
IN THE SUPREME COURT OF FLORIDA

CASE NO. 1999-92

WILLIAM G. BELL, et al.,

Petitioner,

vs.

JANET SNYDER,

Respondent.

ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL
Case Nos. 2D98-00191 and 2D98--00852

INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

CERTIFICATE OF TYPE, SIZE AND STYLE i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 3

SUMMARY OF THE ARGUMENT 21

ARGUMENT 23

 I. AN ESTATE MAY NOT BE PUNISHED BY THE AWARD OF
 TREBLE DAMAGES 23

 II. THE JURY’S SPOILIATION VERDICT SHOULD BE REINSTATED ... 31

 III. THIS CASE SHOULD BE REMANDED TO CONSIDER THE
 IMPACT OF SNYDER’S SPOILIATION OF EVIDENCE ON THE
 REMAINING CLAIMS 41

CONCLUSION 49

CERTIFICATE OF SERVICE 50

TABLE OF CITATIONS

FEDERAL CASES

<i>Anderson v. Production Management Corp.</i> , 2000 U.S. Dist. LEXIS 5696 (E.D. La. April 26, 2000)	38
<i>Anthony Distrib., Inc. v. Miller Brewing Co.</i> , 941 F. Supp. 1567 (M.D. Fla. 1996)	46
<i>BMW of North America, Inc. v. Gore</i> , 517 U.S. 559 (1996)	48-49
<i>Bonner v. City of Prichard</i> , 661 F.2d 1206 (11th Cir. 1981)	27
<i>Confederation Life Ins. Co. v. Goodman</i> , 842 F. Supp. 836 (E.D. Pa. 1994)	29
<i>In re E.I. duPont de Nemours & Co. - Benlate Litig.</i> , 918 F. Supp. 1524 (M.D. Ga. 1995), <i>vacated on other grounds</i> , 99 F.3d 363 (11th Cir. 1996), <i>cert. denied</i> , 118 S. Ct. 263, 139 L. Ed. 2d	32
<i>Epstein v. Epstein</i> , 966 F. Supp. 260 (S.D. N.Y. 1997)	29
<i>NHL v. Metropolitan Hockey Club</i> , 427 U.S. 639 (1976)	42
<i>RSE, Inc. v. H&M, Inc.</i> , 90 F.R.D. 185 (M.D. Pa. 1981)	27
<i>Rogers v. Douglas Tobacco Bd. of Trade, Inc.</i> , 244 F.2d 471 (5th Cir. 1957)	27, 29
<i>Schimpf v. Gerald, Inc.</i> , 2 F. Supp. 2d 1150 (E.D. Wisc. 1998)	29-30

<i>Shires v. Magnavox Co.</i> , 432 F. Supp. 231 (E.D. Tenn. 1976)	27
<i>Summers v. FDIC</i> , 592 F. Supp. 1240 (W.D. Okla. 1984)	27, 29-30
<i>Telectron, Inc. v. Overhead Door Corp.</i> , 116 F.R.D. 107 (S.D. Fla. 1987)	40, 42-43
<i>White v. Office of the Public Defender</i> , 170 F.R.D. 138 (D. Md. 1997)	38

STATE CASES

<i>Amlan, Inc. v. Detroit Diesel Corp.</i> , 651 So. 2d 701 (Fla. 4th DCA 1995)	38
<i>Ballou v. Campbell</i> , 204 So. 2d 526 (Fla. 2d DCA 1967), <i>cert. denied</i> , 210 So. 2d 865 (Fla.1968)	44
<i>Bill Terry's Inc. v. Atlantic Motor Sales, Inc.</i> , 409 So. 2d 507 (Fla. 1st DCA 1982)	24-25
<i>Brown v. City of Delray Beach</i> , 652 So. 2d 1150 (Fla. 4th DCA 1995)	37
<i>Builders Square, Inc. v. Shaw</i> , 755 So. 2d 721 (Fla. 4th DCA 1999)	36
<i>Burr v. Norris</i> , 667 So. 2d 424 (Fla. 2d DCA 1996)	26-27
<i>Camodeca v. Camodeca</i> , 464 So. 2d 662 (Fla. 2d DCA 1985)	44
<i>Continental Ins. Co. v. Herman</i> ,	

576 So. 2d 313 (Fla. 3d DCA 1990), <i>rev. denied</i> , 598 So. 2d 76 (Fla. 1991)	32-33
<i>Country Manors Ass'n, Inc. v. Master Antenna Systems, Inc.</i> , 534 So. 2d 1187 (Fla. 4th DCA 1988)	26
<i>Cutler v. Pelletier</i> , 507 So. 2d 676 (Fla. 4th DCA 1987)	26
<i>Dale v. Jennings</i> , 90 Fla. 234, 107 So. 175 (1925)	43
<i>DeLong v. A-Top Air Conditioning Co.</i> , 710 So. 2d 706 (Fla. 3d DCA 1998)	38, 42
<i>DiGiulio v. Prudential Property and Casualty Ins. Co.</i> , 710 So. 2d 3 (Fla 4th DCA 1998)	36
<i>Eaton Vance Distrib., Inc. v. Ulrich</i> , 692 So. 2d 915 (Fla. 2d DCA 1997)	27
<i>FDIC v. Allister Mfg. Co.</i> , 622 So. 2d 1348 (Fla. 4th DCA 1993)	38, 40
<i>Figgie Int'l, Inc. v. Alderman</i> , 698 So. 2d 563 (Fla. 3d DCA), <i>rev. denied</i> 703 So. 2d 476 (Fla. 1997)	42
<i>Gable v. Miller</i> , 104 So. 2d 358 (Fla. 1958)	33, 44
<i>Greenberg v. Grossman</i> , 683 So. 2d 156 (Fla. 3d DCA 1996)	27
<i>Hall v. State</i> , 752 So. 2d 575 (Fla. 2000)	31
<i>Johnson v. Thomas</i> ,	

111 So. 541 (Fla. 1927)	36
<i>Keegan v. Ennia Gen. Ins. Co.</i> , 591 So. 2d 300 (Fla. 3d DCA 1991)	26
<i>Estate of Kuba v. Ristow Trucking Co., Inc.</i> , 508 N.E.2d 1 (Ind. 1987)	27
<i>Lohr v. Byrd</i> , 522 So. 2d 845 (Fla. 1988)	23, 30
<i>McArthur Dairy, Inc. v. Original Kielbs, Inc.</i> , 481 So. 2d 535 (Fla. 3d DCA 1986)	25
<i>Mercer v. Raine</i> , 443 So. 2d 944 (Fla. 1983)	32, 38, 42
<i>Miller v. Allstate Insurance Co.</i> , 573 So. 2d 24 (Fla. 3d DCA 1990), <i>rev. denied</i> , 581 So. 2d 1307 (Fla.1991)	32, 41
<i>Miller v. Murray</i> , 68 So. 2d 594 (Fla. 1953)	44
<i>Moghari v. Anthony Abraham Chevrolet Co.</i> , 699 So. 2d 278 (Fla. 3d DCA 1997)	37
<i>Moonlit Waters Apartments, Inc. v. Cauley</i> , 666 So. 2d 898 (Fla. 1996)	24
<i>Nelson v. AmSouth Bank of Florida</i> , 699 So. 2d 810 (Fla 1st DCA 1997)	27
<i>Owens-Corning Fiberglas Corporation</i> , 749 So. 2d 483 (Fla. 1999)	49
<i>Public Health Trust v. Valcin</i> , 507 So. 2d 596 (Fla. 1987)	40

<i>Rockwell Int'l Corp. v. Menzies,</i> 561 So. 2d 677 (Fla. 3d DCA 1990)	42
<i>Rosen v. Marlin,,</i> 486 So. 2d 623 (Fla. 3d DCA 1986)	24, 26
<i>S & S Toyota, Inc. v. Kirby,</i> 649 So. 2d 916 (Fla. 5th DCA 1995)	26
<i>Savoie v. State,</i> 422 So. 2d 308 (Fla. 1982)	31
<i>Sponco Mfg., Inc. v. Alcover,</i> 656 So. 2d 629 (Fla. 3d DCA 1995), <i>rev. dismissed,</i> 679 So. 2d 771 (Fla. 1996)	42
<i>St. Mary's Hospital, Inc. v. Brinson,</i> 685 So. 2d 33 (Fla. 4th DCA 1996), <i>rev. denied,</i> 709 So. 2d 105 (Fla. 1998)	32-33, 37
<i>Torres v. El Paso Elec. Co.,</i> 987 P.2d 386 (N.M. 1999)	38
<i>Tramel v. Bass,</i> 672 So. 2d 78 (Fla. 1st DCA), <i>rev. denied,</i> 680 So. 2d 426 (Fla. 1996)	42
<i>Traurig v. Spear,</i> 102 So. 2d 165 (Fla. 3d DCA 1958)	44
<i>Turman v. Ellison,</i> 174 P. 396 (Cal. Ct. App. 1918)	44
<i>United Pacific Insurance Co. v. Berryhill,</i> 620 So. 2d 1077 (Fla. 5th DCA 1993)	26
<i>Vining v. Martyn,</i>	

660 So. 2d 1081 (Fla. 4th DCA 1995)	27
<i>Viviano v. CBS, Inc.</i> , 597 A.2d 543 (N.J. Super. Ct. App. Div. 1991), <i>cert. denied</i> , 606 A.2d 375 (N.J. 1992)	38, 41
<i>Warren v. Monahan Beaches Jewelry Center, Inc.</i> , 548 So. 2d 870 (Fla 1st DCA 1989)	26
<i>Westinghouse Elect. Corp. v. Shuler Bros., Inc.</i> , 590 So. 2d 986 (Fla. 1st DCA 1991), <i>rev. denied</i> , 599 So. 2d 1279 (Fla. 1992)	46
<i>White v. Johnson</i> ,, 59 So. 2d 532 (Fla. 1952)	25
<i>Yoakum v. Hartford Fire Ins. Co.</i> , 923 P.2d 416 (Ida. 1996)	36, 38
<i>Zucker v. Sears Roebuck & Co.</i> , 589 So. 2d 454 (Fla. 5th DCA 1991)	27

RULES AND STATUTES

Florida House of Representatives Committee on Judicial Staff Analysis Report (April 23, 1996), 86 SS PCB 17 at 3, Series 19, Carton 1493	25
Florida Senate Staff Analysis & Economic Impact Statement, H.B. 69 (April 13, 1984), Series 18, Carton 1391, Page 1.	25
Section 733.309, Florida Statutes.	36
Section 733.607, Florida Statutes.	36
Section 772.11, Florida Statutes.	23

OTHER AUTHORITY

J. Gorelick, <i>Destruction of Evidence</i> § 3.9 n.6 (1989)	38
J. Sparkman & J. Reis, <i>Spoliated Evidence: Better than the Real Thing?</i> 71 Fla. B.J. 22, 27 (Aug. 1997)	34
R. Tucker, <i>The Flexible Doctrine of Spoliation of Evidence: Cause of Action, Defense, Evidentiary Presumption, & Discovery Sanction,</i> 27 U. Tol. L.Rev. 67, 79-80 (1995)	35
S. Nolte, <i>The Spoliation Tort: An Approach to Underlying Principles,</i> 26 St. Mary's L.J. 351, 402 (1995)	32
Sheldon R. Shapiro, Annotation, <i>Survival of Right of Action for Damages</i> <i>Based on Violation of Federal Antitrust Laws,</i> 11 A.L.R. Fed. 963, § 5 (1999)	27

INTRODUCTION

This appeal concerns two important legal issues arising out of a lawsuit against the Estate of Malvern Bell. First, this Court granted jurisdiction to consider whether treble damages for a theft allegedly committed by Malvern Bell can be visited upon the innocent heirs of his estate. The Estate's brief will prove that treble damages are punitive, and as this Court has long ruled, punitive damages may not be awarded against an Estate.

