IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NUMBER: SC03-334
L.T. NUMBER: 4D01-2693

RONNA MARTINO and RAYMOND MARTINO,

Petitioners,

vs.

WAL-MART STORES, INC.,

Respondent.
_____/

BRIEF OF GEORGE R. HARPER, III, d/b/a RUSTY HARPER FERNERIES; ROBERT STONE d/b/a ROBERT STONE FERNERIES; L. CHARLES HERRING d/b/a H & H GREENS; LARS HAGSTROM & LORNA JEAN HAGSTROM d/b/a LARS HAGSTROM PARTNERSHIP; LARS HAGSTROM d/b/a LARS HAGSTROM FERNERIES; T. LARRY JONES, INC.; MORRIS HAGSTROM and FRED WESTON d/b/a HAGSTROM & WESTON FERNERIES; MORRIS HAGSTROM and LARS HAGSTROM d/b/a HAGSTROM & HAGSTROM FERNERIES; MORRIS A. HAGSTROM d/b/a MORRIS A. HAGSTROM FERNERIES; SUNSTATE FERNERIES, INC.; ROBERT I. STOKES and PHILLIP A. STOKES d/b/a RICHFERN GROWERS; ALBIN HAGSTROM & SON, INC.; RAIFORD G. HAGSTROM d/b/a RAIFORD G. HAGSTROM FERNERIES; HUGO R. MASSY d/b/a HUGO R. MASSY FERNERIES; RICHARD HAGSTROM, d/b/a RICHARD HAGSTROM FERNERIES; DEAN HAGSTROM d/b/a DEAN HAGSTROM FERNERIES; GENEVA HERRING d/b/a LEMUEL C. HERRING FERNERIES; SUPERIOR GREENS, SA; PARADISE GREENS, SA; HELECHOS ORNAMENTALES LA MARGARITA, SA; INVERSIONES LA MARA, SA; HELECHOS ORNAMENTALES de SAN ISIDRO, SA; CORPORACION LUMS, SA; AGRITICA, SA; PARAISO VERDES, SA; HACIENDO RIO PURIES, SA; FINE FOLIAGE PRODUCTION; JACK B. SHUMAN d/b/a SHUMAN FARMS; STEVE SHUMAN d/b/a STEVE SHUMAN GREENS; JOANN BURNSED d/b/a LANE BURNSED FERNERIES; DONALDSON ORNAMENTALS, INC.; R. SCOTT JONES d/b/a HIGH POINT FARMS; JONES BROTHERS FERNERIES; HELECHOS de PARAISO, SA; VERDES de PERFECTA CALIDAD, SA; STACY JONES d/b/a STACY JONES FERNERIES; NORMA JONES d/b/a RONALD JONES FERNERIES; FRANK E. UNDERHILL, JR. and

