IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-334

RONNA MARTINO AND RAYMOND MARTINO,

Petitioners,

-vs.-

WAL-MART STORES, INC.,

Respondent.

ON DISCRETIONARY REVIEW FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

BRIEF OF AMICUS CURIAE, ACADEMY OF FLORIDA TRIAL LAWYERS SUPPORTING POSITION OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS

The Amicus Curiae, Academy of Florida Trial Lawyers ("Academy"), is a statewide organization of approximately 3,500 trial lawyers which frequently appears in cases involving issues important to the rights of individuals and to the administration of justice. The Objectives and Goals of the Academy are as follows:

> Section I. The objectives of this corporation are to: (a) Uphold and defend the principles of the Constitutions of the United States and the State of Florida. (b) Advance the science of jurisprudence. (c) Train in all fields and phases of advocacy. (d) Promote the administration of justice for the public good. (e) Uphold the honor and dignity of the profession of law. (f) Encourage mutual support and cooperation among members of the Bar. (g) diligently work to promote public safety and welfare while protecting individual liberties. (h) Encourage the public awareness and understanding of the adversary system and to uphold and include the adversary system, assuring that the courts shall be kept open and accessible to every person for redress of any injury and that ***the right to trial by jury*** shall be secure to all and remain inviolate.

Article II, AFTL Charter, approved October 26, 1973 (emphasis added).

Consistent with the foregoing, the Academy has one of the State's most active Amicus Curiae committees, whose members work on a pro bono basis to address important issues of substantive and procedural law of widespread importance to the Academy's members and our clients, as well as to all of the citizens of the State. This

is such a case, in which the Academy writes to assist the Court in establishing the procedural parameters of the tort of spoliation of evidence and in recognizing the jury's essential role in resolving disputed issues of fact concerning spoliation.

SUMMARY OF THE ARGUMENT

The Petitioners have comprehensively briefed the issue of whether first party spoliation should be recognized as a tort in Florida, so the Academy will not rehash those persuasive arguments with which it agrees. Instead, the Academy in this brief suggests a procedural framework which this Court should adopt in first-party spoilation cases for the guidance of the lower courts considering such cases. This procedural framework recognizes the importance of the jury's role in spoliation cases, provides an escalating scale of remedies depending upon the level of the spoliator's culpability, and provides for procedural economy by permitting joinder of first party's spoliation claims with the original tort claim of personal injury or wrongful death.

This Court should establish that the remedy for negligent spoliation of evidence is the establishment of a burden-shifting presumption on the ultimate liability issue in favor of the opposing party. In a case such as this one involving claims for negligent inspection of Wal-Mart's shopping cart and negligent mode of operation, a finding by the jury of negligent spoliation would result in a jury instruction that Wal-Mart's negligence in inspecting the shopping cart should be presumed, and shifting the burden

to Wal-Mart to prove the absence of negligence.

A jury finding of intentional spoliation should result in jury instructions which establish the liability issues in non-spoliator's favor, and remove from jury consideration any affirmative defenses raised by the spoliator. A party which intentionally destroys relevant evidence should not be entitled to a reduction in its percentage of responsibility by the innocent party's comparative negligence, fault of non-parties, or otherwise be permitted to rely upon affirmative defenses which are affected by the missing evidence.

The Academy disagrees that an effective remedy for either negligent or intentional spoliation is the mere establishment of a permissive inference in the non-spoliator's favor. However, to address the portion of the Fourth District's decision which rejected the use of a jury instruction where such inferences are the appropriate remedy, the Academy submits that jury instructions are necessary and proper. Such an instruction is necessary because in the absence of guidance from the court concerning the effect of such negligence or intentional misconduct in allowing evidence to be lost or destroyed, the jury might well disregard the mere argument of counsel that it could find for Plaintiff on the ultimate issue from the basic fact of negligent spoliation.

While most spoliation cases should now be resolved by the jury as part of the

underlying tort case, these remedies should not restrict judges' authority in cases of such egregious culpability that the question can be taken from the jury. In cases in which spoliation of evidence is so blatant and deliberate that it amounts to a fraud upon the court, trial judges should be empowered to enter judgment by default or dismissal against the offending party, thereby effectively directing a verdict for the non-spoliator.

