SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

RONNA MARTINO and RAYMOND MARTINO, her husband,	)	
Petitioners,	)	
vs.	)	SC 03-334
WAL-MART STORES, INC., an Arkansas corporation,	)	
Respondent.	)	

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, WEST PALM BEACH, FLORIDA

ANSWER BRIEF OF AMICUS CURIAE FLORIDA DEFENSE LAWYERS ASSOCIATION

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PREFACE

The Florida Defense Lawyers Association (FDLA) files this Amicus Curiae Brief in support of the position of the Defendant-Respondent Wal-Mart Stores, Inc. FDLA will refer to the parties by name or as Plaintiffs or Defendant.

In addition to the abbreviations used by Wal-Mart, FDLA will refer to the briefs of the parties and other amici curiae as follows:

WB: Wal-Mart's Brief

MB: Martino's Brief

AB: Amicus Brief of Academy of Florida Trial Lawyers

GB: Amicus Brief of Growers

AIM AND SCOPE OF FDLA'S AMICUS CURIAE BRIEF

The Florida Defense Lawyers Association (FDLA), formed in 1967, has a statewide membership of over 1000 lawyers engaged in civil litigation, primarily for the defense. Among the aims of the FDLA and its members are "impro[ving] the adversary system of jurisprudence and … the administration of justice." See www.fdla.org/ByLaws.asp.

FDLA maintains an active amicus curiae program in which FDLA members donate their time and skills to submit briefs in important cases pending in state and federal appellate courts. FDLA screens those cases for their content of significant legal issues which affect the interests of the defense trial bar or the fair administration of justice. See www.fdla.org/about/amicus.asp. As in the present case, this practice often results in FDLA and the Academy of Florida Trial Lawyers, its counterpart representing the interests of the plaintiffs' bar, filing amicus briefs presenting their opposing views.

FDLA will limit this brief to issues inherent in the certified conflict between the decision below and Bondu v. Gurvich, 473 So. 2d 1307 (Fla. 3rd DCA 1984). Therefore, FDLA will not address the issues raised in Wal-Mart's Point II. [WB 44-50].

SUMMARY OF THE ARGUMENT

The Court should approve the Fourth District's decision because it is based on sound judicial policies supported by a clear majority of courts that have addressed the question at issue. The rationale of the opinion below is similar to that found in Judge Schwartz's cogent dissent in Bondu v. Gurvich, 473 So. 2d 1307 (Fla. 3rd DCA 1984), the case certified to be in conflict with the Fourth District's decision.

The Fourth District correctly held that there is no need to recognize a separate tort for alleged spoliation of evidence by the defendant in an underlying tort case. The availability of sanctions and remedial inferences in the main suit renders a separate tort for spoliation unnecessary and unwise, given the high potential for confusing the issues and misleading the jury.

The Fourth District was also correct in holding that no special jury charge would be needed to resolve spoliation issues raised in the underlying case. The standard instruction that jurors can use their common sense to draw reasonable inferences from the evidence will allow them to infer that evidence lost or destroyed by Defendant would have been favorable to Plaintiffs. Because there are adequate remedies in the main suit, including relief for spoliation discovered after judgment, the decision below should be affirmed.

ARGUMENT

THIS COURT SHOULD RESOLVE THE CERTIFIED CONFLICT BY APPROVING THE FOURTH DISTRICT'S DECISION THAT PLAINTIFFS HAVE NO SEPARATE CAUSE OF ACTION AGAINST WAL-MART FOR ITS ALLEGED SPOLIATION OF EVIDENCE SUPPORTING PLAINTIFFS' UNDERLYING TORT CLAIM.

A. The Decision Below Rests on Sound Judicial Policy Favored by Nationwide Precedent

The decision under review is no aberration in the progress of the law of spoliation. On the contrary, the Fourth District's opinion is but the most recent indicator of a nationwide trend away from treating first party spoliation[1] as a separate tort.