JEAN F. UNDERHILL d/b/a UNDERHILL FERNERIES; TERRY TAYLOR ENTERPRISES, INC.; JAMES O. TAYLOR, CO., INC.; US FERN, SA; ESTATE OF PATRICIA RICHARDSON c/o F.A. FORD, JR.; O. FREEMAN GREENLUND, JR. d/b/a FREEMAN GREENLUND FERNERIES; ROBERT F. GREENLUND d/b/a ROBERT F. GREENLUND FERNERIES; DAVID G. DREGGORS; JOHN FLOWERS; GREG JAMES FERNERIES, INC.; JAMES BALDAUFF and PATRICIA S. BALDAUFF d/b/a J&P PROPERTIES; JAMES MARTIN d/b/a JAMES MARTIN FERNERIES; MICHAEL E. OTT d/b/a MANOR WAY FERNS; JAMES & SCARLETT WARNER d/b/a JAMES K. WARNER FERNERIES; THOMAS J. LAWRENCE, JR., and ESTATE OF THOMAS J. LAWRENCE, SR., d/b/a T.J. ENTERPRISES; SUNRIDGE, INC.; LAWRENCE FARMS, INC.; HAROLD DWAYNE COHEN and CAROL LYNN COHEN d/b/a COHEN FOLIAGE; BRIAN FOXX and KENT FOXX d/b/a FOXX FERNERY; FANCY FOLIAGE, INC.; ROBIN C. LENNON and WANDA G. LENNON d/b/a CENTRAL FLORIDA FOLIAGE; ROBERT HARPER d/b/a ROBERT HARPER FERNERIES; HELECHOS POLIFORMA, S.A.; HELECHOS INTERNACIONALES, S.A.; HELECHOS EXPRESO, S.A.; HELECHOS TROPICALES, S.A.; MARSELL, S.A.,; PROYECTOS DE DESARROLLO DE FRAIJANES, S.A.; FINCO LOS LLANOS DE CIRUELAS, S.A.; FINCA D.J. SA; PLANTAS ORNAMENTALES DE GUANACASTE, S.A.; FLORIDA HELECHOS, S.A.; HELECHOS DE COSTA RICA, S.A.; A y H HELECHOS, SA; HELECHOS de ORO, SA; FOLIAGE INCORPORADO, SA; HELECHOS DE POAS, S.A.; FERNEXPORT, SA; COSTA RICAN FLOWER CORPORATION, SA; AMERICAN FLOWER SHIPPERS, INC.; AMERICAN FLOWER CORPORATION, SA; FLOWERTREE NURSERY, INC.; BOTANICS WHOLESALE, INC., as successor in interest to J.W.M., INC., d/b/a BOTANICS WHOLESALE AND FOLIAGE CO-OP, INC.; FULL BLOOM FARMS, LLC., f/k/a LOVELL FARMS, INC., FRED HENRY PARADISE ORCHID; PAUL M. BOOKER, JR.; GREEN ACRES FERNERY & CITRUS, INC.; LAKE HARRIS GREENS, INC. d/b/a GREEN ACRES FERNERY & CITRUS, INC., TREE FACTORY, INC., RIVERS FOLIAGE, INC., GREENLEAF FOLIAGE, INC., G&B NURSERY, INC., WEEKS, d/b/a WEEKS FARM, JAMAICAN FLORAL EXPERTS LTD., KIM'S NURSERY, INC., CONTINENTAL WHOLESALE FLORIST, INC.; KHD, LTD.; WILLIAM KEEBLER, COCONUT ORCHIDS,

INC.; AND SAGAERT ORCHIDS, INC, AS AMICI CURIAE
IN SUPPORT OF PETITIONERS
(CONSENTED TO BY THE PARTIES)

Dated: April 25, 2003

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GUANACASTE, S.A.; FLORIDA HELECHOS, S.A.; HELECHOS DE COSTA RICA, S.A.; A y H HELECHOS, SA; HELECHOS de ORO, SA; FOLIAGE INCORPORADO, SA; HELECHOS DE POAS, S.A.; FERNEXPORT, SA; COSTA RICAN FLOWER CORPORATION, SA; AMERICAN FLOWER SHIPPERS, INC.; AMERICAN FLOWER CORPORATION, SA; FLOWERTREE NURSERY, INC.; BOTANICS WHOLESALE, INC., as successor in interest to J.W.M., INC., d/b/a BOTANICS WHOLESALE AND FOLIAGE CO-OP, INC.; FULL BLOOM FARMS, LLC.;FRED HENRY PARADISE ORCHID; PAUL M. BOOKER, JR.; GREEN ACRES FERNERY & CITRUS, INC.; LAKE HARRIS GREENS, INC. d/b/a GREEN ACRES FERNERY & CITRUS, INC., TREE FACTORY, INC., RIVERS FOLAGE, INC., GREENLEAF FOLIAGE, INC., G&B NURSERY, INC., WEEKS, d/b/a WEEKS FARM, JAMAICAN FLORAL EXPERTS LTD., KIM'S NURSERY, INC., CONTINENTAL WHOLESALE FLORIST, INC., KHD, LTD., WILLIAM KEEBLER, COCONUT ORCHIDS, INC., and SAGAERT ORCHIDS, INC. are nurserymen and women operating as individuals, partnerships, and corporations in Florida, Costa Rica, Panama and Jamaica (the "Growers"). The Growers are plaintiffs in consolidated fraud, racketeering and spoliation of evidence actions presently pending before the 17th Judicial Circuit Court in Broward County (the "Broward County Actions"). The Broward County Actions arise out of mass settlements of earlier product liability litigation (the "Underlying Product Liability Actions") in which the Growers sought damages associated with the fungicide, Benlate, a product of the E.I. du Pont de Nemours & Company, Inc. ("DuPont").