Under all three of these remedies, the tort of spoliation should be held to be established by a finding that the evidence in question was material, and not reserved for those cases in which the evidence in question was so critical to the non-spoliator's case that the absence of the evidence precludes a jury finding on the original tort cause of action. Even in those cases in which a plaintiff might survive a motion for directed verdict notwithstanding the defendant's destruction of evidence, if that evidence is important to the plaintiff's case, its tortious loss or destruction should be remedied by one of the foregoing procedures.

ARGUMENT

I.

THIS COURT SHOULD ADOPT AN ESCALATING SCALE OF REMEDIES FOR FIRST PARTY SPOLIATION WHICH PRESERVES THE ROLE OF THE JURY

A. Jury Trial of Spoliation Claims:

The Academy submits that a fundamental flaw in the Fourth District's reasoning in this case is that remedies of judge-imposed sanctions are sufficient to address the negligent or intentional destruction by a party of evidence which will be relevant in litigation involving that party. The Academy agrees with the Petitioners that one flaw in the Fourth District's reasoning is that discovery sanctions, and sanctions under a court's inherent powers, are usually reserved for conduct which takes place ***after*** litigation has commenced, instead of situations like this one in which the destruction of evidence occurs ***before*** the lawsuit was filed. Additionally, a more fundamental reason why the judge-imposed sanctions mentioned by the Fourth District should not be the sole remedy for first party spoliation is that such a procedure constitutes a denial of litigants' right to trial by jury on crucial issues.

Just as the parties are entitled to have a jury decide whether Wal-Mart negligently maintained its premises, engaged in a negligent mode of operation, or negligently inspected its shopping carts, so too should the parties be entitled to a jury resolution of the question whether Wal-Mart negligently or intentionally destroyed evidence relevant to those theories. Juries are in a better position to determine the materiality of the evidence and the culpability of the spoliator in the context of the trial of the original tort liability issues, compared to having a judge decide on remedies either before or after a trial in which the judge was not the trier-of-fact. And these issues are important

enough to recognize the role of a jury as a litigant's right under the Florida Constitution, apart from the practical superiority of the jury deciding these issues.

A case which squarely addresses the question of whether the trial judge or jury should decide the factual issues concerning spoliation is *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995). That was a case involving both admiralty and law claims arising out of the death of the plaintiff's husband following an explosion and fire on a boat. The plaintiff's expert engaged in destructive testing of the boat and the defendant persuaded the trial court to allow the jury to draw an adverse inference of the spoliation of that evidence. Following a verdict in favor of the defendants, the plaintiff appealed and argued that the trial should have decided the spoliation issue itself and not submitted the matter to the jury. In affirming, the Fourth Circuit held:

> We conclude that the district court acted within its discretion in permitting the jury to draw an adverse inference if it found that Vodusek or her agents caused destruction or loss of relevant evidence. Rather than deciding the spoliation issue itself, the district court provided the jury with appropriate guidelines for evaluating the evidence.

71 F.3d at 157.

While the Academy disagrees with the *Vodusek* court's statement that the law provides no remedy for "negligent loss or destruction or evidence," but "requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction," and while the Academy

disagrees with the limitation on the remedy to an adverse inference, the *Vodusek* decision correctly recognizes the proper role of the jury in deciding the underlying facts which establish a spoliation claim or defense. The case also supports the Academy's position that, where an adverse inference from spoliation is the appropriate remedy, the jury should be provided with a suitable instruction making it clear that such an inference is permissible from the fact of the spoliation itself.

The jury which decides the underlying tort case should be the jury to decide the spoliation issues as well. Because remedies for spoliation should be recognized even where the non-spoliator may succeed without the lost evidence, there is no need to await the outcome of the underlying tort trial to litigate the spoliation issues. Further, permitting the jury in the underlying tort case to hear the evidence concerning spoliation will provide great savings of time and money for the litigants and the judicial system as a whole. Otherwise, common questions such as the materiality of the destroyed evidence and the extent of prejudice to the non-spoliator will essentially need to be tried twice.

B. Remedy for Negligent Spoliation:

This Court should adopt a hierarchy of remedies to be enforced against spoliators which attempts to match the effectiveness of the relief to the level of culpability of the spoliator. All else being equal (such as the materiality of destroyed

evidence to a given case, the strength or weakness of the non-spoliator's case without that evidence, and so on), a spoliator who through mere negligence allows evidence to be lost or destroyed should not be subject to as harsh a remedy in favor of the opposing party as should a spoliator who deliberately destroys evidence to gain an advantage in litigation. However, even the negligent destruction of evidence which there was a duty to maintain for litigation purposes should not go unremedied.

