IN THE SUPREME COURT OF FLORIDA
Lower Tribunal No. **4D01-2693**

Case No. SC03-334

RONNA MARTINO and RAYMOND MARTINO,

Petitioners,

v.

WAL-MART STORES, INC.,

Respondent.

BRIEF OF RESPONDENT WAL-MART STORES, INC.

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INTRODUCTION

The Respondent/Defendant, Wal-Mart Stores, Inc., shall be referred to as "Wal-Mart".

The Petitioner/Plaintiffs, Ronna and Raymond Martino shall be referred to in the singular as "Martino".

The record on appeal shall be designated as "R"

The trial transcript in the record on appeal shall be designated as "T"

All emphasis in the brief is that of the writer unless otherwise indicated.

STATEMENT OF THE FACTS AND CASE

On March 1, 1997, Mrs. Martino went to the Wal-Mart store located on State Road 7 in West Palm Beach, Florida in order to purchase some computer paper and some salt for her water softener (T-41). Upon entering the store, she obtained a shopping cart (T-47). She gathered the majority of her merchandise and placed it into her shopping cart (T-43). However, she had to get the salt, which comes in 40 pound bags, from the Garden Center (T-42). Martino put two bags of salt in a different shopping cart in the Garden Center, and then she transferred them into her cart later (T-42-43). Mrs. Martino had no difficulty whatsoever in lifting the bags of salt when she retrieved them from the Garden Center at the store (T-69). Additionally, she had no problem lifting the bags of salt when she transferred the bags of salt from one cart to the other (T-69). She described the accident:

> I was in the line and she (Wal-Mart cashier) was finishing up with her customer that was right in front of me and she asked if I could pick up this bag of salt so that she could get the sku number, and instead of actually picking it up and putting it on the counter, because it was heavy, I was going to set it in the front of the basket where a child would sit. And when I went to put it in there, I had it right in the position to put it in and I thought I was dropping it in there and when I did the, um, basket part where a child would sit closed.

(T-68-69)

The plaintiff said that she did not know if the cart broke or if the cart malfunctioned (T-58, 70-74). She said she sustained a puncture wound to her wrist because: "When the bag hit the bottom or the seat part is when it pulls my arm down into the bottom of the shopping cart..." (T-45).

Following the incident, Martino continued to use the cart to take her merchandise to her car (T-72). After she loaded her merchandise, she left the cart in the parking lot (T-53). Martino testified she went home and some time later:

> I called the store and asked for the manager. The manager was not in, so they said they would connect me to the assistant manager. I spoke to Rick Ramos over the phone, which was the assistant manager at the time and I explained to him how I felt with my arm and he asked me at that point why I didn't tell somebody.
>
> I explained to him I had told the cashier and that she shrugged her shoulders and that maybe she didn't understand what I was saying (the cashier is Vietnamese). I knew that I had to take care of my arm because it was bleeding and so he told me at that point, advised me to go to the emergency room and that it sounds that what I said could be a possibility. So I did that, I went to the Wellington Regional Hospital.
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> * * *
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> I did exactly what Rick Ramos asked me to do, which was to stop by the store and see him so that I could pick up the incident report and phone number so that it could be submitted to Wal-Mart claims department.
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> * * *
>
> I told Rick Ramos when I told him on the phone, he asked me where the shopping cart was. I told him then that the shopping cart was out in the

parking lot. I told him approximately where and so forth.

> That's when he said to me, could you please stop by the store on your way back from the hospital, if you can. He was very concerned over it and he understood that I was injured. So I did stop by there and at that point I told him and pointed out to where exactly the shopping cart was.
>
> And also we made note of the video camera that was over head of the cashier when you're checking out. There are security cameras. I said, please pull the video camera or the video tape out of there so you can see exactly what happened. And also pull the shopping cart for two reasons, more so on part was to protect somebody else from getting hurt on the same shopping cart because at that point I really did not believe that my arm was severely, severely injured. (T-52-53)

However, the Plaintiff was unable to show that there was in fact a video camera filming the check out line that she used, or that a video tape ever existed in the first place. (T-87). Wal-Mart never found a broken shopping cart despite looking for it (T-86).

Martino filed suit two years later against Wal-Mart, alleging that it negligently maintained its premises (R-1-5). Martino filed a second amended complaint adding a count for spoliation of evidence, based on allegations that the shopping cart and video tape existed and Wal-Mart should have saved them (R-310-316). Wal-Mart answered and moved to dismiss the spoliation Count, because Martino did not allege ultimate facts indicating that Wal-Mart had a legal or contractual duty to preserve the evidence (R-351-360). The trial court granted WalMart's motion to dismiss (R-374-375). The

parties then agreed to bifurcate the trial, which began on June 4, 2001.

Admittedly, Martino produced absolutely no evidence that Wal-Mart either created a dangerous condition, or that Wal-Mart had actual or constructive knowledge of a dangerous condition on its premises (T-107-114). Instead, Martino sought to get to the jury based on an inference of negligence, arising from spoliation of evidence, or on a theory that Wal-Mart had a negligent method of operation (T-107-114). Martino argued that she was entitled to an inference of negligence, because Wal-Mart knew she had a potential civil cause of action and it failed to preserve the shopping cart and video tape (T107-114). Martino's argument that Wal-Mart had a negligent method of operation, was based on the allegations that Wal-Mart's cashier asked her to lift the bags of salt onto the counter, rather than manually entering the product number and that WalMart failed to have a "uniform system for inspecting its carts" (T-107-114). However, the evidence showed that Wal-Mart shopping carts were inspected by an independent maintenance company 2 to 3 times per year (T-87). Additionally, the carts were inspected regularly by the stockmen (T-88). The trial court found that Martino was not entitled to an inference of negligence based on spoliation of evidence, and that Martino's evidence of negligent method of operation failed to establish a prima facie case as a matter of law. Accordingly, the trial court directed a verdict and entered a final judgment in favor of Wal-Mart (T107-114). Martino appealed and the Fourth

District found that no cause of action existed for the tort of first party spoilation, in direct conflict with the Third District. *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251, 1256 (Fla. 4th DCA 2003); *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. 3d DCA 1984).

The Fourth District reversed for a new trial on Martino's negligent maintenance theory on the basis she was entitled to argue an adverse inference due to Wal-Mart's failure to produce the cart, even though there may have been no duty to preserve the evidence. *Martino,* 1257.

The appellate court also reversed for a new trial on the negligent mode of operation theory; finding that it has existed in tort law since *Wells v. Palm Beach Kennel Center*, 35 So. 2d 720 (Fla. 1948), and that the decision in *Owens v. Publix Supermarkets, Inc.*, 802 So. 2d 315 (Fla. 2001) was not being applied retroactively to Martino's 1999 lawsuit. *Martino* 835 So. 2d at 1257-1258. Martino timely appealed to this Court for resolution of the District Court conflict.

SUMMARY OF THE ARGUMENT

At issue is sanctions for litigation related misconduct. Out of the dozens and dozens of cases around the country addressing spoliation, an overwhelming majority found that the sanction power of the trial court is more than adequate to address the issue of litigation misconduct, including pre-litigation and post-litigation wrongdoing. The majority of state Supreme Courts ruling on this exact question have found that the availability of sanctions under a trial court's powers, whether inherent or under Rules of Civil Procedure, are more than adequate to deal with all issues of spoliation; whether the spoliation is intentional or negligent, whether it involves first parties or third parties, and whether it takes place before, during or after litigation and there is no need for an independent tort. Florida should follow suit.

This Court should not adopt a per se common law duty to preserve evidence. There is no need to turn every accident scene into a crime scene. There was absolutely nothing about the circumstances of Martino's injury that would put Wal-Mart on notice that she was planning to sue Wal-Mart. There was no duty imposed on Wal-Mart to preserve evidence and Mrs. Martino was not entitled to any jury instruction on spoliation of evidence or an adverse inference and the verdict for Wal-Mart must be affirmed.

Even if this Court recognizes an independent tort for spoliation, it cannot lie in

the case, where there was no duty to maintain the evidence, with no facts or circumstances indicating litigation was imminent or foreseeable and no actual notice that Martino was going to or had sued. The plaintiff was not entitled to an adverse inference, as she could not meet the *Valcin, infra* test and no jury instruction was required. Martino presented her evidence on negligent maintenance, which included the lack of timely cart inspection, but there was no evidence that Wal-Mart's biannual, or triannual cart inspections were the proximate cause of her injury. Wal-Mart had no duty to preserve the cart, therefore there was no basis for an adverse inference and Martino simply cannot prove negligent mode of operation, as a matter of law. The verdict for Wal-Mart must be reinstated.