However, the treble damages issue does not fully resolve this case. The Estate will also prove that judgment should never have been entered against the Estate at all. The Estate was forced to prosecute and defend claims below without critical evidence – evidence that the jury decided was spoliated by respondent, Janet Snyder. Indeed, the jury was so moved by evidence of Snyder's misconduct that it awarded the Estate \$250,000 in punitive damages on its claims against Snyder.

The trial judge erroneously vacated the spoliation verdict awarded to the Estate, not because of any disagreement with the jury's conclusion that Snyder had concealed evidence, but because of the court's restrictive view of the elements of spoliation. Put simply, the trial court ruled that Snyder had no duty not to conceal documents she took from Malvern Bell's home immediately before she initiated litigation and that she had not spoliated evidence because she "merely" concealed the evidence instead of destroying it. The Second District erroneously refused to correct these legal errors and reinstate the spoliation award.

The errors snowballed, having a dramatic impact on other issues in the case. As a result of the lower courts' erroneously restrictive view of the spoliation claim,

the courts below improperly reduced the amount of punitive damages awarded by the jury against Snyder. More importantly, these rulings permitted Snyder to benefit from her concealment of crucial evidence. The Estate was forced to defend without critical documents it needed to disprove Snyder's claims. As a result, Snyder's misdeeds went almost entirely unpunished to the substantial detriment of the Estate.

Accordingly, in addition to a decision that treble damages are punitive and may not be entered against an estate, the Estate seeks a ruling from this Court reinstating its spoliation verdict and a remand to the Second District to consider the impact of restoring the spoliation award on Snyder's judgment against the Estate and the Estate's punitive damage award. Because of the legal errors below on the Estate's spoliation claim, the courts below have not yet fully considered the impact of Snyder's spoliation on the balance of the claims presented by this case. Remand will permit that analysis to occur.

The spoliation issue is of statewide importance. The narrow view of the tort adopted by the courts below permitted Snyder to profit from her misconduct. Concealment of evidence by litigants is no less worthy of condemnation and sanction than destruction of evidence. This Court should take this opportunity to correct the misunderstanding of the courts below and clarify the elements of a spoliation claim in Florida.

STATEMENT OF THE CASE AND FACTS

In 1976, after a two-year courtship, Frances Miller Wynn and Malvern Hill Bell wed (T. 803).

¹ This was the second marriage for both Frances and Malvern. Prior to their marriage, Malvern was a decorated naval officer, aviator, and successful civilian businessman. Malvern volunteered during World War II and rose in the U.S. Navy to the position of Commanding Officer of the first naval air squadron to fly jet fighters (T. 422-23, 2676-78). Upon his departure from the Navy after the Korean conflict, Malvern built a successful parcel delivery business, the Red Arrow Trucking Company (T. 423, 2680). In 1969 Malvern sold Red Arrow for \$216,000 (T. 964). After the sale of Red Arrow, Malvern worked as a stockbroker and then fulfilled a life-long dream by heading to the Caribbean Islands to enjoy an early retirement (T. 2681-85). Between 1969 and 1975, Malvern spent his time sailing between the Bahamas and Florida, doing some boat chartering while continuing his interest in investing (T. 2681-85).

Frances Wynn was introduced to Malvern by her son Richard who met Malvern while Malvern's yacht was docked in Palm Beach (T. 775, 802). Richard invited Malvern to a party being thrown for wealthy Palm Beach patrons of the arts (T. 789-90). At this party Malvern and Frances met.

Frances was a divorcee at the time. Her first husband "Breezy" Wynn had a successful sporting goods business. Following her divorce from Breezy, Frances had substantial means and moved comfortably in Palm Beach social circles (T. 759, 774,

¹ This brief will refer to the trial transcript as "T." and the record as "R."

999, 1023-24). Frances and Malvern began their courtship and two years later were married (T. 791, 803). Pictures taken during the marriage show an elegant, attractive and well-matched couple (T. 1737-38).

As is common in second marriages, the parties signed a pre-nuptial agreement promising to hold separate the various properties each brought to the marriage. The parties retained the right to acquire real property jointly, to open joint bank accounts, and to convey or transfer property to each other during the marriage or upon their deaths (R. 2093-97).

The marriage between Malvern and Frances Bell lasted nearly twenty years, until Malvern's death. Malvern passed away in November, 1995, leaving a substantial estate. Shortly after Malvern's death, Janet Snyder, Frances' daughter by her first marriage, brought suit against Malvern's estate, purporting to act on behalf of her mother. The gist of Snyder's claim was that, in Snyder's opinion, Malvern died with too much money. Snyder's argument is that Malvern must have stolen or converted Frances' property for his own benefit. Frances, who was rendered incompetent by a seizure shortly before Malvern's death, has not participated in the lawsuit. Neither, of course, did Frances bring any such claim during the many years of her marriage to Malvern.

Snyder's case is built on two critical assumptions. The first is that Malvern came to his marriage with Frances a relative pauper. The second is that any asset that Snyder's expert could not trace throughout the entire period of their twenty-year marriage is declared "missing" from Frances' estate and assumed to have been

converted by Malvern (even when there is no evidence that this asset ended up in Malvern's personal accounts).

Malvern's Financial Status at the Time of the Marriage

As to Snyder's first assumption, no one knows or can ever know exactly what Malvern's assets were at the time of the marriage because Malvern's personal bank and brokerage account records from this time period are now missing. As discussed below, these are the records that the jury determined were spoliated by Janet Snyder. Even without these records, however, it is clear that Malvern brought substantial independent assets to the marriage. Here is what is not disputed:

C His business. Malvern built a successful parcel delivery company, Red Arrow, which he sold in 1969, receiving \$216,000 (net) in cash (T. 964, 2680; DX46C at Tab 1).

2

C His boats. After his semi-retirement to Florida, Malvern bought a series of boats (T. 2681-82). The boat he was living on at the time he met Frances was an 40-foot DeFever trawler worth \$80-100,000 in 1971 dollars (T. 805, 1491).

C Family wealth. Malvern's mother left an estate of \$152,967.86 upon her death in 1986 (R. 2484). Malvern received between \$131,000 to \$148,000 of that estate, depending upon whose version of the evidence is credited (T. 917, 1629).

C Brokerage business. After selling Red Arrow, Malvern became a stockbroker. Because of the absence of brokerage or bank records from this time

² Defendant's Exhibits ("DX") are in the record at R. 4292-4543.

period (T. 2254), no one knows the full extent of Malvern's investments at the time of the marriage.

C Frugal lifestyle. The evidence suggests that Malvern was not spending his wealth. Malvern lived a frugal lifestyle as he sailed between the Bahamas and Florida (Br. 2, T. 789).

C Frances' generosity. Frances very generously gave Malvern a \$150,000 cash gift upon their wedding (T. 454, 2427). Because of the missing records, it is impossible to document other instances of Frances' generosity.

C Evidence of Wealth. Apparently, Malvern's nest egg was substantial enough to permit him to contribute one-half (or approximately \$208,000) to the construction of the couple's summer home in Elk River, North Carolina (R. 4557-58; T. 923). There is no evidence that Frances was surprised that Malvern was comfortably able to participate in such a major expenditure.

3

C Investments. All of Malvern's investment or bank account records from the 1970's and early 1980's are missing. Although we know Malvern was an active investor, it is impossible to determine what additional assets Malvern may have had when he married Frances. Moreover, Frances and Malvern's favored investment

³ There is also evidence that Malvern contributed one-half (or approximately \$100,000) to the purchase of a North Carolina condominium in 1979. Although the deed shows that Malvern and Frances held joint title (R. 4552-56), Snyder claims without any corroborating evidence that Malvern contributed nothing to the condominium purchase. Her claim contravenes the couple's prenuptial agreement which provides that property may not be designated as jointly owned unless Malvern and Frances contributed equally to its purchase (R. 2084-92).

vehicle was tax-free municipal bonds, which leave little or no paper trail (T. 751, 905-06, 955-57, 1318-19, 1737-40, 1752-55, 1759).

As discussed in more detail below, Malvern's financial status is extremely important because of the liability and damage theories proposed by Snyder's experts. Put simply, Snyder contends that Malvern ended the marriage with "too much" in his account (R. 925-28). Whether Malvern in fact had "too much" is largely dependent upon Snyder's assumption that Malvern came to the marriage with nothing. More on the expert controversy below.

Malvern and Frances' Financial Relationship

What little we know about Malvern and Frances' financial relationship is far outweighed by what we do not know.

⁴ Snyder's claim was not brought until after Malvern was dead and Frances incompetent (R. 1, 57). Here is what is indisputable:

C Duration. The marriage between Malvern and Frances lasted nearly 20 years until Malvern's death in 1995 (T. 803).

C Lifestyle. Malvern and Frances continued Frances' comfortable lifestyle (T. 2692-96). There is no evidence of extravagant purchases for Malvern's sole

⁴ The parties' description of Malvern and Frances' personal relationship could hardly be more different. The Estate submitted evidence from the couple's friends that Frances and Malvern were very much in love. Malvern is described by these friends of the couple as a true southern gentleman who was a devoted and caring husband until the end (T. 1645-46, 1670-71, 1697-98, 1722, 1945, 1951-52, 1954, 2687). In Snyder's view Malvern was cold and domineering, so obsessed with Frances' money that he skimmed on her medical care. According to Snyder, Malvern isolated Frances from her friends and family and then used his increasing control over the couple's finances to steal Frances' money (R. 310).

benefit.

