IN THE SUPREME COURT OF FLORIDA

WILLIAM G. BELL, ET AL.,

Petitioner,

v. **Case No. 1999-92**

JANET SNYDER,

Respondent.

______________________________________/

Appeal from the District Court of Appeal
Second District of Florida
Case Nos. 98-00191 and 98-00853

RESPONDENT'S ANSWER BRIEF

A. Lamar Matthews, Jr.
FB# 051390
Arthur S. Hardy
FB#721492
MATTHEWS, HUTTON & EASTMOORE
1777 Main Street, Suite 500
Post Office Box 49377
Sarasota, Florida 34230
(941) 366-8888
Fax: (941)954-7777
Counsel for Respondent

I. TABLE OF CONTENTS.

PAGE

II. CERTIFICATE OF SIZE, TYPE AND STYLE ii

III. TABLE OF CITATIONS iii

IV. PRELIMINARY STATEMENT vi

V. STATEMENT OF CASE AND FACTS 1

VI. SUMMARY OF ARGUMENT 19

VII. ARGUMENT 20

A. No Conflict Exists Between The Decision Below and Any Decision of This Court. Jurisdiction Should Be Dismissed 20

B. The Second District Court of Appeal Correctly Ruled That Frances Bell's Civil Theft Damages Award Should Be Trebled 23

C. The Court Should Decline to Consider Other Issues Raised in Petitioner's Initial Brief 32

D. The Second District Properly Affirmed the Trial Court's Ruling Directing a Verdict on Bill Bell's Spoliation Claim 33

E. No Remand is Necessary. The Jury's Verdict and Subsequent Judgment Against the Estate and Trust Should Be Affirmed 46

VIII. CONCLUSION 50

IX. CERTIFICATE OF SERVICE 51

II. CERTIFICATE OF TYPE, SIZE AND STYLE.

Counsel for respondent certifies that this Brief on Jurisdiction is typeset to 14 point (proportionally spaced) Times New Roman.

III. TABLE OF CITATIONS.

Cases

Aagaard-Juergensen, Inc. v. Lettelier, 579 So. 2d 404 (Fla. 5th DCA 1991) 24, 26

Aurbach v. Gallina, 753 So. 2d 60 (Fla. 2000) 30

City of Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769 (1914) 27

Clock v. Clock, 649 So. 2d 312 (Fla. 3d DCA 1995) 47

Continental Ins. Co. v. Herman, 576 So. 2d 313 (Fla. 3d DCA 1990), rev. denied, 598 So. 2d 76 (Fla. 1991) 35

Delgado v. J.W. Courtesy Pontiac GMC-Truck, 693 So. 2d 602 (Fla. 2d DCA 1997) 28

Dept. of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888 (Fla. 1986) 22

DePuy, Inc. v. Eckes, 427 So. 2d 306 (Fla. 3d DCA 1983) 34

Epstein v. Epstein, 966 F. Supp. 260 (S.D.N.Y. 1997) 31

First American Corp. v. Al-Nahyan, 948 F. Supp. 1107 (D.D.C. 1996) 31

In re M.P., 472 So. 2d 732 (Fla. 1985) 21

Lohr v. Byrd, 522 So. 2d 845 (Fla. 1988) 20, 21, 25, 27, 33

McArthur Dairy, Inc. v. Original Kielbs, Inc., 481 So. 2d 535 (Fla. 3rd DCA 1986) 21, 22

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed. 2d 444 (1985) 31

Monks v. Smith, 609 So. 2d 740 (Fla. 1st DCA 1992) 48

Provident Management Corp. v. City of Treasure Island, 718 So. 2d 738 (Fla. 1998) 33

Reaves v. State, 485 So. 2d 829 (Fla. 1986) 22

Satz v. Perlmutter, 362 So. 2d 160, (Fla. 4th DCA 1978), aff'd, 379 So. 2d 359 (Fla. 1980) 20

Senfeld v. Bank of Nova Scotia Trust Co. Ltd. , 450 So. 2d 1157 (Fla. 3rd DCA 1984) 25, 32

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed. 2d 185 (1987) 31

Snow v. Nelson, 475 So. 2d 225 (Fla. 1985) 30

Snyder v. Bell, 746 So. 2d 1096 (Fla. 2d DCA 1999) 18, 21, 23, 33

St. Mary's Hospital, Inc. v. Brinson, 685 So. 2d 33 (Fla. 4th DCA 1996), rev. granted, 695 So. 2d 701 (Fla. 1997), rev dismissed, 709 So. 2d 105 (Fla. 1998) 45

Sunland Hospital/State of Florida v. Garrett, 415 So. 2d 783 (Fla. 1st DCA 1982) 47

United Pacific Ins. Co. v. Berryhill, 620 So. 2d 1077 (Fla. 5th DCA 1993) 22

VanBibber v. Hartford Accident and Indemnity Ins. Co., 439 So. 2d 880 (Fla. 1983) 27

Vining v. Martyn, 660 So. 2d 1081 (Fla. 4th DCA 1995) 22

W.R. Grace & Co.-Conn. v. Dougherty,
636 So. 2d 746 (Fla. 2d DCA 1994),
rev. denied, 645 So. 2d 454 (Fla. 1994) 47

Ziccardi v. Strother, 570 So. 2d 1319 (Fla. 2d DCA 1990) 32

Statutes

Fla. Stat. §46.021 . . . . 24, 30

Fla. Stat. §772.104 32

Fla. Stat. §772.11 . . . . 2, 20-24, 26, 29

Fla. Stat. §772.19 29

Fla. Stat. §775.021 32

Fla. Stat. §812.035 . . . . 24, 32

Fla. Stat. §812.035(7) 24

Fla. Stat. §812.037 . . . . 21, 24, 32

Other

J. Sparkman & J. Reis, Spoliated Evidence:
Better than the Real Thing? 71 Fla. B.J. 22
(July/August 1997) 34

IV. PRELIMINARY STATEMENT

Respondent, the plaintiff below, is Janet Snyder, as conservator of her mother, Frances Bell. She will be referred to as "Janet" or "Janet Snyder." Frances Bell will be referred to as "Frances" or "Frances Bell." Janet Snyder was also a counterdefendant below in her individual capacity as was her husband, Bill Snyder. Petitioner, defendant/counterplaintiff below, is William Bell, in his capacities as personal representative of the Estate of Malvern H. Bell, trustee of Malvern Bell's trust, and individually. He will be referred to as "Bill Bell" or "William Bell." The decedent, Malvern Bell, will be referred to as "Malvern" or "Malvern Bell."

The answer brief will cite to the record on appeal as "R." The transcript of the trial included in the record will be cited to as "Tr."

V. STATEMENT OF CASE AND FACTS

A. Introduction

This case was tried before a jury in September 1997. At the conclusion of the two week trial, the jury found that Malvern Bell had stolen a $122,634.59 check from his second wife, Frances Bell, while she was living in an assisted care living facility and that Malvern had committed constructive fraud and breached the couple's prenuptial agreement causing Frances an additional $140,000 in damages. The jury also found that Janet Snyder, Frances Bell's daughter and court-appointed conservator, had converted $13,200 worth of Malvern's property after his death, spoliated evidence resulting in $40,000 damages to Malvern's estate, and assessed punitive damages against Janet in the amount of $250,000, not knowing at the time that the court had dismissed the spoliation claim. R. 4933-37.

In ruling on post-trial motions and entering judgment, the trial court refused to award Frances statutory treble damages on her civil theft claim. The court had previously granted Janet's motion for directed verdict on the spoliation claim while the jury was deliberating on punitive damages. The court also reduced the punitive damages award to $30,000 which it found to be the highest amount which could be awarded consistent with due process. R. 5032-33.

Both parties appealed. The Second District Court of Appeal affirmed in all

respects but one. The Court held that Frances Bell was entitled to have her statutory civil theft damages trebled pursuant to Section 772.11, Florida Statutes. Petitioner sought review in this Court alleging that the Second District's decision trebling Frances Bell's civil theft damages was in conflict with earlier decisions of this Court. On the basis of the alleged conflict, this Court granted review.

These are all the facts required to resolve the issue which is the sole basis of this Court's jurisdiction: the alleged conflict created by the Second District's allowance of an award of treble damages against an estate. However, because petitioner has seen fit to concentrate on other issues and devote two-thirds of his brief to facts and issues unrelated to treble damages, Snyder is compelled to respond. Accordingly, the following facts are submitted so the Court has an accurate and complete review of the entire record.