I. THE FOURTH DISTRICT CORRECTLY REFUSED TO RECOGNIZE AN INDEPENDENT TORT OF FIRST PARTY SPOLIATION AND FLORIDA SHOULD JOIN THE MAJORITY OF JURISDICTIONS WHICH AGREE WITH THIS POSITION.

This is a case of first impression in this Court. The Plaintiff and Amici have collectively argued virtually every aspect of spoliation and have made numerous suggestions on how this Court should rule. It is submitted that this Court should join the majority of jurisdictions throughout the United States which do not recognize the need for an independent tort of spoliation of evidence, whether committed negligently or intentionally and these litigation related matters are appropriately handled by the trial judge. *Martino* must be affirmed on this issue and *Bondu* quashed.

To date, this Court has only addressed spoliation in its recent decision in *Humana Workers' Compensation Services v. Home Emergency Services, Inc.*, 842 So. 2d 778 (Fla. 2003). In that case, an employee fell from a ladder and received workers' compensation benefits. His employer HES agreed to maintain the ladder for the employee, who intended to pursue a claim against the ladder manufacturer and distributor. The ladder was subsequently misplaced or destroyed. Milian, the employee, later filed suit against the manufacturer and distributor for product liability and sued HES for negligent spoliation of evidence. The issue was whether the employer's liability coverage and commercial general liability coverage required the

insurance carriers to provide a defense and coverage for the claim against the employer for spoilation of evidence. *Humana*, 842 So. 2d at 779-780. Ultimately, the Court found that the plain language of the liability policy did not provide coverage for a claim of negligent spoliation of evidence and such a claim was not one for "bodily injury by accident." *Id* at 781. The Court also pointed out that the damages for a claim of spoliation of evidence are not derived from the plaintiff's bodily injury, but rather from a completely separate incident, where evidence is destroyed and the damage is the inability to prove the underlying action. *Id*.

The following statement in *Humana* could be read as a recognition a cause of action for negligent spoliation:

> Negligent spoliation of evidence is a tort claim based on a defendant's breach of a duty to preserve evidence. The damage that flows from such a breach is the resulting inability to prove a cause of action. Milian's spoliation claim seeks compensation not for bodily injury he sustained in falling from the ladder, but rather, for his loss of probable expectancy of recovery in the underlying suit. *Id*.

Review of the *Martino* decision gives this Court the opportunity to clarify whether in fact it has recognized an independent tort for spoliation of evidence in a third party claim and whether or not such a claim also exists in a first party situation. The majority of jurisdictions in the United States do not recognize an independent tort of spoliation of evidence. There are very strong public policy and legal reasons why

this Court should join the majority of jurisdictions in the United States to find that spoliation of evidence is best handled in the main litigation and not in some subsequent or additional lawsuit.[1]

Florida is generally counted among the eight jurisdictions which have adopted

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[1]Over 36 jurisdictions have considered whether to adopt an independent tort of spoliation, but the vast majority have refused to recognize such an independent tort, including: *Trevino v. Ortega*, 969 S.W. 2d 950 (Tex. 1998) (Texas does not recognize spoliation as a tort cause of action; Texas is especially adverse to creating a tort that would only lead to duplicative litigation, encouraging inefficient re-litigation of issues better handled within the context of the core cause of action by the trial court); *Wilson v. Beloit Corp.*, 921 F.2d 765, 767 (8th Cir. 1990) (no spoliation tort under Arkansas law); *Bell v. CSX Transp.*, 1997 WL 695607 (E.D. Ca. 1999) (applying Louisiana law); *Christian v. Kenneth Chandler Constr. Co.*, 658 So.2d 408, 412-413 (Ala. 1995); *La Raia v. Superior Court*, 150 Ariz. 118, 772 P.2d 286, 289 (Ariz. 1986) (existence of adequate remedies); *Gardner v. Blackston*, 185 Ga.App. 754, 365 S.E.2d 545, 546 (Ga. Cet. App. 1988) (no spoliation tort under Georgia law); *Boyd v. Travelers Ins. Co.*, 166 Ill2d 209 Ill.Dec. 727, 652 N.E.2d 267, 270 (Ill. 1995) (traditional negligence remedies sufficiently address the issue and remove the need to create an independent cause of action); *Murphy v. Target Prods.*, 580 N.E.2d 687, 690 (Ind.Ct.App. 1991) (no common-law duty for employer to preserve potential evidence for employee's benefit); *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997) (existence of adequate remedies); *Miller v. Montgomery County*, 64 Md.App. 202, 494 A.2d 761, 767-68 (Md.Ct. App. 1985) (existence of adequate remedies); *Panich v. Iron Wood Prods. Corp.*, 179 Mich. App. 136, 445 N.W.2d 795, 797 (Mich. Ct. App. 1989) (no cause of action under facts of case); *Brown v. Hamid*, 856 S.W.2d 51, 56-57 (Mo. 1993) (existence of adequate remedies and not appropriate on facts of case). Add *Comp. Lucas v. Christian A. Skating Center, Inc.*, 722 A. 2d 1247 (Del. Super. Ct. 1998); *Fletcher v. Dorchester Mutual Ins. Co.*, 2002 WL 1870258 (Mass. 2002). *Manorcare Health Services Inc. v. Osmose Wood Preserving, Inc.*, 764 A. 2d 435 (N.J. 2001); *Tiano v. Jacobs*, 2001 WL 225037 (S.D.N.Y. 2001) (applying New York); *Rhoads v. Potsville Hospital*, 31 Pa. D & C. 4th 500, 1996 WL 932109 (Pa. Commw. Ct.. 1996); *Estate of Neumann*, 626 N.W.3d 821 (Wis. App. 2001); *Koplin v. Rosez Well Perforation Inc.*, 734 P.2d 1177 (Kan. 1987).

a tort for spoliation of evidence, some based on the Third District's decision in *Bondu*.[2] Fourteen state Supreme Courts have not recognized a tort for spoilation of evidence and three recognize the tort only for intentional spoliation.[3]

It is important to note that the California Supreme Court, in *Cedars-Sinai,* refused to recognize the need for independent tort of spoliation, overruling existing appellate court decisions. California was the first jurisdiction to recognize the independent tort of spoliation of evidence in *Smith v. Superior Court,* 198 Cal. Rptr. 829 (Cal. Ct. App. 1984); *See also, Williams v. California*, 34 Cal.3d 18, 192 Cal.Rprtr. 233, 664 P.2d 137 (1983). *Williams* and *Smith* were the lynch pin for the Third District's decision in *Bondu,* recognizing an independent cause of action for

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[2]*Homes v. Amerex Rent-A-Car*, 710 A.2d 846 (D.C. 1998) (recognizing an independent tort for the negligent spoliation of evidence only against a third party to the underlying civil litigation); *Bondu, supra*; *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185 (N.M. 1995); *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993); *Oliver v. Stinson Lumber Co.*, 993 P.2d 11 (Mont. 1999)(recognizing only third part spoliation tort); *Smith v. Atkinson*, 771 So. 2d 429 (Ala. 2000); *Hazen v. Municipality of Anchorage*, 718 P.2d 456 (Alaska 1986); *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267 (Ill. 1995).

[3]*Cedars-Sinai Medical Center v. Superior Court*, 954 P.2d 511 (Cal. 1998); *Dowdle Butaine Gas Co., Inc. v. Moore*, 831 So.2d 1124 (Miss. 2002); *Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky. 1997); *Murray v. Farmers Ins.* Co., 796 P.2d 101 (Idaho 1990); *Federated Mutual Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434 (Minn. 1990); *Trevino, surpra*; (refusing to recognize any independent tort of spoliation of evidence); *Fletcher, supra; Brown, supra; Koplin, supra; LaRaia, supra; Torres v. El Paso Elect. Co.*, 987 P.2d 386 (N.M. 1999); *Atkinson, supra*; *Boyd, supra*; *Timbertech, Nickols, Austin, Meyn, infra.*

spoliation of evidence which it found was not a new tort. *Bondu, supra* at 1312.

The bottom line is that the overwhelming majority of jurisdictions and state Supreme Courts in the United States have found no independent tort of spoliation of evidence. Therefore, the weight of legal authority is with the Fourth District's decision in *Martino* and it must be affirmed.