In the Underlying Product Liability Actions, a central issue was the causal,

scientific, link between the application of Benlate and the crop and plant damage experienced by the Growers. The Growers allege in the Broward County Actions that DuPont, as part of a scheme to depress the value of hundreds of Benlate claims nationwide, destroyed and concealed important evidence that would have supported the Growers' position on the causal link between Benlate and their damages. They further allege that they settled the Underlying Product Liability Actions for substantially less than full value, due to DuPont's destruction and concealment of evidence. The nature of these claims has been described in *Harper v. E.I. du Pont de Nemours & Co., Inc.*, 802 So.2d 505 (Fla. 4th DCA 2001) ("*Harper*"), where the Growers were petitioners, as well as, *Mazzoni Farms, Inc. v. E.I. du Pont de Nemours & Co., Inc.*, 761 So.2d 306 (Fla. 2000) ("*Mazzoni*") and *E.I. du Pont de Nemours & Co., Inc. v Florida Evergreen Foliage*, 744 A.2d 457 (Del. 1999) ("*Florida Evergreen*"); *Matsuura v. Alston & Bird*, 166 F.3d 1006 (9th Cir. 1999), *modified*, 179 F.3d 1131 (9th Cir. 1999).

Mazzoni was before this Court on certified questions from the United States Court of Appeals for the Eleventh Circuit, in litigation that originated in the United States District Court for the Southern District of Florida. This Court held that (1) Delaware choice-of-law provisions in a general release governed claims of fraudulent inducement to settle; and (2) where Florida law applies, general releases do not bar claims of fraudulent inducement to settle.

Florida Evergreen was before the Delaware Supreme Court on certified questions directly from the United States District Court for the Southern District of Florida. The Delaware Supreme Court held that general releases (which contained a

Delaware choice of law provision) did not bar subsequent claims for fraudulent inducement to settle based on the withholding of evidence. *Florida Evergreen* also expressly recognized a fraud claim for fraudulent inducement to settle, approving the decision of *DeSabatino v. U.S. Fidelity & Guaranty Co.*, 635 F. Supp. 350 (D. Del. 1986).

The Broward County Actions were stayed pending the decisions in *Mazzoni* and *Florida Evergreen*. *See generally Harper*, 802 So.2d 505. After the stay was lifted, the Growers filed an amended complaint that included claims for spoliation of evidence, in addition to claims for fraud and racketeering.

Certain aspects of the Fourth District Court of Appeal's decision in this case are of concern to the Growers. The Fourth District concluded that tort remedies for conduct associated with the destruction of evidence are "unnecessary" and that other remedies such as disciplinary proceedings and litigation-based sanctions are adequate to deter and remedy the destruction of evidence. 835 So.2d at 1256. The Fourth District also suggested that a cause of action seeking to determine the damage associated with the loss or destruction of critical evidence is "speculative." *Id.* at 1255. Most importantly, the Fourth District's approach leaves parties who discover the destruction of evidence after a case concludes without a remedy. The Growers may be adversely affected if the decision of the Fourth District remains the law. The potential impact of *stare decisis* provides an adequate basis for the Court to consider their views as amici curiae. *See, e.g., Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) ("amicus brief should normally be allowed" when pending case of amicus "may be affected" by intervening appellate decision), *cited*

with approval in Rathkamp v. Dept. of Community Affairs, 730 So.2d 866 (Fla. 3d DCA 1999).

Summary of Argument

An independent spoliation tort serves important policy goals and helps to ensure that parties conduct litigation fairly. It also serves to protect a party's right to seek damages when wronged by the conduct of another. Many question the effectiveness of non-tort based remedies to vindicate these important principles. The Fourth District's distinctions between 'first party' and 'third party' spoliation claims do not survive scrutiny and do not support the rejection of 'first party' claims. The Fourth District's broad prohibition against 'first party' spoliation claims would leave those parties who discover the destruction of evidence only after a case concludes without a monetary remedy. The Fourth District's other concerns, particularly the purported speculative nature of spoliation claims, do not warrant rejection of 'first party' spoliation claims.

