IN THE SUPREME COURT OF FLORIDA
Case No. SC15-

In the matter of Standard Jury Instructions (Civil),

Committee Report 15-01

Proposed Instruction 301.11 and Proposed Amendments to Instructions 402.4, 501.5, 501.7, and 502.7.

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REPORT (NO. 15-01) OF THE COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

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July 13, 2015

To the Chief Justice and Justices of the Supreme Court of Florida:

The Committee on Standard Jury Instructions in Civil Cases requests that this Court approve for publication and use proposed instruction 301.11 and proposed amendments to instructions 402.4, 501.5, 501.7, and 502.7. These proposals are set forth in Appendix A. This Report is filed pursuant to article V, section 2(a), of the Florida Constitution.

I. INTRODUCTION AND PROCEDURAL NOTE

In March 2010, the Court adopted the Committee's proposal to reorganize the Standard Jury Instructions in Civil Cases and simplify the language used throughout the instructions. *See In re Standard Jury Instructions in Civil Cases – Reports 09-01 – 09-09*, 35 So. 3d 666 (Fla. 2010), 35 So. 3d 666 (Fla. 2010). Since that major project was completed, however, the Committee has continued its work on drafting and revising individual jury instructions that it believes need attention in the light of developments in the case law or issues experienced in and reported from courtrooms around the state. This report highlights three such examples, which the Committee has now addressed.

II. DESCRIPTION OF APPENDICES

The following appendices are attached to this Report:

Appendix A:	Proposed Instruction 301.11 and Proposed Amendments to Instructions 402.4, 501.5, 501.7, and 502.7.
Appendix B:	September 15, 2011, and October 15, 2012, *Florida Bar News* notices.
Appendix C:	Relevant excerpts from the Committee's minutes.
Appendix D:	Committee materials relevant to these proposals.

III. THE PROPOSED INSTRUCTIONS

As part of its continuing review of the Standard Jury Instructions for Civil Cases, the Committee proposes one new standard instruction and revisions to four current standard instructions. These proposals are set forth in Appendix A to this report. The proposals fall into three general categories.

Proposed instruction 301.11 and proposed revisions to instruction 402.4

First, the Committee proposes comprehensive spoliation instructions. Proposed instruction 301.11 is a new general spoliation instruction. There is no current standard instruction that covers this issue generally. Proposed instruction 402.4d. is a significant overhaul to the *Valcin* instruction, *see Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987), that currently is situated only in the professional negligence section of the standard instructions.

As background, the current *Valcin* instruction was proposed in Committee Report 09-08 (Professional Negligence Instructions), filed in this Court on February 17, 2009. That proposal was adopted by this Court in *In re Standard Jury*

Instructions in Civil Cases – Reports 09-01 – 09-09, 35 So. 3d 666 (Fla. 2010), as part of the reorganization of the standard jury instructions book.

At that time, the *Valcin* instruction was placed in the professional negligence section of the reorganized book (Section 402) and no comparable standard instruction existed for other cases. In 2010, the Committee looked at the possibility of drafting a general spoliation (or adverse inference) instruction that could be used in other cases. After the spoliation subcommittee created a draft and the whole Committee worked on the proposal over the course of several meetings, the proposed new instruction 301.11 was published in the September 15, 2011, *Florida Bar News*. The Committee received no comments.

At the same time that proposed instruction 301.11 was published for comment, the spoliation subcommittee took another look at the *Valcin* instruction found in Section 402.4. At the October 2011 meeting of the whole Committee, the spoliation subcommittee presented a proposed revision to the current *Valcin* instruction. The whole Committee worked on this revision over its next few meetings and, at the July 2012 meeting of the whole Committee, the whole Committee unanimously agreed that there should be a parallelism between instructions 301.11 and 402.4 and that similar language for an adverse inference instruction and a burden-shifting presumption should be used in both places. The current version of the *Valcin* instruction would be deleted and replaced with the new

language.

The proposed new instruction 301.11 and the proposed revisions to instruction 402.4 were published for comment in the October 15, 2012, *Florida Bar News*. The Committee received no comments.