A. *Background law*

Evidence spoliation has been dealt with by courts for almost 400 years. The original solution was a spoliation inference or "omnia praesumuntur contra spoliatorem," meaning all things are presumed against a wrongdoer. *Rex v. Arundel*, 1 Hob 109, 80 Eng. Rep. 258 (K.B. 1617) (applying the spoliation inference); *Brown, supra* (pointing out that Missouri has recognized the spoliation inference for over a century). *Black's Law Dictionary* defines "spoliation" as "the intentional destruction of evidence"; and the first recorded imposition of a sanction for spoliation of evidence was in 1722 in *Armory v. Delamirie*, 93 Eng. Rep. 664 (K.B. 1722). *Black's Law Dictionary*, 1401 (6th Ed. 1990).

One of the difficulties in allowing a tort of spoliation is that many courts recognize is that the damages are speculative, because the damages inquiry is difficult, since evidence spoliation tips the balance in the lawsuit and does not create damages amenable to monetary compensation. *Trevino, supra* at 952; *Smith, supra* at 835;

Cedars-Sinai, supra at 954 P.2d 515-516; *Koplin, supra*, at 1183; *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312, 1320 (Ill. Ct. App. 1986); *Humana, supra* (this Court pointed out that the basis of cause of action for spoliation of evidence is "an intangible and beneficial interest in the preservation of evidence"; noting that the plaintiff's spoliation claim sought compensation for the loss of a probable expectancy of recovery in the underlying suit).

The Texas Supreme Court in *Trevino* refused to recognize an independent tort of spoliation of evidence, finding it unnecessary since the traditional response to such a problem properly frames the alleged wrong as an evidentiary concept, not a separate cause of action. *Trevino* at 952; *See also, Cedars-Sinai, supra* at 954 P.2d at 517-518. The Court in *Trevino* substantiated its refusal to recognize spoliation as an independent tort, with the analogous line of cases refusing to recognize a separate cause of action for perjury or embracery, other forms of litigation misconduct.[4] *Id.* That Supreme Court pointed out that evidence spoliation, civil perjury, and civil embracery all involved improper conduct by a party or a witness within the context of the underlying suit. A number of courts considering the issue have refused to allow the wronged party to bring a separate course of action for either perjury or embracery.

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[4]Embracery is the crime of attempting to influence the jury corruptly to one side or the other. *Black's Law Dictionary*, 522 (6th Ed. 1990).

Id. and cases cited therein. These decisions, which the Texas Supreme Court embraced, relied on public policy concerns, such as insuring the finality of judgments, avoiding duplicative litigation and recognizing the difficulty in calculating damages, citing to, among other cases, *Kessler v. Townsley*, 132 Fla. 744, 182 So. 232 (1938).

The Texas court went on to point that evidence spoliation would create an impermissible layering of liability and would allow a plaintiff to collaterally attack an unfavorable judgment, with a different fact finder, at a latter time, in direct opposition to the sound policy of insuring the finality of judgments. *Trevino, supra; See also Cedars-Sinai, supra* at 515-516. Parties would be allowed to litigate how the case was litigated. In *Trevino* the Court found that the creation of an independent tort was not warranted, because of a simpler, more practical, and more logical method for rectifying any improper conduct, within the context of a lawsuit, which was with trial judges who had broad discretion to take measures ranging from jury instructions on the spoliation presumption, to far more egregious cases which required the severest sanctions. *Id*. at 953. Like Florida, the Texas court reminded that the trial court must respond appropriately based on the particular facts of each individual case as with any discovery abuse or evidentiary issue. The Court found that the best and most efficient way to rectify any improper conduct was within the context of the lawsuit in which it is relevant, as obligations not to destroy evidence arise in the context of particular

lawsuits, therefore, spoliation is best remedied within the lawsuit itself and not a separate tort. *Id*.

Another concern of some courts is the possibility of an unwarranted intrusion on personal property rights of those who lawfully dispose of their own property. *Koplin, supra* at 1183.

The analysis and rationale used by the Texas Supreme Court in *Trevino*, represents the majority view in the United States and the view of the vast majority of state Supreme Courts which have considered this issue. *Cedars-Sinai; Christian; LaRaia, Boyd; Montsanto; Brown; Dowdle; Koplin; Fletcher, supra.* It is submitted that this Honorable Court should adopt these rationale and public policy reasons for recognizing the lack of necessity of a new independent tort of spoilation of evidence and this portion of the *Martino* decision should be affirmed.

Having said that, however, Wal-Mart is not unmindful of all the various other issues that have been raised regarding spoliation, the duty to preserve evidence, the remedies for spoliation, etc. Martino suggests that this Court should recognize an independent tort of spoliation of evidence for both first and third party claims; it should apply in pre-litigation, litigation, and post-litigation circumstances; it should apply to any relevant evidence; it should apply regardless of whether the evidence "substantially impairs" the plaintiff's cause of action; it should apply even if there is

no prejudice to the plaintiff from the lack of the relevant evidence; and if the missing evidence has some effect on the plaintiff's case the result should be a directed verdict on liability, or striking the spoliator's pleadings. Martino argues, of course, for the most extreme view of spoliation that could possibly exist, apparently in hopes that this Court will adopt some middle ground view, such as recognizing an independent tort in a first party case.

The elements of a cause of action for spoliation of evidence in Florida appellate courts are: (1) the existence of a potential civil cause of action; (2) a legal or contractual duty to preserve the evidence; (3) destruction of the evidence; (4) significant impairment of the ability to prove the elements of the civil action; (5) a causal relationship between the destruction of evidence and the inability to prove the civil cause of action; and (6) damages. *Continental Ins. Co. v. Herman*, 576 So.2d 313 (Fla. 3d DCA 1990); *Jost v. Lakeland Regional Medical Center*, 28 Fla.L.Weekly D710 (Fla. 2d DCA March 12, 2003).

Spoliation of evidence was first recognized as an independent tort in Florida in 1984, shortly after California. *See,* Stefan Rubin, *Tort Reform: A Call for Florida to Scale Back Its Independent Tort for the Spoliation of Evidence*, 51 Fla. L. Rev 345, 361 (hereinafter *Tort Reform*) . However, the elements of the cause of action were not clearly defined until 1990, when, on the same day, the Third District decided *Miller v.*

Allstate Ins.Co., 573 So. 2d 24 (Fla. 3d DCA 1990) and *Continental Ins. Co. v. Herman*, 576 So. 2d 313 (Fla. 3d DCA 1990). Subsequently, there have been very few reported decisions clarifying the elements. See 51 Fla. L. Rev 345, 361.

B. Why and When to Remedy Spoliation of Evidence

The reasons for fashioning remedies for spoliation of evidence and the public policy behind the need for the remedies in order to insure a fair judicial system were succinctly restated:

> The American judicial system is designed to achieve justice, which can only result from fair trials. In order to achieve this goal, courts strive to ensure that at trial, factfinders will be presented with relevant and trustworthy evidence. After all, at the heart of any court action is the oral and physical evidence which the parties produce at trial to establish their claims and defenses. Because relevant evidence is so crucial to enabling just verdicts, our judicial system has continually found ways to encourage people to safeguard and preserve any potentially relevant evidence.
>
> Unfortunately, sometimes relevant evidence cannot be presented at a trial because it has been negligently or intentionally lost or destroyed before the trial ever began. This is known as spoliation of evidence, and it poses a serious threat to the integrity of our judicial system. Without essential evidence, factfinders in a case cannot make an informed decision because they lack the requisite evidence on which to vase their findings. Thus, for centuries, courts have reprimanded parties who have engaged in the spoliation of evidence. ...
>
> Traditionally, courts have relied on adverse inferences and presumptions to deter a party from destroying evidence. Perhaps the earliest recorded decision to recognize and reprimand the spoliation of evidence was the eighteenth century decision in *Armory v. Delamirie.* In that case, a chimney sweeper's boy found a ring and asked a jeweler to appraise its

> value. The jeweler then removed the stones from the ring and refused to return them to the boy. When the boy sued and the jeweler refused to produce the stones at trial, claiming he had lost them, the court ordered unless the stones were produced, the jury could infer that they were the finest quality. This practice of allowing an adverse inference for nondisclosed evidence is still commonly used today. *Tort Reform*, at 346-349 (Footnotes and citations omitted).

Therefore, the remedies for spoliation of evidence are fashioned to serve three general purposes. *Trevino, supra* at 954. First, the remedy punishes the spoliator for destroying the evidence; second, the remedy deters future spoliators; and third, and most importantly, the remedy serves an evidentiary function. *Id., see also, Cedars-Sinai* at 18 Cal.4th 8.

Having recognized that there are public policy reasons to encourage the preservation of evidence and sanction the loss or the destruction of evidence, the question is whether creating tort liability is justified for such litigation related conduct. A tort involves the violation of a legal duty imposed by statute, contract or otherwise owed by the defendant to the person injured. *Id.* In making the decision on whether to recognize a tort, courts generally weigh the relevant policy considerations both for and against a tort remedy.