Argument

I. First Party Spoliation Claims Serve Important Public Policy Needs and Ensure That Unscrupulous Counsel and Parties Do Not Profit from Misconduct.

A. Spoliation of Evidence Is A Serious Problem.

Litigation misconduct gives the system a black eye. One wishes it were rare. Unfortunately, this is not true. One commentator attempting to account for the animus the public feels toward lawyers and the courts has suggested that the traditional approaches of the bar and the courts to remedy such problems have only contributed to the crisis of confidence:

> Although the bar's conventional response to such problems has been that they 'should be left to the procedural rules and sanctions of the court involved,' these correctives have repeatedly proven inadequate. Sanctions are expensive to seek and administer, and judicial responses to adversarial imbalance or pretrial pugnacity are constrained by time, information and perception of role. Although recent amendments to the Federal Rules encourage greater use of discovery sanctions, such formal mandates are likely to have limited effect on the incentive and information structures that impede judicial oversight.
>
> These constraints on judicial governance are readily exploited by resourceful counsel. Many of the nation's most eminent law firms are noted for their skill in genteel procrastination. . . . Nor is delay the only pretrial pathology. The adversarial framework has often generated an ethos in which truth becomes more an obstacle than an objective. In a national survey of 1,500 large-firm litigators, half of those responding believed that unfair and inadequate disclosure of information prior to trial was a 'regular or frequent' problem. Similarly 69% of surveyed antitrust attorneys had encountered unethical practices in complex cases; the most frequently cited abuses were tampering with witnesses' responses and destroying evidence.
>
> As in Norman trial by combat, the prime objective in much contemporary litigation is to force the adversary to 'cry craven' well before discovery of critical facts or adjudication by a neutral decisionmaker. The objective is frequently achieved. According to a survey of Chicago litigators, one in three cases was concluded without at least one party having discovered potentially significant information.

Rhode, "Ethical Perspectives on Legal Practice," 37 Stan. L. Rev. 589, 597-99 (1985) (citations omitted).

One could endlessly debate just how extensive these problems are today. One thing, however, is not debatable: some lawyers and their clients have concluded that cheating—despite the risks of getting caught—pays. *Cf.* Spencer, "Do Not Fold Spindle or Mutilate: The Trend Towards Recognition of Spoliation as a Separate Tort," 30 Idaho L. Rev. 37, 63 (1993-94) ("Spencer") (failure to recognize spoliation torts "would invite the destruction or suppression of relevant evidence by an opponent

or third-party"). Armed with Fourth District's decision below, one would be hard-pressed to quarrel with their logic. Indeed, the Growers believe that the decision sends a disturbing signal in Florida to those who would even contemplate the knowing destruction of evidence. Yes, for the lawyers, there is the risk of a bar grievance for violating Rule 4-3.4 of the Rules Regulating the Florida Bar. 835 So.2d at 1256. For a party who destroys evidence, unspecified "sanctions" may follow. *Id*. If the Fourth District's view of spoliation becomes the law of this state, however, lawyers and their clients can be assured that when the destruction of evidence *succeeds*, the aggrieved party will have no monetary remedy.

Multiple factual scenarios serve as compelling examples. For lack of evidence that has been destroyed, many meritorious cases will never be brought; others will be dropped. For lack of evidence that has been destroyed, some cases will simply fail due to insufficient proof, whether at summary judgment, directed verdict or following a complete trial and jury deliberations. For lack of evidence that has been destroyed, parties with meritorious claims will be obliged to discount the value of those claims in settlement. In each such instance, the destruction of evidence will result in an improper and unfair advantage over an adversary. For the "bad man" (or woman) described by Holmes, who is motivated only by "the material consequences of his actions," cheating can and will pay. *See* Nesson, "Incentives to Spoliate Evidence in Civil Litigation," 13 Cardozo L. Rev. 793, 795-803 (1991) ("Nesson") (describing inherent failures in the legal system which make the temptation to destroy or suppress evidence too great for lawyers and litigants unmotivated by conscience) (citing Holmes, "The Path of the Law," 10 Harv. L. Rev. 457 (1897)). The courts should

show a "change in judicial attitude" and actively employ a full range of remedial measures, including the spoliation tort. *Id.* at 806.