B. Facts and Procedural History

Frances Wynn and Malvern Bell were married in January 1976. Tr. 883. It was the second marriage for each. Frances came to the marriage as a wealthy divorcee with two grown children, Richard Wynn and Janet Snyder. Tr. 774; 999.
Malvern came to the marriage after having been divorced by his first wife. He had a grown daughter with whom he had had no contact for many years. Tr. 1729.
Malvern's finances were much different than Frances'. Tr. 2703. At the time of the

couple's marriage, Malvern lived on a boat and owned only a bicycle for transportation. Tr. 789. In 1974 and 1975, the two years before Malvern and Frances' marriage, Malvern reported to the Internal Revenue Service adjusted gross incomes of $2,387 and $3,475, respectively. Tr. 2862. Recognizing this financial disparity, shortly after their marriage Frances provided Malvern with $150,000 cash. Tr. 2427. Other than this $150,000, it was estimated that Malvern brought only approximately $29,000 to the marriage. Tr. 917.

Notwithstanding Malvern's incomes for 1974 and 1975, Bill Bell attempts to paint the picture that Malvern came to his marriage a wealthy man. This is not supported by the evidence. Bill Bell tries to obscure Malvern's small income by asserting that Malvern had numerous tax-free municipal bonds which would leave "little paper trail." Bill Bell's own expert testified, though, that when such an asset is sold it is to appear on a tax return. Tr. 2388. This was confirmed by Frances' expert. Tr. 2872-73. There is no dispute that all tax returns from the marriage were available, Tr. 2388, and evidence of Malvern's alleged preexisting portfolio was never produced. Similarly, the statement that records of Malvern's investments from the 1970's and early 1980's are missing is contradicted by Bill Bell's expert who acknowledged he reviewed records from brokerage accounts over a twenty year period commencing in 1977 or 1978. Tr. 2406.

Much of the evidence that Malvern came to his marriage to Frances with considerable wealth is provided by Bill Bell. However, Bell testified that he did not see his uncle "from at least '69 to at least '74." Tr. 2815. These were the very years Malvern was allegedly accumulating his wealth. Moreover, Bill Bell testified that Malvern never told him he had used his first wife's money to buy the trucking company, that his first wife paid for their marital home with her own funds, or that he ceased working as a stock broker in January 1970, less than one year into his employment. Tr. 2810-11. In the end, there is scant evidence that Malvern came to the marriage with anywhere near the assets to enable him to have died with a sizable estate without much of Frances' money being used to supplement his own.

Prior to their marriage, Frances and Malvern entered into a prenuptial agreement. Tr. 352-3. This agreement, as interpreted by the trial court in its September 15, 1997, order, provided, inter alia, that any funds placed into joint accounts by either Frances or Malvern would remain as that individual's separate property unless a gift could be proven. R. 2084-92.

Following their marriage ceremony, which was attended by no family members, the couple resided at Frances' Palm Beach condominium. Tr. 797; 809-10. In the earliest years of the marriage, Frances maintained her relationships with preexisting friends and business people such as her accountant. Over time, however, Malvern

systematically took over control of Frances' surroundings and finances and her preexisting personal and financial relationships were severed.

In 1987, the couple moved from Palm Beach to a home in Osprey (just south of Sarasota) after his boorish behavior resulted in Malvern being removed from a social club in which Frances was a long-time member. Tr. 1005; 1044-47. Frances, not Malvern, paid for the home. The couple also left the summer residence she owned in Tennessee and purchased a home in Hound's Ear, North Carolina. Tr. 2433. Frances paid for this home as well. Tr. 2434. Thus, after several years of marriage to Malvern and well past 65 years of age, Frances left the surroundings in which she had spent a lifetime and moved to Osprey and North Carolina.

Malvern also assumed greater control over Frances' finances. Tr. 1659. Her stock broker was discharged and Malvern began managing Frances' investments and keeping the checkbook. Tr. 532; 1659. Malvern exclusively provided information to Frances' long-time accountant in Tennessee, Herbert Ward, who prepared the couple's tax returns until 1988. Tr. 737; 744. After 1988, Malvern himself took over the preparation of all tax returns. Tr. 745-46. Malvern kept track of all financial information on his computer in his private office.[1] Malvern instructed that he alone

---

[1]Malvern was so protective over the information contained on the computer that he even requested that the computer be brought to him in the hospital during his final illness. Tr. 379.

must receive the mail containing the various bank and brokerage statements which arrived at the couple's home. Tr. 541-2. Indeed, Malvern was so determined that only he, and not Frances, retrieve the mail that he devised a form of "early warning system" using flags and fishing weights which he fastened to the mailbox to alert him when the mail arrived. Tr. 541.

In January 1994, Frances, then age 81, suffered a broken hip and her health thereafter deteriorated. Tr. 536-7. As a consequence, Frances employed two nurses to help care for her in her home. Tr. 539. In October 1994, Frances suffered a debilitating stroke. Tr. 539; 1048. Shortly after Frances' return home from the hospital, Malvern unilaterally discharged the nurses who had been caring for Frances because he believed the nurses were pampering her too much. Tr. 540-41.

Several months later Malvern called Janet and told her he was no longer able to care for Frances and wanted Frances moved out of her house. Tr. 1010. Janet made arrangements to have her mother transported by air ambulance to an assisted care living facility near Janet's home in Knoxville, Tennessee. Tr. 1012-14. Frances has lived continuously at that facility and its nursing home since late February or early March 1995. Tr. 1012. She is now 87 years old.

Although Frances had been removed from her home at his request and was living in Tennessee, Malvern continued to control her finances. Among the actions

taken by Malvern while Frances was living in the Knoxville nursing home was his receipt of a Brown & Company brokerage house check dated September 1, 1995, in the amount of $122,634.59 made payable to Frances. The endorsement on the back of the check purported to be the signature of Frances Bell and underneath it was stamped "for deposit only Malvern H. Bell." Tr. 359-61. Malvern then deposited this check, payable to Frances, in his own, individual NationsBank account. Tr. 360. This is the money that the jury found Malvern had stolen. R. 4934.

On October 17, 1995, Malvern entered the hospital after having had cancer for a lengthy period of time. Tr. 437. Because Malvern was unable to continue writing the checks to pay the bills for Frances' care, some of her nursing home bills were in arrears. Tr. 2599. Janet and her husband, Bill Snyder, traveled to Osprey not only for their concern about Malvern's condition but to marshal the information necessary to pay for Frances' continuing support. Tr. 2598.

On October 24, 1995, Janet and Bill Snyder met Malvern's nephew, Bill Bell, at Frances' Osprey house. Tr. 440. What occurred during that meeting and in the succeeding days is a matter of dispute in the evidence. Viewing the facts in the light most favorable to Bill Bell, the following account comes from his testimony.

When Bill Bell arrived at Frances' Osprey house, Janet and Bill Snyder had already been there for about three days. Tr. 440. Bill Bell found many documents,

including checks, bank and financial statements, and wills set out on tables. Tr. 427-8. Janet gave Malvern's financial statement to Bill Bell and he was disturbed because she appeared to have read Malvern's will and financial statement. Tr. 440-41; 2723. Janet also told him she had made several attempts to access the computer containing financial information. Tr. 442. Bill Bell also recalled seeing some of his grandmother's (Malvern's mother's) silver in an area where Janet indicated she had segregated some of Frances' belongings. Tr. 447-48; 2718-19. Because of this, he went through the house with Janet and saw other items of personalty which belonged to his uncle. Tr. 447-51. Believing it was inappropriate for him or Janet to take control of the documents and personalty, Bill Bell on two occasions suggested employing a third party to go through the documents and possessions to decide what belonged to whom. Tr. 444-46. Janet declined this suggestion telling him she knew what belonged to each person. Tr. 446-47.

Bill Bell recalled that during the October 24 meeting, Janet was concerned about making sure her mother's nursing care bills, and life and health insurance premiums were paid. Tr. 363. Bill Bell did not see the "extreme urgency" Janet expressed, though, because he did not believe the "nursing home would take an 80-year-old woman and push her out in the street in the wheelchair." Tr. 444.

Bill Bell acknowledged that he left the house that day with numerous items of

his uncle's personalty including guns, silver, and a ship's clock and that Janet had no objections to him taking these items. Tr. 364. He also testified that although he had no particular interest that day in looking at financial documents, Janet made no effort to keep him from looking at any records, Tr. 363-64, and, in fact, gave him a medium stack of documents to take with him that day, Tr. 426. Bill Bell's sisters also removed other documents that pertained to Malvern on another one of their trips to the Osprey house when the Snyders were not present. Tr. 426. These trips were facilitated by the fact that Janet had left a key to the house at the subdivision guard gate for Bill Bell and his family to use. Tr. 2601; 2655.

