IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC03-334

RONNA MARTINO and RAYMOND MARTINO, her husband,

Petitioners,

-vs-

WAL-MART STORES, INC., an Arkansas corporation,

Respondent.
_____/

BRIEF OF PETITIONERS ON THE MERITS

On Appeal from the Fourth District Court of Appeal of the State of Florida

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PREFACE

This case is before the Court based on a decisional conflict certified by the Fourth District Court of Appeal. The parties will be referred to by their proper names or as they appeared in the trial court. The following designations will be used:

(R) - Record-on-Appeal

(T) - Trial Transcript

STATEMENT OF THE FACTS

This case arises out of an incident that occurred at a Wal-Mart Store on State Road 7 in Royal Palm Beach, Florida on March 17, 1997 (R453). The Plaintiff, Ronna Martino,[1] went to the store to buy computer paper, but also bought a folding chair and two 40 lb. bags of salt for her water softener (T41-43). She put the merchandise in a cart and proceeded to the checkout line, where she put the computer paper and the chair on the counter (T43). She was expecting the cashier to scan the SKU number on the salt bags while they were in the cart (T69). However, the cashier told her to put everything on the counter so she could scan the SKU number code (T43). As a result of the close quarters in the checkout area, it was difficult for Martino to lift the salt bags onto the counter, so she lifted them onto the part of the cart where a child would sit (T44-45). However, that portion of the cart either bent or broke, pulling Martino's arm to the bottom of the cart where a piece of metal went through her wrist (T44-48). The cashier still wanted her to put the salt bags on the counter, but Martino could not do so at that point because her wrist was bleeding (T47-48). The cashier eventually scanned the SKU code, concluded the transaction, and Martino proceeded to the parking lot where a bystander helped her load the salt bags into her car (T48).

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[1]/For purposes of clarification, Plaintiff (singular) will refer to Ronna Martino and Plaintiffs (plural) will refer to both Ronna and Raymond Martino.

Upon arriving home, Martino called the Wal-Mart store and spoke to an assistant manager, Rick Ramos (T49-52). She told him what happened, and described where she left the cart in the parking lot so that he could retrieve it (T53). Ramos advised Martino to go to an emergency room for treatment, and then return to the store so that an incident report could be prepared (T52).

Pursuant to Ramos' instructions, after being treated at a hospital emergency room, Martino went back to the Wal-Mart store (T53-54). She showed Ramos exactly where the shopping cart was in the parking lot (T53-54). Martino testified that Ramos told her he would retrieve the cart and save it (T55). She also noted a video camera aimed at the checkout counter, so she also asked Ramos to save the videotape so they could see exactly what had happened to her (T54). An incident report was prepared and Martino was given a copy of it.

Ramos corroborated Martino's version of the events with respect to her calling him and returning to the store on the day of the incident (T81). However, he testified he could not recall whether she asked him to find the cart (T81). In his pretrial deposition, Ramos testified he could not recall whether he looked for the cart (T82). However, at trial he first testified that he looked for it and did not find it, but later testified that he probably did not look for the cart, that he probably had someone else look for it (T81-86). It is undisputed, however, that Wal-Mart did not preserve the

shopping cart, nor did it preserve the videotape from the camera pointed at the checkout counters.

Two days after the incident, at Wal-Mart's request, Martino returned to the store to provide a recorded statement for its Risk Management Department (T56).

The only witness other than Martino and Ramos to testify at trial regarding this incident was the Wal-Mart cashier, Carolyn Nguyen. She denied that any accident occurred or that the cart malfunctioned, although she had some memory of the incident (T101-04). However, Nguyen claimed that Martino never lifted the salt bags, because she could read the SKU number from where she stood and enter them into the computer "because I'm the best cashier at Wal-Mart" (T103, 105).

STATEMENT OF THE CASE

Plaintiff's initial complaint against Wal-Mart contained one count alleging negligence against the Defendant for failing to properly maintain or inspect the shopping carts, and for the negligence of the cashier in instructing the Plaintiff to place the bags of salt on the counter instead of utilizing other measures to scan their SKU code (R1-5). Plaintiff's husband also alleged a claim for loss of consortium (R1-5).

Subsequently, Plaintiffs were granted leave to amend the complaint to allege special damages including, inter alia, expenses associated with her trip to the Mayo Clinic for medical treatment (R40-45). Wal-Mart filed an answer to the amended complaint denying the allegations of negligence and raising various affirmative defenses including, inter alia, comparative negligence (R67-69).

Subsequently, Plaintiffs filed a motion for leave to amend the complaint to add a count for spoliation of evidence, on the basis that crucial evidence, i.e., the cart and videotape, was not preserved by the Defendant (R317-18). The trial court granted leave to the Plaintiffs to make that amendment (R339). Plaintiffs added the spoliation claim as Count III, which contained extensive and specific allegations regarding the Plaintiff's discussions with Wal-Mart's assistant manager in which she requested that he retain the videotape from the checkout counter and the shopping cart (R313-16).

Plaintiffs alleged that, despite her requests, Wal-Mart failed to preserve that evidence and had responded to discovery requests by stating that the videotape did not exist and the cart was not available (R313-16). Count III alleged that the condition of the shopping cart and the manner in which the accident occurred were critical issues in the case and the Defendant knew of Plaintiff's potential cause of action, thereby imposing on it a duty to preserve that evidence (R313-16). Plaintiffs specifically alleged that Wal-Mart knew of Plaintiffs' cause of action, since it arranged for a statement to be taken from Martino by its risk management service two days after the incident (R313-16).

Wal-Mart filed an Answer to the Second Amended Complaint and a Motion to Dismiss Count III on the basis that it failed to state a cause of action (R351-55, 356-58). A hearing was held on Defendant's Motion to Dismiss, after which the trial judge granted the motion, on the rationale that Wal-Mart had no contractual or statutory duty to preserve the cart or videotape (R374, 375).