B. The Fourth District's Distinction Between 'First Party' and 'Third Party' Spoliation Claims Fails to Ensure Adequate Remedies for Parties Aggrieved by Spoliation.

"Spoliation principles have grown in recent years because of an increasing sentiment against document destruction." Egan, "Arthur Andersen's Evidence Destruction Policy: Why Current Spoliation Standards Do Not Adequately Protect Investors," 34 Tex. Tech L. Rev. 61, 64 (2002) (citing Kindel & Richter, "Spoliation of Evidence: Will the New Millennium See a Further Expansion of Sanctions for the Improper Destruction of Evidence?," 27 Wm. Mitchell L. Rev. 687, 706 (2000)). In an unbroken series of decisions beginning with *Bondu v. Gurvich*, 473 So.2d 1307 (Fla. 3d DCA 1984) ("*Bondu*"), the Third and Fourth District Courts of Appeal responded to this sentiment through the recognition of the spoliation tort. *See Continental Ins. Co. v. Herman*, 576 So.2d 313 (Fla. 3d DCA 1990) ("*Herman*"); *Miller v. Allstate Ins. Co.*, 573 So.2d 24 (Fla. 3d DCA 1990) ("*Miller*"); *Brown v. City of Delray Beach*, 652 So.2d 1150 (Fla. 4th DCA 1995) ("*Brown*"); *St. Mary's Hospital, Inc. v. Brinson*, 685 So.2d 33 (Fla. 4th DCA 1997) ("*St. Mary's*"); *Strasser v. Yalamanchi*, 783 So.2d 1087 (Fla. 4th DCA 2001) ("*Strasser*"); *Hagopian v. Publix Supermarkets, Inc.*, 788 So.2d 1088 (Fla. 4th DCA 2001) ("*Hagopian*"). *But see Jost v. Lakeland Regional Medical Center, Inc.*, 28 Fla. L. Weekly D710 (Fla. 2d DCA March 12, 2003) (following the Fourth District's decision herein).

Prior to the Fourth District's decision in this case, neither court had drawn the distinction between 'first party' and 'third party' spoliation drawn by the Fourth

District here. Indeed, in this case, the Fourth District avoided the question of duty, *see* 835 So.2d at 1254, which frequently troubles courts and commentators seeking to explore the contours of the spoliation tort. *See, e.g. Pennsylvania Lumberman's Mutual Ins. Co. v. Florida Power & Light Co.*, 724 So.2d 629 (Fla. 3d DCA 1999) ("*Pennsylvania Lumberman's*") (potential claimant's *failed* attempts to place party on notice of need to preserve evidence did not give rise to the duty element of a spoliation claim); *Brown*, 652 So.2d at 1153 (police department's failure to honor promise to preserve physical evidence from accident scene gave rise to spoliation claim against city)

[1]; *Miller*, 573 So.2d at 27 (insurer's failure to honor contractual obligation to preserve evidence gave rise to spoliation claim); Spencer, 30 Idaho L. Rev. at 56-57 (factors which may lead to recognition of a duty).

Oddly enough, it is the extension of this duty to 'third parties' that probably represents a more significant development of the tort law because the obligation of 'first party' adversaries to preserve evidence was already there. As the Fourth District explained in *Strasser*,

> a party does have an affirmative responsibility to preserve any items or documents that are the subject of a duly served discovery request. *See Figgie Int'l, Inc. v. Alderman*, 698 So.2d 563, 567 (Fla. 3d DCA 1997) ("[T]he duty of a litigant to preserve relevant evidence is established by the opposing party's submission of a discovery request identifying documents of the same subject matter as those which the receiving party possesses. . . .").