Proposed revisions to note on use for instruction 501.5

Second, the Committee proposes a minor, but important, modification to the note on use to instruction 501.5a. Former Committee member Alan Wagner sent the Committee a letter (*see* App. D, Part 3, at 16-17) stating his belief that, if instruction 501.5a (aggravation or activation of disease or defect) is given, it must be accompanied by instruction 401.12b (concurring cause). The current note on use to instruction 501.5a. has it backwards. That is, the current note on use states that instruction 501.5a (aggravation or activation of disease or defect) should be given every time instruction 401.12b (concurring cause) is given. The Committee unanimously agreed with Mr. Wagner's proposed change.

Proposed note on use for instructions 501.7 and 502.7

Third, the Committee proposes a new note on use for instructions 501.7 and 502.7, which both instruct the jury to reduce future economic damages to present value. In one narrow circumstance, that direction is in conflict with a statute.

Specifically, the Committee received an email from Michael Kotler (*see* App. D, Part 3, at 11) regarding the interaction of instructions 501.7 and 502.7 with

section 768.77(2)(a)2., Florida Statutes. Instructions 501.7 and 502.7 tell the jury to that future damages should be reduced to present value, such that "only the present money value of these [future economic damages] should be included in your verdict."

In contrast, section 768.77, Florida Statutes, has a provision to accommodate periodic payments as allowed by section 768.78, Florida Statutes, in certain circumstances. To provide the trial court with the information it would need to order periodic payments, section 768.77, Florida Statutes, would have the jury enter an unreduced figure for future economic damages on the verdict form. In particular, the relevant subsection reads as follows:

> (2) In any action for damages based on personal injury or wrongful death arising out of medical malpractice, whether in tort or contract, to which this part applies in which the trier of fact determines that liability exists on the part of the defendant, the trier of fact shall, as a part of the verdict, itemize the amounts to be awarded to the claimant into the following categories of damages:
>
> > (a) Amounts intended to compensate the claimant for:
> >
> > > 1. Past economic losses; and
> > >
> > > 2. Future economic losses, ***not reduced to present value***, and the number of years or part thereof which the award is intended to cover

(Emphasis supplied.)

The Committee unanimously agreed that a note on use should be added to instructions 501.7 and 502.7 to indicate that the instructions conflict with section 768.77(2)(a)2., Florida Statutes, and should not be given in medical malpractice cases when a party has requested that future economic damages be paid in periodic payments.

IV. DISSENTING VIEWS FROM THE COMMITTEE

There are no dissenting views from the Committee. The Committee believes that proposed instruction 301.11 and the proposed amendments to instructions 402.4, 501.5, 501.7, and 502.7 will improve the standard jury instructions. The Committee unanimously recommends their publication.

V. COMMENTS RECEIVED AND ACTION TAKEN IN RESPONSE

A version of proposed instruction 301.11 was published in *The Florida Bar News* on September 15, 2011. The Committee received no comments. All of the proposals in this report were published for comment in *The Florida Bar News* on October 15, 2012. The Committee received no comments.

VI. CONCLUSION

WHEREFORE, for the above reasons, the Committee respectfully requests that the Court approve for publication and use proposed instruction 301.11 and proposed amendments to instructions 402.4, 501.5, 501.7, and 502.7.

Respectfully submitted,

/s/Joseph Hagedorn Lang, Jr.

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July 13, 2015

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this report complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

/s/Joseph Hagedorn Lang, Jr.
Florida Bar Number 059404

APPENDIX A

301.11 FAILURE TO MAINTAIN EVIDENCE OR KEEP A RECORD

a. Adverse inference.

If you find that:

(Name of party) **[lost] [destroyed] [mutilated] [altered] [concealed] or otherwise caused the** (describe evidence) **to be unavailable, while it was within [his] [her] [its] possession, custody, or control; and the** (describe evidence) **would have been material in deciding the disputed issues in this case; then you may, but are not required to, infer that this evidence would have been unfavorable to** (name of party). **You may consider this, together with the other evidence, in determining the issues of the case.**

NOTES ON USE FOR 301.11a

1. This instruction is not intended to limit the trial court's discretion to impose additional or other sanctions or remedies against a party for either inadvertent or intentional conduct in the loss, destruction, mutilation, alteration, concealment, or other disposition of evidence material to a case. See, *e.g., Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 780 (Fla. 4th DCA 2006); *American Hospitality Management Company of Minnesota v. Hettiger*, 904 So.2d 547 (Fla. 4th DCA 2005); *Jost v Lakeland Regional Medical Center*, 844 So.2d 656 (Fla. 2d DCA 2003); *Nationwide Lift Trucks, Inc v. Smith*, 832 So.2d 824 (Fla. 4th DCA 2002); *Torres v. Matsushita Electric Corp.*, 762 So.2d 1014 (Fla. 5th DCA 2000); and *Sponco Manufacturing, Inc. v. Alcover*, 656 So.2d 629 (Fla. 3d DCA 1995).

