, the very nature of the newly-crafted cause of action in these situations — leaving aside cases in which a non-party caused the loss of evidence or an intentional destruction of evidence — competes with the policy of the common law that "tort" claims should be curtailed, not expanded, where the plaintiff is seeking to recover purely economic loss and other remedies are available.

1. Florida's common law provides adequate relief for a plaintiff whose lawsuit has been impaired by the defendant's loss or destruction of evidence.

Florida common law provides ample and adequate remedies within the context of any lawsuit to remedy harm caused to a plaintiff by a defendant's **unintentional** loss or destruction of evidence. The three most traditional in Florida are burden-shifting presumptions, inferences, and discovery sanctions. The *Bondu* majority decision was mistaken when it approved a separate and independent cause of action for Mrs. Bondu on the rationale that, if a suit is available against a *non-party* who loses or destroys evidence, then "a fortiori" one should be available against the defendant in an ongoing tort suit.

a. **The rebuttable presumption.** In *Public Health Trust v. Valcin*, the Court affirmatively created a powerful tool for rectifying the harm caused by a defendant's loss or destruction of evidence needed by the plaintiff. The plaintiff there had sued the hospital where she had undergone surgery, but found that her suit was frustrated by the hospital's loss of her surgical reports. This loss impaired her ability to have an expert determine whether the operation had been performed with due care. The Court held that the appropriate remedy for a defendant's negligent loss of evidence is a rebuttable presumption that does not vanish even after the introduction of contrary evidence, as an "expression[] of social policy." 507 So. 2d at 601. That presumption shifts the burden of producing evidence to the defendant once the plaintiff has shown that the absence of that evidence hinders his or her ability to establish a *prima facie* case. This presumption was held suitable "to serve the purposes ofjustice" *(id* at 599), in order "to equalize

the parties' respective positions in regard to the evidence and to allow the plaintiff to proceed." (*Id.* at 599-600). A "*Valcin* presumption" is one of the strongest possible — requiring the defendant to *prove* a negative, and never being overcome *except* by a jury's defense verdict. The very philosophy of *Valcin* militates against the creation of an independent spoliation tort for the *negligent* loss or destruction of evidence by the defendant in an existing tort lawsuit.

The Fourth District, however, not only let the Brinsons have an unnecessary second lawsuit for spoliation, but in doing so relieved them of having to establish any relationship of the lost vaporizer to *aprima facie* case of impairment in their products liability suit against BOC Group, Inc., the manufacturer (or, for that matter, in their medical malpractice suit against St. Mary's). The district court did not attempt to equalize the parties' positions; it allowed the Brinsons to put their thumb on their side of the scale of justice.

The experience with spoliation in Alaska provides a lesson for Florida. The high court there adopted the independent tort of spoliation of evidence for **intentional** acts that cause a loss of evidence,[24] but after doing so affirmatively decided against the adoption of a spoliation tort for merely negligent behavior. *Sweet* v. *Sisters of Providence*, 895 P.2d 484 (Alaska 1995). In rejecting negligent spoliation for Alaska, the Court relied on *Valcin* and its reasoning to conclude, in a case fully as tragic as this one, that "the remedy of burden shifting is a sufficient response to the loss or destruction of [medical evidence]. . . ." 895 P.2d at 493. The court could only identify one California case, one federal district court case, and *Bondu* as support for a "negligent" spoliation tort suit. 895 P.2d at 492. (The court left open whether the tort of negligent spoliation might be applied against a third party not associated with the underlying lawsuit, as was the situation in *Miller* and in *Herman.)*

Since *Bondu,* no court in Florida other than the Fourth District in this case has faced the issue of choosing between an independent spoliation tort and the *Valcin* rebuttable presumption. The dissent in *Bondu* believed that a strong presumption for the plaintiff was a better reasoned

[24] *Hazen v. Municipality of Anchorage,* 718 P.2d 456 (Alaska 1986).

tool to employ than an independent tort for "negligent" spoliation. It's anomalous that in *Herman,* even the Third District noted "that courts in other jurisdictions have held that if a strong spoliation presumption, given in the underlying action, provides a complete remedy to the plaintiff, the spoliation tort is preempted." 576 So. 2d at 3 15 n. 1.[25]

A review of the source for the *Bondu* majority's adoption of "negligent" spoliation demonstrates the extremely slim reed of authority on which the court relied to open that Pandora's box. The majority believed there to be an emerging development of spoliation law in California, and it referenced *Williams v. California,* 192 Cal. Rptr. 233, 664 P.2d 137 (1983), as recognizing a cause of action for the negligent failure to preserve evidence for civil litigation. The court neglected to note that the *Williams* decision only held that a police officer arriving at the scene of an accident did not owe a duty of non-negligent investigation to an accident victim, and remanded to allow the possible re-pleading of a valid cause of action the content of which was not described. 192 Cal. Rptr. at 238-39. Nonetheless, *Bondu's* majority took as a given that California's courts had endorsed an action for negligent failure to preserve evidence (473 So. 2d at 13 12), being comforted that it did not have to "strike out boldly to recognize the cause of action" for negligent failure to preserve evidence for civil litigation. *Bondu, 473 So.* 2d at 13 12.[26]

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[25] Other courts unwilling to adopt the spoliation tort have adhered to some form of "missing evidence" instruction in the underlying suit, even in *intentional* spoliation situations. *Monsanto Co.* v. *Reed,* 1997 WL 20043 1 at 5 (Ky. April 24, 1997) ("We decline the invitation to create a new tort claim. Where the issue of destroyed or missing evidence has arisen, we have chosen to remedy the matter through evidentiary rules and 'missing evidence' instructions . . . . The vast majority ofjurisdictions have chosen to counteract a party's deliberate destruction of evidence with jury instructions and civil penalties."); *Beers v. Bayliner Marine Corp., 236* Conn. 769, 675 A.2d 829 (1996) (intentional spoliation allows an adverse inference to be drawn against the despoiler by fact-finder); *State v. Atley,* N.W.2d ___, 1997 WL 331976 *3 (Iowa June 18, 1997) (due process rights not impaired by spoliation of evidence absent proof of bad faith destruction).

