IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

RONNA MARTINO and
RAYMOND MARTINO,

Petitioners,

-vs- CASE NO. SC03-334

WAL-MART STORES, INC.,

Respondent.
_____/

REPLY BRIEF OF PETITIONERS ON MERITS

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

SCHULER & HALVORSON, P.A.
1615 Forum Place, Ste. 4-D
West Palm Beach, FL 33401
and
CARUSO & BURLINGTON, P.A.
Suite 3A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(561) 686-8010
Attorneys for Petitioners

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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

(A) - Appendix (attached to Initial Brief)

STATEMENT OF THE CASE AND FACTS

Certain representations made by Wal-Mart require a response. It repeatedly claims that there are no facts or circumstances in the record which would justify imposing a duty on it to preserve the videotape and the cart (Answer Brief pp. 31-40). This ignores the fact that Plaintiffs were never permitted an opportunity to present evidence on that issue, since the duty issue was decided, as a matter of law, based solely on the allegations of the Second Amended Complaint (R374, 375). Wal-Mart implies that nothing happened to put it on notice of Plaintiffs' claim between the date of the incident and when the suit was filed two years later. That is false. However, Plaintiffs were deprived of any opportunity to present such evidence, because their spoliation claim was dismissed, and the order determined, as a matter of law, that Wal-Mart had no duty to preserve the evidence (R374-375).

Nonetheless, the record does contain some evidence on this issue, which should be sufficient to establish a duty. For example, it is undisputed that Wal-Mart prepared an incident report and obtained information for it from Martino (T52). Additionally, two days later, Defendant's risk management division took a recorded statement of the Plaintiff (T56). Moreover, Plaintiff testified that she asked Ramos, Wal-Mart's

assistant manager, to preserve the videotape and the cart when she returned to the store on the date of the incident (T52-53).[1]

Wal-Mart states it never found the cart despite looking for it (Answer Brief p.3). This ignores that its only witness on this subject was, at best, inconsistent in his testimony. Ramos, Wal-Mart's assistant manager, testified in his deposition that he could not recall looking for the cart, or whether any other employee did so (T82). At trial, Ramos could not recall whether Martino asked him to retrieve the cart, and he initially testified that he did not find the cart (T81). However, when asked by the court specifically whether he looked for the cart, he answered (T85), "Did I look for a broken cart? Probably not." He then said he believed he asked an employee to look for it, but he could not "100% swear to it" (T86). Contrasted with that evidence, was Plaintiff's testimony that when she returned to the store she spoke to Ramos and "pointed out...where exactly the shopping cart was," and that Ramos told her he would save it (T54-55). Wal-Mart also states that Plaintiffs were unable to show there was a video camera filming or that a videotape ever existed (Answer Brief p. 3). The only cite for that statement is page 87 of the trial transcript where Ramos testified that he could not recall whether the video camera was aimed on the register where the

[1]/Contrary to Wal-Mart's suggestion, Martino did not ask Ramos to retrieve the cart solely to prevent other injuries; she testified she did it for two reasons, and that was one of them (T54).

incident occurred (T87). However, Martino testified that she and Ramos noted the video camera on the day of the incident, and that she specifically requested him to get the videotape "so that you can see exactly what happened" (T54). Under these circumstances, there is no valid basis to blame Plaintiffs for not being able to prove that the videotape existed. Respectfully, the burden should be on Wal-Mart to prove that the videotape did not exist, since the Plaintiffs could not force them to produce it to her at the time of the incident.[2]

ARGUMENT

POINT I

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

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[2]/Defendant's brief makes other inaccurate factual statements such as that the Plaintiff had a "minor injury" (Answer Brief p.25). In fact, her injuries did not turn out to be minor, as evidenced by the fact that the Plaintiff made a motion to bifurcate, which Wal-Mart did not oppose, on the basis that the medical testimony would be extensive and it would be more efficient to determine the liability issue first (R499-500). Wal-Mart also inaccurately states that the Plaintiff continued shopping after the incident, and that she loaded the 40 lb. salt bags into the car herself afterwards (Answer Brief p.2). That is false; she testified that after her injury she pushed the cart into the parking lot with her left arm, and that she asked a man to help her load the packages into her trunk, which he did (T48). Wal-Mart also emphasizes that Plaintiff had no problem initially lifting the salt bags into the shopping cart, implying that there is some lack of credibility in her rendition of the incident. However, this ignores her undisputed testimony that at the checkout counter the aisle was narrow and that in those close quarters it was very difficult to pick the salt bags out of the cart and place them on the counter (T43-44, 76).