2. The inference addressed in this instruction does not rise to the level of a presumption. *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987), and Instruction 301.11b.

3. This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence.

b. Burden shifting Presumption.

The court has determined that (name of party) **had a duty to [maintain** (describe missing evidence)**] [keep a record of** (describe subject matter as to which party had record keeping duty)**]**. (Name of party) **did not [maintain** (describe missing evidence)**] [or] [keep a record of** (describe subject matter as to which party had record keeping duty)**].**

Because (name of party) **did not [maintain** (describe missing evidence)] **[or] [keep a record of** (describe subject matter as to which party had a record keeping duty)], **you should find that** (name of invoking party) **established [his] [her]** (describe applicable claim or defense) **unless** (name of party) **proves otherwise by the greater weight of the evidence.**

NOTES ON USE FOR 301.11b

1. This instruction applies only when the court has determined that there was a duty to maintain or preserve the missing evidence at issue and the party invoking the presumption has established to the satisfaction of the court that the absence of the missing evidence hinders the other party's ability to establish its claim or defense. See *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987).

2. This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence.

402.4 MEDICAL NEGLIGENCE

a. Negligence (physician, hospital or other health provider):

Negligence is the failure to use reasonable care. Reasonable care on the part of a [physician] [hospital] [health care provider] is that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers]. Negligence on the part of a [physician] [hospital] [health care provider] is doing something that a reasonably careful [physician] [hospital] [health care provider] would not do under like circumstances or failing to do something that a reasonably careful [physician] [hospital] [health care provider] would do under like circumstances.

[If you find that (describe treatment or procedure) **involved in this case was carried out in accordance with the prevailing professional standard of care recognized as acceptable and appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers], then, in order to prevail,** (claimant) **must show by the greater weight of the evidence that his or her injury was not within the necessary or reasonably foreseeable results of the treatment or procedure.]**

NOTES ON USE FOR 402.4a

1. See *F.S.* 766.102. Instruction 402.4a is derived from *F.S.* 766.102(1) and is intended to embody the statutory definition of "prevailing professional standard of care" without using that expression itself, which is potentially confusing.

2. The second bracketed paragraph is derived from *F.S.* 766.102(2)(a) and should be given only in cases involving a claim of negligence in affirmative medical intervention.

b. Negligence (treatment without informed consent):

[Negligence is the failure to use reasonable care.] Reasonable care on the part of a [physician] [health care provider] in obtaining the [consent] [informed consent] to treatment of a patient consists of

(1). When issue is whether consent was obtained irregularly:

obtaining the consent of the patient [or one whose consent is as effective as the patient's own consent such as (describe)**], at a time and in a manner in accordance with an accepted standard of medical practice among members of the profession with similar training and experience in the same or a similar medical community.**

(2). When issue is whether sufficient information was given:

providing the patient [or one whose informed consent is as effective as the patient's informed consent, such as (describe)**] information sufficient to give a reasonable person a general understanding of the proposed treatment or procedure, of any medically acceptable alternative treatments or procedures, and of the substantial risks and hazards inherent in the proposed treatment or procedure which are recognized by other [physicians] [health care providers] in the same or a similar community who perform similar treatments or procedures.**

NOTE ON USE FOR 402.4b

This instruction is derived from the provisions of *F.S.* 766.103.

c. Foreign bodies:

[Negligence is the failure to use reasonable care.] The presence of (name of foreign body) **in** (patient's) **body establishes negligence unless** (defendant(s)) **prove(s) by the greater weight of the evidence that [he] [she] [it] was not negligent.**

NOTES ON USE FOR 402.4c

1. This instruction is derived from *F.S.* 766.102(3). The statute uses the term "prima facie evidence of negligence." The committee recommends that term not be used as not helpful to a jury. Rather, the committee has used the definition of prima facie. See, *e.g.*, *State v. Kahler*, 232 So.2d 166, 168 (Fla. 1970) ("prima facie" means "evidence sufficient to establish a fact unless and until rebutted").