After leaving the house on October 24, and after Janet and Bill Snyder had returned to Tennessee, Bill Bell instructed his sisters to remove the computer from the Osprey house. Tr. 379. The computer was removed at night without notice because he was unaware what documents Janet might have taken from the house and this was the only way to get the financial information he needed. Tr. 379-80; 387. The computer was taken to the home of Patricia Morrison, one of Bill Bell's sisters, and then given to a friend of Bill Bell, Ken Lynse, in an effort to retrieve information. Tr. 380-83. Eventually, the computer was returned to Bill Bell who admitted that one file, "MALSBK", was deleted by him. Tr. 384-85.

On November 3, 1995, Malvern died. Bill Bell was appointed the personal

representative of his uncle's estate and the trustee of his trust. Following Malvern's death, Bill Bell testified he was not permitted by Janet to reenter the Osprey or North Carolina residences until being given permission to do so by the court in June 1996, at which time the documents he had previously seen were gone. Tr. 451. Bill Bell testified that he has not received all relevant documents, Tr. 426-27, and that numerous items of Malvern's personalty were missing, Tr. 2757-62.

In his haste to brand Janet a thief, Bill Bell makes several statements flatly contradicted by the record. For example, Bill Bell implies that Janet took Malvern's flight jacket and other items of sentimental value. In fact there is no such evidence. Indeed, the only evidence is directly to the contrary. Malvern and Frances' housekeeper testified that she saw Malvern give the flight jacket away to another man. Tr. 2766-67. Similarly, Bill Bell tries to imply Janet rifled through Malvern's "meticulously organized" study because he found it in disarray when he entered the house. Once again, this is contradicted by the testimony of the housekeeper. She testified that after Malvern's illness, the study in the home was "a mess." Tr. 2769-70. Moreover, no one from Janet's family was present at the Osprey home from October 24 to October 29 when some of the documents allegedly disappeared. Only Bill Bell and his family had unfettered access at that time. Tr. 2600-02. Thus, Bill Bell was unable to show that Janet took items of Malvern's personalty and ignores

undisputed evidence to the contrary.

Bill Bell further improperly attempts to brand Janet as litigious for filing suit in this case. He neglects to mention that suit was filed only after Bell and his sister removed Malvern's computer and began the process which culminated with them deleting at least one relevant file. Bell tries to bolster this point by stating Janet "had recently been the plaintiff in similar litigation with her stepmother concerning her father's estate." Pet. br. at 35. The record clearly shows this statement is incorrect. In reality, Janet's stepmother filed a dissent from the will under Tennessee law. Herbert Ward, co-executor of the estate, as well as Janet and other beneficiaries, simply asked the court to carry out the provisions of the will. Janet never filed any document challenging the will. Tr. 747-8.

Bill Bell also implies Janet Snyder forged Malvern's signature to a membership certificate for the Cherokee Country Club in Knoxville, Tennessee. No one testified to this conclusion. Janet's expert testified that the signature on the certificate was "without a doubt" Malvern's. Tr. 2790. While Bill Bell's expert did not agree, he provided no opinion as to whom he believed did sign Malvern's name. Tr. 2116-17. Hence, contrary to Bill Bell's implication, no one ever stated that Janet signed Malvern's name.

With respect to the country club certificate, Janet Snyder testified without

contradiction that although titled in Malvern's name, the membership was paid for and maintained by Frances. Tr. 2525. That was confirmed by other uncontradicted evidence: Frances' payment of the couple's Club expenses; giving up her Club membership when she married Malvern because the Club's rules required the membership to be in the husband's name; and her efforts to get Malvern admitted. Tr. 2899; R. 4654-83. Janet testified that before she did anything to effect a transfer of the certificate, Malvern's signature was already on the document. Tr. 2522. She obtained the advice of Tennessee counsel to ensure she acted properly. Tr. 2596-7.

After Malvern's death, two suits were filed by Janet on behalf of her mother. One suit, filed on November 9, 1995, was against Bill Bell and Patricia Morrison for conversion of the computer and related items. R. 1-4. The other suit, filed November 21, 1995, was against Bill Bell, as personal representative and trustee, and sought an accounting as well as damages for conversion and fraud allegedly perpetrated by Malvern in taking money from Frances' accounts. R. 57-63. This latter action was based on Malvern's conduct during his marriage to Frances including taking complete control of her finances resulting in Malvern having a much greater estate than would have been expected and Frances having much less money than expected at Malvern's death. To substantiate these allegations at trial, Frances called two certified public accountants as expert witnesses.

The first, Leroy Bible, testified that Frances and Malvern had almost identical individual investment portfolios and that Malvern handled the investment decisions for each. Tr. 926. Accordingly, Mr. Bible expected the growth rates of the two portfolios to be very close. Tr. 927. Mr. Bible's investigation revealed the growth rates were quite different, however; Malvern's portfolio grew at a 12.28% annual rate while Frances' grew only 7.06% annually. Tr. 925. Mr. Bible further testified that the overall growth rate of Frances' and Malvern's investments (taken together) was 8.09%. Tr. 926-7. Mr. Bible calculated that if Frances' and Malvern's investments had each grown by 8.09%, then Frances' portfolio would have been $1,046,000 higher than it actually was and Malvern's would have been $1,022,000 lower than it actually was.[2] Accordingly, Mr. Bible found a one million dollar shortfall from what he would have expected in Frances' account and a corresponding one million dollar windfall in Malvern's account.

The second CPA expert called by Frances was Charles Baumann. Among the evidence offered by Mr. Baumann was that his investigation indicated that while

[2]At death, Malvern's brokerage account had a value of $1,607,000. Tr. 925. Had it increased at 8.09% rather than 12.28%, it would have had a value of $585,000. Tr. 927-8. Conversely, Frances' portfolio was actually worth $2,624,000. Tr. 925. Had it grown at 8.09% rather than 7.06%, it would have had a value of $3,671,000. Tr. 927. If it had grown at Malvern's actual 12.28% rate, her portfolio value would have skyrocketed to $11,400,000. Tr. 928.

Malvern wrote 93.9% worth of the couple's checks, Tr. 1350, he contributed only 2.5% of the deposits to the couples' joint accounts, Tr. 1353. Mr. Baumann also testified that he was unable to account for $600,000 to $700,000 worth of investments which had been in Frances' individual accounts over which Malvern exercised control. Tr. 1345.

On December 11, 1995, within a month following the institution of these suits, Bill Bell filed a petition for the appointment of a conservator of his choosing in Tennessee state court seeking to have all rights removed from Frances Bell and asking the court to appoint, not one of her children, but a stranger to the family as Frances' conservator. Tr. 404-06; R. 2138-44. After a motion for sanctions was filed against him, Bill Bell non-suited his petition. Tr. 481.

On June 6, 1996, Bill Bell filed another petition seeking once again to remove all of Frances' rights and to have a different stranger to the family appointed her conservator. Tr. 408; R. 2145-54. In this petition Bill Bell averred that among the reasons Frances' rights should be removed and a conservator of Bell's choosing appointed was that Frances' daughter and holder of her power of attorney, Janet Snyder, was "needlessly and imprudently" filing suits in Florida which were not in Frances' best interests. Id. This action was dismissed by the court. Tr. 409.

Because of the actions of Bill Bell, Janet Snyder filed her own petition to have

herself appointed her mother's conservator. Bill Bell filed a motion to intervene in that proceeding seeking to prevent Janet from being appointed conservator. Tr. 409; R. 2155-75. Ultimately, Bill Bell's petition was dismissed and Janet was appointed Frances' conservator. Tr. 409-11; R. 2176-80.

Well before trial, the Florida cases were consolidated and numerous amendments were filed. Bill Bell filed a counterclaim and Frances added several causes of action. Three new claims are particularly relevant to this appeal: Bill Bell's claims for conversion and spoliation against Janet and Frances' claim for civil theft against Malvern's estate and trust. R.1579-1617.

Frances' claim for civil theft involved Malvern's wrongfully depositing directly into his account the $122,634.59 Brown & Company check made payable solely to Frances. On July 29, 1997, the trial court entered an order on Frances' civil theft cause of action dismissing Frances' claim for statutory treble damages. R. 5061-65. As is discussed more fully below, the court concluded that, as a matter of law, statutory treble damages are not available against an estate. Id.

When the two week trial of this case began before the jury on September 15, 1997, the following causes of action were at issue: Frances' claims against the estate and trust for conversion, constructive fraud, breach of prenuptial agreement, and civil theft; Frances' claim against Bill Bell, individually, for conversion and breach of

fiduciary duty; Frances' claim against Bill Bell and Patricia Morrison for spoliation of evidence; and Bill Bell's claims against Janet Snyder and her husband, Bill Snyder, for conversion (including punitive damages) and against Janet for spoliation of evidence.[3]

In the midst of the first week of trial, the court sua sponte severed Frances' claim for spoliation of evidence against Bill Bell and Patricia Morrison.[4] Tr. 1218-20. The spoliation claim involved two separate instances of spoliation: (1) the improper deleting of files contained on Malvern's computer and (2) the removal and corrupting of the hard drive from the DOS Computing Center by Bill Bell, Ms. Morrison, or their attorneys. Tr. 1239-46.