C Trust and confidence. Frances and Malvern both had enough trust and confidence in each other to exchange durable powers of attorney (R. 2680-83).

Malvern was named the co-trustee of the trust established by Frances' will and Frances was named successor trustee of Malvern's living trust and was to be personal representative of Malvern's estate (until a seizure rendered her incompetent in July, 1995) (R. 2642, 2684; T. 2003, 2010).

C Frances' knowledge about family finances. Frances and Malvern often met together with their legal and financial advisors and during these meetings their individual assets were discussed. None of the couple's financial advisors testified that they saw any effort by Malvern to hide information from Frances.

5

C Nature of their investments. The parties invested almost entirely in tax-free municipal bonds. During the 70's and 80's many of these bonds were bearer bonds kept by Malvern and Frances in their safe at home. The purchase and sale of these bearer bonds leaves little paper trail except when the bonds are deposited into or withdrawn from a brokerage account or when the proceeds are deposited in a bank account (T. 751, 905-06, 1737-40, 1752-55, 1759).

Frances' health began to decline first. She suffered a broken hip in 1989 from

⁵ For example, during one meeting between Frances, Malvern and Sarasota estate planning attorney Norman Quale in 1987, there was open discussion that Frances' estate was valued between three-and-one-half to five million dollars while Malvern's estate was worth one million dollars (R. 2533-39, 2598). There is no evidence that Frances was shocked or surprised by the amount of Malvern's wealth at this time.

which she never fully recovered (T. 1005-06). She broke her other hip in 1994 (R. 2623-24). While recovering from her second broken hip, she suffered a series of debilitating strokes and a seizure in July, 1995 which rendered her incompetent (T. 362-63, 538, 1039, 1048).

During this difficult time, Malvern had been diagnosed with cancer (T. 2705; R. 2623-24). Physically unable to take care of her, Malvern consulted with Frances' family and physician and made the decision in early 1995 to move her to a nursing home near her children in Knoxville (T. 1010-11, 2711). Frances continues to reside in the nursing home to this day.

In October, 1995, Malvern entered the hospital with what proved to be his final illness (T. 437). Malvern's closest relatives, his nieces and nephews, were called to the hospital. Among them was his nephew William Bell, whom Malvern had designated to be his personal representative and successor trustee after Frances' seizure in July, 1995 (R. 2136, 2695). Asked by his uncle to help keep his affairs in order, Bill Bell went to Malvern and Frances' home in Osprey on October 24, 1995 to obtain and review financial records (R. 438-40). It was there that Bill Bell first met Janet Snyder. The meeting did not go well.

Spoliated Evidence

Because of Frances' move to a nursing home eight months earlier, Malvern was in sole possession of the couple's homes at the time of Bill Bell's visit.

⁶ Malvern had a study in the Osprey home where he meticulously organized and kept his and Frances' important papers (T. 427-28, 768, 2701, 2705). Included among these records were drawers full of cancelled checks and bank statements (T. 427).

When Bill Bell arrived at Frances and Malvern's home, Janet Snyder and her husband Bill Snyder had already been there for three days (T. 440). Malvern and Frances' records were now in disarray. Piles of documents covered the dining room table.

Boxes of documents were out, and drawers full of documents were open. Documents and personal possessions were being readied by the Snyders for shipment back to Knoxville (T. 427-29, 445, 2701, 2716, 2721-22).

Bell immediately became concerned. He first suggested to Snyder that neither party should be rummaging through these documents and personal possessions while Malvern was still alive (T. 365-66, 444-46). He suggested that a third party (for example, Malvern and Frances' mutual law firm) be retained to take possession of the documents and sort out the couple's documents and personal possessions in an orderly manner. Janet Snyder rejected Bell's suggestion. Bill Bell later reiterated this suggestion, which Snyder again rejected (T. 444-47, 1713, 2519, 2718-19).

Bell was worried about the integrity of the documents (T. 1653). It was clear

⁶ As Snyder conceded in the Second District, the facts relating to the missing documents must be viewed in a light most favorable to the Estate in light of the jury's favorable verdicts on the Estate's spoliation of evidence and conversion of personal property claims.

from his conversations with Snyder that she had already attempted to open Malvern's computer records (T. 442). She was already familiar with the terms of Malvern's will and reviewing documents concerning Malvern's net worth (T. 440-41).

⁷ Certain comments Snyder made also caused Bell to be concerned that information on Malvern's computer was being changed.

⁸

Beyond Bell's concern that Snyder was claiming property and reviewing private documents even before Malvern died, Bell worried that Snyder was making mistakes in the division of the couple's personal property. He observed that Snyder had already piled certain personal possessions to be moved back to Knoxville. Within those piles were Bell family heirlooms including property that belonged to Bell's grandmother (T. 444-49, 2717-19). Six suitcases were packed and several boxes appeared ready to be shipped back to Knoxville by Snyder over Bell's objection (T. 2721-22).

Bell returned to his sisters visibly upset after his confrontation with Snyder (T. 1652). Bell and his sisters were seriously concerned about the integrity of Malvern's financial records (T. 457-58, 1653, 1705-08). By this time, the Bells had learned that Snyder had been involved in litigation with her father's second wife, Lola Wynn, over the division of his estate and they were concerned about whether the same fate awaited them (T. 1713). A few days later, the sisters' fears were confirmed when

⁷ Thus, Snyder was aware that she was neither a personal representative nor beneficiary and therefore had no rights to his property or records.

⁸ Snyder admitted to Bill Bell that when she was using the computer, the computer prompted her with messages asking whether she wanted to save her changes (T. 2716-17).

during a visit to Malvern's home, they saw that a folder of Malvern's private papers was gone, along with the drawer full of cancelled checks and other items (T. 1713, 1716).

On October 26, 1995, Malvern Bell was declared incompetent, and his nephew Bill became his successor trustee (T. 459). A few days later, on November 3, Malvern passed away and Bill Bell soon became his personal representative. After additional conversations with his sisters about the fact that documents were already missing, Bill and his sisters decided to try to secure the information in Malvern's computer. The sisters visited his home once more and took with them the computer tower containing the hard drive (T. 459, 1713-17). The hard drive was later duplicated and produced to all of the parties to the litigation.

9

Although hard drive was secured, much of Malvern's financial information was kept on a series of computer diskettes. Snyder took sole possession of those diskettes. Her brother Richard Wynn spent months analyzing the disks before they were turned over to the Estate. There is no way of knowing whether information on those disks was altered or disks were destroyed or concealed (T. 817-20, 825-27, 833-34).

Snyder sued almost immediately after Malvern's death (T. 425, 2733; R. 1, 57). From that point forward, Snyder denied Bell and his family access to Malvern and

⁹ Bill Bell's intention was to copy information relating solely to Malvern Bell on disks, and place all of the information in the hands of a responsible third party. However, after a computer technician transferred one file, Bell realized that the project was larger and more complicated than anticipated and he determined to leave the hard drive intact. The one file that the technician transferred to disk has been distributed to both parties (T. 384-85, 388, 460-65).

Frances' Florida and North Carolina homes (T. 2727-28).

When Bill Bell as personal representative finally was granted access (over Snyder's objections) to Frances and Malvern's homes by court order, much turned out to be missing (T. 2728-29, 2758-61). The file containing Malvern's personal papers never reappeared. The drawer full of cancelled checks is still missing. Virtually all financial records from the early part of Malvern and Frances' marriage were missing. Neither have Malvern's personal papers from before the marriage been located (T. 426-27, 451, 878, 903, 1307, 1318-19, 2254). Bell has no idea what happened to boxes of documents that the Snyders shipped to Knoxville. Bell testified that he spent between \$50,000 and \$100,000 trying to reconstruct these missing records (R. 2752-53).

The jury later ruled that Snyder spoliated these missing records and there is evidence to support this verdict. The most compelling evidence came near the end of the trial. Snyder's handwriting expert presented exemplars of Malvern's signature taken from original bank records. These records included cancelled checks from Malvern's bank accounts during the critical time period when records are otherwise missing. Snyder produced these records to her expert but to this day has never produced them to Bell (R. 4742-4832; T. 2782, 2791-93).

Missing Property

Much personal property remains missing. Certain of Malvern's most prized possessions such as his flight jacket (which had been worn by his friend Chuck Yeager), his service medals and his dog tags have never been found. Also missing

were his knife collection, sporting equipment, artwork, and other family heirlooms. Unaccounted for are certain pieces of his mother's furniture and silver (T. 2677-79, 2689-91, 2757-62, 2728-30). Bell was never permitted to inspect the property Snyder removed from the couple's homes. Although Snyder was ordered to provide photographs of each item that she admitted removing, she never provided photographs for one-half of the inventory. For example, there were no photographs of any of the pieces of Bell family silver that Snyder removed (R. 2702-22; T. 2053-67).

Perhaps Snyder's most blatant act of conversion related to Malvern's \$12,000 membership interest in the Cherokee Country Club in Knoxville, Tennessee. Snyder found Malvern's certificate of membership in the Osprey home and took it (T. 2746-49). Snyder admits that *after* Malvern passed away, she typed in language transferring the certificate to her husband, Bill Snyder (T. 2521). After her typewritten endorsement, someone then forged Malvern Bell's endorsement of the certificate to Bill Snyder (T. 2109-11, 2116-17). Bell's expert document examiner revealed to the jury that Malvern's forged signature was applied *after* his death. *Id.* Once Malvern's forged signature was applied, Snyder turned in the certificate to the Club, and the Snyders began to utilize the membership as if it were their own (T. 2746-49).

10

The Litigation

Snyder brought suit purportedly on her mother's behalf almost immediately

¹⁰ Interestingly, Bill Bell did not find out about this certificate until he received a bill addressed to Malvern for a party thrown at the Country Club by the Snyders (T. 2746).

after the meeting between the Snyders and Bill Bell (R. 1, 57). After much procedural skirmishing, none of which remains relevant, the parties' various claims and counter-claims stood like this: Snyder sued Malvern Bell's estate for breach of the prenuptial agreement, conversion, constructive fraud, and civil theft alleging that Malvern had misappropriated assets belonging to Frances. Snyder also brought claims individually against Bill Bell claiming that he had mismanaged the probate estate and a trust established by Malvern (Frances is one of the beneficiaries of this trust) (R. 1579). Bill Bell in his representative capacity counterclaimed against Snyder and her husband for conversion of Malvern's personal property and country club membership. Bell also sued for spoliation of evidence in connection with the missing documents, computer diskettes and personal property (R. 1613).