2. Before this instruction is given, the court must make a finding that the foreign body is one that meets the statutory definition. See *Kenyon v. Miller*, 756 So.2d 133 (Fla. 2d DCA 2000).

d. ~~Failure to make or maintain records:~~

~~[Negligence is the failure to use reasonable care.] The law requires~~ (defendant) ~~as a licensed health care provider to prepare and maintain health care records.~~

~~[Because~~ (defendant) ~~did not [make] [or] [maintain]~~ (describe the missing record(s))

~~*or*~~

~~[If you find that a person who was responsible for [making] [or] [maintaining]~~ (describe the missing record(s)) ~~and failed to do so]~~

~~you should presume~~ (describe the missing records(s)) ~~contained evidence of negligence unless~~ (defendant) ~~proves otherwise by the greater weight of the evidence. You may consider this presumption, together with the other evidence, in determining whether~~ (defendant) ~~was negligent.]~~

~~NOTES ON USE FOR 402.4d~~

~~1. The second bracketed paragraph should be used if there is no issue about whether the records were made or maintained. If there is an issue about the making or maintenance of the records, then the third bracketed paragraph should be used.~~

~~2. This instruction applies only when records are required to be made and maintained and the court determines that the inability or failure to locate a record or records hinders the plaintiff's ability to establish a case. *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987).~~

(1). Adverse inference.

If you find that:

(Name of party) **[lost] [destroyed] [mutilated] [altered] [concealed] or otherwise caused the** (describe evidence) **to be unavailable, while it was within [his] [her] [its] possession, custody, or control; and the** (describe evidence) **would have been material in deciding the disputed issues in this case; then you may, but are not required to, infer that this evidence would have been unfavorable to** (name of party)**. You may consider this, together with the other evidence, in determining the issues of the case.**

NOTES ON USE FOR 402.4d(1)

1. This instruction is not intended to limit the trial court's discretion to impose additional or other sanctions or remedies against a party for either inadvertent or intentional conduct in the loss, destruction, mutilation, alteration, concealment, or other disposition of evidence material to a case. See, *e.g.*, *Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 780 (Fla. 4th DCA 2006); *American Hospitality Management Company of Minnesota v. Hettiger*, 904 So.2d 547 (Fla. 4th DCA 2005); *Jost v Lakeland Regional Medical Center*, 844 So.2d 656 (Fla. 2d DCA 2003); *Nationwide Lift Trucks, Inc v. Smith*, 832 So.2d 824 (Fla. 4th DCA 2002); *Torres v. Matsushita Electric Corp.*, 762 So.2d 1014 (Fla. 5th DCA 2000); and *Sponco Manufacturing, Inc. v. Alcover*, 656 So.2d 629 (Fla. 3d DCA 1995).

2. The inference addressed in this instruction does not rise to the level of a presumption. *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987), and Instruction 402.4d(2).

3. This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence.

(2). Burden shifting Presumption.

The court has determined that (name of party) **had a duty to [maintain** (describe missing evidence)] **[keep a record of** (describe subject matter as to which party had record keeping duty)]. (Name of party) **did not [maintain** (describe missing evidence)] **[or] [keep a record of** (describe subject matter as to which party had record keeping duty)]**.**

Because (name of party) **did not [maintain** (describe missing evidence)] **[or] [keep a record of** (describe subject matter as to which party had a record keeping duty)]**, you should find that** (name of invoking party) **established [his] [her]** (describe applicable claim or defense) **unless** (name of party) **proves otherwise by the greater weight of the evidence.**

NOTES ON USE FOR 402.4d(2)

1. This instruction applies only when the court has determined that there was a duty to maintain or preserve the missing evidence at issue and the party invoking the presumption has established to the satisfaction of the court that the absence of the missing evidence hinders the other party's ability to establish its claim or defense. See *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987).

2. This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence.

e. Res Ipsa Loquitur:

[Negligence is the failure to use reasonable care.] If you find that ordinarily the [incident] [injury] would not have happened without negligence, and that the (describe the item) **causing the injury was in the exclusive control of** (defendant) **at the time it caused the injury, you may infer that** (defendant) **was negligent unless, taking into consideration all of the evidence in the case, you find that the** (describe event) **was not due to any negligence on the part of** (defendant).