Late in the evening on Friday, September 26, 1997, the jury returned its verdict and found: that Malvern had committed constructive fraud against Frances and breached his prenuptial agreement with her, with damages in the amount of $140,000; that Frances proved by clear and convincing evidence that Malvern had committed civil theft of the $122,634.59 Brown & Company check; that Malvern did not commit conversion; that Bill Bell, individually, did not commit conversion; that Bill Bell did

---

[3]There were additional non-jury claims for an accounting and to remove Bill Bell as personal representative and trustee.

[4]This claim has subsequently been voluntarily dismissed without prejudice. R. 5052-53.

not breach his fiduciary duty as Trustee to Frances; that Janet converted property belonging to Malvern in the amount of $13,200; that Bill Snyder did not commit conversion; that Janet spoliated evidence with damages in the amount of $40,000; and that Janet was liable for punitive damages. R.4933-36; Tr. 3283-85.

At 11:35 p.m. on that Friday night, the court immediately began the punitive damages phase of the trial. Tr. 3289. Two witnesses were called, Janet Snyder and Bill Bell's expert accountant, Robert Piper. After midnight, an exhausted jury was sent out to deliberate its verdict on the amount of punitive damages. Tr. 3326.

While the jury was deliberating, the court granted Janet Snyder's renewed motion for directed verdict on the spoliation claim against her and set aside the $40,000 verdict on that claim. Tr. 3326-34. At approximately 12:50 a.m. on Saturday, September 27, 1997, the jury, not knowing the spoliation claim had been dismissed, found Janet liable for $250,000 in punitive damages. Tr. 3337. The court postponed consideration of Janet's renewed motion for directed verdict on punitive damages and adjourned the proceedings at 12:53 a.m. Tr. 3338-40.

At a hearing on November 12, 1997, the court heard argument on a number of post-verdict motions, including Janet's renewed motion for directed verdict or, alternatively, for remittitur on the punitive damage award. By order dated December 15, 1997, the court granted the motion for remittitur holding that the highest amount of

punitive damages that could be awarded against Janet Snyder consistent with due process was $30,000. R. 5032-33. All other post-verdict motions by the parties were denied. Id.

On December 15, 1997, the court also entered its final judgment which, inter alia, awarded Frances a judgment of $318,091.58 against Malvern's estate and trust and awarded Malvern's estate a judgment of $45,933.10 against Janet, individually. R. 5066-71. Consistent with its prior ruling, in the final judgment the court refused to award treble damages to Frances on her civil theft claim. Id.

Both parties appealed to the Second District Court of Appeal. The District Court affirmed in all respects except it held the trial court erred in refusing to treble Frances' civil theft damage award. Snyder v. Bell, 746 So. 2d 1096 (Fla. 2d DCA 1999). Asserting this holding conflicted with a prior decision of this Court, Bill Bell sought discretionary review which this Court granted on April 28, 2000.

VI. SUMMARY OF ARGUMENT

The decision below, permitting statutory treble damages against an estate, does not conflict with Lohr v. Byrd, 522 So. 2d 845 (Fla. 1988), or any other decision. Jurisdiction was improvidently granted and should be dismissed.

In Lohr, this Court made its own policy determination that common law punitive damages could not be awarded against an estate. With respect to statutory treble damages for civil theft, it is the Florida Legislature that has the authority to establish state policy. It has done so; the Legislature has provided that all individuals proving civil theft by clear and convincing evidence are entitled to treble damages. No exception is made for estates. The doctrine of separation of powers prohibits the Court from reversing this legislatively enacted policy and replacing it with the Court's own policy choice.

No other issue forms the jurisdictional basis in this Court nor was any other issue commented on by the Second District. The Court, therefore, should not consider the other issues raised. If it does, it should affirm the Second District's ruling that petitioner failed to prove his spoliation claim. The Court should also reject petitioner's attempt to sanction Frances Bell for the alleged acts of another and prolong this case beyond the five years (by the time of oral argument) it has already been pending. The decision of the Second District should be affirmed.

VII. ARGUMENT

A. No Conflict Exists Between The Decision Below and Any Decision of This Court. Jurisdiction Should Be Dismissed.

Before the decision below, no court in Florida had considered the issue of whether treble damages under Section 772.11, Florida Statutes (1995), could be awarded against an estate. Without a prior Florida decision on point, there can be no conflict of decisions. Satz v. Perlmutter, 362 So. 2d 160, 164 (Fla. 4th DCA 1978)(Anstead, J., concurring specially)("Everyone agrees that this is a case of first impression in the appellate courts of Florida. Hence, there is no case in conflict with this decision that would give rise to conflict certiorari jurisdiction in the Supreme Court."), aff'd, 379 So. 2d 359 (Fla. 1980). Accordingly, jurisdiction should be dismissed.

Lohr v. Byrd, 522 So. 2d 845 (Fla. 1988), presents no conflict. Lohr concerned whether common law punitive damages could be awarded against an estate. Lohr did not address the application of statutory damages under Florida's civil theft law. One case concerning judicially-created punitive damages and another case concerning legislatively-created remedies for civil theft are jurisdictionally dissimilar.

This Court denies conflict review even when seemingly similar concepts conflict where one issue is a product of common law and the other is a product of statute. In re M.P., 472 So. 2d 732 (Fla. 1985)("Because we find the [statutory] issue

in this case clearly distinguishable from the [common law] issues decided in In the Interest of D. B., we deny review."). The Second District below distinguished Lohr based upon the distinctions between common law and statutory law:

> The trial court's position fails upon a critical examination of the differences between judicially-created punitive damages and legislatively-created treble damages.

Snyder, 746 So. 2d at 1098.

It does not help petitioner's argument for conflict jurisdiction that the lower court held section 772.11 to be "remedial." That holding is in accord with all Florida courts who have had occasion to address the issue. See Snyder, 746 So. 2d at 1098 (collecting cases). Even the statute itself states that the various sections of the law "shall be construed in light of their purposes to achieve their remedial goals." §812.037, Fla. Stat. (1995)(emphasis added). Moreover, "remedial" statutes can be "punitive." The terms are not mutually exclusive. The Second District never said that treble damages were not punitive. Rather, the court simply classified the entire civil theft law as remedial.

The cases cited by petitioner in support of conflict jurisdiction are inapposite; none even address the remedial issue. For example, McArthur Dairy, Inc. v. Original Kielbs, Inc., 481 So. 2d 535 (Fla. 3rd DCA 1 986), was decided under an older version of the civil theft law–a version which did not exclude on its face (as does the present

version) the award of both punitive and treble damages. The McArthur court held, even under the prior version, that both types of damages could not be recovered in the same case. Significantly, the court never addressed whether treble damages under the statute were remedial. The remaining two cases cited by petitioner, Vining v. Martyn, 660 So. 2d 1081 (Fla. 4th DCA 1995), and United Pacific Insurance Co. v. Berryhill, 620 So. 2d 1077 (Fla. 5th DCA 1993), are the same. Both hold that treble damages are "in the nature of" punitive damages. The cases do not hold that the civil theft law is not remedial.

Petitioner's resort to legislative history in his jurisdictional brief is beyond the four corners of the district court's opinion and cannot be considered for jurisdictional purposes. Reaves v. State, 485 So. 2d 829 (Fla. 1986)(conflict of decisions must arise from "four corners of the majority decision"); Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986)(same). Nevertheless, contrary to petitioner's statement, "the Act" was never "amended to delete any reference to punitive damages." In fact, section 772.11 continues to "reference" punitive damages: "In no event shall punitive damages be awarded under this section." In making this unmistakable "reference," the Legislature acknowledged that punitive damages under the common law and treble damages under section 772.11 were simply not the same. The lower court noted this fact in reaching

its holding.

> The civil theft statute expressly provides that "[i]n no event shall punitive damages be awarded under this section. " §772.11, Fla. Stat. (1995). However, the statute also provides for <u>and mandates</u> an award of treble damages upon a finding of liability. If treble damages are no more than a "form of punitive damages," as the trial court concluded, the statute would contain an inherent inconsistency.

<u>Snyder</u>, 746 So. 2d at 1098-99 (emphasis added). Because no conflict exists, the Court should decline to exercise its discretionary jurisdiction and dismiss this case.