783 So.2d at 1093. Yet the Fourth District's decision in this case appears to have equal application to the destruction of evidence prior to suit, during suit, and following the service of discovery seeking such evidence. It appears to apply even to parties who do not discover the destruction of evidence until

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[1]One federal court has interpreted *Pennsylvania Lumberman's* and *Brown* as giving rise to a duty to preserve evidence upon receipt of "formal notice of plaintiff's intent to file a lawsuit." *Silhan v. Allstate Ins. Co.*, 236 F. Supp.2d 1303, 1313 n. 13 (N.D. Fla. 2002) ("*Silhan*").

after a lawsuit has concluded.[2]

It is the latter two circumstances that are of particular concern to the Growers here because in the Broward County Actions they have alleged that (1) DuPont suppressed and destroyed evidence DuPont had an obligation to produce in discovery and (2) they did not learn of DuPont's misconduct until long after they settled their cases for substantial discounts.[3] The most severe lawyer discipline would do nothing to remedy the wrong alleged by the Growers. Similarly, the full panoply of in-court sanctions, otherwise available to litigants during a lawsuit, provide no comfort to those who only belatedly discover that an adversary has destroyed evidence.

Public policy supports the availability of remedies for those who discover only after a case settles that an adversary has suppressed or destroyed evidence. *Cf. Mazzoni*, 761 So.2d at 313-14 (party fraudulently induced to settle may elect to sue to rescind settlement or sue for damages).[4] As

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[2]This latter feature amounts to an unexplored extension of *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal.4th 1, 74 Cal. Rptr.2d 248, 954 P.2d 511 (1998) ("*Cedars-Sinai*"), upon which the Fourth District relied, because in *Cedars-Sinai*, the California Supreme Court expressly declined to consider whether 'first party' spoliation claims would lie when the spoliation comes to light only after the underlying litigation is decided "on the merits." 954 P.2d at 521 n. 4. One solution would be to allow, as New Jersey does, an independent tort claim for "fraudulent concealment" when "the spoliation is not discovered until after the underlying action has been lost or otherwise seriously inhibited." *See Rosenblit v. Zimmerman*, 166 N.J. 391, 766 A.2d 749, 758 (2001).

[3]In *Mazzoni*, the plaintiffs made similar allegations. *See* 761 So.2d at 309 ("After executing the releases, the nurseries discovered information which led them to believe that DuPont intentionally concealed the value of the nurseries' claims to induce settlement. Specifically, the nurseries alleged that DuPont had discovered the perilous effects of Benlate in its field tests, destroyed the test plants and fields, and required all of the participants in the testing process to sign confidentiality papers.").

[4]One federal court has rejected this reading of *Mazzoni*, finding that Florida law bars claims of fraudulent inducement to settle, based on the concept of "immunity for litigation conduct" outlined in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So.2d 606 (Fla. 1994). *See Florida Evergreen Foliage v. E.I. du Pont de Nemours & Co., Inc.*, 135 F. Supp.2d 1271, 1280 (S.D. Fla. 2001), *question certified, id.* at 1297-98 ("Reasonable jurists could disagree with this Court's interpretation of Florida and Eleventh Circuit precedent."). The same court has dismissed spoliation claims similar to those of the Growers, ruling

Nesson has explained,

> The fact that most civil cases settle before trial further reduces the spoliator's risk of being caught. Once a case settles, there is virtually no chance of spoliation coming to light thereafter because the victimized litigant has no occasion, incentive, or practical means to investigate further. The case is closed. Fees are paid. The lawyers move on to other matters. This gives the bad man a potent strategy: suppress and settle. Suppression will deprive the opponent of valuable evidence and will promote a favorable settlement; settlement will produce closure that effectively seals the case.

13 Cardozo L. Rev. at 796.

C. The Spoliation Remedy Should Extend Not Only to Parties in Litigation, But Also to Parties Facing Prospective Litigation.

While the obligation of parties to a lawsuit to refrain from the destruction of evidence is clear enough, the decisions of the District Courts of Appeal have not thoroughly addressed the question whether such an obligation exists when litigation is likely or certain to follow. It is perhaps ironic that the Fourth District appears to have assumed the existence of such a duty on the part of a defendant in *Hagopian*, which like this case, concerned a premises liability claim against a retail chain store, and an attendant 'first party' spoliation claim. *See* 788 So.2d at 1090 ("The trial court . . . found that the [store] manager's preparation of an incident report on the date of the accident, together with Publix's refusal to give a copy to appellant based upon work product grounds, evidenced Publix's anticipation of litigation and therefore the necessity of preserving the instrumentality of injury, [a] bottle."). In fact, one federal

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as a matter of law that the alleged destroyed evidence was "cumulative" of other available evidence. *Florida Evergreen Foliage v. E.I. du Pont de Nemours & Co., Inc.*, 165 F. Supp.2d 1345, 1360-61 (S.D. Fla. 2001). The court also held as a matter of law that concealment of evidence is "immune litigation conduct, and is not actionable." *Id.* at 1361.

court has interpreted *Hagopian* as determining "that an adverse party's duty to preserve evidence is created when that party recognizes that an adverse suit is imminent." *Silhan*, 236 F. Supp.2d at 1313.