501.5 OTHER CONTRIBUTING CAUSES OF DAMAGES

a. Aggravation or activation of disease or defect:

If you find that the (defendant(s)) **caused a bodily injury, and that the injury resulted in [an aggravation of an existing disease or physical defect] [or] [activation of a latent disease or physical defect], you should attempt to decide what portion of** (claimant's) **condition resulted from the [aggravation] [or] [activation]. If you can make that determination, then you should award only those damages resulting from the [aggravation] [or] [activation]. However, if you cannot make that determination, or if it cannot be said that the condition would have existed apart from the injury, then you should award damages for the entire condition suffered by** (claimant).

NOTE ON USE FOR 501.5a

This instruction is intended for use in situations in which a preexisting physical condition is aggravated by the injury, or the injury activates a latent condition. See *C. F. Hamblen, Inc. v. Owens*, 172 So. 694 (Fla. 1937). When Instruction 501.5a is ~~necessary where~~ given, Instruction 401.12b~~,~~ (Concurring cause~~,~~) is ~~given~~necessary. See *Hart v. Stern*, 824 So.2d 927, 932–34 (Fla. 5th DCA 2002); *Auster v. Gertrude & Philip Strax Breast Cancer Detection Institute, Inc.*, 649 So.2d 883, 887 (Fla. 4th DCA 1995).

b. Subsequent injuries/multiple events:

You have heard that (claimant) **may have been injured in two events. If you decide that** (claimant) **was injured by** (defendant) **and was later injured by another event, then you should try to separate the damages caused by the two events and award** (claimant) **money only for those damages caused by** (defendant). **However, if you cannot separate some or all of the damages, you must award** (claimant) **any damages that you cannot separate as if they were all caused by** (defendant).

NOTES ON USE FOR 501.5b

1. Instruction 501.5b addresses the situation occurring in *Gross v. Lyons*, 763 So.2d 276 (Fla. 2000). It is not intended to address other situations. For example, see *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977), and *Eli Witt Cigar & Tobacco Co. v. Matatics*, 55 So.2d 549 (Fla. 1951). The committee recognizes that the instruction may be inadequate in situations other than the situation in *Gross*.

2. The committee takes no position on whether the subsequent event is limited to a tortious event, or may be a nontortious event.

c. Subsequent injuries caused by medical treatment:

If you find that (defendant(s)) **caused [loss] [injury] [or] [damage] to** (claimant), then (defendant(s)) **[is] [are] also responsible for any additional [loss] [injury] [or] [damage] caused by medical care or treatment reasonably obtained by** (claimant).

NOTE ON USE FOR 501.5c

This instruction is intended for use in cases involving additional injury caused by subsequent medical treatment. See, e.g., *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977); *Pedro v. Baber*, 83 So.3d 912 (Fla. 2d DCA 2012); *Tucker v. Korpita*, 77 So. 3d 716, 720 (Fla. 4th DCA 2011); *Nason v. Shafranski*, 33 So. 3d 117 (Fla. 4th DCA 2010); *Dungan v. Ford,* 632 So. 2d 159 (Fla. 1st DCA 1994).

501.7 REDUCTION OF DAMAGES TO PRESENT VALUE

Any amount of damages which you allow for [future medical expenses], [loss of ability to earn money in the future], [or] [(describe any other future economic loss which is subject to reduction to present value)] **should be reduced to its present money value and only the present money value of these future economic damages should be included in your verdict.**

The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate (claimant) **for these losses as they are actually experienced in future years.**

NOTES ON USE FOR 501.7

1. Designing a standard instruction for reduction of damages to present value is complicated by the fact that there are several different methods used by economists and courts to arrive at a present-value determination. See, for example, *Delta Air Lines, Inc. v. Ageloff*, 552 So.2d 1089 (Fla. 1989), and *Renuart Lumber Yards v. Levine*, 49 So.2d 97 (Fla. 1950) (using approach similar to calculation of cost of annuity); *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), and *Loftin v. Wilson*, 67 So.2d 185 (Fla. 1953) (lost stream of income approach); *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967) (total offset method); *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982), and *Seaboard Coast Line Railroad v. Garrison*, 336 So.2d 423 (Fla. 2d DCA 1976) (discussing real interest rate discount method and inflation/market rate discount methods); and *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977) (even without evidence, juries may consider the effects of inflation).