B. The Second District Court of Appeal Correctly Ruled That Frances Bell's Civil Theft Damages Award Should Be Trebled.

Frances Bell proved by clear and convincing evidence that Malvern Bell stole $122,634.59 from her while she was debilitated by a stroke and residing in an assisted care living facility. Notwithstanding the express language requiring the trebling of civil theft damage awards contained in Section 772.11, Florida Statutes, the trial court refused to comply with that statute concluding, "treble damage awards are a form of punitive damages" and are therefore not recoverable against a "deceased tortfeasor as a matter of law." R. 5061-65. Recognizing the distinction between "judicially-created punitive damages and legislatively-created treble damages," the Second District reversed ordering the trial court to comply with Section 772.11 by trebling Frances' civil theft award. This Court should affirm.

The Florida civil theft statute, contained in Section 772.11, Fla. Stat. (1995)[5], provides as follows:

> Any person who proves by clear and convincing evidence that he has been injured in any fashion by reason of any violation of the provisions of §§ 812.012-812.037 has a cause of action for threefold the actual damages sustained ...
>
> ****
>
> In no event shall punitive damages be awarded under this section.

(emphasis added).

The law is clear that an award of treble damages under the Florida civil theft statute is mandatory upon a determination of liability. See Aagaard-Juergensen, Inc. v. Lettelier, 579 So. 2d 404 (Fla. 5th DCA 1991)(applying section 812.035(7)). Moreover, an award of treble damages is nothing more than a ministerial act to be conducted by the trial court upon a finding by the trier of fact of liability for civil theft. Senfeld v. Bank of Nova Scotia Trust Co. Ltd. , 450 So. 2d 1157, 1166 (Fla. 3rd DCA 1984). The statute expressly prohibits the awarding of punitive damages.

---

[5]Prior to 1986 the civil theft remedy was contained in section 812.035(7). Effective October 1, 1986, section 812.035 was amended to limit treble damages to the state or its agencies. However, simultaneously therewith section 772.11, Fla. Stat. was amended to provide individuals with a civil theft remedy, including treble damages. Inasmuch as the pertinent provisions of the pre-1986 version of section 812.035(7) and the post-1986 version of section 772.11 are nearly identical, the case law interpreting and applying section 812.035(7) (1985) should apply to section 772.11 (1995).

Notwithstanding the mandatory requirement of the civil theft statute, the trial court ruled that, based on public policy reasons previously applied by this Court to punitive damage claims in Lohr v. Byrd, 522 So.2d 845 (Fla. 1988), statutory treble damages cannot, as a matter of law, be recovered against a decedent's estate. R. 5061-65. The Court of Appeal properly reversed on this issue.

In Lohr, the Court was presented with the following question certified to be of great public importance: "MAY PUNITIVE DAMAGES BE AWARDED AGAINST A DECEASED TORTFEASOR'S ESTATE?" Lohr, 522 So.2d at 845. In answering this question in the negative, the Court analyzed the public policy considerations and ramifications of allowing such damages, which are solely meant to punish, against the "innocent heirs or creditors of a decedent's estate." Id. at 847. Specifically, the Court stated that because the basic purpose of punitive damages is punishment and not compensation to the injured party, the imposition of these damages at the expense of innocent heirs and creditors "ignores our basic philosophy of justice." Id. As such, the court made a public policy decision that punitive damages would not be allowed against a deceased tortfeasor in Florida.

In this case, the trial court adopted the reasoning employed in Lohr and expanded that holding to include statutory treble damages. The basis for this ruling is found, primarily, in the trial court's conclusion that treble damages are a "form of

punitive damages." According to the trial court, if treble damages are no more than a form of punitive damages and punitive damages may not be awarded against a deceased tortfeasor's estate, then treble damages are also not recoverable.

As the Second District properly concluded, the trial court's position fails to recognize the critical distinction between judicially-created punitive damages and legislatively-created treble damages. First, a conclusion that the treble damages recoverable under Section 772.11 are a form of punitive damages flies in the face of the statute itself. The civil theft statute expressly provides that "[i]n no event shall punitive damages be awarded under this section." Sec. 772.11, Fla. Stat. (1995). However, the statute also provides for, and mandates the awarding of, treble damages upon a finding of liability. <u>See</u> <u>Aagaard-Juergensen, Inc. v. Lettelier</u>, 579 So.2d 404 (Fla. 5th DCA 1991). Therefore, if treble damages are no more than a "form of punitive damages" as the trial court concluded, the statute would contain an inherent inconsistency. One portion of the statute would require the imposition of "punitive damages" while another portion specifically forbids such damages. Clearly the Legislature did not intend such a result. While treble damages may be, as some courts have stated, "in the nature of punitive damages," they are <u>not</u> themselves punitive damages. Accordingly, <u>Lohr</u> does not apply.

Second, treble damages are a creature of statute while punitive damages exist

under Florida common law. This distinction negates the court's ability to circumvent the scope of the civil theft statute based on its own concept of public policy. Consistent with the separation of powers doctrine, while courts "may determine public policy in the absence of legislative pronouncement, such a policy decision must yield to a valid, contrary legislative pronouncement." VanBibber v. Hartford Accident and Indemnity Insurance Co., 439 So. 2d 880, 883 (Fla. 1983)(emphasis added). Therefore, while this Court in Lohr was permitted to rely on public policy considerations to preclude a remedy which is governed by Florida common law, fundamental constitutional principles forbid the judicial branch from dismissing statutorily created rights and remedies.

This Court has long recognized the limitation upon judicial policy-making power imposed by the doctrine of separation of powers.

> Where a statute does not violate the federal or state Constitution, *the legislative will is supreme, and its policy is not subject to judicial review. The courts have no veto power, and do not assume to regulate state policy*; but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law.

City of Jacksonville v. Bowden, 67 Fla. 181, 188, 64 So. 769, 772 (1914)(emphasis added). This deference to legislatively enacted statutes is mandated even in the face of a contrary judicially created policy.

Our supreme court has also directed that when a court

> construes a statutory scheme, it may not question the "substantial legislative policy reasons" underlying the statute nor exercise any "prerogative to modify or shade" the "clearly expressed legislative intent" of the statutory enactment "in order to uphold a *policy* favored by the court.
>
> *****
>
> Accordingly, so long as a statutory enactment passes constitutional scrutiny, the judicial branch, in construing the enactment, has no prerogative to alter or limit the legislative policy clearly expressed in the enactment in order to further a different policy or view preferred by the courts, including one favored by the Florida Supreme Court.

Delgado v. J.W. Courtesy Pontiac GMC-Truck, 693 So. 2d 602, 609 (Fla. 2d DCA 1997) quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)(emphasis in original).

In this case, it is imperative for the Court to recognize the distinction between the common law right to punitive damages and the legislatively-created statutory right to treble damages. With respect to the former, the judiciary establishes the scope of entitlement; with respect to the latter, that authority resides in the Legislature. As the court stated in Delgado, the separation of powers doctrine prohibits the judiciary from imposing its own policy view in opposition to that expressed by the Legislature. The trial court made this error; it wrongly substituted its policy judgment for the Legislature's. The Second District corrected the error and reversed. This Court should affirm that ruling.

Although never addressing the dispositive issue of separation of powers directly

in his initial brief, Bill Bell attempts to skirt the issue by asserting that the Legislature did not intend to award treble damages against estates. This novel argument, raised substantively for the first time here, has no support in the language of the statute and should be rejected.

Section 772.11, Florida Statutes, provides that any person who proves a civil theft by clear and convincing evidence is entitled to treble damages. Contrary to Bill Bell's assertion, the Legislature did not provide this remedy to any person except one who is suing an estate. No such limitation is found in Chapter 772. Significantly, Chapter 772 shows that the Legislature considered exemptions in drafting the civil theft statute and, in fact, created one: Section 772.19 exempts the state, its agencies, institutions, subdivisions, municipalities from damages under that chapter. Thus, the Legislature knew how to create the exemption Bill Bell seeks; the Legislature simply chose not to enact it.

Raising a footnote in his brief to the Second District to his primary argument here, Bill Bell argues that because Section 772.11 allows a party to "recover the damages allowed under this section" against a tortfeasor's parents or guardians while not explicitly allowing such recovery against an estate, no recovery can be had against an estate for treble damages. The flaws in this argument are many. First, the passage cited by Bill Bell and quoted above refers to all damages, not simply treble damages.

Bill Bell has never argued, nor could he, that an aggrieved party cannot recover any damages, even non-trebled ones, against an estate.

Second, it is "basic and established law that a parent is not liable for the tort of a minor child because of the mere fact of paternity." Snow v. Nelson, 475 So. 2d 225, 226 (Fla. 1985)(citing Gissen v. Goodwill, 80 So. 2d 701, 703 (Fla. 1955)). Because the Legislature obviously wanted to change that rule with regard to a minor who committed a civil theft, it had to explicitly say so in Chapter 772. See Aurbach v. Gallina, 753 So. 2d 60, 65-6 (Fla. 2000)(in absence of statutory or common law authority, parent not vicariously liable for torts of child).