Judge Alan Schwartz presaged that trend by his cogent dissent in Bondu v. Gurvich, 473 So. 2d 1307, 1313-14 (Fla. 3d DCA 1984), the first Florida case to recognize a cause of action for spoliation. Judge Schwartz urged that the tort "created by the majority opinion should not be recognized" for reasons that also apply to the present case. He noted that the new "rule runs counter to the basic principle that there is no cognizable independent action for perjury, or for any improper conduct by a witness, much less by a party, in an existing lawsuit." The dissent contended that any improper failure by defendant to

[1] This term is commonly used to describe spoliation by a defendant in the main action. It is distinguished from the term "third party spoliation," which is used to describe spoliation by persons who are not parties in the main action.

provide records in the underlying malpractice suit should be raised only in the course of that litigation or, "if an adverse judgment has been entered as in the present circumstances, in a Rule 1.540 motion or an independent action to set the judgment aside." Id. at 1314.

The majority in Bondu reasoned that the separate tort remedy for spoliation should also apply against defendants in the underlying suit:

> If, as in Williams[2] and Smith,[3] an action for failure to preserve evidence or destruction of evidence lies against a party who has no connection to the lost prospective litigation, then, a fortiorari, an action should lie against a defendant which, as here, stands to benefit by the fact that the prospect of successful litigation against it has disappeared along with the crucial evidence.

Bondu, 473 So 2d at 1312 (citations added). Judge Schwartz's dissent faulted the majority's reasoning quoted above: "[W]hat the court characterizes . . . as an a fortiorari situation is instead a complete non-sequitur." Id. at 1314. This Court should reach the same conclusion.

The Third District decided Bondu in June, 1984, only a few months after a California District Court of Appeal decided Smith, the first case to adopt a new tort for spoliation of

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[2] Williams v. California, 664 P. 2d 137 (Cal. 1983).

[3] Smith v. Superior Court, 198 Cal. Rptr. 829 (Cal. App. 1984).

evidence by a party to the underlying suit. Major changes in legal thought and precedent during the intervening nineteen years, especially the erosion of support for the Smith/Bondu rationale, led the Fourth District in Martino to question the continued wisdom and need for a separate cause of action for first party spoliation. Most notably, Smith, a prime authority followed in Bondu, was expressly disapproved by the Supreme Court of California in Cedars-Sinai Medical Center v. Superior Court, 954 P. 2d 511 (Cal. 1998), which firmly held there is no tort remedy for first party spoliation. Id. at 521.

In addition to relying on Cedars-Sinai and adopting its basic rationale, the Martino panel cited post-Bondu cases from seven other states[4] that "have refused to recognize an independent cause of action for spoliation where the spoliator is the defendant in the underlying litigation. . .." Martino, 835 So. 2d at 1255. Wal-Mart's more recent count cites cases from some 36 jurisdictions which have considered but rejected an independent tort for spoliation. Other states have recognized

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[4] Sweet v. Sisters of Providence in Wash., 895 P. 2d 484, 493 (Alaska 1995); Goff v. Harold Ives Trucking Co., 27 S.W. 3d 387 (Ark. 2000); Lucas v. Christiana Skating Ctr., Ltd., 722 A. 2d 1247 (Del. Super. Ct. 1998); Monsanto Co. v. Reed, 950 S.W. 2d 811, 815 (Ky. 1997); Miller v. Montgomery County, 494 A. 2d 761, 768 (Md. App. 1985); Oliver v. Stimson Lumber Co., 993 P.2d 11, 17 (Mont. 1999); Trevino v. Ortega, 969 S.W. 2d 950 (Tex. 1998).

the tort only for spoliation by third parties. [WB 10, fn. 1; 11, fn. 3]

A well-crafted case note, Rubin, "Tort Reform: A Call for Florida to Scale Back Its Independent Tort for the Spoliation of Evidence," 51 Fla. L. Rev. 345 (1999), traced the development of the tort in Florida and other jurisdictions. After probing the factors considered by courts for and against adoption of the tort in various contexts, Mr. Rubin concluded that the availability of remedial sanctions eliminated the need for an independent action for spoliation against a defendant in the underlying suit.