Bell complained about the spoliated evidence from the beginning of the litigation. Bell asserted the missing documents as an affirmative defense in response to Snyder's complaints (R. 1633-34). Besides suing Snyder for spoliation, the Estate filed three motions to compel the production of the missing bank records and asked for sanctions including the dismissal of Snyder's case (R. 1550-56, 1862-67, 2017-21). Apparently choosing to leave for the jury to resolve the factual dispute over whether Snyder had spoliated the documents, the trial court denied the motions to compel (R. 2046-48).

Snyder's Proof

Snyder's proof of liability and damages was entirely based on the testimony of two accountants, Leroy Bible and Charles Baumann. Bible's thesis was that Malvern

Bell's estate had too much money in light of the assets Malvern brought to the marriage (T. 925-28). Because Malvern Bell's financial records from the time of the marriage are now missing, Bible was forced to guess at Malvern's assets at the time of the marriage (T. 878, 914, 959, 985, 1318, 1318-19, 2254). Bible himself expressed frustration about the lack of records, admitting that coming up with an expert opinion was like trying to "nail jello to the wall" (R-878). Bible speculated that Malvern's net assets at the time of the marriage (aside from the \$150,000 gift from Frances) were \$29,000, ignoring the \$216,000 that Malvern had received from the sale of Red Arrow, ignoring the \$80,000-\$100,000 DeFever trawler owned by Malvern, and giving virtually no value to whatever bearer bonds, investments or bank accounts Malvern must have owned (for which the records are now missing) (T. 908).

The Estate's experts conducted the same analysis but took into consideration the assets ignored by Snyder's experts. Using those assets as a beginning point, the Estate's experts concluded that the final value of Malvern's estate was consistent with conservative rates of return available during Malvern's lifetime (DX46C at Tab 1; T. 2333-40).

Snyder's second expert, Charles Baumann, focused on municipal bonds owned by Frances during the course of the marriage (R. 2283-2471). Baumann then attempted to trace what happened to the bonds. Any bond whose history could not be traced from its point of purchase until Malvern's death was declared "missing" and assumed to have been converted by Malvern even though there was no evidence that any bond had ended up in Malvern's account (T. 1330). For example, assume that

Frances is known to have purchased a particular bond in 1982. If there was no record of when that bond was sold, Baumann declared the bond missing and assumed that it was converted by Malvern. Baumann opined that \$600,000 to \$700,000 worth of bonds were “missing” (T. 1345, 1397-98). He conceded that most of these bonds were possessed early in the marriage during the time when bank records are missing (T. 1413-14, 1431).

The Estate’s expert, Mr. Piper, sharply disputed Baumann’s theory. First, Piper pointed out that these bonds could have easily been sold and reinvested or deposited into Frances’ individual accounts or Malvern and Frances’ joint accounts during the time period for which no bank or brokerage records are available (T. 2299-2305, 2311-13, 2365-66). Moreover, Piper examined the so-called missing investments one investment at a time (R. 4302-4501; T. 2261-95, 2317). Piper testified that there were only three bonds totaling \$35,000 that were sold during the time period when bank records exist but whose proceeds could not be fully traced (R. 4302-4501; T. 2303-04). Piper identified another \$214,000 worth of bonds that were “missing” within Baumann’s definition. However, these bonds were all sold during the time period for which bank records are unavailable. Piper testified that the proceeds of these bonds could easily have been deposited into the couple’s joint accounts (R. 4302-4501; T. 2304-05). Piper was able to trace the balance of the securities identified by Baumann as “missing” directly into Frances’ individual accounts or the couple’s joint accounts ((R. 4302-4501; T. 2261-95). Piper saw no evidence of fraud (R. 2259-61, 2317, 2404, 2411).

Over the course of the parties' nearly 20-year marriage, Snyder's experts were able to find only one \$122,634.59 check that had been transferred directly from Frances' individual accounts into any of Malvern's accounts (R. 2100, 2283-2471; T. 1356). This check closed out one of Frances' minor investment accounts and formed the basis of the civil theft claim. Less than two months prior to his death, Malvern deposited the proceeds into his living trust account (of which Frances was a beneficiary) (T. 1356). There was evidence that the amount of this check was equivalent to Malvern's share of the sale proceeds of the couple's jointly-owned Hounds Ear condominium in North Carolina (T. 2339). Although this condominium had been acquired in joint names, all of the sale proceeds from the condominium had been deposited into Frances' account (T. 2338). Unfortunately, because of Malvern's death, the parties can only guess at the purpose of Malvern's transfer.

Although both sides timely moved for a directed verdict, the judge allowed all claims to go to the jury. The jury found that Janet Snyder had converted property rightfully belonging to the Estate and awarded damages of \$13,200. The jury also determined that Janet Snyder had spoliated evidence and awarded the Estate damages in the sum of \$40,000 (R. 4933-36). The jury then awarded punitive damages of \$250,000 on the conversion and spoliation claims (R. 4937). As to Snyder's claims, the jury found that Malvern Bell was guilty of civil theft in the amount of \$122,634.59 (the amount of the check deposited in Malvern's account shortly before his death). The jury found that Malvern had committed constructive fraud and breached the prenuptial agreement and awarded an additional \$140,000 in damages. The jury

rejected Snyder's claims that Malvern had converted other assets belonging to Frances. The jury rejected all of Snyder's claims relating to Bill Bell's administration of the Estate and trust (R. 4933-36).

Post-Trial Motions

The trial court vacated the jury's spoliation verdict and entered judgment in favor of Snyder on the spoliation claim. The court ruled as a matter of law that a spoliation claim could not lie if the documents were only concealed rather than destroyed and that Snyder had no duty to preserve or protect Malvern's records that later turned up missing. Having vacated the \$40,000 spoliation verdict, the court then reduced the punitive damage award from \$250,000 to \$30,000. The court rejected the Estate's post-trial motions and entered judgment against the Estate on Snyder's breach of the prenuptial agreement, constructive fraud and civil theft claims (R. 5032-33, 5066-71). The court, however, refused to treble the civil theft claim holding that treble damages were punitive and could not be assessed against the innocent beneficiaries of the Estate (R. 1651-55, 5067)

¹¹

The Appeal

Following the verdict, both parties appealed to the Second District Court of Appeal. The Estate argued that the trial court erred in setting aside the spoliation verdict and reducing punitive damages. The Estate also argued that the judgment against the Estate could not stand in light of Snyder's spoliation of the very evidence needed by the Estate to defend against her claims. Snyder appealed the trial court's refusal to award treble damages and the trial court's decision to award punitive

¹¹ For some reason, the court's July 29, 1997 order does not appear in the index to the record although R. 1651-55 seems to be where it belongs. A copy of the order is attached to this brief as an Appendix.

damages against Snyder. Snyder did not appeal the conversion award.

The Second District affirmed in all respects but one. In a split decision, the court reversed the trial court's decision not to assess treble damages against the Estate on Snyder's civil theft claim. The Estate sought discretionary review in this Court which was granted on April 28, 2000.

SUMMARY OF THE ARGUMENT

Snyder's claim that Malvern Bell misappropriated money from his wife Frances put Malvern's estate in a decidedly difficult and unfair position. Frances brought no such claim during her lifetime despite the fact that she could afford top financial and legal talent. Of course, Malvern's accuser is not Frances, who sadly is incompetent and living out her last days in a Tennessee nursing home. It is Frances' self-appointed conservator and heir, Snyder, who brings this claim, seeking to augment the \$4 million Estate that her mother already possessed. As a result of Snyder's claims, the Estate faces the unenviable task of reconstructing the finances of a nearly 20-year marriage when the voices of the two participants have been silenced by the infirmity of age and the inevitability of mortality.

Because Malvern and Frances cannot speak on their own behalf, their writings and financial records must speak for them. Snyder, however, has silenced even this last means of communication. A jury found, based on competent and substantial evidence, that Snyder concealed or destroyed evidence that was of critical importance to the Estate's defense and counterclaims.

Before discussing the spoliation issue, the Estate's brief opens with a discussion of the treble damages issue that formed the basis of its jurisdictional brief in this Court. The Estate will show that treble damages have long been considered punitive by Florida courts. As this Court has already determined, it is unfair and unproductive to award punitive damages against an estate. The alleged wrongdoer is deceased, and the punishment is imposed upon blameless beneficiaries (including Frances Bell herself). The split decision below departing from this Court's precedent

should be reversed.

The brief then turns to the trial court's erroneous decision to vacate the spoliation award (and the Second District's failure to correct that legal error). The decisions below were based on a restrictive view of the elements of spoliation. The Estate will show that Snyder in fact had a duty to preserve for the Estate the documents and other evidence she spoliated and that it was irrelevant that Snyder had concealed rather than destroyed the evidence.

Once the Estate's spoliation claim is reinstated, this case should be remanded to the Second District to consider the impact of the revival of that claim on the balance of the case. At a minimum, the amount of the punitive damages verdict must be reassessed. Important elements in the court's consideration of the amount of a punitive damages award are the ratio between the compensatory and punitive awards and the nature of the defendants' wrongdoing. The courts below may well reach a different conclusion on the propriety of the jury's \$250,000 punitive award if the spoliation verdict is restored and the underlying compensatory damages verdict has increased from \$13,200 to \$53,200. Finally, the Second District should be required to consider the impact of a successful spoliation verdict on Snyder's claims against the Estate. The Second District has not yet assessed whether Snyder's claims can stand in the face of a ruling that she spoliated evidence critical to the Estate's defense of Snyder's claims. Remand will permit that analysis to occur.

ARGUMENT

I. AN ESTATE MAY NOT BE PUNISHED BY THE AWARD OF TREBLE DAMAGES

The Estate shows in parts II and III below that the verdict against the Estate cannot stand in light of Snyder's spoliation of evidence. But even if this Court upholds the civil theft verdict, it should affirm the trial court's decision not to treble the award. Because the purpose of treble damages is to punish, the trial court correctly looked to the law of punitive damages for guidance. This Court has clearly ruled that punitive damages may not be awarded against a deceased tortfeasor's estate. *Lohr v. Byrd*, 522 So. 2d 845 (Fla. 1988). As this Court explained, the purpose of punitive damages is to punish and deter. Neither function is served by punishing the tortfeasor's innocent heirs. *Id.* at 846.

The trial court correctly applied the *Lohr* rule and granted partial summary judgment. The Second District, however, reversed in a split decision. The majority excused its departure from *Lohr* characterizing the civil theft statute as primarily remedial, not punitive. The dissent disagreed citing the many cases both in and outside of Florida holding that treble damages are, in fact, punitive and cannot be assessed against estates.