The law is precisely the opposite with respect to estates. An estate is responsible for the debts of, and damages caused by, its decedent. See §46.021, Fla. Stat. Thus, if the Legislature wants estates to be responsible for the civil theft of its decedent, nothing need be expressly stated. Only had the Legislature desired to change the law, i.e., except estates from some or all of the civil theft damages of its decedent, would it have had to expressly so provide. Legislative silence on this point simply maintains the status quo: estates are responsible for all statutorily-mandated damages of decedents.

Although not dispositive of the issue, several courts applying analogous federal statutes have concluded that treble damages claims under federal law can be recovered

against the decedent's estate. See, e.g., Epstein v. Epstein, 966 F. Supp. 260 (S.D.N.Y. 1997)(remedial claims survive death of defendant; provision in federal RICO act for treble damages is remedial in nature); First American Corp. v. Al-Nahyan, 948 F. Supp. 1107 (D.D.C. 1996) (same). These courts have recognized that treble damages have a "punitive" element, but conclude that such damages are designed primarily as a remedy, not a punishment. See Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 240, 107 S.Ct. 2332, 2345, 96 L.Ed. 2d 185 (1987)(federal RICO Act's legislative history "reveals the . . . emphasis on the remedial role of the treble-damages provision,"); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed. 2d 444 (1985)(treble damages under the Clayton Act, "seeks primarily to enable an injured competitor to gain compensation for that injury").

As the district court in First American Corp. v. Al-Nahyan acknowledged, "the mere inclusion of treble damages within a statutory scheme does not operate to make it punitive." 948 F.Supp. at 1122. Moreover, Florida's Third District Court of Appeal has recognized that the treble damages provision of the Florida civil theft statute is analogous to the treble damages section of the Sherman Antitrust Act. Senfeld v. Bank of Nova Scotia Trust Co., 450 So. 2d 1157, 1165 (Fla. 3d DCA 1984). Further, Senfeld held that the prior version of the civil theft statute, then

section 812.035, was remedial in nature and thus applied retroactively. Id. See also Ziccardi v. Strother, 570 So. 2d 1319, 1321 (Fla. 2d DCA 1990)(section 772.104, the Florida RICO statute, is remedial in nature and applies retroactively).

These federal decisions are persuasive authority supporting the Second District's decision. Florida's civil theft statute is without question remedial in nature. See Sec. 812.037, Fla. Stat. (1995)("notwithstanding section 775.021, sections 812.012-812.037 shall not be construed strictly or liberally, but shall be construed in light of their purposes to achieve their remedial goals").

Treble damages under the Florida civil theft statute are not a form of punitive damages and are, in any event, damages which the Legislature can permit against estates in its policy-making discretion. Accordingly, this Court should affirm the Second District's decision permitting Frances Bell to receive treble damages.

C. The Court Should Decline to Consider Other Issues Raised in Petitioner's Initial Brief.

The Court accepted jurisdiction in this case to review the alleged conflict between the decision below and Lohr v. Byrd. While no such conflict exists, even should the Court choose to address the treble damages issue on the merits, it should decline to exercise its jurisdiction to consider other, non-conflict issues.

Bill Bell presented many arguments to the Second District including the other issues he attempts to now raise in this Court. With the exception of the treble

damages issue, though, the Second District affirmed "without comment." Snyder, 746 So. 2d at 1097. This Court should decline to consider these tangential issues which do not relate to the alleged jurisdictional basis and which the Second District did not find sufficiently meritorious to be worthy of comment. See, e.g., Provident Management Corp. v. City of Treasure Island, 718 So. 2d 738, 740 (Fla. 1998)(declining to address issues which were not basis for review; "as a rule, we eschew those claims not first subjected to the crucible of the appellate process").

In an abundance of caution, and so that the 87 year-old Frances Bell need not be subjected to another two week trial and more years of delay before she is permitted to collect the money the jury awarded to her nearly three years ago, Janet Snyder responds to the additional, meritless issues raised yet again by petitioner.

D. The Second District Properly Affirmed the Trial Court's Ruling Directing a Verdict on Bill Bell's Spoliation Claim.

While Florida has been among the few states to recognize a claim for spoliation of evidence[6], the new cause of action created is a narrow one. Bill Bell now asks this Court to remove all limits from spoliation claims and make them essentially coterminous with causes of action for conversion. The trial court and Second District

[6]As of August 1997, one month prior to the trial of this case, one pair of commentators found that Florida was one of only six states to recognize such a cause of action. J. Sparkman & J. Reis, Spoliated Evidence: Better than the Real Thing? 71 Fla. B.J. 22 (July/August 1997).

wisely rejected this expansion of tort law. This Court should affirm.

Judicial intervention when a spoliation of evidence is alleged is not new. For many years courts have entered sanctions against a party who has been proven to have spoliated evidence. See, e.g., DePuy, Inc. v. Eckes, 427 So. 2d 306 (Fla. 3d DCA 1983)(striking defendant's answer and affirmative defenses for returning prosthesis to plaintiff with crucial piece missing). Of course, sanctions are entered only after it has been proven that a party actually had possession of a certain piece of evidence and then destroyed it. Such a showing was never specifically made in this case. While Bill Bell testified generally that he saw a mass of documents and then did not see them again, the specific item he discussed, Malvern's flight jacket, was shown by undisputed evidence to have been given away by Malvern himself. Moreover, Bill Bell did seek sanctions in the discovery process on several occasions; never were they granted. R. 1550-56; 1862-67; 2017-2021.

The separate cause of action for spoliation is even more limited. To prove a spoliation claim, a plaintiff must prove:

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

Continental Ins. Co. v. Herman, 576 So. 2d 313 (Fla. 3d DCA 1990), rev. denied, 598

So. 2d 76 (Fla. 1991). The trial court was correct to find that Bill Bell was unable to prove these elements.

As the trial court held, there was no potential civil action between the parties at the time Janet allegedly removed some of Malvern's belongings from the house. At that time Janet was attempting to gather property and financial information to allow her to insure that her mother's overdue nursing home bills were paid and her health care would continue uninterrupted. There is no evidence that any individual contemplated legal action when Janet traveled to her mother's home in mid-October 1995 to gather some of her belongings.

Similarly, Janet was under no legal duty to preserve evidence for a potential civil action. This is unlike the usual spoliation case in which there is a piece of evidence (typically a vehicle or some other product) which is lost or destroyed by one party and which is the subject matter of an underlying lawsuit. Here, Janet took items she believed were her mother's. She was under no duty to preserve such items. To the extent she acted on an incorrect assumption and took something that belonged to Malvern, Bill Bell received recompense in his conversion count.

The items removed by Janet did not impair Bill Bell's ability to defend the claims brought against him. In the first place, it was never proven what, if anything, Janet took. Although general allegations were made, there was never any specific

evidence showing Janet permanently took anything belonging to Malvern. Second, it is clear Bill Bell's experts not only had all the same documentation available to them that Janet's experts had available to them, they had more. Because Janet's claim for spoliation against Bill Bell was severed, it could not be determined how many records Bell and his sister retrieved or deleted from the original hard drive. Nevertheless, each of the experts presented their theories to the jury; the jury accepted none in full. Clearly, Bill Bell was able to present his defense.

Similarly, Bill Bell was not impeded in the presentation of his affirmative claims. To show this, each of his theories of conversion are discussed below.

Conversion Claim No. 1 <u>Against Janet Snyder, Conversion Of The Proceeds From The Sale Of The Banner Elk, North Carolina House</u>. Tr. 3256.

There is no dispute that the net proceeds from the sale of the house in Banner Elk were $375,000.00. Tr. 2323. Frances took full title to the house by right of survivorship upon Malvern's death. Tr. 2324. The house was sold by Janet as Frances' conservator. Tr. 2324. Bill Bell's forensic accounting expert testified that when the house was constructed it cost $481,000.00. Frances contributed $269,000.00, or 56%, and Malvern contributed $211,000.00, or 44%. Tr. 2318.

The issue, as explained by the judge in his instructions to the jury, was whether a portion of the proceeds from the sale should go to Malvern's estate because the

terms of the prenuptial agreement were not followed when the house was constructed. The prenuptial agreement prohibited acquiring property in any form of ownership involving the right of survivorship except where both made an equal contribution to the cost of a residence. The judge instructed that there could be substantial performance, something not exactly an equal contribution but so nearly equivalent that it would be unreasonable to deny Frances all the proceeds from the sale of the house. Tr. 3258-60. Clearly Bill Bell had all relevant information to present this conversion claim.