[26] The California courts have **not** uniformly adopted negligent spoliation, however. In *Velasco v. Commercial Building Maintenance Co.,* 169 Cal. App. 3d 874,215 Cal. Rptr. 504, 506 (Cal. Ct. App. 1985), the **court rejected** a negligent spoliation charge by a would-be plaintiff against a janitorial service for destroying evidence that was sitting on a desk in the plaintiffs counsel's office, finding a lack of duty and foreseeability. 215 Cal. Rptr. at 507. See *also Reid v. State Farm Mutual Automobile Ins. Co.,* 173 Cal. App. 3d 557,218 Cal. Rptr. 913 (Cal. Ct. App. 1985) (absent agreement to preserve evidence, insurer had no duty to preserve evidence for permissive user of insured automobile). In 1987, the California Supreme Court commented that "[n]ext to [a case seeking recovery for interference with the opportunity to win a sporting event], (continued . . .)

b. **The adverse inference.** In *New Hampshire Ins. Co, v. Royal Ins. Co., 559 So.* 2d 102 (Fla. 4th DCA 1990), the court held that one party's destruction of relevant and material information indispensable to the other party's claim would allow an adverse inference to be drawn that the withheld evidence would be unfavorable to the party that caused the evidence to be destroyed. In the absence of demonstrated prejudice, however, the court held it was error to strike a defaulting party's pleadings and to grant summary judgment for the aggrieved party. The Fourth District offered no explanation for declining to follow its *Nw Hampshire Ins.* decision in this case, rather than giving the Brinsons an independent cause of action as an answer to the same difficulty that was reflected in that case.

The use of an inference or some comparable evidentiary leg-up is the traditional way in which Florida courts have dealt with the destruction of evidence relevant to a party's suit. For example, in *Hernandez* v. *Pino*, 482 So. 2d 450 (Fla. 3d DCA 1986), the court utilized the "best evidence rule" to address the inability of the plaintiff to produce x-rays that the defendant needed to defend the lawsuit, holding that it was error to enter summary judgment for the defendant based on the plaintiffs production default. The same is true elsewhere in the country. See *Miller v. Montgomery County,* 494 A.2d 761, 768 (Md. Ct. Spec. App.), *cert. denied, 498* A.2d 1185 (1985) ("[T]he remedy for the alleged spoliation would be appropriate jury instructions as to permissible inferences, not a separate and collateral action."); *Brown v. Humid, 856* S.W.2d 5 1 (MO. 1993).

c. **Sanctions.** Florida's courts have the power to apply a range of sanctions when evidence is lost or destroyed, corresponding to the degree of harm, the nature of the sanction-inducing violation, and the degree of culpability or carelessness. *Tramel v. Bass, 672 So.* 2d 78,

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(. continued)
Smith [v. Superior Court, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984)] may represent the most speculative advantage that has heretofore been recognized by the California appellate courts." *Youst* v. *Longo,* 43 Cal. 3d 64, 729 P.2d 728, 734-35,233 Cal. Rptr. 294 (1987). California's Supreme Court has never expressly adopted a negligent spoliation tort. The court has accepted review, however, 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).

84 (Fla. 1st DCA), *review denied, 680* So. 2d 426 (Fla. 1996); *Metropolitan Dade County v. Bermudez*, 648 So. 2d 197, 200 (Fla. 1st DCA 1994). The Sixth Circuit has pointed out that

> Destruction of potentially relevant evidence obviously occurs along a continuum of fault — ranging from innocence through the degrees of negligence to intentionahty. The resulting penalties vary correspondingly.

Welsh v. United States, 844 F.2d 1239, 1246 (6th Cir. 1988). The innocent failure to preserve evidence for another's use in civil litigation would not warrant the extreme sanction inflicted on St. Mary's, but it could lead to a default judgment on liability when the destruction of evidence is willful, or the plaintiff is so prejudiced by the loss that the case can no longer proceed, as in *Sponco, supra.*[21]

2. A cause of action for the lost economic expectation of a tort recovery runs counter to the policy of the economic loss rule.

Bondu 's aggressive recognition of a spoliation tort sounding in negligence is not in harmony with Florida law. A spoliation cause of action is designed to remedy a lost economic expectancy from a chose in action — another potential, civil lawsuit. *Miller I,* 573 So. 2d at 29. Florida, however, has never recognized a tort claim for **negligent** interference with a prospective economic advantage. See, e.g., *Florida Power &Light Co, v. Fleitas, 488 So.* 2d 148, 151 (Fla. 3d DCA 1986) ("The law in Florida is clear that '[t]here is no such thing as a cause of action for interference [with a contractual or advantageous business relationship] which is only negligently or consequentially effected.'"); *Ethyl Corp. v. Balter, 386 So.* 2d 1220, 1224 (Fla. 3d DCA 1980), *review denied, 392 So.* 2d 1371 (Fla.), *cert. denied, 452* U.S. 955 (1981).