The case proceeded to a jury trial on Plaintiffs' negligence claims. The Plaintiffs filed a motion to bifurcate the trial as to liability and damages, because liability was hotly contested and that proceeding to address the Plaintiff's medical condition would require an additional three and a half to four days of trial (R499-500). The trial court granted the motion to bifurcate (R501).

Prior to the presentation of evidence, the successor trial judge ruled that it would not instruct the jury that it could infer that Wal-Mart's failure to produce the shopping cart or the videotape could give rise to a legal inference that such evidence would be adverse to it (T14). In fact, the trial judge stated he intended to give an instruction that, under the circumstances, Wal-Mart had no duty to preserve the cart (T19). The judge indicated he believed he was bound to do that based on the predecessor judge's ruling dismissing Plaintiffs' spoliation claim (T21). However, the court did permit Plaintiffs to present evidence relating to the mode of operation theory of negligence, rejecting Defendant's contention that it did not apply in this case (T22).

At the conclusion of the evidence, the trial court granted Defendant's Motion for Directed Verdict, ruling that the Plaintiffs failed to create an issue of fact regarding liability in the absence of the shopping cart or the videotape (T113). A judgment was entered in accordance with the Motion for Directed Verdict, and Plaintiffs timely appealed.

The issues on appeal before the Fourth District were 1) whether the trial court erred in dismissing Plaintiffs' spoliation claim on the ground that Wal-Mart had no duty to preserve either the cart or the videotape; and 2) whether the trial court erred in directing a verdict on Plaintiffs' negligence claim.

The Fourth District issued an opinion which declined to address the duty issue, but instead rejected the tort of spoliation of evidence for "first parties," i.e., defendants against whom the evidence would have been offered, MARTINO v. WAL-MART STORES, INC., 28 Fla.L.Weekly D321 (Fla. 4th DCA January 29, 2003). Based on that holding, the Fourth District acknowledged conflict with the Third District's decision in BONDU v. GURVICH, 473 So.2d 1307 (Fla. 3d DCA 1984), rev. den., 484 So.2d 7 (Fla. 1986). It should be noted, however, that the Fourth District did not recede from its prior decisions which had recognized spoliation as a tort with respect to third parties.

The Fourth District also ruled that the negligent mode of operation theory was viable in this case. It concluded that in the trial court erred in directing a verdict on the Plaintiffs' negligence claim, since the jury could have inferred from the absence of the cart and videotape that that evidence would have been unfavorable to Wal-Mart's position.[2]

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[2]/The Fourth District's opinion also states (28 Fla.L.Weekly at D323):

> On appeal, the Martinos do not challenge the court's refusal to give either the requested adverse inference instruction or the burden of proof shifting presumption of negligence instruction formulated in [PUBLIC HEALTH TRUST OF DADE COUNTY v.] VALCIN, [507 So.2d 596 (Fla.

(continued...)

The Plaintiffs have sought timely review in this Court based on the decisional conflict certified in the Fourth District's opinion.

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[2](...continued)
1987)].

This is a rather perplexing statement. The trial court directed a verdict on all of Plaintiffs' claims, so the jury was never instructed on the law in this case. Therefore, it would have been futile for the Plaintiffs to raise an issue regarding jury instructions on appeal. Plaintiffs note this because they do not wish to be foreclosed from seeking such jury instructions upon remand, if they are appropriate.

SUMMARY OF ARGUMENT

In the case sub judice, the Fourth District declined to recognize a tort cause of action for "first party" spoliation of evidence, that is, where the spoliation is done by a defendant against whom that evidence would be used in the lawsuit. The Fourth District relied heavily on an analysis of the California Supreme Court, without recognizing that there are significant distinctions between the jurisprudence of each state. California has a statute that imposes criminal penalties for the spoliation of evidence relevant to a court case, while Florida does not. California has a standard jury instruction authorizing the jury to reach adverse inferences against a spoliator, whereas under the Fourth District's decision no such jury instruction is available under Florida law. As a result, the rationale for the decision, that there are other remedies/sanctions available for spoliation, is questionable.

The Fourth District declined to determine the issue of whether Wal-Mart had a duty to preserve the shopping cart and videotape as evidence. As a result, its conclusion that there were other remedies and sanctions available for spoliation is undermined. The only "remedy" it authorized to these Plaintiffs is that their attorney could argue to the jury that they could infer that the lost evidence would have been harmful to Wal-Mart's position. That is an ineffective remedy, and does nothing to punish or deter the spoliation.

Without resolving the duty issue, the Fourth District could not reasonably analyze the availability of other remedies or sanctions. While a court clearly has authority to impose sanctions for discovery misconduct, there are significant questions regarding whether it has the inherent authority to sanction a party for pre-litigation conduct. Even assuming arguendo that such inherent authority exists, under Florida law a court's inherent authority is to be exercised with restraint and only in situations of necessity. The Fourth District's analysis here appears to be that a tort remedy of spoliation should not be accepted unless it is necessary, and that the inherent authority of the court should be a favored basis for sanctions. That reasoning is erroneous, and raises significant concerns regarding the constitutional restraints on the exercise of a court's inherent authority.

The recognition of a tort for spoliation of evidence is consistent with Florida jurisprudence, as demonstrated by the fact that each of the three district courts that have addressed it, have adopted it. Even the Fourth District accepts the tort when the spoliation is done by third parties. That acceptance necessarily undermines its analysis, since it rejects the tort in the situation where the spoliator has the greatest motivation to engage in the misconduct. Moreover, the acceptance of the tort as to first parties is consistent with the access to courts provisions of the Florida constitution, as well as the constitutional right to trial by jury. It also provides an

additional means of deterrence, since if the spoliation is sufficiently egregious, punitive damages could be available.