The briefs served thus far suggest, and FDLA agrees, that the outcome of this discretionary review will depend on how this Court balances the factors favoring and disfavoring the continued viability of a separate tort for spoliation by a party to the main suit. There also seems to be general agreement that those factors are essentially the same as those weighed against one another in Smith, the first case to adopt the tort of first party spoliation. [MB 16-28; AB 4-11; GB 16-20; WB 18-19]. The same is true of the majority and dissenting opinions in Bondu, the first Florida case to recognize the tort, the many ensuing holdings summarized by Mr. Rubins' case note, and, most

recently, the Fourth District's Martino decision. The key issue here is which factors should prevail.

FDLA adopts, and thus need not revisit, Wal-Mart's persuasive arguments that the factors favoring the Fourth District's rejection of a separate tort for first party spoliation far outweigh the opposing factors urged by Plaintiffs and favored by some courts. Instead, FDLA will devote the rest of its Subpoint A to three matters of general jurisprudential interest that may assist the Court.

If this Court overrules Bondu and approves the decision below, it will not be the first time Florida has judicially eliminated an erstwhile tort this it deemed useless or redundant in light of legal progress. In Kramer v. Piper Aircraft Corp., 520 So. 2d 37 (Fla. 1988), this Court held that because its earlier decision in West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976), had adopted strict liability for product defects, the former cause of action for non-privity breach of implied warranty was rendered useless and thus abolished. Kramer, 520 So. 2d at 39. A similar rationale should apply here.

The availability of sanctions and remedial inferences in the underlying suit removes any need to superimpose a piggy-back tort with a high potential for jury confusion and other unfair

prejudice. Such concerns are analogous to those expressed in 90.403 Fla. Stat. (2002):

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

The balancing tests applied by the Fourth District and the persuasive out-of-state cases on which it relied are entirely consistent with the spirit and intent of that section of Florida's Evidence Code.

Before addressing Martino's specific points challenging the Fourth District's decision, the general breadth and scope of those challenges deserve brief comment. The issues raised and remedies proposed by Plaintiffs and their allies go well beyond those decided below. Examples are their arguments about (1) the non-issue of spoliation discovered after the main suit has ended [AB 24; GB 6, 13-14], which did not occur here, and (2) whether Wal-Mart had a duty to preserve the cart and the video tape [MB 16-23], an element the Fourth District expressly found that it need not address. Martino, 835 So. 2d at 1254. Moreover, AFTL proposes a "escalating scale" or "hierarchy" of remedies and urges this Court to write a comprehensive decision adopting the full spoliation agenda of the plaintiffs' bar. [AB 2, 7].

As another threshold matter, FDLA questions the worth and wisdom of trying to resolve a wide range of issues neither

decided below nor needed to resolve the certified conflict. Under the wise precepts of Dobson v. Crews, 164 So.2d 252 (Fla. 1st DCA 1964), aff'd. 177 So.2d 202 (Fla. 1965), appellate courts should confine their opinions to those legal pronouncements needed to resolve particular questions litigated and decided in the case being reviewed. Dobson, 164 So.2d at 255.

B. Plaintiffs' Arguments for "First Party" Spoliation Claims Are Far Outweighed By the "Prudential Concerns" Cited in the Opinion Below.

Plaintiffs have effectively commended the panel below by pointing out that its decision was based on "prudential concerns." [MB 15, 35, 38]. The chosen phrase is apt, for "prudential" is defined as "characterized by prudence," a word which in turns means "wise, judicious, or wisely cautious in practical affairs . . . " Random House Dictionary of the English language, page 1158 (1966).

Wal-Mart's thorough and well-supported analysis of various arguments in the opposing briefs obviates any need to add extended comment. FDLA will thus limit this Subpoint B to a few brief supplemental responses to points argued by Plaintiffs and their allied amici curiae.