The conclusion reached by the trial court and the dissent is strongly supported by the civil theft statute itself, its legislative history, and case law. The analysis must, of course, begin with the statute. The statutory source for treble damages, Section 772.11 Florida Statutes, says nothing about awarding treble damages against an estate. By contrast, the statute specifically provides that treble damages are recoverable from

a tortfeasor's parents or legal guardians. The legislative silence on the issue of treble damages against an estate is dispositive. Had the legislature wished to permit such damages, it could have done so easily by adding estates to the list of those derivative entities that remain liable for treble damages. The majority opinion below ignores the well-settled maxim that the Legislature's specific reference to parents and guardians must be interpreted to exclude those entities, such as estates, not referenced.

¹²

This conclusion is particularly appropriate in light of the fact that the treble damage remedy is a departure from common law. Thus, as one court has specifically held, the statute must be strictly construed. *See Rosen v. Marlin* (the treble damage statute "is clearly a departure from common law which proscribes a penalty which did not exist at common law and should be strictly construed and limited in its application.").

¹³ Put simply, the common law cannot be changed by implication, only by express legislative action.

Moreover, *Lohr's* holding that punitive damages may not be entered against an estate was published in 1988. Treble damages have been characterized as "punitive" by Florida courts at least as early as 1982.

¹⁴ If the Legislature wished to make clear an intent to permit treble damages to be entered against an estate, it has had ample time to do so legislatively. Its inaction on

¹² *See, e.g., Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898 (Fla. 1996).

¹³ 486 So. 2d 623, 624-25 (Fla. 3d DCA 1986).

¹⁴ *Bill Terry's Inc. v. Atlantic Motor Sales, Inc.*, 409 So. 2d 507, 509 (Fla. 1st DCA 1982).

the issue can only be interpreted to mean that it had no intent to punish estates with treble damages.

15

The majority's characterization of treble damages as remedial and not punitive is also belied by the legislative history of the civil theft statute. In 1984, the act was amended to delete any reference to punitive damages. The senate staff concluded that punitive damages are redundant because trebling already constitutes punishment.

¹⁶ When the Florida House of Representatives Committee on Judiciary Staff Analysis revisited this issue in 1986, it also noted that "treble damages are, in and of themselves, punitive in nature."

17

Every Florida court to consider the issue (except the split decision below) has likewise considered treble damages to be punitive. For example, in *McArthur Dairy, Inc. v. Original Kielbs, Inc.*,

¹⁵ See, e.g., *White v. Johnson*, 59 So. 2d 532, 533 (Fla. 1952) (lack of subsequent amendment indicates acceptance of the Court's construction).

¹⁶ "The appellate courts have generally frowned upon awards for treble damages, plus punitive damages, upon the ground that treble damages are punitive in nature already and the combination of the two are necessarily duplicative as a punitive element, resulting in an excessive penalty." Florida Senate Staff Analysis & Economic Impact Statement, H.B. 69 (April 13, 1984), Series 18, Carton 1391, Page 1; see *Bill Terry's Inc. v. Atlantic Motor Sales, Inc.*, 409 So. 2d 507, 509 (Fla. 1st DCA 1982) ("an award of both treble damages and punitive damages for the same act amounts to a double recovery or an excessive penalty.").

17

Florida House of Representatives Committee on Judiciary Staff Analysis Report (April 23, 1986), 86 SS PCB 17 at 3; Series 19, Carton 1493.

¹⁸ the court held that the innocent employer of a thief could not be vicariously liable for treble damages. The court concluded the

¹⁸ 481 So. 2d 535 (Fla. 3d DCA 1986).

treble damage award to be punitive and held that such punishment was inappropriate without fault.

In *Country Manors Ass'n, Inc. v. Master Antenna Systems, Inc.*,

¹⁹ the court, considering insurance coverage for treble damages, held that treble damages for civil theft were “in the nature of a fine or penalty, similar to punitive damages, which are not covered by insurance by reason of public policy.”

²⁰ The court ruled that the same public policy that applied to punitive damages also applied to civil theft treble damages.

²¹ Similarly, the court in *United Pacific Insurance Co. v. Berryhill* denied recovery for treble damages under a surety bond, noting: “Treble damages are punitive and in the nature of fines.”

²² These are a mere sampling of the numerous cases in Florida unanimously holding that treble damages are punitive.

²³

Numerous Florida courts have reached the same conclusion concerning the punitive nature of treble damages in a slightly different context. These courts have

¹⁹ 534 So. 2d 1187 (Fla. 4th DCA 1988).

²⁰ Id. at 1195.

²¹ See id.

²² 620 So. 2d 1077, 1079 (Fla. 5th DCA 1993).

²³ *Burr v. Norris*, 667 So. 2d 424 (Fla. 2d DCA 1996) (treble and punitive damages are alternative remedies); *S & S Toyota, Inc. v. Kirby*, 649 So. 2d 916 (Fla. 5th DCA 1995) (same); *Rosen*, 486 So. 2d at 624-25; See also *Keegan v. Ennia Gen. Ins. Co.*, 591 So. 2d 300, 301 (Fla. 3d DCA 1991) (treble damages were of “a punitive nature”); *Warren v. Monahan Beaches Jewelry Center, Inc.*, 548 So. 2d 870 (Fla 1st DCA 1989) (punitive damages and treble damages are duplicative); *Cutler v. Pelletier*, 507 So. 2d 676 (Fla. 4th DCA 1987).

refused to award pre-judgment interest on the trebled portion of a judgment. These courts have recognized that, although untrebled damages may be remedial and compensatory, the trebled portion is purely a penalty. For example, in *Gilliard v. Wright*,

²⁴ the court held that prejudgment interest could not be awarded on the trebled portion of a civil theft verdict because it was a “statutory penalty.” The purpose of prejudgment interest is not punishment but to compensate for the loss of the use of money. Similarly, the court in *Zucker v. Sears Roebuck & Co.*,

²⁵ refused to grant prejudgment interest on the trebled portion because to do so would ignore that prejudgment interest is for restitution and not retribution.

²⁶ *Gilliard* and *Zucker* are representative of many cases reaching the same conclusion that treble damages are punitive and cannot support prejudgment interest.

²⁷

Federal courts interpreting other treble damages statutes likewise consider them punitive. For example, if Snyder were to step across the street to federal court, she would be barred from recovering treble damages against Bell’s estate. *See Rogers v. Douglas Tobacco Bd. of Trade, Inc.*, 244 F.2d 471, 483 (5th Cir. 1957) (“Trebling of the damages seems to us to be in the nature of a penalty for the public wrong, and we

²⁴ 667 So. 2d 815 (Fla. 2d DCA 1995).

²⁵ 589 So. 2d 454 (Fla. 5th DCA 1991).

²⁶ *See id.* at 455.

²⁷ *Nelson v. AmSouth Bank of Florida*, 699 So. 2d 810 (Fla 1st DCA 1997); *Eaton Vance Distrib., Inc. v. Ulrich*, 692 So. 2d 915 (Fla. 2d DCA 1997); *Greenberg v. Grossman*, 683 So. 2d 156, 157 (Fla. 3d DCA 1996); *Vining v. Martyn*, 660 So. 2d 1081 (Fla. 4th DCA 1995).

do not think that the personal representatives would be liable for more than actual damages.”).

28

Snyder has been unable to cite a single case upholding an award of civil theft treble damages against an estate. Instead she cited, and the majority relied on, cases holding in other contexts that the overall purpose of the civil theft statute is remedial. For example, in *Ziccardi v. Strother*,

²⁹ relied upon by the majority below, the Court held that the Civil Remedies for Criminal Practices Act was remedial and could be applied retroactively. Reliance on cases like *Ziccardi* misses the point entirely. Obviously, part of the purpose of the civil theft statute is to compensate. The question here is the purpose of the trebled damages portion of the award, above the amount needed to compensate the victim. It is one thing to hold, for purposes of a retroactivity analysis, that the overall purpose of the statute is remedial. It is quite another to hold that the additional penalty in the form of treble damages is remedial. In fact, no court has done so. Instead, courts have

²⁸ This holding is binding on federal district courts in Florida. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981). For additional cases ruling that antitrust treble damages are not recovered against an estate, see Sheldon R. Shapiro, Annotation, *Survival of Right of Action for Damages Based on Violation of Federal Antitrust Laws*, 11 A.L.R. Fed. 963, § 5 (1999). See also *Summers v. FDIC*, 592 F. Supp. 1240, 1243 (W.D. Okla. 1984) (RICO treble damages are punitive and cannot be recovered against a receiver); *RSE, Inc. v. H&M, Inc.*, 90 F.R.D. 185, 187 (M.D. Pa. 1981) (antitrust; “recent case law clearly holds that the treble damages and attorneys fees are not recoverable from a defendant’s estate.”); *Shires v. Magnavox Co.*, 432 F. Supp. 231, 235 (E.D. Tenn. 1976) (weight of “persistent authority” is to deny treble antitrust damages against estate); *Estate of Kuba v. Ristow Trucking Co., Inc.*, 508 N.E.2d 1, 2 (Ind. 1987) (“The treble damage statute . . . is punitive in nature, imposing a greater amount of damages than those actually incurred due to the violation of a criminal statute.”).

²⁹ 570 So. 2d 1319 (Fla. 2d DCA 1990).

recognized that a statute may be remedial for some purposes (to the extent it compensates the victim) but punitive or deterrent for other purposes (to the extent that the statute adds a penalty).

This is precisely the holding of the *Rogers* case and its many progeny, the federal decisions discussed above refusing to award antitrust or RICO treble damages against an estate.

³⁰ These courts note that for the purposes of the survivability of such statutes as a whole, the antitrust laws are remedial and would survive the defendant's death. However, the trebled portion was purely punitive and would not survive.

³¹

This is also the holding of the many cases in Florida cited above that permit prejudgment interest only on the amount stolen, but not upon the trebled portion. Although recovery of the amount stolen serves a compensatory purpose and therefore supports the recovery of pre-judgment interest, the trebled portion is punitive.

Thus, it reveals little to cite cases from other contexts holding that the overall purpose of the civil theft statute is remedial. A statute may have many purposes, including compensating the victim as well as punishing the defendant. The relevant analysis must focus on the particular provision of the statute at issue.

³⁰ See note 28, *supra*.

³¹ Interestingly, there is a dispute among courts whether a RICO action survives at all against an estate, even as a single damage remedy. Compare *Schimpf v. Gerald, Inc.* 2 F.Supp. 2d 1150 (E.D. Wisc. 1998) (holding that RICO actions do not survive); *Confederation Life Ins. Co. v. Goodman*, 842 F.Supp. 836 (E.D. Pa. 1994); *Summers v. FDIC*, 592 F.Supp. 1240, 1243 (W.D. Okla. 1984) (treble damages portion of RICO is punitive and does not survive the death of the defendant) with *Epstein v. Epstein*, 966 F.Supp. 260 (S.D. N.Y. 1997) (RICO action survives).