It is worth noting a *plaintiff* responsible for the spoliation of evidence material to a pending—or contemplated lawsuit—must ordinarily suffer the consequences, including dismissal of his or her case if the loss or destruction of such evidence impairs the defense of the lawsuit. *See, e.g.*, *Torres v. Matsushita Electric Corp.*, 762 So.2d 1014, 1017-18 (Fla. 5th DCA 2000) (en banc) ("*Torres*"). As Judge Harris explained in his concurring opinion in *Torres*, "If one knows that he, she, or it is about to become involved in a civil action, this alone should be sufficient special circumstance to impose a duty of care to preserve such evidence in such potential party's possession that a reasonable person would foresee is material to that action." *Id.* at 1014 (Harris, J., concurring) (citing *Boyd v. Travelers Ins. Co.*, 166 Ill.2d 188, 209, 652 N.E.2d 267, 270 (1995). It is difficult to see why this principle should not apply equally to prospective defendants, as well as plaintiffs. Indeed, in *St. Mary's*, the Fourth District appears to have assumed that knowledge of a prospective claim against a 'third party' is adequate to impose a duty to preserve evidence in a 'third party' spoliation case. *See St. Mary's*, 685 So.2d at 34.

The spoliation tort should provide a remedy to all those who are harmed by the destruction of evidence, whether litigation exists or is reasonably foreseeable.

D. Deterrence Is Not the Only Purpose Served By Recognition of 'First Party' Spoliation Claims.

Recognition of the spoliation tort is not merely to deter the destruction of

material evidence. As the Third and Fourth Districts have explained, a cause of action is "a valuable 'probable expectancy' that the court must protect from interference." *St. Mary's*, 685 So.2d at 35 (quoting *Miller*, 573 So.2d at 26). *See also Herman*, 576 So.2d at 315 ("In *Miller* we tracked the origin and development of the cause of action under some of its various nomenclatures, *e.g.*, the loss of the value of a chance, loss of an opportunity to litigate, spoliation of evidence, or interference with a prospective civil action."). These policies derive not only from Florida's spoliation cases, but are rooted in Florida constitutional law. Through its access to courts guarantee, Art. I ¡±21, Fla. Const., the "Florida Constitution implements the maxim that for every wrong there is a remedy." 10 Fla. Jur.2d ¡±317 at 657 (1997) (citing *Holland v. Mayes*, 19 So.2d 709, 711 (Fla. 1944) ("When we commenced the study of law, we were early confronted with the maxim; For every wrong there is a remedy. Section Four of our Declaration of Rights . . . was designed to give life and vitality to this maxim."), *criticized on other grounds, Mendez v. Blackburn*, 226 So.2d 340 (Fla. 1969)). Recognition of the spoliation tort gives life to this legal maxim by ensuring a remedy for damage to a party's legal rights due to the destruction of evidence.

II. Other Concerns Expressed by the Fourth District Do Not Justify Rejection of the Spoliation Tort.

The Fourth District cited the California Supreme Court's decision in *Cedars-Sinai* with approval in concluding that the spoliation tort should be limited to 'third party' cases. 835 So.2d 1254-55.[5] In