Wal-Mart's Brief does not accurately characterize Plaintiffs' arguments, nor the state of the case law in other jurisdictions[3], on the spoliation issue. It also essentially

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[3]/In footnote 1 of Wal-Mart's Brief, it claims the vast majority of courts have refused to recognize an independent tort for spoliation and then submits a string cite of cases, many of which do not stand for that proposition. It cites Christian v. Kenneth Chandler Construction Company, 658 So.2d 408 (Ala. 1995), in which the court did not reject a spoliation tort, but simply determined that the evidence was insufficient to prove that tort. In fact, Alabama has specifically approved a third party spoliation tort under the traditional doctrine of negligence, Smith v. Atkinson, 771 So.2d 429 (Ala. 2000). Wal-Mart cites Boyd v. Travelers Ins. Co., 652 N.E.2d 267 (Ill. 1995), in which the Illinois Supreme Court also recognized a tort for spoliation as part of a traditional negligence cause of action. Wal-Mart also cites Murphy v. Target Products, 580 N.E.2d 687 (Ind. Ct. App. 1991), which did not involve the tort of spoliation, but only a determination that an employer did not have a common law duty to preserve potential evidence for an employee's benefit. In fact, in Thompson v. Owensby, 704 N.E.2d 134 (Ind. App. 1998), the court specifically recognized a cause of action for negligent spoliation of evidence. Wal-Mart cites Manor Care Health Services, Inc. v. Osmose Wood Preserving, 764 A.2d 475 (N.J. App. 2001), in which a plaintiff had allegedly spoliated evidence, and thus there was no issue as to a cause of action for that conduct; the only issue was the appropriate sanction. In fact, the Supreme Court of New Jersey has recognized spoliation of evidence as a subspecies of the tort of fraudulent concealment, Rosenblit v. Zimmerman, 766 A.2d 749 (N.J. 2001). Additionally, some of the cases cited by Wal-Mart involve the rejection of the cause of action based on the particular facts of the case, and expressly decline to foreclose further consideration of that tort, e.g., Panich v. Iron Wood Products Corporation, 445 N.W.2d 795 (Mich. App. 1989); Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177 (Kan. 1987). On page 11 of its Brief, Wal-Mart claims that fourteen state supreme courts have not recognized a tort for spoliation and three have recognized it only for intentional spoliation. This is inaccurate, since seven state supreme courts have recognized a tort for spoliation of evidence, either as a discrete cause of action or as a subspecies of an existing tort, Rosenblit v. Zimmerman, 766 A.2d 749, 754 (N.J. 2001); Hazen v. Municipality of Anchorage, 71 8 P.2d 456 (Alaska 1986); Smith v. Howard Johnson Co., Inc., 615 N.E.2d 1037 (Ohio 1993); (continued...)

concedes an error of law in the Fourth District's decision. This last point will be addressed first.

On page 38 of its Brief, Wal-Mart states: "there is no doubt that an adverse inference jury instruction is available." This ignores the specific ruling of the Fourth District that such a jury instruction is "not appropriate." (A 5n.2) Apparently, Wal-Mart is conceding *sub silentio* that there is no legal authority for that conclusion. Instead of trying to support the Fourth District's rationale, Wal-Mart argues that Plaintiffs were not entitled to an adverse inference instruction because they did not demonstrate that Wal-Mart had a duty to preserve the cart and videotape. This ignores the fact that in granting Wal-Mart's Motion to Dismiss Plaintiffs' spoliation count, the trial court ruled that Wal-Mart had no such duty, as a matter of law (R374, 375). Thus, Plaintiffs were never given an opportunity to present evidence on the duty issue. Moreover, at the outset of the trial the presiding judge specifically denied Plaintiffs' request for the adverse inference instruction relying solely on the predecessor judge's ruling that Wal-Mart had no duty to preserve the evidence (T14-21). Therefore, this

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[3](...continued)
Coleman v. Eddy Potash, Inc., 905 P.2d 185 (N.M. 1995), overruled in part, on other grounds, 34 P3d 1148 (N.M. 2001); Oliver v. Stinson Lumber Co, 993 P.2d 11 (Mont. 1999); Boyd v. Travelers Ins. Co., 652 N.E.2d 267 (Ill. 1995); Smith v. Atkinson, 771 So.2d 429 (Ala. 2000).