The concerns that recognition of this tort would result in endless litigation is unfounded, especially in light of the fact that the torts of malicious prosecution and abuse of process have long been part of Florida jurisprudence, without generating that problem. Moreover, finality is not an end in itself; justice is. Spoliation is a pernicious form of misconduct that undermines the very fundamental basis of a judicial system. No remedy or sanction for it should be rejected without compelling reasons. The Fourth District's decision presents no such compelling circumstances, and therefore it should be quashed and the spoliation tort recognized consistent with the Third District's decision in BONDU, supra.

ARGUMENT

Standard of Review

The issue whether to accept a tort for spoliation of evidence is a question of law subject to de novo review, RYKIEL v. RYKIEL, 838 So.2d 508 (Fla. 2003).

QUESTION PRESENTED

THE FOURTH DISTRICT ERRED IN REFUSING TO RECOGNIZE A CAUSE OF ACTION FOR "FIRST PARTY" SPOLIATION OF EVIDENCE.

Introduction

Any analysis of spoliation of evidence must begin with the unassailable premise that such conduct is universally condemned by the courts and requires an effective judicial response. Such conduct is contemptuous of the legal system, inherently unethical, and fundamentally unfair to adverse parties. The judicial response to it must achieve three objectives: 1) remedy the unfairness caused by the spoliation; 2) punish the spoliator; and 3) deter future spoliation, see ROSENBLIT v. ZIMMERMAN, 766 A.2d 749, 754 (N.J. 2001), citing, STEFFEN NOLTE, THE SPOLIATION TORT: AN APPROACH TO UNDERLYING PRINCIPLES, 26 St. Mary's L.I. 351, 355-56 (1995).

The question of the appropriate means to achieve those objectives has generated a wide divergence of judicial opinions, especially on the issue of whether spoliation of evidence can constitute an independent tort.[3] While many commentators divide the courts into those which recognize a tort for spoliation and those which do not, that is an oversimplification. Some jurisdictions have declined to adopt any tort for spoliation, e.g., CEDARS-SINAI MEDICAL CENTER v. SUPERIOR COURT, 954 P.2d 511 (Cal. 1998); DOWDLE BUTANE GAS CO, INC. v. MOORE, 831 So.2d 1124 (Miss. 2002); MONSANTO CO. v. REED, 950 S.W.2d 811 (Ky. 1997); some have approved a tort action when the spoliation is intentional, but not where it is negligent, see HAZEN v. MUNICIPALITY OF ANCHORAGE, 718 P.2d 456 (Alaska 1986); SMITH v. HOWARD JOHNSON CO., INC., 615 N.E.2d 1037 (Ohio 1993); COLEMAN v. EDDY POTASH, INC., 905 P.2d 185 (N.M. 1995), overruled in part, on other grounds, DELGADO v. PHELPS DODGE CHINO, INC., 34 P.3d 1148 (N.M. 2001); some have recognized a tort for negligent spoliation, HOLMES v. AMEREX RENT-A-CAR, 710 A.2d 846 (D.C. Ct. App. 1998); THOMPSON v.

[3]/There is an equally vast array of law review articles on the subject, with one treatise listing some of them with the comment, "Much ink has been spilled discussing the subject of spoliation of evidence." FEDERAL COURTS AUTHORITY TO IMPOSE SANCTIONS FOR PRELITIGATION OR PRE-ORDER SPOLIATION OF EVIDENCE, 156 F.R.D. 313, n.4, Iain. D. Johnson, 1994.

OWENSBY, 704 N.E.2d 134 (Ind. App. 1998); and some, like the Fourth District in the case sub judice, have accepted the cause of action against "third parties" but not against "first parties" (the latter being defined as the defendant against whom the evidence would have been utilized), OLIVER v. STINSON LUMBER CO., 993 P.2d 11 (Mont. 1999). There are also courts that have concluded that no new tort need be recognized, since a spoliation claim can be made within the parameters of existing causes of action, see BOYD v. TRAVELERS INS. CO., 652 N.E.2d 267 (Ill. 1995) (action for negligent spoliation can be stated under existing negligence law); SMITH v. ATKINSON, 771 So.2d 429 (Ala. 2000) (recognizing claim against third party for spoliation of evidence "under the traditional doctrine of negligence"); ROSENBLIT v. ZIMMERMAN, supra, (recognizing spoliation of evidence as a subspecies of the tort of fraudulent concealment).

It is important to note that the courts rejecting a tort remedy for spoliation do not conclude that spoliation is not tortious conduct, nor that there is any legal impediment to recognizing such a cause of action. They have done so based on prudential concerns, such as a belief in the adequacy of other remedies/sanctions, a

concern for finality of adjudication, a perceived uncertainty of the fact of harm, and even a cost/benefit analysis, see CEDAR-SINAI, supra.[4]

The Fourth District's Decision

In the case sub judice, the Fourth District chose to follow the analysis in CEDAR-SINAI, supra, without noting significant differences in California jurisprudence that relate to the availability and adequacy of other deterrents and remedies. Moreover, the Fourth District never resolved the issue of whether Wal-Mart had a duty to preserve the videotape and cart in this case, even though that determination is critical to a proper analysis of available sanctions and remedies. Apparently, under the Fourth District's reasoning, the only "remedy" available to this

[4]/It should be noted that the cost/benefit analysis expressly engaged in by the court in CEDARS-SINAI was not based on any specific objective data. Opponents of the tort of spoliation make much of the fact that California was the first jurisdiction to expressly recognize an independent tort for spoliation, see SMITH v. SUPERIOR COURT, 198 Cal.Rptr. 829 (Cal. App. 1984); but later rejected that tort in CEDARS-SINAI, supra. It is important to note, however, that CEDARS-SINAI did not cite any statistical or even anecdotal experience with either a flood of litigation or abuse of the spoliation claim subsequent to the SMITH decision as a basis for its rejection of the tort. Rather, it relied on generalities and predictions to support its cost/benefit analysis. Thus, the California experience was not that of a jurisdiction that actually found the tort of spoliation to be burdensome or prone to abuse, but rather was simply a situation in which an intermediate appellate court made a ruling based on a legal analysis that the Supreme Court subsequently rejected.