Plaintiffs fault the Fourth District for its failure to rule on the issue of duty, "which is a critical element of any sanction analysis." [MB 23-24]. That argument has no legal or

logical merit. Appellate courts routinely decide which issues are dispositive of the cases before them, and the court below properly carried out that function. The presence or absence of a duty by Wal-Mart to preserve evidence relevant to the underlying claim against it has no bearing on the dispositive holding that no separate cause of action exists for first party spoliation. If there were no such duty, there could have been no breach for which Wal-Mart would be subject to sanctions. If a duty did exist, any breach or potential sanctions could be dealt with in the main suit, as held in the opinion below. Either way, the existence and effect of a duty were moot points in the context of the facts and legal issues considered below.

There is no merit to Plaintiffs' argument that the Fourth District "undermine[d] the rationale of its decision" when it recognized a cause of action for spoliation by a third party "yet reject[ed] it in first party cases where the spoliation has the greater motivation . . ." and stands to benefit from his actions in destroying or failing to preserve evidence. The Bondu majority used the same reasoning, which Judge Schwartz's dissent correctly identified as "a complete non-sequitur." Bondu, 473 So. 2d at 1312 (majority opinion) and 1314 (dissent).

Some Florida appellate courts have discussed, and even assumed the existence of, a tort for third party spoliation. In addition to Bondu, see Humana Workers' Compensation Services, Inc. v. Home Emergency Services, Inc., 842 So. 2d 778 (Fla. 2003), discussed at WB 8-9. Whether Florida has already squarely adopted a tort for spoliation by a third party or will do so in the future is debatable. Either way, the tort will clearly be based on a perceived need to grant a remedy where none otherwise exists. For example: A plaintiff injured by an electric tool he has purchased entrusts it to a third party for safekeeping or expert analysis pending trial of a product liability suit against the manufacturer. The third party loses or destroys the product which results in dismissal of plaintiff's personal injury suit against the manufacturer. Under those assumed facts, a tort action against the spoliator could fill an obvious need to afford plaintiff some remedy for the harm caused by the third party's spoliation of evidence.

It by no means follows, however, that there is a similar need for a separate tort of first party spoliation. As the Fourth District has held, based on the weight of nationwide authority and sound legal scholarship, ample remedial measures are available in the core action against a defendant accused of spoliation.

The Academy argues that "[t]he jury which decides the underlying tort case should be the jury to decide spoliation issues as well," and that having that same jury "hear the evidence concerning spoliation will provide great savings of time and money for the litigants and the judicial system as a whole." [AB 7]. FDLA submits that far greater savings will result if this Court approves the decision below, a course that will yield the added benefits of keeping personal injury suits free of unnecessary and extraneous issues and arguments with a high potential for unfair prejudice, confusing the core issues, and misleading the jury. Given the remedial inferences and other sanctions available in the main suit, there is no need to add to the arsenal of personal injury plaintiffs a separate spoliation tort that can be used to distract and even inflame the jury on collateral matters that have no real bearing on liability for the underlying tort.

Plaintiffs insist that a special jury charge is needed to "maximize [the] effectiveness" of the adverse inference a jury can draw from a defendant's failure to produce evidence. [MB 20-22]. The Academy strongly endorses that view. [AB 15-17]. Their arguments on that subject greatly undervalue the common sense of jurors, the forensic skills of the plaintiffs' bar, and

the force and effect of the standard jury charge on inferences, which reads:

> In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence.

Fla. Std Instr. (Civ.) 2.1 [Emphasis added].

The Academy argues that "mere argument is insufficient," and that "it takes an instruction from the court to adequately communicate the permissible effect of a finding of underlying fact." [AB 15. See also MB 21]. The emphasized part of the charge just quoted refutes our opponents' contention that attorney argument is not sufficient for their purposes.

Perhaps more telling are Plaintiffs' and the Academy's motives for wanting a special jury charge:

> 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 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 inferences can be drawn from the circumstances.