Conversion Claim No. 2 Against Janet and William Snyder, Conversion Of A Computer System, Hard Drive and Diskettes, And Other Office Equipment. Tr. 3256.

There was likewise no impediment to Bill Bell presenting evidence on this claim. Bill Bell was precise in describing all of the allegedly converted items and even placed monetary values on them. Bill Bell testified that Malvern had a large color monitor for the computer which probably cost \$500-\$800; two printers, one of which was a tractor feed for printing checks which probably cost \$300, the other was a laserjet printer; a fax machine and phone; a U.P.S. system which prevents fluctuations in power from damaging the computer; a mouse and a keyboard; and “that’s about it.” Tr.2759-60. Bill Bell thus testified with extraordinary precision.

He could not have done so if evidence had been spoliated.

Conversion Claim No. 3 Against Janet and William Snyder, Conversion Of A Certificate To The Cherokee Country Club in Knoxville Tr. 3256.

The jury had before it records from the Club showing that prior to her remarriage in 1976, Frances held a membership. On April 9, 1976, Frances wrote the Club asking what to do about the membership. In her letter, she recounted what a Club official had told her. She stated she was advised that *"Mal and I* apply for" a membership because she would have to "resign as a lady member as I am no longer eligible for said membership." That being the case, she realized "it is necessary for *us* to fill out an application form." R. 4656-57 (emphasis added). The response from the Club, dated April 14, 1976, was addressed to Frances only and stated that the Club agreed "that *you* should apply for a" membership and asked that *"you"* return the enclosed membership application. R. 4658 (emphasis added).

In the only letter in the Club's records signed by Malvern, a September 10, 1979, letter to the Club advising of the move from the Knoxville summer home and requesting change of the membership to non-resident status, he asked that no action be taken "that would, in any way, jeopardize Mrs. Bell's right to become a Lady Member in the event that anything happened to me." R. 4666.

This evidence, plus the fact that every check recovered that was written to the Club for any expenses was written on a joint account funded by Frances, should have

been enough to establish title to the value of that certificate in Frances. In addition, while Malvern referred in various versions of his wills to a membership certificate in another club, he never mentioned the Cherokee Club certificate. R. 2610-15; 2684-89; 2690-91; 2693-2701.

Nevertheless, out of an abundance of caution, the Snyders sought legal advice from an attorney in Knoxville who was the senior partner in the oldest firm in the city. Tr. 2668. The opinion of that attorney, contained in a December 5, 1995, letter to Mr. Snyder, was that under the circumstances a resulting trust had been created in favor of Frances and that she was entitled to the certificate. R. 4638-39.

Notwithstanding this evidence, Bill Bell has attempted to claim that Malvern's signature on the certificate was forged by Janet. No one, expert or otherwise, ever testified that Janet signed Malvern's name to that certificate.[7] This was not because Bill Bell did not have access to documentary evidence, however. He had all the Club records and his expert reviewed 69 separate exemplars of Malvern's signature, Tr. 2135, and examined the original Club certificate under a stereo microscope, Tr. 2127-30. Thus, all evidence was available to Bill Bell as to this claim.

---

[7]The best Bill Bell's expert could do was to opine that the signature was not Malvern's. Tr. 2116. He never testified the signature was Janet's. In contrast, the expert called by Janet testified in great detail why she believed the signature was Malvern's and, in any event, certainly not Janet or Bill Snyder's. Tr. 2779-2807.

Conversion Claim No. 4 Against Janet Snyder and William Snyder, Conversion of Bank And Brokerage Statements And Other Financial Records. Tr. 3256.

While describing his visit to the Osprey house on October 24, 1995, Bill Bell testified he saw documents in the Snyder's suitcases, Tr. 2721-22, and that he knew the Snyders shipped back boxes of documents to Tennessee, Tr. 452. During the trial, a box was placed in front of Janet as she testified. She was asked if the box contained everything she removed from the Osprey house on October 24, 1995. She testified that it did, identifying some of the items such as Malvern's checks she didn't realize she had for another six months at least. Tr. 2854-55. The accuracy of that testimony was not questioned by Bill Bell's counsel, nor did they examine the contents of the box. That should not have been surprising since during the twenty-one months of discovery they were furnished copies of the items more than once.

In addition, it was acknowledged by Bill Bell and his sister, Mary Coffey, that in the five days after October 24, 1995, when the Snyders were not at the house and they had access to it because Janet had left a key for them, they took some of Malvern's paperwork. Tr. 456; 1711. Perhaps the reason they did not take it all was best explained by Mary Coffey. The only evidence to prove the truth would be on the computer. So they took the computer and several disks. Tr. 1713.

Particularly telling was the description of the enormous amount of financial

documents available given by Snyder's forensic accounting expert. A veteran of record intensive cases, he described this one as perhaps the most complex he had ever seen. Tr. 1297. He had over 12,000 documents when the financial experts exchanged documents prior to trial. Tr. 1299. During that exchange he received additional financial records from Bill Bell's expert he had not seen before. Tr. 1299. Before the spoliation count was severed, it was shown that Bill Bell, his sister, and their counsel had the original hard drive. It can only be assumed that the additional records came from there.

Bill Bell was unable to show that there was any spoliation of evidence associated with his claim for conversation of financial records. Everything Janet removed during the October 1995 visit was returned, he and his sisters had free rein of the house for five days taking what they chose and they chose the most important repository, the computer. Before trial Bill Bell, his counsel, and expert had every financial document in the possession of the plaintiff and plaintiff's expert and more. They had the additional documents taken from the computer that had not been provided previously. If anything, spoliation occurred from the other direction.

Conversion Claim No. 5 Against Janet Snyder and William Snyder, Conversion of Furnishings and Other Property, Including Silver, a Flight Jacket, Service Medals, Property Inherited from Malvern Bell's Mother, and Art, From the Florida and North Carolina Houses. Tr. 3256-57.

This claim must be addressed in two parts, furnishings and other property, and specific items such as the flight jacket. Bill Bell's claim for every piece of furniture and antique in the Florida and North Carolina residences was not filed until he amended his counterclaim on May 5, 1997, eighteen months into the case. This position was contrary to that which he had previously taken. Indeed, from the time Bill Bell first went to Tennessee in December 1995 to have a stranger appointed conservator for Frances, and continuing for the next year while he was pursuing that effort, he swore under oath in the Tennessee proceedings that Frances' property included furnishings and antiques worth hundreds of thousands of dollars. Tr. 404-11; 2818-2819; R. 2138-75.

Having failed in Tennessee, Bill Bell reversed course in Florida and claimed, in May 1997, that all the furnishings and antiques belonged to Malvern's estate. That, coupled with the extraordinary detail presented by Janet proving Frances' ownership, Tr. 2616-2623, R. 2726-3150, gave Bill Bell a problem of proof, not a lack of information. Not only did Janet have receipts from before the marriage, she had photographed everything but the towels, dishes and ashtrays. Tr. 2620.

That was evident from the testimony of Ms. Post, Bill Bell's expert. She was asked by Bell's counsel to give an appraisal only from the photographs given her by Bell's counsel. She took into account virtually none of the large amount of backup

documentation furnished by Mrs. Snyder as composite exhibit 36, R. 2726-3150, and even failed to count items if a photograph contained multiple items or if there was only one photograph for an item noted as being identical to many others. Tr. 2072-2087. No documentation about the furniture and antiques was withheld. Bill Bell's counsel and expert witness just failed to digest what was provided them.

As to the particular items of personalty claimed, Bill Bell also had problems with his proof. There was unrefuted testimony by the housekeeper that Malvern had given the flight jacket to a "tall slender" man. Tr. 2766-67. As to the silver, the contradiction in evidence worked against Bill Bell. He testified that as he went through the house on October 24 he took the silver he recognized as his grandmother's. Tr. 449. He testified the value of his grandmother's missing silver and jewelry was at least $100,000. Tr. 2753. Yet he acknowledged that Malvern had sold many of his grandmothers things after her death, Tr. 2822, and that her personal property was only valued at $1,500.00 on her estate tax return, Tr. 2816-17. In addition, Bill Bell's sisters visited the house at least three times between October 24-29, 1995, Tr. 1709, taking Malvern's personal things as well as things they believed belonged to their grandmother, Tr. 1711-12.

Finally, there were the disinterested witnesses who testified about what Malvern had told them belonged to him, the housekeeper, Charlene Champagne, Tr.

2764-2767, and a neighbor, Lois Vogel, Tr. 2893-98. According to them, there was very little in the house Malvern identified as his.

With respect to all the personalty in the fifth category of Bill Bell's conversion claims, he seems to be arguing that because his proof failed, evidence must have been spoliated. There was plenty of proof that what little belonged to Malvern was given away before his death or was taken by his family. Bill Bell, therefore, was not impeded in his attempt to establish his conversion claim.