Plaintiff is that her attorney can argue to the jurors that they may infer, from the absence of the cart and videotape, that that evidence would have been adverse to Wal-Mart. Respectfully, that does not remedy, punish, nor deter spoliation. Morever, the Fourth District's recognition of a tort claim for "third party" spoliation further undermines the rationale of its decision. That is, the court accepts the cause of action when a third party commits spoliation, yet rejects it in first party cases where the spoliator has the greatest motivation, and will reap the greatest reward, for its misconduct.

Criminal Penalties and Jury Instructions

The Fourth District relied heavily on the CEDARS-SINAI rationale that there are other effective means to remedy and deter spoliation which render recognition of a tort claim to be unnecessary. However, there are significant distinctions between the jurisprudence of California and that of Florida, which were overlooked by the Fourth District. For example, California punishes and deters spoliation by making it a criminal offense, see Calif. Penal Code §135, quoted in CEDARS-SINAI, 954 P.2d at 518. Florida does not have such a provision; the only similar statute is limited in application to criminal cases and certain governmental proceedings, §918.13, Fla. Stat. Thus, Florida does not have that deterrent to spoliation.

Additionally, California has a standard jury instruction authorizing the jury to make adverse inferences[5] against a party that spoliated evidence, BAJI 2.03, as noted by the court in CEDARS-SINAI, 954 P.2d 517.[6] Nonetheless, the Fourth District ruled that the Martinos would not be entitled to such an instruction, concluding that it would constitute an inappropriate comment on the evidence (28 Fla.L.Weekly at D324, n.2). The Fourth District stated that Plaintiffs' attorney could simply argue the adverse inference to the jury (Ibid).

While the Fourth District cites other jurisdictions which have declined to recognize a spoliation tort,[7] virtually all of them expressly rely, in part, on the fact that

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[5]/Some jurisdictions utilize a jury instruction that spoliated evidence authorizes presumption that the lost evidence would be adverse to the spoliator, LYNCH v. SADDLER, 656 N.W.2d 104 (Iowa 2003); WAL-MART STORES, INC. v. JOHNSON, 39 S.W.3d 729 (Tex. App. 2001); VAUGHN v. METROPOLITAN PROPERTY & CASUALTY INS. CO., 2003 WL 1537831 (Ga.App. March 26, 2003).

[6]/California also has a provision in their evidence code authorizing an adverse inference where there has been a willful suppression of evidence, Calif. Evidence Code §413, see CEDARS-SINAI, 954 P.2d at 517. Florida does not.

[7]/The Fourth District included Alaska as one of the jurisdictions which has rejected the tort of spoliation, 28 Fla.L.Weekly at D322, citing SWEET v. SISTERS OF PROVIDENCE IN WASHINGTON, 895 P.2d 484 (Alaska 1995). In fact, Alaska has expressly adopted a tort for intentional spoliation, see HAZEN v. MUNICIPALITY OF ANCHORAGE, supra. The Supreme Court of Alaska did not recede from that holding in SWEET v. SISTERS OF PROVIDENCE, supra, but simply determined that the spoliation there could be remedied by shifting the burden (continued...)

a jury instruction on the adverse inference is available, GOFF v. HAROLD IVES TRUCKING CO., 27 S.W.3d 387 (Ark. 2000) (noting that it was "most significant" that an aggrieved party can request that the jury be instructed to draw a negative inference against the spoliator); LUCAS v. CHRISTIANA SKATING CENTER LTD., 722 A.2d 1247 (Del. Super. Ct. 1998) (a "proper remedy" is to instruct the jury of the adverse inference); MONSANTO CO. v. REED, supra, (court notes that it has chosen to remedy spoliation through evidentiary rules and jury instructions); MILLER v. MONTGOMERY COUNTY, 494 A.2d 761 (M.D.Ct. Spec. App. 1985) (noting that a remedy for spoliation is an appropriate jury instruction); TREVINO v. ORTEGA, 969 S.W.2d 950 (Tex. 1998) (authorizing measures to respond to spoliation "from jury instructions to death penalty").

The Fourth District's rejection of a jury instruction on the adverse inference is puzzling, since it had previously authorized such an instruction, see AMLAN, INC. v. DETROIT DIESEL CORP., 651 So.2d 701, 703 (Fla. 4th DCA 1995); see also, HAGOPIAN v. PUBLIX SUPERMARKETS, INC, 788 So.2d 1088, 1092 (Fla. 4th DCA 2001), rev. den., 817 So.2d 849 (Fla. 2002) (reversing directed verdict on third

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[7](...continued)
of proof to the defendant, relying primarily on this Court's decision in PUBLIC HEALTH TRUST v. VALCIN, 507 So.2d 596 (Fla. 1987).

party spoliation claim and expressly authorizing trial court to reconsider giving adverse inference jury instruction). Its contrary holding here is based on a prior decision which addressed a party's failure to produce evidence within its control, JORDAN v. MASTERS, 821 So.2d 342 (Fla. 4th DCA 2002). However, in JORDAN, there was significant doubt whether the item at issue ever actually existed. More importantly, that case did not involve crucial evidence which undermined the very basis of the Plaintiff's claim. The item which was allegedly not produced in JORDAN was a videotape of a recantation by the plaintiff regarding an alleged sexual assault. However, it was undisputed that an audiotape of that same recantation was produced and played for the jury.

In JORDAN, the Fourth District analogized the situation to one in which a party fails to produce a witness within its control, an issue on which the Florida Standard Jury Instructions Committee recommends that no charge be given, see Comment, Florida Standard Jury Instruction 2.3. However, that situation is inapposite to spoliation. If a party chooses not to call certain witnesses, its adversary can still take their depositions during discovery and use them at trial pursuant to Fla.R.Civ.P. 1.330. Thus, there is no impediment to the evidence being presented to the jury, as there is with spoliation; there is simply a strategy decision by one party regarding its selection of witnesses. Under that circumstance, clearly a jury instruction is inappropriate.