The situation in California, from which the *Bondu* majority drew inspiration, is entirely different. Decisions in California that have approved negligent spoliation have found support in that state's recognition of a tort for the *negligent* interference with a business expectancy or

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[27] *Vodusek v. Bayliner Marine Corp.,* 71 F.3d 148 (4th Cir. 1995); *Beil v. Lakewood Engineering &Manufacturing Co.,* 15 F.3d *546* (6th Cir. 1994); *Gumbs v. International Harvester, Inc.,* 718 F.2d 88 (3d Cir. 1983); *Beers v. Bayliner Marine Corp., 236* Conn. *769, 675* A.2d 829 (1996).

advantageous relationship. *Velasco, supra,* discussing *J'Aire Corp. v. Gregory, 24 Cal.* 3d 799, 157 Cal. Rptr. *407, 598* P.2d *60* (1979). *J'Aire*, however, involved a negligence exception to the economic loss rule that Florida has **not** embraced. The court there adopted a claim in negligence for economic damages borne from a special relationship found in the common law of California. Florida, in contrast, has never recognized a negligence-grounded tort for interference with a prospective economic advantage. An allegation for the negligent loss of evidence that causes the deprivation of an economic opportunity in prospective civil litigation is not analytically different from the "disappointed economic expectations" that this Court has held is **not** recoverable in negligence. *Casa Clara Condominium Ass 'n v. Charley Toppino & Sons, Inc.*, **620 So. 2d 1244 (Fla. 1993).** *See also Palau Int'l Traders, Inc. v. Narcam Aircraft, Inc.*, 653 *So.* 2d 412 (Fla. 3d DCA), *review denied*, 661 So. 2d 825 (Fla. 1995).[28]

Except for *Bondu* (and now the Brinsons' case), all assessments of the spoliation tort by Florida's district **courts** have been in the context of **contract,** rather than **negligent** spoliation. In *Miller* I and *Herman,* the court was dealing with a contract-based duty to preserve evidence. 573 So. 2d at 27; 576 So. 2d at 314.[29] In part, the spoliation claim based on "contract" is reliant on "the legal trend toward expanding the scope of remedies for breach of contract[,] reject[ing] the narrow view of contract damages" and thereby avoiding a trend "that the law of contract is being absorbed by the expanding theory of tort." *Miller I,* 573 So. 2d at 30. This language, of course, mirrors the well-recognized admonition that this Court used in approving the economic loss rule — absent which "contract law would drown in a sea of tort." *Casa Clara, 620 So.* 2d at 1247.

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[28] The negligent spoliation tort is not excused from the economic loss rule by application of the personal injury or other property exceptions to the rule. The spoliation tort is distinct from the underlying suit for medical negligence that seeks damages for pain and suffering — such as the Brinsons' malpractice suit against St. Mary's and Dr. Cooney. The only connection to personal injury or property damage is the measure of damages.

[29] In a third case, the Third District found a statutory duty under the workers' compensation law to preserve evidence. *General Cinema Beverages of Miami, Inc. v. Mortimer*, 689 So. 2d 276 (Fla. 3d DCA 1995).

Only Illinois,[30] California and the Third District appear to have carved from the common law a new and independent tort cause of action for a **negligent** failure to preserve property for use as evidence in future or pending litigation.[31] *Bondu's* acceptance of the spoliation tort has not been repeated in a majority of jurisdictions, according to a recent tally from Connecticut which found that 17 of 23 jurisdictions have declined to recognize of action for spoliation of evidence. *Regency Coachworks, Inc. v. General Motors Corp.*, 1996 WL 409339 (Conn. June 26, 1996).

In establishing common law policy for Florida, the Court is respectfully urged to deal with a defendant's unintentional loss or destruction of evidence that is asserted to impair a plaintiffs lawsuit in the way that Florida courts have traditionally protected any party to litigation. The *Valcin* presumption, adverse inferences and sanctions are sturdy, reliable, well-shaped and completely adequate remedies for a plaintiff who claims to be deprived of material evidence. A separate spoliation lawsuit may be justified where there is an *intentional* loss or destruction of evidence, or where the loss is occasioned either negligently or intentionally by someone who is

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[30] *Miller v. Gupta*, 672 N.E.2d 1229, 1232, 220 Ill. Dec. 217 (1996) (negligent spoliation claim for physician's loss of x-rays can be pursued since plaintiff "cannot assert a 'meritorious' [medical malpractice] cause of action [and] cannot proceed with her medical malpractice claim"). One Texas intermediate appellate court has recently reversed what amounted to a motion to dismiss granted on the basis that Texas does not recognize the tort of intentional or negligent spoliation of evidence. *Ortega v. Trevino*, 938 S.W.2d 219 (Tex. App. 1997). That decision provoked immediate disagreement from a sister court. *Malone v. Foster*, ___ S.W.2d ___, 1997 WL 196340 at 9 (Tex. App. Apr. 23, 1997) ("Absent controlling supreme court precedent, we decline to expand the law to recognize such a cause of action.").

[31] *E.g.*, *Sweet v. Sisters of Providence*, 895 P.2d 484 (Alaska 1995) (intentional tort of spoliation of evidence previously recognized, but not negligent spoliation); *Reilly v. D'Errico*, 1994 WL 547671 (Conn. Super. Ct. 1994); *Gardner v. Blackston*, 365 S.E.2d 545 (Ga. Ct. App. 1988); *Murray v. Farmers Ins. Co.*, *796* P.2d 10 1 (Idaho 1990); *Edwards v. Louisville Ladder Co.*, *796* F. Supp. *966* (W.D. La. 1992); *Miller v. Montgomery County*, *494* A.2d 761 (Md. Ct. Spec. App.), *cert. denied*, *498* A.2d 1185 (1985); *Federated Mutual Ins. Co. v. Litchfield Precision Components, Inc.*, *456* N.W.2d 434 (Minn. 1990); *Panich v. Iron Wood Products Corp.*, 445 N.W.2d 795 (Mich. Ct. App. 1989); *Brown v. Hamid*, 856 S.W.2d 51 (Mo. 1993); *Hirsch v. General Motors Corp.*, *628* A.2d 1108 (N.J. Super. Ct. Law Div. 1993) (intentional tort for spoliation only); *Weigl v. Quincy Specialties Co.*, 601 N.Y.S.2d 774 (N.Y. Sup. Ct. 1993) (noting that the courts of New York follow the majority view in not recognizing spoliation of evidence as a cognizable tort action); *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037, 1038 (Ohio 1993) (intentional spoliation of evidence recognized as an independent tort, not negligent spoliation). Only a handful ofjurisdictions in addition to California have recognized the intentional tort, including Alaska, Ohio, New Jersey and possibly Kansas and Texas.

not already a party to the plaintiffs lawsuit, but neither of those situations is involved in the decision now before the Court.