Recognizing a remedy for negligent spoliation in first party cases is in keeping with Florida tort law in general which provides a cause of action for negligence which causes cognizable injury or damage to another party. Further, permitting a remedy for negligent spoliation permits the jury to afford some relief to an innocent party where the loss or destruction of evidence may well have been intentional, but proof of that intent is unclear.

This Court should formulate a rule of law which recognizes a burden-shifting presumption for the non-spoliating party on the ultimate liability issue based upon a finding of the underlying fact of negligent spoliation of material evidence. "Creating this rebuttable presumption occupies a middle ground — it neither simply condones the defendant's negligent spoliation evidence at the plaintiff's expense nor imposes an unduly harsh and absolute liability upon a merely negligent party." *Welsh v. United States*, 844 F.2d 1239, 1249 (6th Cir. 1988).

This Court should hold that the presumption it recognized in *Public Health Trust v. Valcin* 507 So. 2d 596 (Fla. 1987) is the appropriate remedy where a party has negligently spoliated evidence as to which there was a common law duty to maintain,[1] and is not limited to circumstances in which there is a statutory duty to preserve evidence. Such a presumption will permit the jury to return a verdict for the innocent party where negligent spoliation and materiality of the evidence are found, but will not require the jury to return a verdict against the spoliating party if, the presumption is rebutted by other evidence.

Such a presumption is warranted by §§ 90.302 (2), 90.303 and 90.304, Fla. Evid. Code, because this presumption is one imposed "to implement public policy" rather than one to facilitate the determination of the particular action. The public policy here, of course, is that of providing a uniform remedy against those who through unreasonable conduct destroy material evidence.

Such a presumption should be recognized because the existing remedies for discovery misconduct under the rules of civil procedure and sanctions under the courts' inherent authority have limitations upon their availability, and because those remedies are not awarded by juries.

C. Remedy for Intentional Spoliation:

[1] The Academy supports the Petitioners' argument concerning the circumstances in which such a duty to refrain from spoliating evidence should be recognized by this Court.

This Court should recognize that a greater range of remedies is available where spoliation of material evidence is intentional. One such remedy which should be adopted instead of the mere presumption in favor of the non-spoliator on the ultimate issue should be to strike the pleadings of a spoliator and enter a judgment on liability by default where the spoliator intentionally destroys evidence which is relevant to the Plaintiff's underlying cause of action.

An essential element of this remedy for intentional spoliation is that the jury be instructed in such a way that the spoliator cannot benefit from affirmative defenses which were negatively affected by the loss of the evidence, such as the defense of comparative negligence and the fault of non-parties. Where evidence concerning a defendant's degree of negligence or other actionable misconduct is intentionally destroyed or concealed, the plaintiff will be prejudiced in proving how fault should be apportioned to that defendant under *Fabre v. Marin* 623 So. 2d 1182 (Fla. 1993).

In the present case, for example, the lost shopping cart was relevant to determine just how obvious was its defect, how long it had been in existence, and just how dangerous it was, all of which factors would come to bear on Wal-Mart's degree of negligence. *See generally, e.g., Hobart Corp. v. Siegel*, 600 So. 2d 503 (Fla. 3d DCA 1992); *Lasar Mfg. Co. v. Bachanov*, 436 So. 2d 236 (Fla. 3d DCA 1983).

The remedy of striking a spoliator's pleadings and thereby precluding it from

relying upon an affirmative defense such as comparative fault is supported by *St. Mary's Hospital v. Brinson,* 685 So. 2d 33 (Fla. 4th DCA 1996). In *Brinson*, the Fourth District affirmed the trial court's decision to strike the defendant's pleadings, including its affirmative defense of apportionment of fault under § 768.81 (3), Fla. Stat., because the defendant "consciously and deliberately" refused to comply with a discovery order. Because the defendant had the burden of pleading the apportionment defense, the remedy recognized by the court of "striking of [the] defense of apportionment eliminated its entitlement to apportionment of damages." 685 So. 2d at 36. Similarly, in a case of intentional spoliation of evidence, the jury should be instructed to disregard the spoliator's affirmative defenses.