However, the situation is not the same where spoliation deprives a party of access to critical evidence, and the jury has thereby been deprived of access to the truth. Under these circumstances a stronger judicial response is required and, at a minimum, a jury instruction authorizing an adverse inference against the spoliation is appropriate. The rationale that such an instruction is an inappropriate comment on the evidence is belied by the fact that every other jurisdiction represented in the Fourth District's opinion specifically authorizes such an instruction, see cases cited supra. More importantly, many Florida Standard Jury Instructions do comment on the evidence in a variety of contexts, see Florida Standard Jury Instruction 2.2a (addressing believability of witnesses); 2.2b (addressing the jury's consideration of expert witness testimony); 4.9 (addressing effect of evidence of violation of a non-traffic penal statute); 4.11 (addressing violation of statute, ordinance or regulation as evidence of negligence). Simply authorizing an attorney to argue the adverse inference in closing argument is ineffectual, since the validity of the inference could simply be disputed by opposing counsel. The logic and proprietary of the inference should be conveyed to the jury clearly and authoritatively by the court, in order to maximize its effectiveness.

Moreover, the Fourth District's reliance on the adverse inference alone as a sufficient judicial response to Wal-Mart's spoliation in this case is erroneous. The

inference does not in any way deter or punish spoliation, it is merely an effort to remedy it.[8] A defendant faced with damaging tangible evidence would still benefit from spoliating it, if the only legal consequence is the adverse inference. If a defendant destroys that evidence the worst it would face is the possibility that the jury might infer that the lost evidence was adverse to its position. On the other hand, spoliation would eliminate the certainty that the damaging evidence would be harmful. Therefore, the failure to recognize a tort cause of action for first party spoliation cannot be justified by the rationale that the adverse inference for spoliation is a sufficient judicial response to remedy and deter such misconduct.

Sanctions

[8]/Deterrence is a particularly significant consideration in the case sub judice, since Wal-Mart is a Defendant. In a recent concurring opinion in DOE v. WAL-MART STORES, INC., 558 S.E.2d 663 (W.Va. 2001), Justice Starcher discussed Wal-Mart's pattern of litigation abuse, and cited fifteen cases in which it had been sanctioned by courts for discovery misconduct within a six year period (J. Starcher concurring 558 S.E.2d at 680-82). One court has remarked that "Wal-Mart has chosen extreme discovery abuse as a litigation strategy," NEW v. WAL-MART STORES, INC., 96-8-10571 (Tex. Dist. Ct. Jackson Co.) (quoted Ibid p.682). At least five of the cases cited in Justice Starcher's opinion involved spoliation of evidence (Ibid). Justice Starcher concluded, "It seems Wal-Mart has yet to learn a lesson from the repeated imposition of sanctions" (Ibid).

The Fourth District's analysis relies heavily on its assumption that other sanctions and remedies for spoliation are sufficiently effective to make it unnecessary to recognize a tort cause of action. However, its analysis is weakened by its failure to address the duty issue, which is a critical element of any sanction analysis. That is, the ability of a court to sanction a party presupposes the existence of a duty and the authority of the court to enforce that duty. Any reasonable determination of the sufficiency of court sanctions as a substitute for a tort claim must analyze both of those considerations.

Certainly a party to litigation has a duty to comply with discovery rules and court orders. This includes the duty to preserve any item of evidence that is the subject of a proper discovery request, STRASSER v. YALAMANCHI, 783 So.2d 1087, 1093 (Fla. 4th DCA 2001), rev. den., 805 So.2d 810 (Fla. 2001); FIGGIE INTERNATIONAL, INC. v. ALDERMAN, 698 So.2d 563, 567 (Fla. 3d DCA 1997), rev. dism., 703 So.2d 476 (Fla. 1997). Clearly, the trial courts are empowered by Fla.R.Civ.P. 1.380, and their inherent authority to sanction discovery misconduct, MAZER v. JEFFERSON STORES, INC., 412 So.2d 945 (Fla. 3d DCA 1982); WARRINER v. FERRARO, 177 So.2d 723 (Fla. 3d DCA 1965), cert. den., 188 So.2d 319 (Fla. 1966). In many cases, spoliation occurs in that context and can be punished and deterred by the court's application of a sanction which also provides a

remedy to the opposing party, e.g., DePUY, INC. v. ECKES, 427 So.2d 306 (Fla. 3d DCA 1983); ROCKWELL INTERNATIONAL CORP. v. MENZIES, 561 So.2d 677 (Fla. 3d DCA 1990).[9] However, those authorities do not address situations in which the spoliation occurred prior to the litigation.[10]

Most jurisdictions recognize that there is a duty to preserve evidence prior to suit if a person or entity knows, or reasonably should know, that it will be relevant in anticipated litigation, NALLY v. VOLKSWAGEN OF AMERICA, INC., 539 N.E.2d 1017 (Mass. 1989); ALLIANCE TO END REPRESSION v. ROCHFORD, 75 F.R.D.

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[9]/Of course, the court can only sanction a party for spoliation if the opposing party learns of that misconduct during the litigation. The court in CEDARS-SINAI specifically declined to extend its holding to circumstances where the spoliation becomes apparent only after the litigation is terminated, CEDARS-SINAI, supra, 594 P.2d at 521, n.4. The Fourth District does not limit its holding in that manner.