The district *court's Brinson* and *Bondu* decisions should be vacated not just as constituting an unnecessary expansion of the common law, not just as creating disharmony with decisions that have previously established remedies for lost evidence situations, and not just for contravening the policies reflected in the economic loss rule. They should be rejected as well for the mischief they create, based on reasons that inhere in the very nature of any spoliation lawsuit.

3. A cause of action for the unintentional spoliation of evidence introduces unwarranted speculation into tort law.

The tort of spoliation is inherently speculative. An attempt to determine what would be shown by absent evidence borders on sheer guesswork. This case is a prime example of the radical results wrought by such speculation. The Brinsons offered no factual evidence, beyond the pure speculation of Dr. Frost and Chalmers Goodyear, as to what a further examination of the vaporizer *might* have shown, or that St. Mary's had acted negligently in any way with respect to the Halothane vaporizer. Yet, there was of record the unrefuted fact that the vaporizer was out of tolerance when tested by the Ohmeda representative on the premises of St. Mary's, and their expert testimony that employees of St. Mary's were not suitably knowledgeable in maintaining the equipment.

In short, it is pure guesswork to believe that the Brinsons were deprived of a successful medical negligence claim against St. Mary's by reason of the absence of the vaporizer. Yet an enormous "spoliation" judgment was entered against St. Mary's based solely on an hypothesis as to the indispensable nature of this one unavailable property.

E. An independent tort of spoliation in tandem with another pending tort cause of action promotes endless litigation.

The broad-spectrum harm militating against the Court's adoption of an independent tort for negligent spoliation for an existing defendant is the very real potential for endless litigation, which is bound to include frivolous claims and produce trial mischief. The nature of this new cause of

action is such that it co-exists in every case in which it can be alleged there is a misplaced record or physical evidence, and it accrues every time a party plaintiff loses a lawsuit and can claim that some piece of evidence was not available for the trial.

The level of potential mischief is apparent from this case. The trial court did not require the Brinsons to bring a product liability suit against the manufacturer, or to show it would be frivolous to do so. The court did not even required the Brinsons to show that the vaporizer caused or would have caused them to lose their pending negligence suit against St. Mary's, as was the predicate for the tort in *Bondu*. The unspecified degree of proof that would be necessary to frame a spoliation tort will necessarily generate endless litigation as the tort is fleshed out in the trial courts. Yet, as voiced by the dissenter in *Bondu,* there is no reason whatever to immerse the courts in that endeavor when there already exists more than adequate means to address an imbalance in proof resulting from inadvertently lost evidence.

To allow the creation of this new tort is also to invite complex trial administration. Juries, for example, may have to sit through two trials when one would have sufficed, as originally required in *Bondu*. The joinder and combined trial of two suits for the same economic relief, as here, will invariably present concerns like the deprivation of statutory rights that faced St. Mary's, for what plaintiff will not want to eliminate defenses and provide a jury with multiple theories of liability? Trial tactic mischief is easily foreseeable. This is a case in point.

II. The trial court erred in forcing the simultaneous trial of two unrelated causes of action, when the effect of consolidation and joint trial was to deny St. Mary's the privileges accorded by statute and court rule.

The trial court's insistence on joinder for trial of the medical negligence and spoliation claims resulted in reversible error warranting a new trial for St. Mary's That consolidation caused St. Mary's to lose the incident report, attorney-client and work product privileges created by the legislature for medical negligence lawsuits and by the evidence code and common law. Worse, the deprivation was done without any Rule-required showing of need or the unavailability of the materials from any other source.

The Florida Legislature has established a work product privilege for "incident reports" developed in a hospital's risk management program. These incident reports are the work papers of the defending attorney, and "are not admissible as evidence in court." § 395.0197(4), Fla. Stat. (1993). Incident reports encompassed by the statute specifically include employee-generated reports, and reports from someone retained by the hospital for risk management responsibilities.

These reports are subject to discovery, but only as effectuated through Fla. R. Civ. P. 1.280(b)(3), which creates a prerequisite showing of need, and that the party requesting discovery "is unable without undue hardship" to obtain the materials elsewhere. All of the district courts of appeal that have considered incident reports have identified this rigid standard for disclosure, and have enforced an absolute immunity from disclosure absent such a showing. *Healthtrust, Inc. v. Saunders*, 651 So. 2d 188, 189 (Fla. 4th DCA 1995); *North Broward Hosp. Dist. v. Button*, 592 So. 2d 367 (Fla. 4th DCA 1992); *All Children's Hosp., Inc. v. Davis*, 590 So. 2d 546 (Fla. 2d DCA 1991); *South Broward Hosp. Dist. v. Gaudia*, 533 So. 2d 880 (Fla. 4th DCA 1988); *Humana of Florida, Inc. v. Evans*, 519 So. 2d 1022 (Fla. 5thDCA 1987); *Dade County Public Health Trust v. Zaidman*, 447 So. 2d 282 (Fla. 3d DCA 1983). *See also Tallahassee Memorial Regional Medical Center, Inc.* v. *Meeks*, 560 So. 2d 778, 781-82 (Fla. 1990) (error even to allow use of incident report for impeachment purposes, but harmless error in particular circumstance).