[5]*Cedars-Sinai* expressly disapproved of *Smith v. Superior Court*, 151 Cal.App.3d 491, 198 Cal. Rptr. 829 (1984) ("*Smith*"), upon which the Third District relied in *Bondu*, 473 So.2d at 1312. One historical footnote to *Smith* is that the spoliation claim never reached trial. "Soon after the appellate ruling came down, the defendant informed plaintiffs' counsel that the [missing] evidence had reappeared and within weeks settled for a large sum of money." Solum & Marzen, "Truth and Uncertainty:

addition to the purported adequacy of other remedies, "[p]aramount among the [California Supreme C]ourt's concerns were the speculative nature of the harm and damages, and the potential for abuse." The California Supreme Court questioned whether a "new cause of action could accrue each time a plaintiff loses a lawsuit, for in most cases there is likely to be some piece of potential evidence that is not available at the time of trial." *Id.* at 1255 (citing *Cedars-Sinai*, 954 P.2d at 519) (other citation omitted). *But cf. Self v. Self*, 58 Cal.2d 683, 376 P.2d 65, 70, 26 Cal. Rptr. 97 (1962) (arguments that tort action will "inundate the courts with trifling suits . . . are not relevant in an intentional tort case").

The Fourth District noted just a few years ago that "[t]he cause of action for spoliation of evidence is part of Florida jurisprudence." *DiGuilio v. Prudential Property & Casualty Ins. Co.*, 710 So.2d 3, 5 (Fla. 4th DCA 1998) (citing *Bondu*) (other citations omitted). In the absence of empirical evidence, the Court should be skeptical of feared abuse of the spoliation tort in Florida. Although the Third District decided *Bondu* in 1984, prior to the Fourth District's decision in this case, the First Second and Fifth District Courts of Appeal had not even decided a spoliation case. Moreover, the elements of proof required to prevail in a spoliation case reduce the risk of abuse in Florida. Among other things, a spoliation plaintiff must prove that a defendant's destruction of evidence resulted in a "significant impairment in the ability to prove the lawsuit." *Compare Hagopian*, 788 So.2d at 1091 ('first party' spoliation claim) *with Herman*, 576 So.2d at 315 ('third party' spoliation claim). The type of evidence contemplated here is not merely "some piece of potential evidence that is not available at the time of trial," 835 So.2d at 1255 (citiation omitted), but evidence which results in a "significant impairment" of the plaintiff's rights. In this setting, the Third District has applied the ordinary dictionary definition of the word "significant," meaning "having or likely to have influence or effect." *Herman*, 576 So.2d at 316 (citation omitted). The obligation to satisfy this element of the spoliation tort adequately addresses the concerns expressed by the Fourth District. Certainly, the law is equipped to have courts and juries determine whether wrongfully withheld information or evidence would have made a difference to the parties. The question of materiality in fraud cases is but one example where a finder of fact must consider such issues.

Legal Control of the Destruction of Evidence," 36 Emory L.J. 1085, 1101 (1987) (citation omitted).

On the question whether spoliation claims may be "speculative," it is difficult, if not impossible, to understand how the Fourth District could draw a distinction between 'first party' and 'third party' spoliation claims. In any event, Florida courts should not refuse to allow a legal remedy against an adversary who is responsible for making proof of damages difficult. Florida recognizes the common law principle that difficulty in proving the exact amount of damage does not bar recovery when the fact of damage is shown and there is a reasonable basis for the amount awarded. *See, e.g., Centex-Rooney Construction Co. v. Martin County*, 706 So.2d 20, 28 (Fla. 4th DCA 1998) (breach of contract); *W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So.2d 1348, 1350-51 (Fla. 1989) (lost profits).

Rejecting the spoliation tort on the ground that spoliation damages are speculative would also reward the party responsible. As the United States Supreme Court has explained, "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.* 327 U.S. 251, 265, 66 S.Ct. 574, 580 (1946). This principle has application across a variety of causes of action. *Id.* "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty in ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights." *Id.*

Conclusion

For the reasons stated herein, this Court should approve *Bondu* and disapprove the Fourth District's decision herein.

Certificate of Service

I CERTIFY that this brief and the accompanying motion were served by U.S. Mail on Rosemary B. Wilder, Esquire Marlow, Connell, Valerius, Abrams, Adler & Newman, 2950 S.W. 27th Avenue, Suite 200, Miami, FL 33233-9075, Philip Burlington, Esquire, 1615 Forum Place, West Palm Beach, FL 33401 and Steven W. Halvorson, Esquire, 1615 Forum Place, West Palm Beach, FL 33401 on this 25th day of April, 2003.

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