The Court in *Cedars-Sinai* found that it had to determine whether a tort remedy for, in that case, intentional first party spoilation of evidence would ultimately create social benefits, outweighing those created by the existing remedies for this type of

conduct and outweighing any costs and burdens it would impose. *Id*. The Court recognized three major reasons why the tort remedy was not necessary or appropriate; (1) the conflict between the tort remedy and the public policy against creating derivative tort remedies for litigation related misconduct; (2) the strength of existing non-tort remedies for spoilation; and (3) the uncertainty of the fact of harm in spoliation cases. *Id*. The Court in *Cedars-Sinai* began by recognizing that using tort law to correct litigation related conduct involved policy considerations not present in deciding whether to create tort remedies for other types or harm in other contexts. *Id.* In the past, California, like the majority of jurisdictions, remedied litigation related misconduct with sanctions imposed within the underlying lawsuit rather than creating derivative torts. *Id*. One of the problems with creating a new tort remedy for litigation related misconduct is that the tort remedy itself would encourage a spiral of lawsuits; observing "we have specifically discounted another round of litigation as an antidote for the fevers of litigiousness, preferring instead the increased use of sanctions within the underlying suit and legislative measures". *Id; citing Rubin v. Green*, 4 Cal.4th 1187, 17 Cal.Rptr.2d 828, 847 P.2d 1044 (Cal. 1993).

The California Supreme Court observed that the law places upon litigants the burden of exposing in a jury trial, the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding and unending roundelay of

litigation. *Id*. at 9. Witness misconduct is routinely handled by the trial judge and is analogous to third party spoliation. As the Texas Court observed in *Trevino*, California also found that it would not be proper to allow a litigant to attack the integrity of evidence after the proceedings had been concluded, except in the most unusual circumstances, such as extringent fraud. Otherwise there would be an impermissible burden on the justice system. *Id*. California also recognized that perjury is not sanctionable by an independent tort, nor is there a tort action for concealment or withholding of evidence, the presentation of false evidence, etc. *Id.* at 9-10. Therefore, finality of adjudication is an important factor in deciding whether to allow additional tort remedies for litigation related conduct. The California Court concluded that weighing against a recognition of a tort cause of action for spoliation was both the strong public policy favoring the use of non-tort remedies, rather than derivative tort causes of action to punish and correct litigation misconduct and the prohibition against attacking adjudications on the ground that the evidence was falsely destroyed. *Id*. at 10. The Court decided that the current evidentiary inferences and rules available in California, as well as a broad range of sanctions for conduct that amounts to a misuse of the discovery process were sufficient. The Court found the civil sanctions to be "potent," ranging from monetary and contempt sanctions to evidence sanctions, to terminating sanctions, including striking part or all of the

pleadings, dismissing part or all of an action, or granting a default judgment. *Id*. at 11-12. Additionally, the California Bar imposes disciplinary sanctions on attorneys who participates in the spoliation of evidence and, finally, California does have a criminal statute imposing a penalty for civil spoliation. *Id*. at 12-13. However, contrary to what Martino suggests to this Court, this was not the decisive factor that California looked at in deciding not to adopt an independent tort of spoliation. This criminal sanction is merely a misdemeanor and applies only to intentional spoliation. Therefore, the procedures in California are not so different, to require the California decision be disregarded by this Court.

The California Supreme Court also considered the fact that in a substantial portion of spoliation cases, the fact of harm would be irreducibly uncertain and even if the jury infers from the act of spoliation that the spoliated evidence was somehow unfavorable to the spoliator, there will be no way of actually telling what the precise evidence would have shown and how much it weighed in the victims favor. *Id*. at 13-14, *citing Petrik, supra*. Therefore, in many spoliation cases a tort remedy for first party spoliation would not accurately compensate for losses caused by the spoliation, or correct the errors in the determination of the issues in the underlying case. *Id*. at 14. In addition to the uncertainty of the fact of harm, which makes the tort remedy a poor way of compensating spoliation victims, there is also the creation of the risk of wrong

determinations of spoliation liability. There could be findings of liability in cases which the availability of the spoliated evidence would not have changed the outcome of the underlying litigation. For example, the erroneous determination for spoliation liability enables the victim to recover damages for avoiding liability for the underline cause of action, when the spoliation victim would not have been able to do this had the evidence be in existence. Moreover, punitive damages attached to the tort of spoliation only magnifies the costs of such an erroneous liability determination. *Id*. at 15.

Another important consideration is the fact that, while Martino claims that there will not be an explosion in litigation, recognizing an independent tort spoliation of evidence, especially under all the circumstances suggested by Martino, could easily lead to a claim for the tort of spoliation in virtually every case:

> There is also the cost to defendants and courts of litigating meritless spoliation actions. A separate tort remedy would be subject to abuse, for in many cases potentially relevant evidence will no longer exist at the time of trial, not because it was intentionally destroyed but simply because it has been discarded or misplaced in the ordinary course of events (Comment, *Spoliation of Evidence: A Troubling New Tort* (1989) 37 U. Kan. L.Rev. 563, 592 ["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"].) Many corporations or entities, for example, have document retention policies under which they destroy as stated intervals of documents for which they anticipate having no further need. (See *Willard v. Caterpillar, Inc., supra*, 40 Cal.App.4th 892, 919-924; *Akiona v. U.S.*

> 938 F.2d 158, 161 (9th Cir. 1991); *Lewy v. Remington Arms Co., Inc.* (8th Cir. 1988) 836 F.2d 1104, 1111-1112; Feders and Guttenplan, *Document Retention and Destruction: Practical Legal and Ethical Considerations* (1980) 56 Notre Dame L.Rev. 5, 7, 11-17, 53-55.) The mere fact of destruction, however, would permit a disappointed litigant to sue the prevailing party for spoliation, and in many cases the issue of the defendant's purpose in destroying the evidence, like many other issues turning on intent and state of mind, could only be resolved at trial. In this case, for example, plaintiff contends that "a trier of fact could easily find intentional spoliation of evidence" from the mere fact that defendant hospital no longer possesses the records in question. *Id.* at 15-16.

Another problem is what the trial will look like if the two torts, the underlying negligence claim and the spoliation of evidence tort are tried jointly. Without a doubt there is a significant potential for jury confusion and inconsistency and the trial would have to be bifurcated. *Id.* at 16. For example, the jury, in a case like the one envisioned by Martino, would first have to consider Martino's underlying negligence claims and if she received complete relief, then the spoliation of evidence caused her no harm, meaning there are no damages and nothing to recover for under that separate tort. *Id.* 16. In the first case, the jury would separately be applying the evidentiary inferences, allowed for the type of spoliation involved and if the jury rejected the spoliation victim's position that would mean it had either rejected the inference, or had decided that even applying the inference the victim was not entitled to recover. *Id.* However, if there were an independent tort, there would be a second trial, or a second

portion, where the jury would consider that independent tort claim and, therefore, would necessarily be reconsidering its deliberations in the first case, and clearly this would not only be confusing, but would lead to inconsistent results. *Id*. The only other way the independent tort could be handled is by having a separate proceeding completely which really would be a retrial within a trial.

Based on the aforementioned reasons and public policies, California joined the majority of jurisdictions in the United States and the majority of state Supreme Courts to address the issue and found no independent tort of spoliation of evidence necessary.

A final consideration regarding the adoption of an independent tort of spoliation of evidence is that such a tort could violate a third party's private property rights and stop or deter the third party (or even a first party) from taking subsequent remedial measures. According to Martino, this Court should adopt a vastly expansive, independent tort; turning every accident scene into a crime scene. In other words, in order to avoid tort liability, every slip and fall, every cut, every car accident, etc., would have to become some type of untouchable scene and everything "relevant" to a potential litigation would have to be preserved, regardless of the injury. A homeowner who has a guest visiting, and the guest trips in a hole in the front yard, is potentially for intentional spoliation of evidence, if the homeowner fills the hole in, so

that no one else is hurt. In the present case, Martino herself testified that the reason she asked Wal-Mart to locate the cart was so that it could be repaired and no one else would be injured by it. She wanted the videotape, if one existed, simply to prove her minor injury at Wal-Mart, so that she could put in a claim in for her E.R. expenses.

A subsequent remedial measure, while part of the public policy of every jurisdiction in the United States, would actually render the third party, or even the first party liable for spoliation of evidence.