The courts have also placed like materials required for the defense of a client under the protection of attorney-client and work product privileges. *See Vann v. State*, 85 So. 2d 133, 137-38 (Fla. 1956) (reports prepared in claims process by insurer having duty to defend, and intended for defense counsel, constitute both attorney-client privileged and work product documents); *Staton v. Allied Chain Link Fence* Co., 418 So. 2d 404, 405-6 (Fla. 2d DCA 1982) (client's communications to insurer for purpose of defending suit are attorney-client privileged); *Grand Union Co. v. Patrick*, 247 So. 2d 474, 475 (Fla. 3d DCA 1971) (incident reports for investigation compiled by insurer to defend for the benefit of defense counsel and "passing through the insurer to counsel," constitute privileged communications between attorney and client); *New Life Acres, Inc. v. Strickland*, 436 So. 2d 391 (Fla. 5th DCA 1983) (statement obtained from insured by

insurer for investigation of claim for which suit subsequently brought is work product subject to disclosure only on need and for undue hardship); ***Winn-Dixie Stores, Inc. v. Nakutis, 435 So.*** 2d ***307*** (Fla. 5th DCA 1983), ***review denied,*** 446 So. 2d 100 (Fla. 1984) (accord); ***Sligar v. Tucker, 267 So.*** 2d ***54*** (Fla. 4th DCA), ***cert. denied,*** 271 so. 2d 146 (Fla. 1972) (accord); § 90.502(1)(b), Fla. Stat. (1993).

As a result of the trial court's insistence on consolidation of the Brinsons' medical negligence and negligent spoliation lawsuits, St. Mary's either had to restrict its defense of the spoliation suit by not bringing forward the hospital's risk management materials, or use those materials at the cost of relinquishing its statutory privilege in the medical malpractice lawsuit. This impossible choice was repeatedly brought to the trial court's attention, yet bifurcation was repeatedly rejected as a means to preserve the statutory privilege.

In order to defend the spoliation lawsuit, St. Mary's allowed the Brinsons to depose the hospital's assistant risk manager. She had reviewed and utilized certain litigation reports prepared for trial counsel's review and assessment of the allegations made by the Brinsons. (T. 1194, 1196-98). (The reports are that part of the record identified as "Sealed Documents Filed by St. Mary's, sent separately.") These were protected from disclosure by attorney-client privilege and work product doctrine, having met the test of ***Southern Bell Tel. & Tel. Co. v. Deason, 632 So.*** 2d 1377 (Fla. 1994).

The dilemma faced by St. Mary became calamitous when the court rejected a reasonable means of protecting privileges, by declining St. Mary's offer not to question its assistant risk manager regarding the handful of privileged materials at issue. (T. 1301, 1326). Unnecessarily, the court struck all of St. Mary's defenses and entered a directed verdict on a suit of the Brinsons' choosing.

The discretion of a trial court to consolidate for trial is limited where proceedings are not related, and where a party will be deprived of any substantive rights. ***Wagner v. Nova University, Inc.,*** 397 So. 2d 375, 377 (Fla. 4th DCA 1981) (quoting Author's Comments to Fla. R. Civ. P.

1.270); *Merchants and Businessmen 's Mutual Ins. Co. v, Bennis, 636 So.* 2d 593 (Fla. 4th DCA 1994). This case involved both factors.

A. **Loss of privileges.** *In Bennis,* the issue was a denied request to sever liability and damages, where the defendant had a statutory right to veil its insurance coverage for the incident. The court held:

> [T]hese claims . . . are essentially unrelated and constitute separate and distinct legal actions. There is no reason for them to be tried together . . . . As a result of the denial of severance, the plaintiff will benefit from the inclusion of the insurance issues thereby evading the clear language and intent of the non-joinder statute.

636 So. 2d at 595.[32] The identical situation pertained here, where the trial court's striking of defenses resulted from the forced consolidation. *See County of Pasco v. Riehl, 63 5 So.* 2d 17 (Fla. 1994); *Conley v. Boyle Drug Co., 570 So.* 2d 275 (Fla. 1990); *Barrios v. Darrach, 629 So.* 2d 211 (Fla. 3d DCA *1993); Christiansen v. Christiansen, 354 So.* 2d 1254 (Fla. 4th DCA 1978).

The Brinsons argued below that St. Mary's had no one to blame but itself for the loss of statutory and common law privileges, because St. Mary's disobeyed a court order. They contended that St. Mary's always has a duty to comply with an order of court, even if it deprives them of rights, and their "remedy" is to appeal the ruling later. Their doctrinaire solution to the entry of *this* unlawful order, **guaranteeing** that St. Mary's would either lose confidentiality privileges (a "cat out of the bag" gotcha) or the spoliation trial, is an absurd and impractical

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[32] The courts had also preserved attorney-client and work product privileges by authorizing abatement of one claim where disclosure would be the rule with one consolidated claim, but not with the other. *See 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); *Allstate Ins.* Co. v. *Lovell, 530 So.* 2d 1106 (Fla. 3d DCA 1988) (insurer need not produce privileged claims file until coverage issue resolved). 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); *Shores Supply Co. v. Aetna Casualty* & *Sur.* Co., 524 So. 2d 722 (Fla. 3d DCA 1988) (substantive right to attorney's fees for prevailing in claims under statutes cannot be defeated by a larger award under a consolidated counterclaim). *And see Royal Ins. Co. of America v. Zayas Men 's Shop, Inc.*, 551 So. 2d 553, 554 (Fla. 3d DCA 1989), recognizing that this court later superseded the need for abatement by determining that the attorney/client and work product privileges continued in both settings.

rationalization for two coalescing trial events — unnecessarily forced consolidation, and unnecessarily forced production of privileged materials. The trial court's sanction order went beyond refusal to comply with a lawful order (an issue of sanctionability) to excessiveness (the separate issue of proportionality).