2. Until the Florida Supreme Court or the legislature adopts one approach to the exclusion of other methods of calculating present money value, the committee assumes that the present value of future economic damages is a finding to be made by the jury on the evidence; or, if the parties offer no evidence to control that finding, that the jury properly resorts to its own common knowledge as guided by instruction 501.7 and by argument. See *Seaboard Coast Line Railroad v. Burdi*, 427 So.2d 1048 (Fla. 3d DCA 1983).

3. This instruction conflicts with *F.S.* 768.77(2)(a)2 and should not be given in medical malpractice cases when a party has requested that future damages be paid in periodic payments.

502.7 REDUCTION OF DAMAGES TO PRESENT VALUE

Any amount of damages which you allow for [loss of earnings] [the estate's loss of net accumulations], [or] [(describe any other future economic loss which is subject to reduction to present value)] **should be reduced to its present money value and only the present money value of these future economic damages should be included in your verdict.**

The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate (claimant) **for these losses as they are actually experienced in future years.**

NOTES ON USE FOR 502.7

1. Designing a standard instruction for reduction of damages to present value is complicated by the fact that there are several different methods used by economists and courts to arrive at a present-value determination. See, for example, *Delta Air Lines, Inc. v. Ageloff*, 552 So.2d 1089 (Fla. 1989), and *Renuart Lumber Yards v. Levine*, 49 So.2d 97 (Fla. 1950) (using approach similar to calculation of cost of annuity); *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), and *Loftin v. Wilson*, 67 So.2d 185 (Fla. 1953) (lost stream of income approach); *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967) (total offset method); *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982), and *Seaboard Coast Line Railroad v. Garrison*, 336 So.2d 423 (Fla. 2d DCA 1976) (discussing real interest rate discount method and inflation/market rate discount methods); and *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977) (even without evidence, juries may consider effects of inflation).

2. Until the Supreme Court or the legislature adopts one approach to the exclusion of other methods of calculating present money value, the committee assumes that the present value of future economic damages is a finding to be made by the jury on the evidence; or, if the parties offer no evidence to control that finding, that the jury properly resorts to its own common knowledge as guided by instruction 502.7 and by argument. See *Seaboard Coast Line Railroad v. Burdi*, 427 So.2d 1048 (Fla. 3d DCA 1983).

3. This instruction conflicts with *F.S.* 768.77(2)(a)2 and should not be given in medical malpractice cases when a party has requested that future damages be paid in periodic payments.

APPENDIX B

The Florida Bar News

September 15, 2011

Proposed amendments to civil jury instructions

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes amendments to Standard Jury Instructions in Civil Cases 201.2, 401.20a, and 801.2, and proposes new Instruction 301.11. Interested parties have until October 15 to submit comments electronically to the chair of the committee, Judge James Manly Barton II, bartonjm@fljud13.org, with a copy to the committee liaison, Jodi Jennings, jjenning@flabar.org. After reviewing all comments, the committee may submit its proposals to the Florida Supreme Court.

201.2 INTRODUCTION OF PARTICIPANTS AND THEIR ROLES

Who are the people here and what do they do?

Judge/Court: **I am the Judge. You may hear people occasionally refer to me as "The Court." That is the formal name for my role. My job is to maintain order and decide how to apply the rules of the law to the trial. I will also explain various rules to you that you will need to know in order to do your job as the jury. It is my job to remain neutral on the issues of this lawsuit.**

Parties: **A party who files a lawsuit is called the Plaintiff. A party that is sued is called the Defendant.**

Attorneys: **The attorneys ~~to whom I will introduce you~~ have the job of representing their clients. That ~~is,~~ means they speak for their client here at the trial. They have taken oaths as attorneys to do their best and to follow the rules for their profession.**

Plaintiff's Counsel: **The attorney on this side of the courtroom,** (introduce by name), **represents** (client name) **and is the person who filed the lawsuit here at the courthouse. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will be referred to most of the time as "the plaintiff."** (Attorney name), **will you please introduce who is sitting at the table with you.**

[Plaintiff without Counsel: (Introduce claimant by name), **on this side of the courtroom, is the person who filed the lawsuit at the courthouse.** (Claimant) **is not represented by an attorney and will present [his] [her] side of things to you [himself] [herself].**

Defendant's Counsel: **The attorney on this side of the courtroom,** (introduce by name), **represents** (client name), **the one who has been sued. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will usually be referred to here as "the defendant."** (Attorney name), **will you please**

introduce who is sitting at the table with you.