³² There can be no argument that the treble damage portion of the statute is punitive. *Every* Florida case addressing that question has reached this inescapable conclusion. As a result, *every* case, state and federal, that has addressed the specific question of whether the treble damages portion of a civil theft, antitrust or RICO claim survives against an estate has concluded that treble damages are punitive and do not survive.

The purpose of treble damages is to punish and deter. As this Court has already noted in *Lohr*, neither goal is served by imposing punitive damages against an estate: “[G]eneral deterrence logically depends upon the perception of punishment suffered by the wrongdoer. When that punishment is diffused and unjustly inflicted upon the innocent, through a doctrine analogous to attainder, the deterrent effect is frustrated.”

³³ Therefore, an award of treble damages does nothing more than punish the innocent. Victims of civil theft do not need treble damages to be fully compensated. Under the statute, they recover the full value of their property with interest as well as their attorney fees and costs.

The statute already adequately compensates theft victims; penalizing the deceased’s innocent loved ones is illogical and brutish. This Court should reverse the split decision below trebling the civil theft award.

³² See *Schimpf*, 2 F.Supp. 2d at 1158 (court must consider each portion of the statute in light of its purpose); see also *Summers*, 592 F.Supp. at 1243 (statute must be analyzed provision by provision).

³³ *Lohr*, 522 So. 2d at 846.

II. THE JURY'S SPOILIATION VERDICT SHOULD BE REINSTATED

The treble damages issue is, of course, only a part of the story here. Equally important is the question whether a judgment should have been entered against the Estate at all. The fundamental misunderstanding of the tort of spoliation by the courts below should be addressed, not only to ensure that justice is done between the parties here, but to further the important purposes of discouraging the concealment or destruction of evidence.

Here, despite a jury's verdict that Snyder had concealed important evidence, the trial court, on extremely technical grounds, vacated the verdict and, in effect, permitted Snyder to profit from her wrong. The bases for its ruling were the indefensible conclusions that (1) the Estate had no remedy for Snyder's concealment as opposed to destruction of evidence and (2) that Snyder had no duty to maintain and produce these records despite the pending litigation between the parties. This Court should exercise its discretion to resolve the uncertainty in the law created by the rulings below, and thus ensure the full and fair resolution of this case.

34

³⁴ See, e.g., *Hall v. State*, 752 So. 2d 575, 577 n.2. (Fla. 2000) (“once we have conflict jurisdiction, we have jurisdiction to decide all issues necessary to a full and final resolution.”); *Savoie v. State*, 422 So. 2d 308 (Fla. 1982) (court has jurisdiction to review all issues appropriately raised in the appellate process).

The Tort of Spoliation

Modern litigation depends upon full and fair disclosure of all relevant evidence. Cases cannot be resolved on their merits if important evidence is destroyed or concealed. As one commentator observed, “Spoliation of evidence creates enormous costs for both the victimized party and the judicial system, prevents fair and proper adjudication of the issues, and interferes with the administration of justice.”

³⁵ Recognizing the importance of maintaining the integrity of evidence, Florida courts have been quick to impose harsh sanctions upon those who destroy or withhold important documents or compromise the integrity of evidence.

³⁶

Florida courts have also recognized that the destruction or concealment of evidence imposes significant monetary costs upon opposing litigants. Thus, Florida, like many states, recognizes a damage cause of action for spoliation of evidence. A party who cannot properly prosecute or defend a claim because an opposing party has rendered evidence unavailable may sue and recover damages.

³⁷ *Miller v. Allstate Insurance Co*

³⁵

S. Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 St. Mary’s L.J. 351, 402 (1995).

³⁶ See, e.g., *Mercer v. Raine*, 443 So. 2d 944 (Fla. 1983) (entering a default judgment based on defendant’s refusal to cooperate in discovery). Perhaps the most remarkable case in recent years is a federal district court’s decision to fine Dupont \$100 million for willful concealment of evidence. *In re E.I. duPont de Nemours & Co. - Benlate Litig.*, 918 F. Supp. 1524 (M.D. Ga. 1995). Although this fine was overturned on procedural grounds, duPont still faced monetary sanctions and its conduct was referred to the U.S. Attorney. 99 F.3d 363, 368-69 (11th Cir. 1996), cert. denied, 118 S. Ct. 263, 139 L. Ed. 2d. 190 (1997). For additional cases, see infra n.48 and n.52.

³⁸ is a representative example. The plaintiff was injured in an automobile accident. Allstate took possession of the car for expert testing. Allstate accidentally sold the car to a salvage yard, rendering it unavailable to plaintiff's expert. As a result plaintiff was unable to maintain a products liability claim against the manufacturer. The Third District held that plaintiff had a damage cause of action against the insurer for its negligent failure to preserve evidence.

According to *Miller* and its progeny, a successful spoliation claim requires proof of the following six elements: 1) existing or impending litigation, 2) duty to preserve the evidence, 3) destruction of the evidence, 4) impairment of the other party's claims or defenses, 5) a causal link between the lost documents and the impaired proof, and 6) damages.

³⁹ The Estate proved these elements by competent and substantial evidence.

The evidence shows that Malvern was a meticulous and complete record keeper; yet, as a consequence of Snyder's actions, important brokerage accounts and bank records are now unavailable. In fact, the earliest bank records that exist (from 1986 forward) had to be obtained through bank subpoenas. On that fateful day in October, 1995 when Bill Bell first met Janet Snyder, Bell observed piles of Malvern

³⁷

St. Mary's Hospital, Inc. v. Brinson, 685 So. 2d 33 (Fla. 4th DCA 1996), *rev. denied*, 709 So.

. 2d 105 (Fla. 1998); *Continental Ins. Co. v. Herman*, 576 So. 2d 313 (Fla. 3d DCA 1990), *rev. denied*, 598 So. 2d 76 (Fla. 1991); *Miller v. Allstate*, 573 So. 2d 24 (Fla. 3d DCA 1990), *rev. denied*, 581 So. 2d 1307 (Fla. 1991).

³⁸ 573 So. 2d 24 (Fla. 3d DCA 1990), *rev. denied*, 581 So. 2d 1307 (Fla. 1991).

³⁹ See *Continental*, 576 So. 2d at 315. See *St. Mary's Hospital*, 685 So. 2d at 35 (adopting the same six elements).

and Frances' documents including drawers full of bank records. Most disturbingly, Bell saw evidence that the Snyders had packed up suitcases and boxes of documents to be shipped back to Knoxville. Bill Bell's worst fears were confirmed when a few days later important files were missing, including most of Malvern's personal files as well as the drawers of bank records.

Although throughout this litigation Snyder has denied withholding documents, many of the documents that Bill Bell observed in October, 1995 in Snyder's possession, have never resurfaced. Shockingly, some of these documents resurfaced only at trial. One of Snyder's last witnesses, a handwriting expert, was called to rebut the Estate's claim that Malvern's signature on the Cherokee Country Club certificate was a forgery. During her testimony, the expert produced exemplars of Malvern's signature given to her by Snyder taken from documents signed in 1976-1995. *Many of these exemplars included cancelled checks from the time period for which bank records have never been found.* The jury was entitled to draw the inference that Snyder had concealed critical evidence.

Snyder's Duty. In overruling the jury, the court first concluded that Janet Snyder had no duty to preserve evidence because there was no litigation pending when Bill Bell and Snyder first met on October 24th, 1995. The trial judge has taken a far too narrow view of Snyder's duty. To begin with, as one commentator suggests, the standard should be whether Snyder knew or should have known that litigation could result.

⁴⁰ To suggest that Snyder had no way of knowing that litigation was imminent ignores the facts. First, Bill Bell was contacted by Snyder's recently employed Florida attorney concerning possible litigation within days of the October 24th meeting. Snyder sued almost immediately thereafter, and full scale litigation was underway within a month of Malvern's death. During the meeting itself, Snyder and Bell had a sharp disagreement about the proper way to sort and manage Malvern and Frances' documents and personal possessions and the involvement of lawyers was discussed. Indeed, Snyder had recently been the plaintiff in similar litigation with her stepmother concerning her father's estate. There was certainly enough evidence to convince the jury that Snyder was aware of the possibility of litigation, or, even more likely, planning once again to initiate litigation.

Secondly, the court read the requirement that there be pending or impending litigation far too literally. The purpose of the impending litigation element of a spoliation claim is to determine whether the defendant had a duty to maintain the evidence. Spoliation most frequently arises in the context of a claim that someone has acted negligently in failing to preserve evidence. In such cases, a third party's duty to preserve evidence may present a close case. How is a third party to know whether a document is important or that litigation looms? Such cases are far different from a *plaintiff* who *intentionally* conceals documents shortly before and during the course of the litigation.

⁴⁰ See

J. Sparkman & J. Reis, *Spoliated Evidence: Better than the Real Thing?* 71 Fla. B. J. 22, 27 (Aug. 1997).

⁴¹ Snyder's duty to preserve is clear.

In any event, regardless of the pendency of litigation, Snyder assumed the duty to preserve the evidence under the facts of this case. Knowing that Malvern was on his deathbed, Snyder entered his home, read his will, and took possession of his financial records. At the very least, Snyder knew that these records were important to the pending administration of his estate and that she would not be the personal representative.

⁴² Snyder had no right to take Malvern's financial records in the first place. Having taken them, she assumed the duty to preserve them for the benefit of the Estate. *See* Section 733.309, Fla. Stat. ("any person taking, converting, or intermeddling with the property of a decedent shall be liable to the personal representative. . . for all damages to the estate caused by his or her wrongful action.").

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R. Tucker, *The Flexible Doctrine of Spoliation of Evidence: Cause of Action, Defense, Evidentiary Presumption, & Discovery Sanction*, 27 U. Tol. L. Rev. 67, 79-80 (1995) (hereinafter "Tucker") ("Obviously, where the spoliator is the plaintiff or his representative, there is no requirement that litigation be pending or contemplated at the time the evidence is destroyed.")

⁴² *See Builders Square, Inc. v. Shaw*, 755 So. 2d 721 (Fla. 4th DCA 1999) (mere knowledge of plaintiff's injury created jury to preserve evidence).

⁴³ In effect, Snyder became an "*executor de son tort*." An *executor de son tort* is one who without authority, assumes, by interference with the deceased's estate, to act as executor or administrator or to intermeddle with the property of an estate. An *executor de don tort* is subject to all the duties of an executor (but not its privileges). *See Johnson v. Thomas*, 111 So. 541 (Fla. 1927). Having intermeddled with Malvern's property, Snyder assumed the duty to preserve it. *See* Section 733.607, Fla. Stat. (imposing duty upon an executor the obligation to preserve the property of the estate pending distribution). *See Builders Square*, 755 So. 2d at 722 (permitting spoliation claim based on breach of statutory duty to preserve evidence).