The district court declined the opportunity to embrace the Brinsons' theory that St. Mary's was itself "at fault," choosing rather the rationale that "St. Mary's made a conscious decision to waive the privilege in order to defend the spoliation claim." 685 So. 2d at 35. This is a facile, analytically unsound, and circular explanation for addressing n&consolidation. St. Mary's was placed in the 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 choice made by St. Mary's was, of course, a "conscious" decision. The court's reasoning would have been equally applicable had St. Mary's made the conscious decision ***not*** to produce the materials and forego its defense of spoliation. *Either* decision made by St. Mary's would have been a "conscious" one, but that fact is no response to the problem which forced the choice in the first place. There is no escape from the conclusion that consolidation for trial was totally unnecessary, as the Brinsons failed to meet the requirements of Rule 1.280(b)(3), or from the fact that the court had no justification for forcing the loss of statutory and common law privileges with consolidation.

B. Dissimilarity of claims. Consolidation requires common questions of law and fact with respect to the claims, in any event. The fact questions in the medical negligence suit related to the act of administering anesthesia in the operating room. The fact questions in the spoliation suit related to post-operative events in presenting a machine. The lack of commonality is displayed by the evidence and arguments related only to spoliation that were overtly prejudicial to St. Mary's medical negligence defense.

The Brinsons' Dr. Frost was allowed to respond to questions respecting "similar fact" evidence involving another incident at St. Mary's where equipment had malfunctioned causing patient injury and the equipment was later determined not to be available for inspection and

testing, as being relevant to only the Brinsons' *spoliation* claim.[33] (T. 84). Dr. Frost's answers to three crisp and cutting questions (T. 968) were inflammatory and prejudicial testimony that would never have been inadmissible in the Brinsons' medical negligence lawsuit.[34]

The opening remarks and closing argument of the Brinsons' counsel were also punctuated with assertions that related only to spoliation, not to professional negligence, and that equally prejudiced St, Mary's right to a fair trial. In opening, the Brinsons' counsel argued that there had been "systematic, continuous conduct on behalf of St. Mary's to hide the truth of what had happened" (T. 345), and that there was an obligation to disclose information relevant to a death "so that other families will not have to suffer, so that there will not be another Brinson case, so that appropriate measures are taken to prevent a tragedy like this form ever occurring again . . . [but] they said nothing." (T. 369). In closing argument, the Brinsons' counsel accused St. Mary's of an indifference to the death of Alonzette that "had been magnified because of the conduct of the defendant in this case of attempting to hide the truth." (T. 1390).

These and other remarks (T. 1352-53, 1364) would have required a new trial in a suit for medical negligence. ***See, e.g., Carnival Cruise Lines v. Rosania, 546 So.*** 2d 736, 738 n. 1 (Fla. 3d DCA 1989) (remarks such as "They want to hide the truth" deemed fundamental error); *Maercks* ***v.*** *Birchansky*, ***549 So.*** 2d 199 (Fla. 3d DCA 1989) ("conscience of the community" and "send a message" arguments reversible). Consolidation of that suit with the spoliation claim gave the Brinsons unconscionable rhetorical liberties yet, again, there was not the slightest countervailing rationale for a joint trial. A trial on spoliation would have been needed only if the Brinsons' underlying claim was so fatally impaired as to have been rendered frivolous, ***Miller II,***

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[33] Actually, as no machine had disappeared in that situation (T. 933), and the Brinsons' counsel argued "spoliation" on the notion that a technician's failure to record ***which*** ventilator had been used on the patient was equivalent to the evidence having "disappeared." (T. 932-34).

[34] ***Compare*** *Miles* ***v. Allstate Ins. Co., 564 So.*** 2d 583, 584 (Fla. 4th DCA 1990) (doctor should not have been compelled to answer questions about alleged prior unnecessary medical tests because not relevant to whether test in question was necessary or not); ***Holland v. State, 636 So.*** 2d 1289, 1293 (Fla.), ***cert. denied,*** 513 U.S. 943 ***(1994);Metropolitan Dade*** *County* ***v. Zapata,*** 601 So. 2d ***239,243*** (Fla. 3d DCA 1992); *I.T.* ***v. Department of Health*** *and Rehab.* ***Serv., 532*** So. 2d 1085, 1088 (Fla. 3d DCA 1988).

650 So. 2d at 674, or if they had failed to recover against St. Mary's in their traditional medical negligence claim. *Herman,* 576 So. 2d at 3 14. In fact, sequential (rather than combined) trials would have provided the most effective administrative procedure by *avoiding* a second trial if the first was successful. The ultimate folly of departing from sequenced trials is the fact that the Brinsons willingly took a "no liability" verdict on their medical negligence claim.

The Court will recognize that, in practical effect, an affirmance of the Fourth District's approval of consolidation will eliminate the statutory risk management privilege completely. Not every medical incident in a health care facility will involve lost equipment, of course, but every medical incident that *does* involve lost equipment, or a misplaced medical record, will generate the impulse of plaintiffs to file and seek to consolidate a spoliation suit, in order to force the choice of privilege waiver or an incapacitated defense. The very possibility of that happening will have the further effect of eroding the very purpose for the statutory privilege, by impairing candid and honest cooperation in the investigation of a medical incident that the privilege is designed to assure, simply because medical and staff personnel cannot know in advance whether any particular medical incident will ultimately involve a lost piece of equipment or medical record. Thus the statutory objective will be subverted in *every* risk management evaluation conducted at a health care facility.