[Defendant without Counsel: (Introduce defendant by name), **on this side of the courtroom, is the one who has been sued.** (Defendant) **is not represented by an attorney and will present [his] [her] side of things to you [himself] [herself].**

Court Clerk: **This person sitting in front of me,** (name), **is the court clerk. [He] [She] is here to assist me with some of the mechanics of the trial process, including the numbering and collection of the exhibits that are introduced in the course of the trial.**

Court Reporter: **The person sitting at the stenographic machine,** (name), **is the court reporter. [His] [Her] job is to keep an accurate legal record of everything we say and do during this trial.**

Bailiff: **The person over there,** (name), **is the bailiff. [His] [Her] job is to maintain order and security in the courtroom. The bailiff is also my representative to the jury. Anything you need or any problems that come up for you during the course of the trial should be brought to [him] [her]. However, the bailiff cannot answer any of your questions about the case. Only I can do that.**

Jury: **Last, but not least, is the jury, which we will begin to select in a few moments from among all of you. The jury's job will be to decide what the facts are and what the facts mean. Jurors should be as neutral as possible at this point and have no fixed opinion about the lawsuit.**

In order to have a fair and lawful trial, there are rules that all jurors must follow. A basic rule is that jurors must decide the case only on the evidence presented in the courtroom. You must not communicate with anyone, including friends and family members, about this case, the people and places involved, or your jury service. You must not disclose your thoughts about this case or ask for advice on how to decide this case.

I want to stress that this rule means you must not use electronic devices or computers to communicate about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept any messages to or from anyone about this case or your jury service.

You must not do any research or look up words, names, [maps], or anything else that may have anything to do with this case. This includes reading newspapers, watching television or using a computer, cell phone, the Internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else.

All of us are depending on you to follow these rules, so that there will be a fair and lawful resolution to this case. Unlike questions that you may be allowed to ask in court, which will be answered in court in the presence of the judge and the parties, if you investigate, research or make inquiries on your own outside of the courtroom, the trial judge has no way to assure they are proper and relevant to the case. The parties likewise have no opportunity to dispute the accuracy of what you find or to provide rebuttal evidence to it. That is contrary to our judicial system, which assures every party the right to ask questions about and rebut the

evidence being considered against it and to present argument with respect to that evidence. Non-court inquiries and investigations unfairly and improperly prevent the parties from having that opportunity our judicial system promises. If you become aware of any violation of these instructions or any other instruction I give in this case, you must tell me by giving a note to the bailiff.

NOTE ON USE FOR 201.2

The portion of this instruction dealing with communication with others and outside research may need to be modified to include other specified means of communication or research as technology develops.

301.11 SPOLIATION

Inference from loss, destruction, or failure to preserve evidence.

If you find that:

(Name of party) **[lost] [destroyed] [mutilated] [altered] [concealed] or otherwise caused the** (describe evidence) **to be unavailable, while it was within [his] [her] [its] possession, custody, or control; and the** (describe evidence) **would have been material in deciding the disputed issues in this case; then you may, but are not required to, infer that this evidence would have been unfavorable to** (name of party)**. You may consider this, together with the other evidence, in determining the issues of the case.**

NOTES ON USE FOR 402.4e

1. This instruction is not intended to limit the trial court's discretion to impose additional or other sanctions or remedies against a party for either inadvertent or intentional conduct in the loss, destruction, mutilation, alteration, concealment, or other disposition of evidence material to a case. See, *e.g., Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 780 (Fla. 4th DCA 2006); *American Hospitality Management Company of Minnesota v. Hettiger*, 904 So.2d 547 (Fla. 4th DCA 2005); *Jost v Lakeland Regional Medical Center*, 844 So.2d 656 (Fla. 2d DCA 2003); *Nationwide Lift Trucks, Inc v. Smith*, 832 So.2d 824 (Fla. 4th DCA 2002); *Torres v. Matsushita Electric Corp.*, 762 So.2d 1014 (Fla. 5th DCA 2000); and *Sponco Manufacturing, Inc. v. Alcover*, 656 So.2d 629 (Fla. 3dDCA 1995).