II.

TRIAL COURTS WILL RETAIN THEIR POWERS TO SANCTION WITH DEFAULTS AND DISMISSALS WHERE WILLFUL SPOLIATION AMOUNTS TO A FRAUD UPON THE COURT

Adoption of first-party spoliation as a tort triable by juries does not eliminate trial courts' power to sanction willful misconduct, as they possess in the analogous area of discovery misconduct. Courts in egregious discovery sanction cases recognize the goals of penalizing the offending party and deterring others of future misconduct. "The more culpable defendant's conduct, the greater the sanction that is required. ***If defendant's conduct is highly culpable, then prejudice to plaintiff***

is not the focal point. The judicial system must be vindicated and like-minded parties deterred." *BankAtlantic v. Eastman Paine Webber* 127 F.3d 224-225 (S.D. Fla. 1989), aff'd., 12 F.3d 1045 (11th Cir. 1994).

The United States Supreme Court has recognized the importance of the goals of punishment and deterrence in discovery misconduct cases involving greater levels of culpability by the offending party. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976), the Supreme Court quashed a decision reversing dismissal for willful failure to timely answer interrogatories as ordered, holding: "the most severe in the spectrum of sanctions . . . must be available . . . in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." This Court has cited the *National Hockey League* case approvingly in *Mercer v. Raine*, 443 So. 2d 944, 945-46 (Fla. 1984).

In *Tramel v. Bass* 672 So. 2d 78 (Fla. 1st DCA 1996), the trial court sanctioned the defendant by striking its pleadings and entering a default judgment based upon a finding of intentional alteration of a video tape which was material. However, the plaintiff was neither foreclosed from recovery in that case, nor even prejudiced in fact, because the plaintiff had obtained an unaltered copy of the videotape from another source. However, the trial court held that the severest of sanctions was appropriate

to remedy the fraud upon the court, and the First District agreed and affirmed the default judgment without any requirement of a showing of prejudice from the misconduct. See also *Heimer v. Travelers Ins. Co.*, 400 So. 2d 771, 773 (Fla. 3d DCA 1981) (Party was to be "punished for willful misconduct"); *U.S. Fire Ins. Co. v. C&C Beauty Sales, Inc.*, 674 So. 2d 169 (Fla. 3d DCA 1996), in which the court affirmed a default for persistent false denials that a document existed and refusals to produce it, even though the defendant finally produced the document. Trial courts will still be empowered to sanction serious spoliation efforts, even unsuccessful ones, after the tort of spoliation is recognized in the first party cases.

III.

THIS COURT SHOULD RECOGNIZE APPROPRIATE REMEDIES FOR SPOLIATION OF MATERIAL EVIDENCE WHICH DOES NOT COMPLETELY PRECLUDE RECOVERY IN THE UNDERLYING TORT CAUSE OF ACTION

Where a party conceals or destroys material evidence, the courts should impose an effective remedy even if that evidence was not so critical to the non-spolitator's case that its unavailability will preclude recovery on the underlying cause of action. This Court should reject any suggestion that the elements of the tort of spoliation require a showing by the non-spoliator of a total inability to establish an essential claim or defense due to the lack of the destroyed or lost evidence. The only injury which the non-spoliator should be required to establish is "that the evidence would have been

relevant to an issue at trial and otherwise would naturally have been introduced into evidence." *Vodusek*, supra, 71 F.3d at 156. In recognizing such a remedy, this Court could simply borrow from the analogous area of sanctioning discovery misconduct, which does not require total devastation to the innocent party's ability to prove his case.

As with the discovery misconduct cases as finding by the jury of spoliation of evidence should warrant an appropriate remedy, even without a showing of such prejudice that the plaintiff could not possibly prove the elements of the underlying tort in the absence of that evidence.

In *William T. Thompson Co. v. General Nutrition Corp.,* 593 F. Supp. 1443 (C.D. Cal. 1984), the court made findings that evidence destroyed by GNC "were relevant, at a minimum, to Thompson's defenses and counterclaims," and concluded that "destruction resulted in prejudice to Thompson," sufficient to support the remedy that "GNC's conduct creates a presumption that the missing data would have permitted Thompson to prove the . . . claims that lie at the heart of its complaint." *Id.* at 1455. No showing of inability to prevail without the lost evidence is required.