Thirdly, the court ignored that there was evidence that permitted the jury to reach the conclusion that Snyder acted intentionally to deprive the Estate of documents needed for administration. Courts have had no difficulty upholding spoliation claims under such circumstances. *See DiGiulio v. Prudential Property and Casualty Ins. Co.*, 710 So. 2d 3 (Fla 4th DCA 1998) (analyzing intentional spoliation to the tort of intentional interference with a prospective economic benefit or relationship; proof of intent to harm is enough); *Yoakum v. Hartford Fire Ins. Co.*, 923 P.2d 416 (Ida. 1996) (same).

Finally, and perhaps most importantly, the judge was wrong to focus exclusively on the October 24th meeting. This litigation has extended four and one-half years past that meeting. Ever since the litigation began, the Estate has been demanding the missing evidence and it moved to compel their production on numerous occasions. Although Snyder argued to the trial court in response to the Estate's several motions to compel that she did not produce the documents because she did not have them, the jury believed otherwise. Thus, Snyder's willful concealment of these documents has continued throughout the entire course of the litigation, long past that initial 1995 meeting. It is simply impossible to rule that Snyder had no duty not to destroy or withhold Malvern's documents while the litigation was pending.

Concealment Versus Destruction. Snyder also argued that spoliation concerns only the destruction of evidence and that willful concealment would not support a spoliation claim. The cases are to the contrary. As the Third District Court

of Appeal explained, the crucial issue is whether the evidence “is *unavailable* at the time of trial due to action by one or the other of the parties.”

⁴⁴ Thus, in Florida, spoliation verdicts have been upheld in cases where evidence has been lost or altered as well as cases where the evidence has been destroyed.

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Cases from other jurisdictions are in agreement. For example, a leading case on spoliation directly addresses the issue of concealment, holding that there is no meaningful difference between willful concealment and willful destruction of evidence.

⁴⁶ A leading commentator is in accord suggesting that spoliation includes both the concealment and destruction of evidence. *See Gorelick, Destruction of Evidence* § 3.9 n.6 (1989) (destruction obviously includes physical destruction but also includes alteration or removal of evidence beyond the reach of the court). The cases are also in accord.

⁴⁷ To distinguish between concealment and destruction is to ignore the very purpose

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ghari v. Anthony Abraham Chevrolet Co., 699 So. 2d 278, 279 (Fla. 3d DCA 1997) (emphasis supplied).

⁴⁵ *Brown v. City of Delray Beach*, 652 So. 2d 1150 (Fla. 4th DCA 1995) (lost bicycle parts); *St. Mary's Hospital v. Brinson*, 685 So. 2d 33 (Fla. 4th DCA 1996) (disassembled vaporizer).

⁴⁶ *See*

Viviano v. CBS, Inc., 597 A.2d 543, 550 (N.J. Super. Ct. App. Div. 1991), *cert. denied*, 606 A.2d 375 (N.J. 1992).

⁴⁷ *See Anderson v. Production Management Corp.*, No. 98-2234 Section N, 2000 U.S. Dist. LEXIS 5696 (E.D. La. April 26, 2000) (spoliation includes the loss, destruction, concealment or alteration of evidence); *Torres v. El Paso Elec. Co.*, 987 P.2d 386, 405 (N.M. 1999) (citing *Drawl v. Cornicelli*, 706 N.E.2d 849, 852 (Ohio Ct. App. 1997)) (same); *White v. Office of the Public Defender*, 170 F.R.D. 138, 148 (D. Md. 1997) (same); *Yoakum v. Hartford Fire Ins. Co.*, 923

of the spoliation tort: Lawsuits should be decided on their merits. What message is sent if litigants are told they can avoid liability simply by withholding or concealing instead of destroying evidence?

Florida courts have carefully avoided sending such messages by imposing harsh sanctions against parties who do not fully disclose their evidence. These sanctions have been applied irrespective of whether the documents were unavailable due to destruction or concealment.

⁴⁸ There is no basis to conclude that a litigant may escape liability for spoliation simply by secreting rather than destroying documents.

Impairment. The trial court also ruled that the Estate did not prove any impairment as a result of the spoliation because the Estate was able to prove its conversion claim. The court ignored completely the devastating impact the missing evidence had on the Estate's ability to defend Snyder's claims and prosecute its own claims.

⁴⁹ In this case the significance of the missing documents cannot be overstated. Frances and Malvern, the two parties who could have disputed Snyder's claims, were unavailable to testify. Snyder built her entire case around two critical assumptions,

P.2d 416 (Idaho 1996) (same).

⁴⁸ *DeLong v. A-Top Air Conditioning Co.*, 710 So. 2d 706 (Fla. 3d DCA 1998); *Mercer v. Raine*, 443 So. 2d 944 (Fla. 1983)(sanctioning refusal to produce documents); *Amlan, Inc. v. Detroit Diesel Corp.*, 651 So. 2d 701 (Fla. 4th DCA 1995) (awarding sanctions resulting from concealment of evidence); *FDIC v. Allister Mfg. Co.*, 622 So. 2d 1348 (Fla. 4th DCA 1993) (discussing sanctions for destruction and concealment of evidence).

⁴⁹ Spoliation applies to the defense as well as prosecution of claims. Tucker, *supra*, at 74 (collecting cases).

both of which could easily have been disproven by the missing evidence. The first assumption was that Malvern brought no assets into the marriage. Had his personal files been available they would have corroborated the Estate's defense that Malvern in fact had substantial assets.

Snyder's second critical assumption was that any bond that could not be traced must have been stolen by Malvern. Thus, if a bond held by Frances in 1982 did not appear in the parties' incomplete records at the time of Malvern's death, Snyder's expert assumed that Malvern converted it, without any evidence that the bond or its proceeds had been deposited into Malvern's accounts. Had bank records from the early 80's been available, it would have been a simple matter to show that, if bonds had been sold, whether the proceeds were deposited into the parties' joint accounts or Malvern's or Frances' individual accounts. The records that Snyder appears to have concealed are among the very records that would have disproven her claim.

Snyder's spoliation of evidence also impaired the Estate's prosecution of its claims. Snyder refused to produce over 200 court-ordered photographs, essential evidence of the personalty removed from the couple's two homes. Thus, the Estate was denied the photographic evidence it needed to identify for the jury other Bell property that had been taken and to establish their value. As a result, the jury's conversion award was largely limited to the forged Cherokee Country Club certificate.

Under such circumstances, the impairment to the Estate is obvious and severe. Evidence that would directly bear on the Estate's claims and defenses is missing. It must be assumed that such documents and photographs would have been helpful to

the Estate. Florida courts have long presumed that parties who conceal or destroy evidence never conceal or destroy evidence helpful to their claims but only those documents that are inconsistent with their claims.

⁵⁰ The jury fairly drew the inference that the Estate had been impaired.

Damages. The court's last concern was damages. However, as courts have recognized, there is a substantially relaxed standard of proof in spoliation cases. Damages are difficult to quantify in *every* spoliation case. The ultimate effect of any spoliation is to render it difficult or impossible to prove or defend a claim. Under such circumstances, how much is the claim worth? It is the very evidence that has been spoliated that would supply the answer. For this reason, courts hold that the party who spoliated the evidence should bear the consequences of the spoliation, not the innocent party.

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Here there was substantial proof of damages. Bill Bell testified that it cost the Estate at least \$50,000 in additional accounting fees to defend Snyder's claims as a result of the missing documents. Accountants spent months of work analyzing claims that could have been proven or disproven by a glance at the missing brokerage and bank statements. Bill Bell also testified concerning the value of missing Bell family property. In light of the evidence, the jury's \$40,000 verdict was reasonable. There

⁵⁰ *See*

Public Health Trust v. Valcin, 507 So. 2d 596, 599 (Fla. 1987); *Allister Mfg.*, 622 So. 2d at 1350; *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 133 (S.D. Fla. 1987).

⁵¹ *See Miller*, 573 So. 2d at 27-29; *Viviano*, 597 A.2d at 551-52.

being competent and substantial evidence to support the spoliation claim, the jury's verdict should be reinstated.

III. THIS CASE SHOULD BE REMANDED TO CONSIDER THE IMPACT OF SNYDER'S SPOILIATION OF EVIDENCE ON THE REMAINING CLAIMS

Once this Court determines that the trial court erred in vacating the spoliation award, the case must be remanded to permit the courts below to determine the impact of the spoliation award on Snyder's claims against the Estate and on the Estate's punitive damages claim against Snyder. Having misunderstood the legal scope of a spoliation claim, neither court below had the opportunity to consider the impact that a successful spoliation claim would have on the balance of the case. Accordingly, a remand to the Second District is appropriate to consider this impact. The Second District can either resolve those issues based on the record before it or remand for further proceedings in the trial court.

Impact on the Verdict Against the Estate

Remand is necessary, first, to consider the impact of the spoliation verdict on the claims against the Estate. The Estate has argued from the beginning of this case that Snyder's spoliation of evidence had prejudicial impact on the Estate's ability to defend against Snyder's claims. Because Malvern is gone and Frances is unavailable, what Snyder concedes to be a "circumstantial" case was presented largely by documentary evidence, or more accurately, the *lack* of documentary evidence. Snyder built her case on critical assumptions that could only be disproven by the very evidence that is now missing. The law is clear that Snyder may not profit from her

abuse of the litigation process.

Concealment of evidence is a serious matter. Florida and federal courts have not hesitated to impose severe sanctions when litigants have concealed or destroyed documents. In cases like this where evidence was willfully concealed, Florida courts routinely enter the ultimate sanction--a default judgment against the spoliator.⁵²

The Southern District's decision in *Telectron, Inc v. Overhead Door Corp.* is representative and contains an excellent discussion of the principles supporting default as a sanction for willful misconduct.

⁵³ In *Telectron* the defendant responded to plaintiff's request for production by ordering the destruction of documents. As in every case where destruction had occurred, it was impossible to determine which documents were gone and how they prejudiced the plaintiff's case. For precisely those reasons, the court determined that default was appropriate. According to the court, the policy of resolving lawsuits on their merits must yield when a party has intentionally prevented the fair adjudication of the case. Where willful destruction or concealment occurs, default judgment is the only appropriate sanction. In essence, by engaging in such misconduct, litigants eliminate their right to have their case decided on the merits.