Court should not hold that the Plaintiffs were not entitled to that jury instruction since they were never allowed to present evidence on the issue of duty.

Wal-Mart's reliance on Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718 (Tex. 2003) is not persuasive on this issue. The court there determined that the plaintiffs had not proven that Wal-Mart had a duty to preserve the evidence at issue, unlike here where the Plaintiffs had no opportunity to present evidence on that issue. Moreover, in that case, the injured plaintiff had told the Wal-Mart assistant manager at the time of the incident that he was not injured, and he did not request preservation of the object which fell on him. Here, Plaintiff, who was obviously injured, returned to the store the same day and specifically requested Wal-Mart to preserve the cart and the videotape. This clearly put Wal-Mart on notice of the potential litigation, as evidenced by its preparation of an incident report and taking a recorded statement from the Plaintiff. Therefore Johnson is inapposite.[4]

While the Plaintiffs here should have been entitled to an adverse inference instruction, that would not be a valid substitute for a cause of action since, as argued in the Initial Brief, the jury instruction is an inadequate remedy and provides no

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[4]/The discussion in Johnson regarding the prejudicial effect of the jury instruction is inapposite, because the jury instruction in Johnson created a presumption that the lost evidence was harmful to Wal-Mart; it did not simply establish a permissible inference.

deterrence against spoliation. Wal-Mart does not address the basic logic that if a party has control of evidence that it knows is damaging, there is no downside to destroying it if the only potential sanction is the permissible inference instruction. As one court has characterized it, spoliation can simply convert "a 'no win' proposition into the proverbial horse race." Headley v. Chrysler Motor Corporation, 141 F.R.D. 362, 366 (D.Mass. 1991).[5] That is, the party has eliminated the certainty of damaging evidence with the only consequence being the possibility that the jury might infer that the evidence would have been adverse to it. A judicial response to spoliation which does nothing to punish or deter the spoliation is wholly inadequate, see Rosenblit v. Zimmerman, 766 A.2d 749 (N.J. 2001).

Wal-Mart engages in the transparent rhetorical device of mischaracterizing Plaintiffs' argument in an absurd manner. It claims that Plaintiffs are arguing for "the most extreme view of spoliation that could possibly exist" including that it should apply to any relevant evidence regardless of whether it substantially impairs the Plaintiff cause of action, and even if there is no prejudice to the Plaintiff (Answer Brief,

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[5]/In Headley, the plaintiffs brought a product liability action against an automobile manufacturer, but had allowed the vehicle to be destroyed. The trial court determined that the exclusion of plaintiffs' expert evidence on the seatbelt issue was an appropriate remedy because by their spoliation the plaintiffs had converted what might have been a "no win" proposition into the proverbial horse race.

p.15-16). No citation to the record nor to Plaintiffs' Initial Brief is made in support of that false statement. In fact, Plaintiffs have consistently argued that the tort of spoliation should be recognized consistent with the pre-existing case law in Florida, beginning with Bondu v. Gurvich, 473 So.2d 1307 (Fla. 3rd DCA 1984), rev. den., 484 So.2d 7 (Fla. 1986) and further developed in Continental Insurance Company v. Herman, 576 So.2d 313 (Fla. 3rd DCA 1990), rev. den., 598 So.2d 76 (Fla. 1991). The essential elements of the spoliation tort include that the loss of the evidence result in "a significant impairment in the ability to prove the lawsuit" as well as "a causal relationship between the evidence destruction and the inability to prove the lawsuit." Continental Insurance v. Herman, 576 So.2d at 315. Plaintiffs plead their spoliation claim accordingly (R313-16).

Furthermore, contrary to Wal-Mart's Brief, Plaintiffs are not contending that the Court does not have authority to sanction for misconduct which occurs during litigation, such as discovery violations, in a manner that may adequately address spoliation. However, the case *sub judice* involves pre-litigation spoliation of evidence, which necessarily invokes different considerations regarding the Court's authority to evaluate and sanction it.