Likewise, in *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 133 (S.D. Fla. 1987), the court held that the bad faith destruction of a relevant document, by itself, "gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for its destruction." There should be no

need for the Plaintiff in the present case, or in any case, to establish that she is precluded from proving her case as a prerequisite to being afforded the remedies based on spoliation of material evidence. This Court should recognize the tort of spoliation and the escalating scale of remedies depending on the greater culpability of the spoliator.

IV.

IN THE EVENT THAT THE COURT DETERMINES THAT A MERE INFERENCE IS AN APPROPRIATE REMEDY, THAT REMEDY SHOULD INCLUDE AN INSTRUCTION TO THE JURY

This Court should reject the Fourth District's approach of denying a jury instruction when a permissive inference may be drawn from the basic fact of spoliation, because mere argument of counsel is insufficient to communicate to the jury its right to return a verdict on liability from the fact of the negligent spoliation alone. It takes an instruction from the court to adequately communicate the permissible effect of a finding of underlying fact.

In the absence of a jury instruction authorizing the jury to infer the ultimate fact of liability from the establishment of the underlying fact of negligent spoliation, jurors will be torn between the non-spoliator's attorney's argument that it may find liability based upon spoliation on the one hand, and the spoliator's attorney's argument that no such inference can be drawn from the circumstances. While

counsel for the spoliator no doubt will argue in closing that the jury ***should not*** infer liability from the basic fact of negligent spoliation, when the trial court is required to instruct the jury that it ***may find*** the ultimate issue from that basic fact, counsel will be constrained from arguing that such an inference ***cannot*** be drawn from the fact of spoliation.

An example of a permissive inference which is recognized in the law to effectuate public policy is the permissive inference of negligence which the jury is instructed it may reach in a res ipsa loquitur case. Juries in those cases are charged that they may find negligence based upon a finding of the underlying facts which the law recognizes gives rise to such an inference. See Fla. Std. Jury Instr. 4.6. Unless the jury is informed by the trial judge that it may reach a finding in favor of the plaintiff based upon its finding of the underlying facts in a res ipsa case, some juries would be persuaded by defense counsel in closing that no such inference was even permissible, and thereby never reach the question to apply the inference in a given case.

The court addressed the appropriateness of a charge to the jury in situations where the proper remedy for spoliation is an adverse inference in *Shaffer v. RWP Group, Inc.*, 169 F.R.D. 19 (E.D.N.Y. 1996), as follows:

> An adverse inference charge serves the dual purposes of remediation and punishment. First, it seeks to put the non-spoliator in

> a position to similar where it would have been but for the destruction of evidence . . . . Second, it carries a punitive effect; "the law in hatred of the spoiler, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer by the very means he had so confidentially employed to perpetrate the wrong."

Id. at 25 (quoting *Pomeroy v. Benton*, 77 Mo. 64, 86 (1882)).

If a permissive inference is an appropriate remedy in a spoliation case, the jury should hear as much from the judge.

CONCLUSION

WHEREFORE, this Court should recognize the tort of first-party spoliation, leaving most cases to the jury trying the underlying tort claim, with escalating remedies as culpability increases.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies hereof were served by U.S. Mail and Facsimile upon **Rosemary Wilder, Esq.,** Marlow, Connell, Valerius, Abrams, Adler & Newman, Attorney for the Respondent, 4000 Ponce de Leon Blvd. Suite

570, Coral Gables, FL 33134, Facsimile ; **Steven W. Halvorson**, Attorney for the Petitioners, Schuler & Halvorson, P.A., 1615 Forum Place, Suite 4-D, West Palm Beach, FL 33401; **Philip Burlington, Esq.**, Caruso, Burlington, Bohn & Compiani, P.A., Attorney for the Petitioners, Suite 3A/Barristers Building, 1615 Forum Place, West Palm Beach, FL 33401; **David J. Sales**, Searcy Denney Scarola Barnhart & Shipley, 2139 Palm Beach Lakes Blvd., P.O. Drawer 3626, West Palm Beach, FL 33402; Paul D. Jess, Academy of Trial Lawyers, 218 S. Monroe Street, Tallahassee, FL 32301; on this 1st day of May, 2003.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been computer generated in 14 point Times New Roman and complies with the requirements of Rules 9.100(l) and 9.210.

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