[AB 15; Emphasis added], and

> Simply authorizing an attorney to argue the adverse inference is ineffectual, since the validity of the inference could simply be disputed by opposing counsel.

[MB 22; Emphasis added]. Surely those proposals strike at the very heart of our adversarial system of justice, the essence of which depends on proper arguments and counter-arguments by lawyers for all parties. It is inconceivable that a valid instruction could create a permissible inference impervious to opposing jury arguments by defense counsel, which is apparently what Plaintiffs and the Academy want. A charge even approaching that goal would violate a basic purpose of Florida's Standard Jury Instructions stated in the Committee notes:

> One of the unfortunate roles assumed by trial judges in the past is that of advocating both sides of the case by reading to the jury a series of argumentative charges favoring one side of the case and then, "on the other hand," reading another series of equally argumentative charges favoring the other side of the case. It has been the Committee's purpose to omit such argumentative charges and to remove all advocacy from the charge.

Fla. Std. Jur. Instr. (Civ.), General Notes on Use, p.xx.

The general jury charges that will be given on (1) the jurors' right to use their common sense to draw inferences from the evidence, and (2) the purposes of the attorneys' arguments, to which they are to give close attention, support the Fourth District's holding that no special instruction on spoliation inferences is appropriate under the evidence in this particular case. Furthermore, the jury charge issue is not within the scope of the certified conflict to be resolved by this court,

because jury charges on spoliation or adverse inferences were not issues in Bondu. Id. 473 So.2d at 1307-14.

It may happen that some future Florida appeal will involve facts which warrant a ruling on the need for a special jury charge on first party spoliation in a tort action. For now, however, this is but one of several points argued by Plaintiffs and their allied amici curiae which need not and should not be decided in the present case.

The decision below accords with the Academy's point that fact issues concerning spoliation should be decided by juries, not judges. [AB 6-7]. Here, both the standard jury charges and the Fourth District's decision will allow Plaintiffs' lawyers to argue to the jury the adverse inferences resulting from the alleged spoliation. The jury alone will decide the facts and inferences based on argument of counsel and the standard jury charge on reasonable inferences.

Growers are wrong in claiming that the decision below "leaves parties who discover the destruction of evidence after a case concludes without a remedy." [GB 6, 13: see also MB 24]. Such a remedy exists under Fla. R. Civ. P. 1.540(b), which provides in pertinent part:

> On motion and on such terms as are just, the court may relieve a party or a party's legal representative from a final judgment …for the following reasons: … (2) newly discovered evidence which by due diligence could

> not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party….The motion shall be made within a reasonable time, and for reasons (1), (2), and (3), not more than 1 year after the judgment … was … entered.

[Emphasis added.]

Judge Schwartz's dissent in Bondu correctly identified Rule 1.540 as providing a remedy for first party spoliation discovered after the entry of final judgment in the underlying suit. Bondu, 473 So. 2d at 1314. Florida's rule provides a broader remedy than the California court construed in Cedars-Sinai, 954 P.2d at 521. The California version of the rule, unlike Florida's, excludes post-judgment relief for intrinsic fraud, such as suppression of evidence in the course of the litigation. Id. Florida's broader rule does cover intrinsic fraud and thus provides a potential remedy for first party spoliation discovered after judgment. This fact fully refutes Plaintiffs' contrary argument in footnote nine of their brief. [MB 24].

It is, of course, true that Rule 1.540(b) puts a strict time limit on this type of post-judgment relief. That fact, however, underscores the high priority this Court, which adopted the rule, gives to achieving finality in judicial proceedings.

Plaintiffs' theories tend to undermine that vital goal, while the decision below fosters it.

CONCLUSION

Based on the sound reasons and authorities argued in this brief and Wal-Mart's brief, this Court should resolve the certified conflict by approving the decision of the Fourth District below, and disapproving the majority opinion of the Third District in Bondu.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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