⁵² See *Mercer v. Raine*, 443 So. 2d 944 (Fla. 1983); *DeLong v. A-Top Air Conditioning Co.*, 710 So. 2d 706, (Fla. 3d DCA 1998) (approving dismissal of the sanction even though evidence was misplaced advertently); *Figgie Int'l, Inc. v. Alderman*, 698 So. 2d 563 (Fla. 3d DCA), *rev. denied* 703 So. 2d 476 (Fla. 1997); *Tramel v. Bass*, 672 So. 2d 78 (Fla. 1st DCA), *rev. denied*, 680 So. 2d 426 (Fla. 1996); *Sponco Mfg., Inc. v. Alcover*, 656 So. 2d 629 (Fla. 3d DCA 1995), *rev. dismissed*, 679 So. 2d 771 (Fla. 1996); *Rockwell Int'l Corp. v. Menzies*, 561 So. 2d 677 (Fla. 3d DCA 1990); *NHL v. Metropolitan Hockey Club*, 427 U.S. 639 (1976); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107 (S.D. Fla. 1987).

⁵³ 116 F.R.D. 107 (S.D. Fla. 1987).

Likewise, in this case dismissal of Snyder's claims is the only appropriate remedy. In light of the case Snyder presented, and, in particular, the nature of the liability and damage theories forwarded by Snyder's experts, the missing evidence was devastating to the Estate.

Consider first the context of this litigation. Malvern could not defend himself. His wife Frances, the one person who could shed light on the couple's finances, is incompetent and in a nursing home. Courts are justifiably suspicious of claims raised against an estate precisely because of the inability of the testator to testify. As one venerable decision observed, courts should be distrusting of attempts to base claims upon the actions of the dead:

The distrust is naturally augmented by the circumstance that the testimony is not presented in any court until all the parties who could have any interest in contradicting it are dead. While we cannot say that under such circumstance it must necessarily be rejected as unworthy of belief, yet it must inevitably occur that the trial judge will regard it with serious misgivings.

Thus, the court concluded that evidence given under such circumstances "should not only be received with the greatest caution" but should be declared "evidence of the

⁵⁴ See *id.* at 109-10, 128-30. Other courts reach the same result through the doctrine of "unclean hands." The result is the same. A litigant guilty of unfair or fraudulent conduct will have claims for relief rejected. See, e.g., *Dale v. Jennings*, 90 Fla. 234, 107 So. 175 (1925).

Turman v. Ellison, 174 P. 396, 398
(Cal. Ct. App. 1918).

weakest and most unsatisfactory nature.”

56

Numerous Florida courts have emphasized similar caution in cases based upon statements or actions of the deceased. For example, in *Traurig v. Spear*⁵⁷ the court rejected claims brought against the estate, noting the problems associated with cases brought after the defendant’s death. Concerned with the unreliability of evidence and the ease with which such claims could be fabricated, the court dismissed the plaintiff’s claims against the estate. *Traurig* is representative of a number of Florida cases dismissing similar cases.

58

Of course, this case involves far more than just the usual proof difficulties connected with litigation against the Estate. Here there was evidence, and the jury so found, that Snyder concealed the very bank records that would have disproven some, if not all of her claims. Despite Snyder’s claim that she had not withheld any of Malvern’s records, it surfaced at trial that she had provided original checks from Malvern’s missing accounts to her own expert. Further, it was uncontradicted that Snyder had taken hundreds of items of personal property from Malvern’s two homes. Despite a court order, she failed to provide photos for over 200 of the removed items.

⁵⁶ *Id.*

⁵⁷ 102 So. 2d 165 (Fla. 3d DCA 1958).

⁵⁸ See *Gable v. Miller*, 104 So. 2d 358 (Fla. 1958); *Miller v. Murray*, 68 So. 2d 594 (Fla. 1953); *Camodeca v. Camodeca*, 464 So. 2d 662 (Fla. 2d DCA 1985); *Ballou v. Campbell*, 204 So. 2d 526 (Fla. 2d DCA 1967), *cert. denied*, 210 So. 2d 865 (Fla. 1968).

Thus, when the inherent difficulties of estate litigation are coupled with the jury's findings of spoliation and the speculative nature of Snyder's proof, the prejudice to the Estate could not be clearer. Consider the Estate's claim in more detail. There were two parts to the jury's verdict against the Estate. First was the jury's conclusion that Malvern had misappropriated \$140,000 either fraudulently or in breach of the prenuptial agreement. The second concerned Malvern's "theft" of one \$122,634.59 check shortly before his death.

The jury's \$140,000 verdict was not based upon evidence of any identified transfer from Frances' accounts to Malvern's accounts. Aside from the \$122,634.59 check discussed below, no evidence of questionable transfers exists. Rather, the jury's verdict could only have been based on the assumptions made by Snyder's experts, self-serving assumptions that could have been disproven by the missing documents.

Put simply, despite the heavy burden that Snyder should face in pursuing a claim of this kind against the Estate and her misconduct in concealing documents, it was the Estate that was penalized by the absence of the couple's bank and brokerage records. Imposing this penalty on the Estate instead of on Snyder turned the law upside down. Under these circumstances, the court below should be required on remand to consider Snyder's claims for constructive fraud and breach of the prenuptial agreement in light of her spoliation of evidence.

As to Snyder's civil theft claim based on the \$122,634.59 check, Snyder at least has direct evidence of a transfer from Frances' account to Malvern's account. But it

must be remembered that Snyder's claim is not a simple breach of contract or conversion claim. Indeed, the jury specifically found that Malvern had not converted the check. Instead, Snyder claims civil theft, which requires proof by clear and convincing evidence of an evil or felonious intent. *Westinghouse Elect. Corp. v. Shuler Bros., Inc.*, 590 So. 2d 986 (Fla. 1st DCA 1991), *rev. denied*, 599 So. 2d 1279 (Fla. 1992).

The necessary proof was nicely described by *Westinghouse*. The First District reversed a civil theft verdict despite the fact there was some supporting evidence. Noting that clear and convincing is a high standard, the court held that the evidence must be direct and clear. The standard "seems to preclude evidence that is ambiguous."

59

Here the evidence was highly ambiguous. Although we know that Malvern transferred these funds, we have no way of knowing why they were transferred. If Malvern was committing theft, why was it done so openly in the time period so close to his death? If there was a pattern of theft or dishonesty, why isn't there a record of similar transfers? Why did he deposit the "ill-gotten gains" into a trust naming his victim (Frances) as a beneficiary? Indeed, if Malvern was engaged in wholesale looting as Snyder would suggest, why did Frances never bring such a claim while she

⁵⁹ *Id.* at 988. See also *Anthony Distrib., Inc. v. Miller Brewing Co.*, 941 F. Supp. 1567, 1575-76 (M.D. Fla. 1996) (clear and convincing evidence means evidence that is credible, distinctly remembered, unambiguous, such as would leave the trier of fact with a firm belief or conviction without any hesitancy as to the truth of the testimony.)

was competent and Malvern was alive? Frances knew that Malvern had a \$1,000,000 estate as early as 1987 but made no formal complaint despite having the resources to hire the best accountants and lawyers in Florida.

⁶⁰ Finally, as Frances' attorney in fact, Malvern had full access to her entire \$4 million fortune. Why would he limit his "wholesale looting" to \$122,634.59 when millions were a phone call away? It is more likely that Malvern was attempting to put his affairs in order by balancing the books between Frances' accounts and his own accounts. There was evidence that the check in the amount of \$122,634.59 was the equivalent of Malvern's share in the sale of the Hounds Ear condominium in North Carolina. Although the condominium was jointly purchased and held, upon its sale all of the proceeds had been deposited into Frances' accounts and Malvern had never shared in the proceeds.

Again the missing documents come into play. Who knows whether the papers in Malvern's personal files would have contained an explanation for the transfer? Who knows whether there was evidence that this \$122,634.59 was a gift to Malvern or was otherwise authorized by Frances? Who knows whether Malvern was simply mistaken? The answer is we can never know. But certainly there is no clear or convincing evidence to uphold a verdict that Malvern had the felonious intent that renders him a thief. The case should be remanded to consider the impact of Snyder's

⁶⁰ Despite a minute examination of Frances and Malvern's nearly 20 years of marriage, Snyder came up with records showing only an additional \$25,000 in "transfers" all of which are from the joint account. Most of these checks are to cash and appear to be pocket spending money for the couple.

litigation misconduct on the \$122,634.59 civil theft claim.

The Impact of the Spoliation Verdict on the Punitive Damages Award

The jury, as well as both courts below, found that the Estate was entitled to punitive damages as a result of Snyder's conversion of property and spoliation of evidence. However, the trial court reduced the punitive damage award from \$250,000 to \$30,000 based on the Supreme Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The trial court opined that \$30,000 was the most due process would allow. In *BMW*, the court held that a \$2 million punitive damage award in a case involving \$4,000 in compensatory damages was so shockingly out of proportion so as to violate BMW's right to substantive due process.

An important part of the inquiry required by *BMW* is the disparity between the actual harm or potential harm suffered by the Estate and the punitive damages awarded. As a result of the trial court's erroneous rejection of the Estate's spoliation award, the ratio between the \$250,000 punitive damage award and the \$13,200 compensatory award was 19 to 1. Although the Estate believes that this ratio was well within limits commonly being approved today,

⁶¹ the trial court was obviously troubled by the ratio. However, should the \$40,000 spoliation award be reinstated, the ratio falls to only 4.7 to 1. This ratio, compared to the 500 to 1 ratio rejected by the court in *BMW*, hardly shocks the judicial conscience. If anything is shocking here, it is the judge's decision to limit punitive damages to a

⁶¹ See, e.g., *Owens-Corning Fiberglas Corporation*, 749 So. 2d 483 (Fla. 1999) (approving ratio of 18 to 1)

ratio of only 2.27 to 1 in a case involving intentional misconduct and forged documents. The courts below should be required to reconsider the jury's \$250,000 punitive damage award on remand in light of the reinstatement of the Estate's spoliation verdict.

CONCLUSION

For all the foregoing reasons, this Court should rule that treble damages for civil theft are punitive and cannot be entered against the Estate of the alleged wrongdoer. This Court should also rule that litigants have a duty not to conceal evidence and reverse the Second District's affirmance of the trial court's erroneous decision to overturn the jury's spoliation verdict. This Court should then remand to the Second District to consider the impact of the reinstated spoliation verdict on the claims against the Estate and on the remittitur of the Estate's punitive damages claim against Snyder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to: **Robert Turffs, Esquire**, 2055 Wood Street, Suite 206, Sarasota, FL 34237; **A. Lamar Matthews, Esquire**, 1777 Main Street, Suite 500, Sarasota, FL 34236; and **W. Andrew Clayton, Jr., Esquire**, 1800 Second Street, Suite 888, Sarasota, FL 34236, this _____ day of June, 2000.

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