As noted above, the only sanction Wal-Mart suggests for spoliation is the utilization of the adverse inference instruction (which was specifically rejected by the

Fourth District). However, that judicial response provides no deterrence and is an ineffectual remedy. More importantly, to reject the tort of spoliation, the Court must conclude that it has inherent authority to adequately remedy any situation in which such misconduct occurs, including where the conduct is engaged in by non-parties, *i.e.*, in third party spoliation situations. Respectfully, no decision in Florida has analyzed that issue, and Wal-Mart's Brief provides virtually no jurisprudential support for it.

Wal-Mart claims that the Court has inherent authority to sanction for pre-litigation conduct. However, its analysis is minimal, as it ignores this Court's decisions in Rose v. Palm Beach County, 361 So.2d 135 (Fla. 1978), and Moakley v. Smallwood, 826 So.2d 221 (Fla. 2002), which clearly compel restraint in the exercise of the court's inherent authority, and permit it only where there is a "clear necessity."[6] Wal-Mart instead cites federal cases which are distinguishable. In each case cited by Wal-Mart, a party seeking affirmative relief from the court had destroyed significant evidence which had substantially impaired the opposing party's ability to defend itself.

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[6]/Wal-Mart also ignores the United States Supreme Court's decision in Chambers v. Nasco, Inc., 501 U.S. 32 (1991), especially the dissent which specifically rejects the suggestion that federal courts have the inherent authority to impose sanctions for pre-litigation conduct. It should be emphasized that the dissent's rationale was not rejected by the majority; the majority simply determined that the trial court had not imposed sanctions for pre-litigation conduct and therefore it did not address that issue.

Unigard Security Insurance Co. v. Lakewood Engineering & Manufacturing Corp., 982 F.2d 363 (9th Cir. 1992); Sacramona v. Bridgestone-Firestone, Inc., 106 F.3d 444 (1st Cir. 1997); Dillon v. Nissan Motor Co., 986 F.2d 263 (8th Cir. 1993); Headley v. Chrysler Motor Corp., supra. In those circumstances, the court utilized its inherent authority to control the admission of evidence to ensure that the opposing party was not unfairly prejudiced. There is a vast difference between that situation and where a defendant destroys or fails to preserve significant evidence prior to suit. It is well established that courts have inherent authority to prevent their power from being exercised to assist a fraud or perpetuate an injustice. See Rhea v. Hackney, 157 So. 190, 194 (Fla. 1934); Attwood v. Singletary, 661 So.2d 1216 (Fla. 1995). However, that does not mean that the court has inherent authority to impose sanctions on a defendant for conduct that occurred prior to the court having jurisdiction over it.

As expected, Wal-Mart relies heavily on the California Supreme Court's decision in Cedars-Sinai Medical Center v. Superior Court, 954 P.2d 511 (Cal. 1998), although it fails to accept the express limitations of that decision. For example, Wal-Mart states that the court there "found that it would not be proper to allow a litigant to attack the integrity of evidence after the proceedings had been concluded" (Answer Brief, p. 20). That is false, because the court specifically stated (954 P.2d at 521 n.4):

> We do not decide here whether a tort cause of action for spoliation should be recognized ... in cases of first party spoliation in which the spoliation victim neither knows or should have known of the spoliation until after a decision on the merits of the underlying action.

Additionally, there is some question whether the court in Cedars-Sinai intended to reject the tort for pre-litigation spoliation, as evidenced by its framing of the issue as follows (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]

Moreover, Wal-Mart does not dispute Plaintiffs' assertion that the rejection of the tort of spoliation in Cedars-Sinai, as in all the other cases, has been based solely on prudential concerns, and not based on a determination that spoliation conduct cannot be properly characterized as tortious. Wal-Mart does not dispute that neither the Fourth District below nor Cedar-Sinai provide any empirical, or even anecdotal, evidence of their concerns that the spoliation tort would be abused or would cause unending litigation. This is significant since the tort of spoliation had been recognized in California for fourteen years prior to the Cedars-Sinai decision, see Smith v. Superior Court, 198 Cal. Rptr. 829 (Cal. App. 1984); and had been recognized in Florida for nineteen years prior to the Fourth District's decision in the case *sub judice*,

see Bondu v. Gurvich, supra. None of the Florida decisions addressing the spoliation tort in the intervening nineteen years have expressed any concerns regarding the abuse of the cause of action. In view of the pernicious nature of spoliation, and its ability to undermine the effectiveness and integrity of the court system, it is respectfully submitted that any viable remedy and deterrent, such as a tort claim, should not be rejected solely on the basis of academic or philosophical concerns.