[10]/In PUBLIC HEALTH TRUST OF DADE COUNTY v. VALCIN, 507 So.2d 596 (Fla. 1987), this Court authorized the sanction of a rebuttable presumption of negligence against a defendant which had breached a presuit statutory duty to maintain surgical records. Contrary to the Fourth District's opinion, the Plaintiffs do not concede that the VALCIN sanction/remedy is only available in situations where there is a statutory duty to maintain potential evidence. While that certainly was a significant factor in the VALCIN decision, this Court also expressed concern (507 So.2d at 599), "[A]s to fairness when 'evidence peculiarly within the knowledge of the adversary is...not made available to the party which has the burden of proof'" [quoting from PUBLIC HEALTH TRUST OF DADE COUNTY v. VALCIN, 473 So.2d 1297, 1305 (Fla. 3d DCA 1986)]. That concern is obviously implicated in the case sub judice, as in most spoliation cases, and this Court did not foreclose the possibility that that consideration, in itself, might justify the same sanction/remedy.

438 (N.D.Ill. 1976); CAPELLUPO v. FMC CORP., 126 F.R.D. 545 (D.Minn. 1989); INDEMNITY INS. CO. OF NORTH AMERICA v. LIEBERT CORP., 1998 WL 363834 (S.D.N.Y. 1998). In KIPPENHAN v. CHAULK SERVICES, INC., 697 N.E.2d 527, 530 (Mass. 1998), the court stated:

> The threat of a lawsuit must be sufficiently apparent, however, that a reasonable person in the spoliator's position would realize, at the time of spoliation, the possible importance of the evidence to the resolution of the potential dispute.

Under these circumstances, the potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence, SHIMANOVSKY v. GENERAL MOTORS CORP., 692 N.E.2d 286, 290 (Ill. 1998). The court in BOWMAN INSTRUMENT CORP. v. TEXAS INSTRUMENTS, INC., 196 U.S.P.Q. 199, 202 (N.D.Ind. 1977), noted that such a duty must be imposed "lest the fact-finding process in our courts be reduced to a mockery." Courts have also justified this duty on the premise that the adverse party has a valuable right in the chose of action represented by the anticipated litigation, which is entitled to legal protection against the conduct of the defendant, see BONDU, supra, 473 So.2d at 1312.

The existence of a presuit duty to preserve evidence has not been extensively discussed in Florida jurisprudence. However, that duty was certainly recognized, at least implicitly, by the Fourth District in HAGOPIAN v. PUBLIX SUPERMARKETS,

INC., supra. In that case, a patron in a grocery store claimed that a bottle exploded off a shelf and damaged her foot. The store manager collected the broken bottle pieces and kept them in a room at the store, 788 So.2d at 1089. Three months after the incident, the plaintiff's attorney wrote to Publix notifying it of plaintiff's claim. Thereafter, the plaintiff filed suit against Publix and Coca-Cola, and it was learned in discovery that the bottle pieces were apparently discarded by Publix. Plaintiff then added a claim for spoliation against Publix, but at trial the judge directed a verdict on that count, concluding that plaintiff's expert was able to testify in support of plaintiff's claim against Coca-Cola without the bottle's remains. After an adverse jury verdict on her negligence claim, the plaintiff brought an appeal.

In HAGOPIAN, the Fourth District reversed the directed verdict on the spoliation claim, and noted the essential elements of a negligent destruction of evidence cause of action which included, inter alia, a duty to preserve the evidence, 788 So.2d at 1091. After concluding that there was evidence that plaintiff's ability to proceed against Coca-Cola had been hampered by Publix's disposal of the bottle pieces, the Fourth District concluded that it was error to have directed a verdict for Publix on the spoliation claim.

In the case sub judice, the Fourth District made one brief reference to HAGOPIAN, characterizing it as "implicitly recognizing a retail establishment's duty

to preserve evidence - a broken bottle - in the absence of any contract, statute or administrative regulation," 28 Fla.L.Weekly at D322. One federal court has characterized 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 v. ALLSTATE INS. CO., 236 F.Supp.2d 1303, 1313 (N.D.Fla. 2002).

Under HAGOPIAN, and the extensive authority from other jurisdictions, Wal-Mart clearly had a duty to the Martinos to preserve the cart and videotape in this case. Wal-Mart obviously knew of the potential for litigation, since it prepared an incident report on the same day, and had Plaintiff return two days later to give a recorded statement to their risk management representative (T56). Nonetheless, while Wal-Mart was actively collecting evidence for its defense, it was also taking steps to eliminate critical evidence, i.e., the cart and videotape. Under these circumstances, the only reasonable conclusion is that Wal-Mart had a duty to exercise reasonable care to preserve that evidence.

The more problematic aspect of the duty to preserve evidence prior to suit is whether the court in which the action is later brought has the power to sanction violations of that duty. There is no rule of civil procedure which provide that

authority[11] and, therefore, a trial court must rely on its inherent authority as the basis for any sanction.

Limitations on the Court's Inherent Authority

A fundamental principle of constitutional law is that each branch of government has, in addition to any express grant of authority, the "inherent right" to accomplish all objects naturally within its function under the separation of powers doctrine, see The Inherent Power of the Florida Courts, 39 U. Miami L.Rev. 257, 262 (Jan. 1985), Roger A. Silver, citing, inter alia, PETERS v. MEEKS, 163 So.2d 753 (Fla. 1964). As this Court stated in ROSE v. PALM BEACH COUNTY, 361 So.2d 135, 137 (Fla. 1978):

> Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions. [Footnote deleted.]

[11]/Fla.R.Civ.P. 1.380 is modeled after Fed.R.Civ.P. 37, see Author's Comment 1967. Federal courts have ruled that Rule 37 does not provide authority to sanction pre-litigation conduct, UNIGARD SECURITY INS. CO. v. LAKEWOOD ENGINEERING & MANUFACTURING CORP., 982 F.2d 363, 368 (9th Cir. 1992); see also, IAIN D. JOHNSTON, supra, 156 F.R.D. at 323-25.