While hundreds of thousands minor injuries occur every day, the independent tort of spoliation of evidence would require that anything which could potentially become relevant evidence, if litigation could be brought, would have to be preserved by any entity, first party or third party, if that evidence might be used in some future litigation. While no one has calculated the cost to private business, homeowners, etc., common sense would conclude that the preservation costs would be astronomical and, of course, the cost would have to be passed on to the consumer; while the homeowner, tenant, etc., would simply have to bear the risk of preserving the hole in the front yard, the slippery floor tile in the kitchen, etc., until the injured party either sues or the statute of limitations runs. As pointed out by the Supreme Courts in Texas and California, the public policy reasons and legal considerations for not recognizing an independent tort of spoliation of evidence applies to both first and third parties.

Therefore, most courts do not make the decision on whether the tort would apply based on whether it is a first or third party involved. The majority of jurisdictions in the United States find no need to recognize a tort of spoliation of evidence and Florida should follow suit. *Trevino, supra, Cedars-Sinai, supra; Timbertech Engineered Building Products v. The Home Insurance Company*, 55 P.3d 952 (Nev. 2002) (no independent tort exists for spoliation of evidence regardless of whether the alleged spoliation is committed by a first or third party); *Nickols v. State Farm Fire & Cas. Co.*, 6 P.3d 300 (Alaska 2000); *Meyn v. State*, 594 N.W.2d 31 (Iowa 1999); *Austin v. Consolidation Coal Co.*, 501 S.E. 2d 161 (Va. 1998); *See also, cases collected at* 101 A.L.R.5th 61 sec. 4(b).

C. *Elements of Spoliation*

1. *Duty*

When spoliation prejudices a non-spoliating party, trial courts can impose sanctions or submit a presumption that levels the evidentiary playing field and compensates the non-spoliating party. *Turner v. Hudson Transit Lines Inc.*, 142 F.R.D. 68, 75 (S.D.N.Y. 1991); *Bachmeier v. Wallwork Truck Centers*, 507 N.W.2d 527, 533 (N.D. 1993); *Trevino, supra* at 954. If an issue exists regarding improperly destroyed evidence, the effected party may either move for sanctions or request a spoliation presumption instruction and the trial court determines which remedy is

justified under the facts and circumstances of each case. *Trevino,* concurring opinion at 954-955.

In Florida, the duty to preserve evidence can arise by contract, by statute or by a properly served discovery request after a lawsuit has been filed. *Silhan v. Allstate Ins. Co.*, 236 F.Supp.2d 1303, 1309 (N.D.Fla. 2002); *Bondu, supra* at 1312; *Miller v. Allstate Ins. Co.*, 573 So.2d 24 (Fla. 3d DCA 1984); *Strasser v. Yalamanchi*, 783 So.2d 1087, 1093-1094 (Fla. 4th DCA 2001). Some courts have interpreted two of the Fourth District's decision to impose a duty to preserve evidence in negligent spoliation cases to situations where litigation has not been filed. *Silhan, supra* at 1309; *citing St. Mary's Hosp. Inc. v. Brinson*, 685 So.2d 33 (Fla. 4th DCA 1996); *Hagopian v. Publix Supermarkets, Inc.*, 788 So.2d 1088 (Fla. 4th DCA 2001). The Fifth District, in Judge Cobb's concurring opinion, has also suggested that a duty may arise from "other special circumstances". *Torres v. Matsushita Electric Corp.*, 762 So.2d 1014, 1019 (Fla. 5th DCA 2000); *citing Boyd v. Travelers, supra*. The *Silhan* court pointed out that no Florida court has adopted Judge Cobb's broad and expansive duty to preserve evidence and such an interpretation pushes the duty requirement to the extreme, because it is essentially impossible for everyone to hold onto every piece of potential evidence, just because there is a possibility that litigation could arise sometime in the future. *Silhan* at 1309. Rather, the more reasonable and prudent

approach would be for a duty to arise when the possessor of the evidence is informed by the plaintiff that a lawsuit will be or is filed.

Most cases involving spoliation of evidence involve sometime of statutory or regulatory duty to preserve the evidence, with many of the cases involving lost medical records or reports, like this Court's decision in *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987); *DeLaughter v. Lawrence County Hosp.*, 601 So.2d 818 (Miss. 1992). To date, in Florida there is no common law duty to preserve evidence absent some form of notice of intent to file a lawsuit. *Silhan, supra* at 1312 (the Fourth District's decision in *Brinson* could have been grounded upon a common law duty to preserve evidence due to the foreseeability of future litigation and noting that the *Brinson* spoliation claim was based on statutory and administrative duties of the hospital to preserve the anaesthesia equipment; and pointing out that the Third District had rejected a common law duty to preserve evidence absent *formal notice* to the alleged spoliator of an intent to file a lawsuit in *Pennsylvania Lumberman's Mutual Insurance Co. v. Florida Power & Light Co.*, 724 So.2d 629, 630 (Fla. 3d DCA 1998).

Martino asserts a common law duty to preserve evidence based on the Fourth's District decision in *Hagopian, supra* and that this duty to preserve evidence applies to retail establishments like Wal-Mart. The duty in *Hagopian* arose when the

preparation of the incident report, coupled with Publix's refusal to give it to Mrs. Hagopian based on work-product privilege grounds. *Hagopian, supra* at 1090. The combination of these two factors evidenced Publix's anticipation of litigation by Mrs. Hagopian thus requiring it to preserve the bottle. *Id.* At best *Hagopian* could be read to impose a duty to preserve evidence when a party recognizes that an adverse suit is imminent. *Id.*; *see also, Silhan, supra* at 1313.

The other Florida cases have been based on a much clearer duty to preserve the evidence, such as a statutory duty, or some type of contractual arrangement to preserve the evidence. *Bondu, supra*, (the hospital owed several administrative and statutory duties to maintain the records of the surgery); *Miller*, (Allstate orally contracted with the plaintiff to preserve the wrecked vehicle); *Continental, supra*, (Continental in possession of the wrecked car, but it orally contracted to preserve it); *Brown v. City of Delray Beach*, 652 So. 2d 1150 (Fla. 4th DCA 1995), (the defendant orally contracted to preserve evidence which was in its possession). *Builder's Square, Inc. v. Shaw*, 755 So. 2d 721 (Fla. 4rh DCA 1999), (the Fourth District affirmed a jury verdict against Builder's Square for the independent tort of spoliation of evidence).

Several courts have recognized the need for a duty to preserve evidence pre-litigation. *Blinzler v. Marriott International, Inc.*, 81 F.3d 1148 , 1158-1159 (1st Cir.

1996); *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 267 (8th Cir. 1993); *Fire Insurance Exchange v. Zenith Radio Corp.*, 747 P.2d 911, 913-914 (Nev. 1987). For a pre-litigation duty to preserve evidence, the question is when is the party on notice of the potential litigation to trigger such a duty. Some courts have found that notice of potential litigation exists when litigation is "reasonably foreseeable because of circumstances are such that they are likely to give rise to future litigation and that a reasonable factfinder would conclude the party in possession of the evidence which was on notice of the evidence was relevant to likely litigation; or the party in possession of the evidence knew or should known that the destroyed evidence was relevant to pending, imminent, or reasonably foreseeable litigation, etc., *Trevino* concurring opinion at 955-956 and cases cited there. The concurring opinion in *Trevino* suggests that in spoliation cases, a party should be found to be on notice of potential litigation when after reviewing the totality of the circumstances, the party in possession of the evidence either actually anticipated litigation, or reasonable person in the party's position would have anticipated litigation. *Id.* at 956. There may be circumstances where a party may not reasonably foresee litigation until the party is actually notified of the opposing party's intent to file suit, but there may be times when certain independent facts will put a party on notice of the potential for litigation. *Id.*

In the present case, Martino wanted the videotape so that she could prove she as injured at Wal-Mart and could make a claim against Wal-Mart for her emergency room treatment; and she asked Wal-Mart to find the cart so that no one else would be injured on it. Martino's expressed testimony was that she had absolutely no idea that she sustained any severe injury whatsoever. She did not file suit until two years later and, therefore, there were no facts and circumstances which would impose any duty on Wal-Mart to preserve the cart; or the videotape if, in fact, it actually existed.

In a case closely on point, *Wal-Mart Stores, Inc. v. Johnson*, 2002 WL 32098152 (Tex. 2003), the Supreme Court of Texas found that the plaintiff had failed to show that the disposal of the evidence occurred after Wal-Mart knew or should have known there was a substantial chance there would be litigation and that the evidence would be material to the action; which is necessary in Texas to establish a foundation for the submission of a spoliation instruction. The Court found that there had not been a sufficient foundation showing that the party who destroyed the evidence had notice both of the potential claim and of the evidence's potential relevance. *Id. citing*, *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 204 (Tex. 1993)(stating an objective test from when litigation may be reasonably anticipated).