Most fundamentally, though, these are simply not the factual circumstances in which a spoliation cause of action should be recognized. This is not a case where it is alleged some piece of extrinsic evidence was damaged or destroyed by a party to a lawsuit. See, e.g., St. Mary's Hospital, Inc. v. Brinson, 685 So. 2d 33 (Fla. 4th DCA 1996)(recognizing spoliation cause of action based upon hospital's failure to preserve vaporizer thus impairing plaintiff's action against manufacturer), rev. granted, 695 So. 2d 701 (Fla. 1997), rev. dismissed, 709 So. 2d 105 (Fla. 1998). Rather, Bill Bell's allegation is that Janet Snyder wrongfully removed certain items belonging to Malvern from her mother's house. In other words, that Janet converted certain belongings of Malvern.

Of course, in another count of his counterclaim, conversion is exactly what Bill Bell alleged. The same facts that formed the basis of Bill Bell's conversion claim

formed the basis of his spoliation claim. The jury instructions make this clear. In his first claim against Janet (and Bill) Snyder, Bill Bell sought recovery for the conversion, *inter alia*, of " bank and brokerage statements and other financial records, . . . [and] furnishings and other personal property, including silver, a flight jacket, service medals, property inherited from Malvern Bell's mother, sporting goods and art from the homes in which Frances and Malvern lived in Osprey, Florida, and Banner Elk, North Carolina." Tr. 3256-57. In his claim for spoliation, Bill Bell sought recovery based on his allegation that "Janet Snyder removed and made inaccessible certain documents, photographs, and furnishings from the home occupied by Frances and Malvern Bell." Tr. 3260. Thus, all items allegedly spoliated were included within the conversion claim.

This fact did not escape the trial court. In granting Janet Snyder's motion for directed verdict, the trial judge stated:

> It seems to me what we have, basically, is a conversion. And if I follow [Bill Bell's] theory, every time you have a conversion, you're going to have — or most times you're going to have some sort of spoliation. And I don't think that's where the law should head. And frankly, I think it's an unwarranted extension of this concept.

Tr. 3335. The trial court was absolutely correct. The law should not be expanded so that whenever there is an allegation that one person took the property of another that conduct is not only a conversion but also a spoliation of evidence. For all these

reasons, the Second District's decision affirming the trial court's granting of a directed verdict on Bill Bell's spoliation claim should be affirmed.

E. No Remand is Necessary. The Jury's Verdict and Subsequent Judgment Against the Estate and Trust Should Be Affirmed.

The jury found in favor of Frances Bell on three counts: constructive fraud, breach of prenuptial agreement, and civil theft. The trial court correctly entered judgment for Frances awarding her $140,000 pursuant to the fraud and prenuptial counts and $122,634.59 pursuant to the civil theft count (subsequently trebled). Bill Bell now argues that the entirety of Frances' judgment should be reexamined, and presumably vacated, because of Janet's alleged spoliation. The Second District properly rejected this argument without comment.

The primary thrust of Bill Bell's argument attacking Frances' judgment is that she should not be permitted to have any recovery for Malvern's fraud and theft as a sanction for Janet Snyder's spoliation of evidence. The most obvious problem with Bill Bell's argument is that he did not present it to the trial court. The failure to raise this ground with the trial court is fatal to Bill Bell's argument here.

While Bill Bell made a motion for directed verdict before the trial court, never did he assert that Frances should be denied any recovery as a sanction. Tr. 1514-76; 3088. The failure to present this argument below precludes Bill Bell from raising it now. <u>Sunland Hospital/State of Florida v. Garrett</u>, 415 So. 2d 783 (Fla. 1st DCA

1982)(appellate court will not reverse on point not preserved in trial court). This waiver precludes appellate review even if the court believes the appellant "presents a compelling argument" on appeal. W.R. Grace & Co.-Conn. v. Dougherty, 636 So. 2d 746, 749 (Fla. 2d DCA 1994), rev. denied, 645 So. 2d 454 (Fla. 1994). Similarly, the fact that a specific objection was made below is insufficient to preserve for review a particular ground not raised before the trial court. Clock v. Clock, 649 So. 2d 312, 315 (Fla. 3d DCA 1995)(review limited to specific grounds raised below).

Bill Bell's "sanctions" argument is comparable to an "unclean hands" defense. Indeed, that was the specific argument he made to the Second District. See Bill Bell Second District br. at 37 n.52. This is another reason to reject Bill Bell's argument. The law is well settled that unclean hands is an equitable defense which has no application to legal claims such as those for which Frances obtained a judgment. Monks v. Smith, 609 So. 2d 740, 743 (Fla. 1st DCA 1992). If equitable concepts were to be mixed into this dispute, it clearly would be inequitable to sanction Frances by prohibiting her from making any recovery for the fraud and theft visited upon her because of the conduct of another.

Bill Bell also misapprehends the spoliation jury verdict. Bill Bell makes the assumption that by finding against Janet on the spoliation claim the jury concluded that Janet spoliated financial records. Of course, it is not Janet's claims, but Frances'

claims that are at issue here. More fundamentally, though, the jury never made such a finding; the financial records were not the sole focus of the spoliation claim. Rather, the court's jury instruction shows the breadth of Bill Bell's allegations: "In particular, William Bell alleges that Janet Snyder removed and make inaccessible certain documents, photographs, and furnishings from the home occupied by Frances and Malvern Bell." Tr. 3260 (emphasis added). Thus, it is pure speculation on the part of Bill Bell that in its verdict the jury believed Janet Snyder removed financial documents making it more difficult to defend Frances' claims. Equally plausible is that the jury believed removal of photographs and furnishings made it more difficult for Bill Bell to prove his conversion claim against Janet Snyder. Bill Bell cannot be allowed to use complete speculation to work a $568,668.77 sanction against Frances Bell.

Bill Bell also argues there was insufficient evidence to support the jury's verdict on the fraud and breach of prenuptial claims. This argument is contradicted by the record itself. There was detailed testimony from two CPAs to substantiate the damages awarded. The fact that the jury did not award the full amount of damages to which these experts testified goes to prove that the jury analyzed all the evidence in the case and did not blindly make a compensatory damage award.

Bill Bell makes the same argument with respect to the civil theft award. In his

directed verdict argument, however, Bill Bell conceded that, as to the $122,643.59 check, there was sufficient evidence to present to the jury.

> MR. HARDY (Frances' counsel): Excuse me. I may be able to help here. As far as our civil theft claim goes, we're claiming a 122,000-whatever check that the demand is in and not those other things.
>
> MR. WASKOM (Bill Bell's counsel): Okay. Well, then we're in agreement. Because that's what I was trying to get out. Other than the 122.

Tr. 1558 (emphasis added). By not challenging the sufficiency of the evidence with respect to the $122,634.59 check, Bill Bell waived presenting that argument here.

Undoubtedly the reason Bill Bell did not object to the civil theft claim for the $122,634.59 check going to the jury is because he recognized there was more than sufficient evidence upon which the jury could conclude that a theft had occurred. The evidence was uncontroverted that Malvern signed Frances' name to a check written solely to her from her individual brokerage account and then deposited the proceeds of her check into his own individual account. Malvern accomplished this at a time when Frances was hundreds of miles away in a Knoxville nursing home. Thus, even had Bill Bell not waived this argument, it should be rejected.

Bill Bell has never accounted for what he and his sisters removed from the house or deleted from the computer. Indeed, if any spoliation of evidence tainted the truth finding process in this trial, it was the spoliation that occurred when Bill Bell and

Patricia Morrison removed the hard drive from Malvern's computer and admittedly deleted at least one file entitled "MALSBK." As the Second District recognized, neither reversal nor remand is appropriate. The judgment in favor of Frances should be affirmed.

VIII. CONCLUSION

Based on the foregoing argument and authorities, jurisdiction should be dismissed. Alternatively, the decision of the Second District Court of Appeal should be affirmed.

Respectfully submitted,

____

A. Lamar Matthews, Jr.
Florida Bar #051390
Arthur S. Hardy
FB # 0721492
MATTHEWS, HUTTON & EASTMOORE
P.O. Box 47377
Sarasota, Florida 34230
(941) 366-8888
Facsimile (941)954-7777

IX. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail this ___ day of July, 2000 to: John J. Waskom, Esquire, Icard, Merrill, et al.,

2033 Main Street, Suite 600, Sarasota, FL 34237, W. Andrew Clayton, Esq., Clayton Lawgroup, P.A., 1800 Second St., Suite 888, Sarasota, FL 34236, and Steven L. Brannock, Esq./David Borucke, Esq., Holland & Knight LLP, P.O. Box 1288, Tampa, FL 33601.

____