While those powers may appear broad, this Court has also stated that the doctrine of inherent power "should be invoked only in situations of clear necessity" (Ibid, 361 So.2d at 138); and "carries with it the obligation of restrained use and due process." MOAKLEY v. SMALLWOOD, 826 So.2d 221, 227 (Fla. 2002). This restraint is necessary, because to the extent any branch of government extends its inherent authority, it risks encroaching on the power of another branch of government, see INHERENT POWER OF THE FLORIDA COURTS, supra, 39 U. Miami L. Rev. at 262. The United States Supreme Court has stated that "because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion," ROADWAY EXPRESS, INC. v. PIPER, 447 U.S. 752, 764 (1980), 100 S.Ct. 2455, 65 L.Ed.2d 488.

The judiciary can encroach on the legislature's authority by unduly extending the exercise of its inherent authority. As noted by the United States Supreme Court in CHAMBERS v. NASCO, INC., 111 S.Ct. 2123 (1991), 501 U.S. 32, 115 L.Ed.2d 27, even the inherent authority of a court to assess attorney's fees as a sanction is limited by the "American Rule" which prohibits fee shifting in most cases. This Court has also wrestled with the extent of a court's inherent authority to assess fees against attorneys, who are officers of the court, in MOAKLEY v. SMALLWOOD, supra; see also, BITTERMAN v. BITTERMAN, 714 So.2d 356 (Fla. 1998) (addressing

limitations on courts' inherent authority to sanction a party for bad faith litigation conduct). CHAMBERS v. NASCO, supra, also stirred controversy about whether a court can exercise its inherent authority to sanction pre-litigation conduct. The dissent specifically determined that the court's inherent power to sanction could not extend to such conduct,[12] 111 S.Ct. at 2148 (J. Kennedy dissenting).

Neither this Court, nor any District Court in Florida, has expressly addressed a court's inherent powers to sanction conduct engaged in by non-attorneys prior to the initiation of litigation. The Fourth District's decision here apparently assumes that that authority is essentially boundless and flexible enough to address every possible inequity that could result from a party's spoliation of evidence. However, relying upon the inherent authority rather than tort law is inconsistent with the principle that the court's inherent power should be invoked only in situations of "clear necessity," ROSE v. PALM BEACH COUNTY, supra, 361 So.2d at 138.

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[12]/That issue was not actually resolved in CHAMBERS, because the majority opinion concluded that the trial court had only sanctioned the defendant for bad faith conduct occurring during the litigation, and not for pre-litigation conduct, 111 S.Ct. at 2138. As a result, the majority opinion expressly declined to address the issue framed by the dissent, 111 S.Ct. at 2138, n.16. The dissent, on the other hand, determined that the trial court's sanction was expressly intended to punish both presuit and litigation misconduct and, thus, exceeded the inherent authority of the court and also violated the limitations of ERIE RAILWAY CO. v. TOMPKINS, 304 U.S. 64 (1938).

Instead, it appears that the Fourth District reversed the appropriate analysis, and concluded that because it had authority to punish, deter, and remedy spoliation whenever it occurred, it was not necessary that a tort action should be recognized. Under this broad concept of the court's inherent authority, there would no longer be any "necessity" for the torts of malicious prosecution or abuse of process, since the court would have the inherent authority to sanction those types of litigation-related misconduct as well. Clearly, that is not the law in Florida. Under well-settled principles, the courts' inherent authority should be exercised only when necessary and, therefore, should not be relied upon as a basis to reject a tort for spoliation, especially as it relates to pre-litigation conduct.

Recognition of a Tort for Spoliation Is Consistent with Florida Jurisprudence

Recognition of a tort cause of action for spoliation of evidence is obviously consistent with Florida jurisprudence, since the three districts which have addressed the issue have adopted that tort, at least with respect to third parties, see BONDU, supra; HAGOPIAN, supra; TOWNSEND v. CONSHOR, INC., 832 So.2d 166, 167 (Fla. 2d DCA 2002) ("Spoliation is a recognized cause of action in Florida"). The Fourth District here (and recently the Second District in JOST, supra), have recently

declined recognition of the tort in the context of a first party spoliation, but solely for prudential reasons, not because it violates any legal principle of Florida law.

In BONDU, supra, the Third District characterized the spoliation cause of action consistent with the three essential elements of a negligence claim: 1) the existence of a duty recognized by law requiring the defendant to conform to a certain standard of conduct for the protection of others including the plaintiff; 2) a defendant's violation of that duty; and 3) injury or damage to the plaintiff proximately caused by that breach, 473 So.2d at 1312.[13] As noted previously, some jurisdictions have acknowledged spoliation as a subspecies of negligence, as opposed to characterizing it as a "new

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[13]/The Third District later expanded those elements, CONTINENTAL INS. CO. v. HERMAN, 576 So.2d 313, 315 (Fla. 3d DCA 1990), rev. den., 598 So.2d 76 (Fla. 1991), as follows:

> We hold now that the elements of a cause of action for negligent destruction of evidence are: (1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages.

The Fourth District adopted that characterization of the tort in HAGOPIAN, supra, 788 So.2d at 1091, see also, ST. MARY'S HOSPITAL, INC. v. BRINSON, 685 So.2d 33 (Fla. 4th DCA 1996), rev. dism., 709 So.2d 105 (1998).

tort," SMITH v. ATKINSON, supra; BOYD v. TRAVELERS INS, supra; see also, ROSENBLIT v. ZIMMERMAN, supra.

The recognition of a tort for spoliation is consistent with the fundamental policies of punishing, deterring, and remedying such misconduct. The fundamental premise of tort law in Florida has always been that it is remedial in character, see WALLER v. FIRST SAVINGS & TRUST CO., 138 So. 780 (Fla. 1931). Additionally, the goal of punishing and deterring spoliation can be implemented effectively in the context of a tort since, if the conduct is sufficiently egregious, punitive damages could be imposed. In fact, other jurisdictions have recognized that punitive damages could appropriately be awarded in a spoliation case, if the conduct was sufficiently egregious, see SMITH v. ATKINSON, supra, 771 So.2d at 432; ROSENBLIT v. ZIMMERMAN, supra, 766 So.2d at 758; see also, DAVIS v. WAL-MART, supra, 756 N.E.2d at 660, n.1.