The trial Court found that the evidence was undisputed that neither Wal-Mart nor the plaintiff knew on the day of the accident that his injury might be serious or that

Johnson might pursue legal action. *Id*. at *4. Even if Mr. Johnson had learned that he had injured his neck, nothing in the record suggested that he had informed Wal-Mart of his claim prior to filing suit or that Wal-Mart learned of his claim at trial in any other way. *Id*. Therefore, the Court found it was an abuse of discretion to use a spoliation instruction, because Johnson had failed to establish that Wal-Mart had a duty to preserve the decorative reindeer which injured him. *Id*.

In the present case, Martino's accident is virtually identical for the purposes of evaluating a duty to preserve evidence as Johnsons. Martino suffered a minor injury to her wrist at Wal-Mart; she was able to continue her shopping; she unload all of her purchases, including lifting and moving the two forty pound bags of salt in car twice more; and at some later point in time she called Wal-Mart to inform it that her wrist was bleeding. Wal-Mart suggested that she go to the emergency room and then return to the store to fill out an incident report, which is what she did. There is nothing about the circumstances of Martino's accident that indicated that, in fact, she would later have a substantial injury to her arm, not directly related to the minor wound she suffered on the day of the accident, and the injury to her arm was completely unknown to Martino as it was to Wal-Mart. At trial, her recovery was to be based on the severe injury to her arm, which was not the known injury to her wrist on the day of the accident. Therefore, there was absolutely nothing about the circumstances of

Martino's injury that would put Wal-Mart on notice that she was planning to sue Wal-Mart. Just as in *Johnson*, there was no duty imposed on Wal-Mart to preserve evidence and Mrs. Martino was not entitled to any jury instruction on spoliation of evidence. This Court should not adopt a per se common law duty to preserve evidence for all pretrial and post-trial incidents. Rather, any duty analysis must be based on the review of the facts and circumstances in each case and only if it is established that a duty to preserve evidence existed should the issue of spoliation be considered.

2. Prejudice

Martino has suggested that evidence that could be relevant or have an effect on the lawsuit must be preserved and the absence of this evidence does not have to substantial impair a plaintiff's claim in order for the plaintiff to be entitled to a remedy for the spoliation. This ignores the fact, however, that one of the main reasons for allowing remedies for spoliation is that the spoliation has prejudiced the non-spoliating party because it was deprived of an opportunity to fully and successfully present its claim. *Herman, supra* at 315; *Headley, infra*. The Third District in *Herman* expressly rejected the same argument made by Martino that she did not have to show that she was significantly impaired, or prejudiced by the lack of the evidence, but rather she claims she needs to show only that she was "hindered" in presenting her

claim. *Id*. The Third District expressly rejected that argument setting forth the six requirements to prove the independent tort of spoliation, the fourth requirement being "significant impairment in the ability to prove the lawsuit". *Id*. Since Mrs. Herman did not suffer a significant impairment in her ability to prove her underlying lawsuit, the court held she had no cause of cause of action for the destruction of evidence. *Id.* To date, no court in Florida has recognized a lesser standard for establishing spoliation than that set forward in *Herman*.

Other considerations for the Court are whether the destroyed evidence was cumulative of other competent evidence that could be used in its place and whether the evidence supports the key issues in the case. *Trevino,* concurring opinion at 958; *Dillon, supra* at 267-268; *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76, 79 (3rd Cir. 1994)(pointing out that in design defect cases, a plaintiff may be only minimally prejudiced by the destruction of the actual product); *Battocchi v. Washington Hospital Center*, 581 A.2d 759, 767 (D.C. 1990)(when the loss or destruction of evidence is not intentional or reckless, the issue is not strictly "spoliation", but rather a failure to preserve the evidence; a factfinder may draw an inference adverse to a party who fails to preserve relevant evidence when his exclusive control is well-established; we reject the rule that a party's failure in a civil case to preserve evidence regardless of the degree of fault, requires the court to instruct the

jury on the missing evidence inference). Therefore, the rule is and should be that before a court considers a claim of spoliation, the non-spoliating party must establish that the evidence is relevant to a key issue in the case, or is critical evidence and that the absence of the evidence substantially impairs or completely precludes the non-spoliating party from proving their claim or defense. *Herman, supra*. *Homes, supra*; *Smith, supra* (while not recognizing negligent spoliation as a distinct tort, the court found that for the family to prevail, it must demonstrate that the evidence was so important that without it the family's claim did not survive); *Callahan v. Stanley Works*, 703 A.2d 1014 (N.J. App. 1997)(to maintain a negligence action, the injured worker had to establish facts sufficient to support a claim that the loss of the evidence caused him to be unable to prove his underlying lawsuit; the plaintiff was allowed to go forward where the pallet, which had fallen and injured him, was the key piece of evidence in the case).

3. <u>*Spoliation Sanctions*</u>

One of the major reasons for refusing to recognize an independent tort of spoliation of evidence is that litigation related conduct is adequately addressed by the trial court under its ability to impose a wide variety of sanctions and this ability applies to first parties, third parties, pre-litigation, litigation, and post-litigation. Martino admits that trial courts in Florida are empowered and have inherent authority to sanction

discovery misconduct under Florida Rule of Civil Procedure 1.380 and *Mazer v. Jefferson Stores, Inc.*, 412 So. 2d 945 (Fla. 3d DCA 1982); and *Warriner v. Ferraro*, 177 So. 2d 723 (Fla. 3d DCA 1965)(brief of petitioner at p. 24). However, the Plaintiff argues that the sanction authority is not well-established, is too vague, must be limited and in generally simply does not do the trick in a spoliation of evidence situation. Martino complains that there is no Rule of Civil Procedure that allows the imposition of sanctions for pre-litigation spoliation, citing to the fact that in the federal rules, Rule 37, has been interpreted not to provide authority to sanction pre-litigation conduct. (Brief of petitioner p. 28, footnote 11). The case cited by Martino, *Unigard Security Insurance Co. v. Lakewood Engineering & Manufacturing Corp.*, 982 F.2d 363, 368 (9th Cir. 1992) does hold that Rule 37 cannot be used to impose sanction for pre-litigation spoliation of evidence, but then recognized the court's broad inherent authority to manage its affairs and there was no pre-litigation ban on using this authority to sanction the third party spoliation of evidence. *See also, Trevino, supra* at 958; *Sacramona v. Bridgestone-Firestone, Inc.*, 106 F.3d 444, 446 (1st Cir. 1997)(recognizing that courts have the inherent authority to sanction a party for spoliating evidence to prevent prejudice to the non-spoliating party; and also recognizing that this inherent power is a companion to, but somewhat different in effect from the doctrine that permits an adverse inference from one side's destruction

of evidence); *Dillon, supra* at 267 (holding that courts have the inherent power to sanction parties for destroying evidence pre-litigation, that a party knew or should have known was relevant to imminent litigation); *Headley v. Chrysler Motor Corp*., 141 F.R.D. 362, 365 (D. Mass. 1991). Martino has not cited a single case from Florida or any other jurisdiction or any other authority, which supports her argument that this inherent authority of trial courts must be limited when the issue is pre-litigation spoliation of evidence.

Not only do trial courts have ample jurisdictional power to impose sanctions related spoliation of evidence, there is a wide variety of sanctions available depending on the facts and circumstances in each case and courts have broad discretion in choosing the appropriate sanction. *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987)(in those extremely rare instances that evidence establishes an intentional interference with the party's access to critical medical records, a wide range of sanctions is available to the trial court under Rule 1.380); *Mercer v. Raine*, 443 So. 2d 944 (Fla. 1983); *see also*, Scott S. Katz & Anne Marie Muscaro, *Spoliage of Evidence –Crimes, Sanctions, Inferences, and Torts*, 29 Tort & Ins. L.J. 51 (1993). Because there is varying degree of sanctions available and because each lawsuit presents a unique and different set of circumstances, the trial court should apply sanctions on a case by case basis. *Mercer, supra*; *Schmid, supra* at 81. Some courts

have only allowed sanctions to be imposed for intentional or bad faith spoliation. *Bashir v. Amtrak*, 119 F.3d 929, 932 (11th Cir. 1997); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (1995); *Vick v. Texas Employment Commission*, 514 F.2d 734 (5th Cir. 1975); *Brown, supra*. Like any other sanction, the remedy chosen by the trial court for spoliation of evidence must be directed against the wrongdoer and the sanction must be carefully tailored to the violation involved and its effects. *J.I. Case Co. v. Steel Fabricators, Inc.*, 438 So.2d 881 (Fla. 4th DCA 1983); *Mercer, supra*.