POINT II

THE FOURTH DISTRICT PROPERLY REVERSED THE TRIAL COURT'S GRANT OF DIRECTED VERDICT ON PLAINTIFFS' NEGLIGENCE CLAIM WHICH WAS BASED ON THE MODE OF OPERATION THEORY

Wal-Mart erroneously states that Plaintiffs' claim of negligence was based on allegations that it negligently maintained its premises. That is false, as a review of paragraph 15 of the Second Amended Complaint lists nine ways in which Wal-Mart was negligent, which are not based on a negligent maintenance theory (R312). As a result, Plaintiffs did not have to prove that Wal-Mart had actual or constructive notice of a dangerous condition in order to prevail.

Additionally, for the reasons addressed in Point I, supra, Plaintiffs were entitled to an adverse inference instruction based on settled case law in Florida, which allows that inference where a party possessing evidence does not produce it at trial. Wal-

Mart cites no Florida case law requiring a separate determination of a duty to maintain evidence within a party's custody as a prerequisite to that instruction. Furthermore, as discussed in more detail in Point I, supra, Plaintiffs were never given an opportunity to prove the duty issue, since the trial court determined that issue, as a matter of law, in its Order dismissing the Plaintiffs' spoliation count.

Wal-Mart claims that Plaintiffs are not entitled to pursue a negligent mode of operation theory, but cites no viable authority for that proposition. It cites cases regarding the operation of places of amusement, and claims that Soriano v. B & B Cash Grocery Stores, Inc., 757 So.2d 514, 516 (Fla. 4th DCA 1999) holds that for a higher burden of care to apply, it must be shown that the operation is inherently dangerous. That is not what Soriano holds, and that case does not justify a directed verdict in the case *sub judice*. Soriano involved a typical "slip and fall" case in which the plaintiff allegedly fell on a banana peel. The Fourth District Court held that the negligent mode of operation theory did not apply in that case. Here, the allegations were significantly different, including that Wal-Mart engaged in a negligent method of operation by requiring customers to place merchandise on the counter in order to scan the codes, failing to inspect the shopping carts, etc. The Fourth District's decision concisely summarizes its reasoning (A6):

> Well before the Owens [Owens v. Publix Supermarkets, Inc., 802 So.2d 315, 332 (Fla. 2001)] decision, outside of the context of foreign substance, supermarket slip and fall cases, Florida's courts have applied a "mode of operation" theory of liability to premises liability cases. See, e.g., Brisson v. W.T. Grant Co., 79 So.2d 771 (Fla. 1955); Fontana v. Wilson World Maingate Condo, 717 So.2d 199 (Fla. 5th DCA 1998). Since, contrary to the trial court's ruling, the law did permit the Martinos to pursue their "mode of operation" theory of negligence, we reverse the directed verdict in favor of Wal-Mart on this issue and remand for further proceedings.

Wal-Mart has not even cited the two cases relied on therein, and thus is conceding *sub silentio* the correctness of the Fourth District's reliance upon them. Therefore, this Court should not address this issue since it is not within the question certified to this Court; and even if it chooses to address this argument, it should reject it and uphold the Fourth District's determination on this issue.

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., 4000 Ponce de Leon Blvd., Ste. 570, Miami, FL 33146, by mail, on August 12, 2003.

SCHULER & HALVORSON, P.A.
1615 Forum Place, Ste. 4-D
West Palm Beach, FL 33401
and
CARUSO & BURLINGTON, P.A.
Suite 3A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(561) 686-8010
Attorneys for Petitioners

By:_____
PHILIP M. BURLINGTON
Florida Bar No. 285862

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CERTIFICATE OF TYPE SIZE & STYLE

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

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PHILIP M. BURLINGTON
Florida Bar No. 285862