Additionally, recognition of a spoliation tort is consistent with Florida constitutional law, more particularly, the access to courts provision, Florida Constitution, Article I, §21. That provision was designed to implement the maxim that for every wrong there is a remedy, HOLLAND v. MAYES, 19 So.2d 709 (Fla.

1944).[14] Additionally, recognition of the tort would preserve to the parties the right to trial by jury, as guaranteed by Article I, §22 of the Florida Constitution.

The Fourth District's decision not to accept the tort of first party spoliation is based on prudential concerns, not on a conclusion that the conduct was not tortious or that there was any legal impediment to a cause of action. Its primary rationale is that there are (28 Fla.L.Weekly at D323), "any number of sanctions and negative consequences" available to punish, deter, and remedy spoliation. However, that

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[14]/While violations of the access to courts provision can occur when common law remedies are eliminated without necessity or alternative, that is not the sole function of that provision. As noted by Justice Terrell in his characteristically colorful language in STATE EX REL POOSER v. WESTER, 170 So. 736, 737-38 (Fla. 1936):

> The test of whether or not old remedies will be extended to the wrongs that constantly arise from new conditions is not what the remedy extended to in the time of Edward the First or George the Third, but whether or not the one complaining has suffered an injury in his "lands, goods, person, or reputation" that should in right and justice be atoned for. If this is not the rule, then the equitable maxim and section 4 of the Declaration of Rights are nothing more than a gesture and had as well be consigned to the pictograph corner in the museum along with the Code of Hammurabi and the tablets that Moses brought down from the mountain.

assumption is not explored, nor are the limits of the court's inherent authority considered, especially in the context of presuit spoliation.[15]

The Fourth District's concern regarding finality of adjudication also does not justify rejection of the tort, especially in view of the fact that long recognized torts such as malicious prosecution and abuse of process are subject to the same criticism. Moreover, finality is not an end in itself; justice is. The unjustifiable and pernicious effect of spoliation on the actual and perceived fairness of the judicial process must outweigh the concerns of finality. Moreover, the Fourth District's recognition of the tort in the context of third parties undermines its premise that finality of adjudication should be a controlling factor.

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[15]/As noted previously, even the California Supreme Court in CEDARS-SINAI, supra, declined to extend its holding to circumstances where the spoliation becomes apparent only after the underlying litigation is terminated, 954 P.2d at 521, n.4. There is also an issue whether that court intended to address pre-litigation conduct, as indicated by the following statement (954 P.2d at 515):

> Our inquiry into whether to create a tort remedy for the intentional spoliation of evidence must begin with a recognition that using tort law to correct misconduct arising during litigation raises policy considerations not present in deciding whether to create tort remedies for harms arising in other contexts. [Emphasis supplied.]

Similarly, the Fourth District's concern for the "speculative nature" of the damages in spoliation torts and their potential for abuse must be considered in light of its recognition of the tort in the context of third parties. The Third District has addressed that concern by requiring that the spoliation be a substantial factor in producing an injurious result in the underlying case, see CONTINENTAL INS. CO. v. HERMAN, supra, compare BROWN v. CITY OF DELRAY BEACH, 652 So.2d 1150 (Fla. 4th DCA 1995).

Additionally, where uncertainty regarding damages is the result of a defendant's conduct, it is not reasonable to respond by immunizing the defendant. As noted by the Illinois Supreme Court in PETRIK v. MONARCH PRINTING CORP., 501 N.E.2d 1312, 1320 (Ill. 1987):

> 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.

See also, SMITH v. ATKINSON, supra, 771 So.2d at 436 (quoting same language). Similar concerns were expressed by the United States Supreme Court in STORY PARCHMENT CO. v. PATERSON PARCHMENT PAPER CO., 282 U.S. 555, 563 (1931). 51 S.Ct. 248, 75 L.Ed. 544:

> To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be thus certainly measured, would be to

> enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite depredation. Such is not, and cannot be the law, though cases may be found where courts have laid down artificial and arbitrary rules which have produced such a result.

Consistent with those fundamental concepts of fairness, any uncertainty regarding the fact, or amount, of damage arising from spoliation should not be a justification for abolishing the tort.

For the reasons stated above, this Court should quash the decision of the Fourth District in the case sub judice, and resolve the decisional conflict by accepting a tort cause of action for spoliation consistent with the Third District's decision in BONDU, supra. There is no empirical basis for the conclusion that the acceptance of such a tort will result in either a flood of litigation or an abuse of use of that cause of action. Spoliation is an unjustifiable and extremely harmful form of misconduct, which demonstrates and fosters disrespect for the judicial system. There is no reason to eliminate any valid remedy or sanction without a compelling reason. The Fourth District's unstated assumption that a court's inherent authority can properly sanction and remedy spoliation in any form is unsupported and problematic in operation. The prudential concerns relied upon by the Fourth District to justify rejection of a tort for spoliation are not compelling enough to eliminate an effective and valid means of

deterring and remedying such misconduct. Therefore, this Court should recognize a tort remedy for spoliation under Florida law.

CONCLUSION

This Court should quash the decision of the Fourth District and recognize a tort cause of action for spoliation of evidence, even as to first parties, consistent with the decision of the Third District in BONDU, supra.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to ROSEMARY WILDER, ESQ., 2950 S.W. 27th Ave., Ste. 200, Miami, FL 33133, by mail, on April 29, 2003.

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CERTIFICATE OF TYPE SIZE & STYLE

I hereby certify that the type size and style of the Brief of Petitioners on the Merits is Times New Roman 14pt.

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