III. The trial court erred in imposing the unnecessarily harsh sanction of striking all of St. Mary's defenses when a less severe sanction was available and adequate to remedy the harm.

The trial court's decision to strike all of St. Mary's defenses was not a well-considered, analytical decision based on either a pattern of disobedience to court orders (there was none) or a necessity to avoid prejudice to the Brinsons (none was claimed). The decision was made in response to a calculated risk by counsel for the Brinsons that their procedural ploy might wipe away both any legitimate defenses that St. Mary's could assert to the Brinsons' claims, and any apportionment of fault to the culprit in this tragedy, Dr. Cooney.

In *Kelley v. Schmidt,* 613 So. 2d 918, 920 (Fla. 5th DCA 1993), the court reversed an order striking pleadings where other, less onerous sanctions were available, noting that "[r]ather than using the scalpel, the trial judge has chosen the atomic bomb." The striking of pleadings for noncompliance with an order compelling discovery, being the most severe of all sanctions, is justified only in response to a "deliberate and contumacious disregard of the court's authority" or "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 conduct was not of that ilk.[35]

The striking of all of St. Mary's defenses arose in conjunction with less than a handful of documents, each of which was relevant only to the proposed testimony of St. *Mary's own witness.* St. Mary's had offered to cure the Brinsons' problem of unfamiliarity with those documents through the less drastic solution of simply not calling the witness or not questioning its witness regarding the subject matter of those documents or any privileged issues. The Brinsons made no showing or suggestion of prejudice that could result from the hospital's limiting or eliminating its own witnesses' testimony in defense of the Brinsons' claims.

Sanctions should be commensurate with the misconduct that is being punished. *Kelley* v. *Schmidt,* 613 *So.* 2d at 920; *Insua v. World Wide Air, Inc., 582 So.* 2d 102 (Fla. 2d DCA 1991). The one imposed here clearly was not . The Brinsons' were "unable to demonstrate meaningful prejudice," and that consideration alone should have diverted the imposition of a default on liability. *Neal v. Neal, 636 So.* 2d 8 10, *8* 12 (Fla. 1 st DCA *1994); In re Estate of Brandt,* 613 So, 2d 1365, 1367 (Fla. 1st DCA 1993); *Beauchamp v. Collins, 500 So.* 2d 294,296 (Fla. 3d DCA 1986), *review denied,* 5 11 So. 2d 297 (Fla. 1987). Even a pattern of noncompliance with standing court orders does not mandate the severe sanction of striking pleadings, because the sanction must be commensurate with the harm done. *Brownell v. Brownell, 685 So.* 2d 78 (Fla.

[35] The trial court made no finding of conduct which would warrant imposition of the most severe sanction available to a court, and its very failure to make any such finding alone requires reversal. *Commonwealth Fed, Sav. &Loan Ass'n v. Tubero, 569 So.* 2d 1271, 1272 (Fla. 1990).

2d DCA 1996). Here, of course, there was no pattern of misbehavior that required curbing. St. Mary's had possessed the absolute privileges at the core of this disagreement from the outset, and argument against imposition of this severe sanction was a singular event in the ongoing tussle over privileged materials. (Attached as Appendix 3 is the colloquy immediately preceding the sanction.) Nonetheless, this draconian sanction led to a denial of ***any*** defense for St. Mary's on the merits of two, pending lawsuits, stripped St. Mary's of its statutory privilege, eviscerated the Brinsons' stipulation that St. Mary's was not vicariously liable for the torts committed by Dr. Cooney and, most devastatingly, caused the loss of St. Mary's right to an apportionment of damages to the prime tortfeasor, Dr. Cooney.

Section 768.81(3), Florida Statutes (1993), commands an apportionment of the Brinsons' damages for non-economic damages according to respective percentages of "fault." In ***Fabre v. Marin***, 623 So. 2d 1182 (Fla. 1993), the Court confirmed that principle, and held that party status is not essential to the required apportionment of fault.

> [T]he only means of determining a party's percentage of *fault* is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants.

623 ***So.*** 2d at 1185 (emphasis added). The trial court refused to allow St. Mary's the opportunity to present evidence on apportionment, or to submit a verdict form to the jury that would allow an apportionment of damages among all of the parties who may have been at fault, on the ground that all affirmative defenses had been stricken. (T. 1338-39). The court absurdly grounded its ruling on ***W.R. Grace & Co. v. Dougherty, 636 So.*** 2d ***746*** (Fla. 2d DCA), ***review denied, 645 So.*** 2d 457 (Fla. 1994), which held that a non-party's fault can reduce a defendant's liability only if there is record evidence to support an apportionment of fault. That rationale is meaningless in this case, where there was massive evidence in the record that Dr. Cooney was largely at fault both for his patient care and for the inadvertent destruction of the vaporizer. In one fell swoop, the trial court's ruling not only took away St. Mary's ***statutory*** and ***Fabre*** apportionment rights,

but the Brinsons' release of St. Mary's from all vicarious and agency liability for the negligence of Dr. Cooney.

The district court initially reversed the trial court's denial of apportionment and remanded for a retrial on damages at which the jury should be instructed regarding Dr. Cooney's fault. ***St. Mary's Hospital, Inc. v. Brinson,*** 21 Fla. L. Weekly D1187 (Fla. 4th DCA May 22, 1996). On rehearing, however, the court rejected apportionment based on ***Nash v. Wells Fargo Guard Serv., Inc.,*** 678 So. 2d 1262 (Fla. 1996), an equally irrelevant precedent for fault apportionment here. ***Nash*** is nothing but a "notice" case, requiring that a defendant notify a plaintiff through an affirmative defense that the fault of a non-party will be asserted.[36] The failure of the defendant to plead apportionment as an affirmative defense led the Court to hold that the defendant "waived" apportionment. 678 So. 2d at 1264. The inapplicability of ***Nash*** to this case is obvious from the fact that Dr. Cooney ***was*** a party and the fact that St. Mary's ***had*** pled an apportionment of his fault as an affirmative defense. The "notice" requirement of ***Nash*** was never an issue here.