One of the sanctions available is an adverse inference. This sanction is based on two public policy rationales; the first being to restore the prejudiced party to the same position as if the spoliation had not occurred, thus is remedial; and second is a punitive measure deterring others from committing the same wrong. *Reingold v. Wet'N Wild Nevada, Inc.*, 944 P.2d 800, 802 (Nev. 1997) While there is no doubt that an adverse inference jury instruction is available, some courts will not give the adverse inference instruction without a showing of bad faith or intentional behavior. *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104, 1112 (8th Cir. 1988); *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96 (3rd Cir. 1983); *Beers, infra*. The adverse inference jury instruction simply enables a plaintiff to survive a motion for summary judgment or a dismissal motion in allowing the plaintiff to prove their case with alternative evidence. The Supreme Court of Connecticut has held that the trier

of fact must be satisfied that all four factors before drawing an adverse inference against the spoilator: (1) spoliation must have been done intentionally; (2) the spoliated evidence must be relevant to the issue for which the party seeks the inference; (3) the party seeking the inference, the non-spoliator must have acted with due diligence with respect to the spoliated evidence; and (4) the trier of fact must be instructed that it is not required to draw the inference unless the above factors are met. *Beers v. Bayliner Marine Corp.*, 675 A.2d 829, 832-833 (Conn. 1996); *see also, Young v. Johnny Ribeiro Building, Inc.*, 787 P.2d 777, 780 (Nev. 1990).

Just like the situation in *Wal-Mart v. Johnson, supra*, where Martino failed to show that Wal-Mart had any duty to preserve the evidence, Martino was not entitled to an adverse inference nor a jury instruction upon that inference. *Johnson, supra* at *4, *5. (Because the instruction itself is given to compensate for the absence of evidence that a party had a duty to preserve, its very purpose is to "nudge" or "tilt" the jury and, therefore, the spoliation instruction should not have been given, when the likelihood of harm from the erroneous instruction is substantial particularly where the case is closely contested).

Martino complains that the adverse inference is insufficient punishment for Wal-Mart and relies on a West Virginia case and a Texas trial court case cited in the West Virginia case. (brief of petitioner, p. 22, footnote 8.) This attempt to sway the Court

simply does not take the place of the facts in the case, based on Martino's own testimony at trial and Martino's failure to show any duty to preserve the evidence at all on the part of Wal-Mart. More importantly, by arguing that the adverse inference is not sufficient and is merely a slap on the hand type of sanction, the Plaintiff ignores the fact that the adverse inference is the same thing as the spoliation presumption and therefore, the same rules apply. In other words, in *Beers*, the Connecticut Supreme Court set our a four part test to be entitled to a jury instruction on the adverse inference; which test is perfectly in line with this Court's decision in *Valcin*, which required the intentional destruction of medical records where the spoliator had a statutory duty to maintain them, prior to the plaintiff being entitled to the *Valcin* presumption. *Valcin, supra* at 599 (although no conclusive presumption exists which establishes liability when medical records are shown to be missing due to deliberate acts or omissions of the hospital or the employee doctor, a rebuttable presumption of negligence exists if the patient demonstrates that the absence of the records hinders her ability to present a prima facia case); *see also, Jordan ex rel. Shealey v. Masters*, 821 So. 2d 342 (Fla. 4th DCA 2002)(*Valcin* presumption and jury instruction was prejudicial reversible error requiring the grant of a new trial; lawyers are entitled to argue adverse inferences from the evidence as part of their closing arguments, but the court may not instruct the jury as to the facts that it can find).

Another important consideration is that Martino is attempting to argue that in other cases involving third parties, the sanctions available in the trial court simply do not apply and, therefore, the third party situation is not adequately addressed. To begin with, the non-spoliating party would have to show some duty on the part of the third party to maintain the evidence and if this duty were breached, it is likely that parties in the underlying litigation would be injured by the third party's single act of destroying the evidence thereby giving rise to two claims with potentially inconsistent or duplicative verdicts. *Temple Community Hospital v. Superior Court of Los Angeles County*, 20 Cal.4th 464, 84 Cal. Rptr.2d 852, 976 P.2d 223 (Al. 1999). In that case, the Court went a step further beyond *Cedars-Sinai* and ruled that there was no independent tort for the intentional spoliation of evidence by third parties. The opinion contains an extensive discussion as to why the third party tort is not necessary and many of those factors apply whether the destruction of the evidence was negligent or intentional. The California Supreme Court points out that there are discovery sanctions available to punish third party spoliation, including monetary and contempt sanctions and it may be even possible to establish an connection between the spoliator and a party to the litigation sufficient to invoke the sanctions applicable spoliation by a party. *Temple Community Hospital*, 20 Cal.4th at 477. More importantly, the Court observed:

> We do not believe that the distinction between the sanctions available to victims of first party and third party spoliation should lead us to employ the burdensome and inaccurate instrument of derivative tort litigation in the case of third party spoliation. We observe that to the extent a duty to preserve evidence is imposed by statute or regulation upon the third party, the Legislature or the regulatory body that has imposed this duty generally will possess the authority to devise and effective sanction for violations of that duty. To the extent third parties may have a contractual obligation to preserve evidence, contract remedies, including agreed-upon liquidation damages, may be available for breach of the contractual duty. Criminal sanctions, of course, also remain available. *Id.*

The California Supreme Court also notes that it may be that there is a limitation on existing remedies involving third party spoliation and that is probably because it has not appeared to be a significant problem in courts today. *Id.*

The bottom line is that most courts in the United States simply do not permit litigation on how the case was litigated and have found that litigant wrong doing is sufficiently handled by trial judges, who have ample power to deal with virtually every situation involving spoliation of evidence, a type of litigant related misconduct, and no tort action is necessary. If this Court recognizes an independent tort of spoliation of evidence, we will be litigating how the first case or underlying claim was litigated. That, of course, is one of the pitfalls of recognizing the independent tort, which can only lead to jury confusion and potentially inconsistent verdicts. It is submitted that this Court should join the overwhelming majority of jurisdictions throughout the United States and the majority of the state's Supreme Courts addressing this issue and

find that an independent tort of spoliation of evidence is not necessary and should not be recognized, especially, in the first party spoliation claim like Martino's. The Fourth District's decision refusing to recognize the independent tort of spoliation in first party cases must be affirmed and the decision in *Bondu* quashed.

II. THE TRIAL COURT CORRECTLY GRANTED WAL-MART'S MOTION FOR DIRECTED VERDICT BECAUSE MARTINO FAILED TO PRODUCE EVIDENCE THAT WAL-MART CREATED A DANGEROUS CONDITION OR THAT IT HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF A DANGEROUS CONDITION AND THE DIRECTED VERDICT MUST BE REINSTATED.

It is well settled in Florida that the issue of negligence is ordinarily one for the jury. However, when facts relating to a negligence claim are sufficiently clear so as to point to but one possible conclusion, summary judgment or a directed verdict as to the issue of negligence is proper. *Food Fair Stores of Florida, Inc. v. Patty*, 109 So. 2d 5 (Fla. 1959); *see also, Cassel v. Price, 396 So. 2d 258* (Fla. 1st DCA 1981). Martino's claim of negligence against Wal-Mart was based on an allegation that Wal-Mart negligently maintained its premises. However, in order to maintain such an action, the Plaintiff must prove that Wal-Mart either created a dangerous condition or had actual or constructive notice of that condition. *Food Fair Stores of Florida, Inc. v. Patty*, 109 So. 2d 5 (Fla. 1959); *Schaap v. Publix Supermarkets Inc.*, 579 So. 2d 831 (Fla. 1st DCA 1991); *Winn-Dixie Montgomery, Inc. v. Petterson*, 291 So. 2d 666 (Fla. 1st DCA 1974); *Castillo v. Baker's Shoe Stores, Inc.*, 115 So. 2d 427 (Fla. 2d DCA 1974); *Publix Super Market Inc., v. Sanchez*, 700 So. 2d 405 (Fla. 3d DCA 1997);

Broz v. Winn-Dixie Stores, Inc., 546 So. 2d 83 (Fla. 3d DCA 1989); *Smith v. Winn Dixie Stores, Inc.*, 528 So. 2d 987 (Fla. 3d DCA 1988); *McDaniel v. Great Atlantic and Pacific Tea Company, Inc.*, 327 So. 2d 893 (Fla. 3d DCA 1976); *Harshbarger v. Miami Herald Publishing Company*, 294 So. 2d 41 (Fla. 3d DCA 1974); *Silver Springs Moose Lodge No. 1199 v. Orman*, 631 So. 2d 1119 (Fla. 5th DCA 1994); and *Haynes v. Lloyd*, 533 So. 2d 944 (Fla. 5th DCA 1988).

In this case, Martino admitted that she did not produce any evidence that Wal-Mart created a dangerous condition, or that it had actual or constructive knowledge of a dangerous condition. Nonetheless, Martino argued that the trial court incorrectly directed a verdict in favor of Wal-Mart, because she was entitled to an inference of negligence based on Wal-Mart's inability to produce the shopping cart and video tape; and/or because Martino presented sufficient evidence that Wal-Mart had a negligent mode of operation.

A. Plaintiffs Were Not Entitled to an Inference of Negligence Based on Wal-Mart's Inability to Produce the Shopping Cart or Videotape.

Martino argued that even if the trial court correctly dismissed her claim for spoliation of evidence, she was still entitled to an adverse inference of negligence based on spoliation of evidence. Martino's argument was incorrect, as was the Fourth District's acceptance of it.

The law of spoliation of evidence in Florida was first thought to have commenced with the case of *DePuy, Inc. v. Eckes*, 427 So. 2d 306 (Fla. 3d DCA 1983). *See*, James T. Sparkman and John W. Reis, *Spoliated Evidence: Better than the Real Thing?*, Fla. Bar J., July/August 1997. In *DePuy*, the plaintiff sued several parties as a result of a defect with her prosthetic hip. *Id.* at 307. After an agreed order was entered requiring defendant to maintain the prosthesis, the plaintiff turned it over to the defendant, but the defendant returned the prosthesis without a crucial part. Id. The plaintiff's expert could not render an opinion necessary to establish a prima facie case as a result. *Id*. Therefore, the trial court entered a default on liability in favor of the plaintiff, because the defendant violated the court order and the plaintiff could not establish a prima facie case without the evidence. *Id*. The district court affirmed.

A similar issue went to this Court. *Valcin*, *supra.* The plaintiff filed a medical malpractice action against the defendant hospital claiming that the hospital negligently performed her tubal ligation. *Id.* at 597. The surgeon's operative note was so flagrantly deficient that the plaintiff's expert could not testify to the necessary elements to establish a prima facie case. *Id.* Therefore, the trial court granted summary judgment to the hospital. *Id*. The Third District reversed and fashioned a set of presumptions to guide the trial court. *Id*. at 598. Specifically, the Third District held that if the surgeon or hospital was found to have deliberately failed to make the report or to

maintain the report, then a conclusive, irrebuttable presumption of negligence would arise. *Id*. The Third District's opinion was contingent upon the fact that the hospital/surgeon had a statutory duty to maintain such records. *Id*. at 598. This Court affirmed in part and reversed in part. *Id*. at 599. The Court held that a conclusive presumption was invalid because it violated due process and short circuited the jury's function. Id. Although the Court did approve of the application of a rebuttable presumption or adverse inference, because the surgeon/hospital had a statutory duty to maintain operative records, it also clarified the limited circumstances in which a rebuttable presumption should be applied. *Id*. Specifically, the Court limited the application of the presumption to cases in which a party is unable to establish a prima facie case due to the deliberate destruction of medical records. *Id*.

There have been a number of cases since *Valcin*, which addressed the issue of sanctions for spoliation of evidence and the independent tort of spoliation of evidence. Although there are additional elements necessary to establish the independent tort of spoliation, there are four elements common to both: (1) the existence of a pending or potential civil cause of action; (2) a legal or contractual duty to preserve the evidence; (3) destruction of the evidence; and (4) significant impairment of the ability to establish a prima facie case. *See, Herman, supra. Brinson, supra.*

In this case, Martino was not entitled to an adverse inference of negligence for

several reasons. First, in regard to the video tape, Martino failed to prove that there ever was a video tape to preserve. In regard to the shopping cart, Martino asked to preserve the cart so it would be "repaired," a subsequent remedial measure. Neither item was to prove a lawsuit. Martino had a very minor injury and the video was to show Wal-Mart she was even injured so she could file a claim with Wal-Mart and be reimbursed for her E.R. bill.

Second, regardless of whether the evidence ever existed or who spoliated it, Martino failed to establish that Wal-Mart had any legal or contractual duty to preserve the evidence in question. A legal or contractual duty can arise in one of three ways: (1) a statutory duty to make and maintain such evidence (*See, e.g.,Valcin, supra*); (2) a contractual duty to make or maintain such evidence (*See, e.g., Rockwell Int'l Corp. v. Menzies*, 561 So. 2d 677 (Fla. 3d DCA 1990)); or a court rule or order to produce or maintain the evidence (*See, e.g., Figgie Int'l, Inc. v. Alderman*, 698 So. 2d 563 (Fla. 3d DCA 1997) (holding that discovery request establishes duty to preserve evidence)). Accordingly, the trial court appropriately denied the Plaintiff's request for an adverse inference of negligence based upon spoliation of evidence and the new trial ordered below must be reversed.

Even if this Court recognizes an independent tort for spoliation, it cannot lie in the case where there was no duty to maintain the evidence, with no facts or

circumstances indicating litigation was imminent or foreseeable and no actual notice that Martino was going to or had sued. Additionally, Martino could prove her claim with her medical records, her testimony, and that of Wal-Mart's manager. The verdict for Wal-Mart must be reinstated.

B. The Trial Court Correctly Prohibited Martino from Reaching a Jury on a Negligent Mode of Operation Theory

As cited above, it is well settled that a plaintiff may not reach the jury in a retail premises liability case without evidence that the premises owner created a dangerous condition or that it had actual or constructive knowledge of a dangerous condition. Although there is a higher burden imposed upon operators of places of amusement, that higher burden generally does not apply to "store[s], bank[s] or such like places] of business. *See, Wells v. Palm Beach Kennel Club*, 35 So. 2d 720, 721 (Fla. 1948). *See also, Soriano v. B & B Cash Grocery Stores, Inc.*, 757 So. 2d 514, 516 (Fla. 4th DCA 1999); *Rowe v. Winn-DixieStores, Inc.*, 714 So. 2d 1180, 1181 (Fla. 1st DCA 1998). In order for such a burden to apply, it must be shown that that the operation is inherently dangerous. *See Soriano*, 757 So. 2d at 516. In *Soriano*, the court specifically declined to extend the negligent method of operation theory to a retail store based on its failure to inspect on a regular basis. *Id.* Furthermore, this Court's recent decision in *Owens v. Publix Supermarkets, Inc.*, *supra*, which changes premises

liability law by allowing plaintiffs to proceed under a negligent method of operation theory, clearly does not apply to this case. The holding was specifically limited to "all cases commenced after the decision becomes final and those cases already commenced, but in which trial has not yet begun." *Owens* was substantially modified by the legislature in § 768.0701 Fla. Stat. (2002) and that law applies to all pending actions, which includes Martino's. Martino presented her evidence on negligent maintenance, which included the lack of timely cart inspection, but there was no evidence that Wal-Mart's biannial or triannial cart inspections were the proximate cause of her injury. Wal-Mart had no duty to preserve the cart therefore there was no basis for an adverse inference (which was argued to the jury) and Martino simply cannot prove negligent mode of operation, as a matter of law. The verdict for Wal-Mart must be reinstated.

CONCLUSION

Florida should join the majority of jurisdictions that do not recognize an independent tort of spoliation of evidence and the Fourth District's decision on this issue should be affirmed and the decision in *Bondu* quashed. The directed verdict for Wal-Mart must be affirmed as a matter of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 17th day of June, 2003 to: **Steven W. Halvorson**, Attorney for 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., Attorneys for Petitioner, Suite 3A/Barristers Building, 1615 Forum Place, West Palm Beach, FL 33401; **David J. Sales, Esq.**, Searcy Denney Scarola Barnhart & Shipley, 2139 Palm Beach Lakes Blvd., P. O. Drawer 3626, West Palm Beach, FL 33402; **Roy D. Wasson, Esq.,** Attorney for Amicus Curiae, Suite 450, Gables One Tower, 1320 South Dixie Highway, Miami, FL 33146; **James Tribble, Esq.**, 2509 Cline Street, Tallahassee, FL 32308; **Tracy Raffles Gunn, Esq., Ceci Berman, Esq.**, Fowler White Boggs Banker, P.A., P. O. Box 1438, Tampa, FL 33601.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Respondent's Brief on Merits complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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ROSEMARY B. WILDER