The difference between liability and fault was recently explicated in ***Y.H. Investments, Inc.*** v. *Godales*, 22 Fla. L. Weekly S153a (Fla. March 27, 1997), where the question arose whether a parent immune from liability for injuries caused her child could still be responsible for a "percentage of fault" in causing the damages. The Court said "yes" — that "no liability" did ***not*** mean no apportionment — because percentage of fault should be measured with respect "to all of the other entities who contributed to the accident . . . ." *Godales*, 22 Fla. L. Weekly at S155, quoting ***Fabre,*** 623 So. 2d at 1185 (emphasis added). *Godales*, not ***Nash,*** applies here, and confirms that a person who has no "liability" to a particular plaintiff may still be "at fault" under section 768.81.[37]

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[36] The Third District recently recognized that ***Nash*** is a "notice" decision, requiring the pleading of apportionment as an affirmative defense. ***Gonzalez v. Veloso, 22*** Fla. L. Weekly D1539 (Fla. 3d DCA June 25, 1997).

[37] In *Shufflebarger v. Galloway*, ***668 So.*** 2d 996 (Fla. 3d DCA 1995), the court recognized the distinction between a party's possible liability and the percentage of fault, and directed on a remand that the jury be instructed that apportionment would be required if the jury found a non-party also at fault. Subsequently, the Third District stated that *Shufflebarger* was not implicitly overruled by ***Nash,*** and approved a remand for apportioning fault even though liability was

(contmued . . .)

Where apportionment of fault has been pled but defenses are stricken (for whatever reason), a party defendant cannot (consistent with *Godales*) be held responsible for 100% of the non-economic damages. The effect is to put a multiplier on the punishment in derogation of the statute, irrespective of the severity of the conduct. The trial court here, for example, could not have known when it struck St. Mary's affirmative defenses that the consequence of doing so was to assign liability for 100% of a $9 million verdict to St. Mary's despite the statute, *Fabre* and Dr. Cooney's admittedly negligent actions. (If the court *was* aware of that possible level of consequence then the action taken was massively out of proportion to St. Mary's refusal to produce less than a dozen pieces of paper.)

IV. The trial court erred in refusing to grant remittitur or a new trial in the face of a clearly excessive verdict.

The $9 million verdict in this case was excessive in every aspect: in its sheer size, in its disproportionality to other pain and suffering verdicts awarded in Florida jurisprudence, and in its relationship to the alleged misconduct of St. Mary's that produced the harm. The jury was unquestionably influenced by the passion of calculated prejudice against St. Mary's generated knowingly by counsel for the Brinsons in opening and in closing arguments. The trial court erred in refusing to grant St. Mary's motion for remittitur, or alternatively to order a new trial. *Rety v.* Green, 546 So. 2d 410, 418-19 (Fla. 3d DCA), *review denied, 553 So.* 2d 1165 (Fla. 1989) ("an 'unprecedented' case of libel . , . which deserved an unprecedented award of damages," but the award shocked the judicial conscience to the point that it was "almost . . . self-evident . . . because no libel verdict in the state or in the country has ever been upheld which even remotely approaches the amount of compensatory and punitive damages awarded in this case"); *Bould v. Touchette,* 349 So. 2d 1181, 1184-85 (Fla. 1977) (damage award may not exceed the maximum limit of a "reasonable range within which the jury may properly operate").

(. . continued)
settled. *Schindler Elevator Corp. v. Viera,* 22 Fla. L. Weekly D1263a (Fla. 3d DCA May 21, 1997).

In Florida, there has been no reported verdict approaching $9 million for parents' loss of a child solely as a bereavement award for these parents.[38] Nothing of this magnitude has ever been approved for this type of loss, and this was *not* a case of unprecedented misconduct. The facts do not establish any conscious or knowing concealment or destruction of the Halothane vaporizer by St. Mary's. The damage award cannot stand, and at a minimum the case should be remanded to the trial court for a substantial remittitur or, in the alternative, for a completely new trial.

CONCLUSION

St. Mary's respectfully requests that the court reverse the decision of the Fourth District, vacate the spoliation judgment and remand for a new trial both on liability and damages.

Respectfully submitted,

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[38] The cases report, and appear to set, a range of $900,000 to $1,000,000 for non-economic damages for the death of a young child in Florida. *See Magsipoc v. Larsen, 639 So.* 2d 1038, 1040-4 1 (Fla. 5th DCA 1994); *Harbor Ins. Co. v. Miller, 487 So.* 2d 46 (Fla. 3d DCA), *review denied,* 496 So. 2d 143 (Fla. 1986) (finding excessive; reversing award for $1.56 million); *Grayson v. United States,* 748 F. Supp. 854 (S.D. Fla. 1990), *aff'd in part, vacated in part, 953* F.2d 650 (1 lth Cir. 1992) (surveying awards and determining similar $1 million standard); *Johnson v. United States,* 780 F.2d 902 (1 lth Cir. 1986) (finding $2 million award — $1 million for each parent — excessive).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing brief on the merits was mailed on July 23, 1997 to:

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APPENDICES

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1.	Complaint
2.	Complaint (Spoliation)
3.	Excerpt of trial transcript (June 24, 1994)