2. The inference addressed in this instruction does not rise to the level of a presumption. *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987), and Instruction 402.4d.

401.20 ISSUES ON PLAINTIFF'S CLAIM — PREMISES LIABILITY
The [next] issues on (claimant's) claim, for you to decide are:

a. Landowner or possessor's negligence (toward invitee and invited licensee):

whether (defendant) **[negligently failed to maintain his premises in a reasonably safe condition], [or] [negligently failed to correct a dangerous condition about which** (defendant) **either knew or should have known, by the use of reasonable care,] [or] *[negligently failed to warn** (claimant) **of a dangerous condition about which** (defendant) **had, or should have had, knowledge greater than that of** (claimant)**]; and, if so, whether such negligence was a legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made).

NOTES ON USE FOR 401.20a

1. If there is an issue of whether claimant had status as an invitee or invited licensee, give instructions 401.16a and 401.17 as preliminary instructions before giving instruction 401.20a. The final segment of instruction 401.20a, marked with an asterisk(*), is inapplicable when plaintiff does not proceed on a theory of defendant's failure to warn.

2. The phrase ". . . about which (defendant) either knew or should have known by use of reasonable care . . ." may be inappropriate in cases involving "transitory foreign objects." to which *F.S.* 768.0710 applies. ~~*Markowitz v. Helen Homes of Kendall Corp.*, 826 So.2d 256 (Fla. 2002); *Owens v. Publix Supermarkets, Inc.*, 802 So.2d 315 (Fla. 2001); *Melkonian v. Broward County Board of County Commissioners*, 844 So.2d 785 (Fla. 4th DCA 2003)~~ *F.S.* 768.0710 was repealed effective July 1, 2010, and replaced with *F.S.* 768.0755, which restores the actual or constructive knowledge requirement. See Ch. 2010-8, Laws of Fla. The committee expresses no opinion concerning the retroactivity of *F.S.* 768.0755.

b. Landowner or possessor's negligence (toward discovered trespasser or foreseeable licensee):

whether (defendant) **negligently failed to warn** (claimant) **of a dangerous condition and risk which were known to**(defendant) **and of which** (claimant) **neither knew nor should have known, by the use of reasonable care; and, if so, whether such negligence was a legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made).

NOTE ON USE FOR 401.20b

Give preliminary instructions 401.16b and 401.17 before giving instruction 401.20b if there is a jury question of whether defendant owned or had possession of the land or premises, or whether he knew of the dangerous condition, or whether he knew of claimant's presence (if claimant was a trespasser) or should have foreseen claimant's presence (if claimant was a licensee).

c. Attractive nuisance:

whether (defendant) **was negligent in maintaining or in failing to protect** (claimant child) **from the** (describe structure or other artificial condition) **on the land or premises in question; and, if so, whether that negligence was a legal cause of the [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made).

NOTE ON USE FOR 401.20c

This instruction and instruction 401.16c, taken together, state all elements of the attractive nuisance doctrine. The committee considers subsections (d) and (e) of **Restatement (2d) of Torts** §339 to be unnecessary to the instruction because negligence is otherwise defined by instruction 401.4.

d. Landlord's negligence (toward tenant):

(1). When leased premises are not residential:

whether (defendant landlord) **negligently failed to disclose to** (claimant tenant) **a dangerous condition on the leased premises which was known to** (defendant), **which was not known to** (claimant) **or discoverable by [him] [her] by the use of reasonable care, and which** (defendant) **had reason to believe** (claimant) **could not discover; and, if so, whether that negligence was a legal cause of [loss] [injury] [or] [damage] to** (claimant, decedent or person for whose injury claim is made).

(2). When leased premises are residential (not common areas):

whether, [before allowing (claimant tenant) **to take possession of the dwelling,** (defendant landlord) **negligently failed to repair a defect that was discoverable by a reasonable inspection] [or] [after** (claimant tenant) **took possession of the dwelling,** (defendant landlord) **negligently failed to repair a dangerous or defective condition on the premises of which [he] [she] [it] had actual notice]; and, if so, whether that negligence was a legal cause of [loss] [injury] [or] [damage] to**(claimant, decedent or person for whose injury claim is made).

NOTES ON USE FOR 401.20d

1. This instruction, reflecting a greater duty by landlord to tenant on leased residential premises, was derived from *Mansur v. Eubanks*, 401 So.2d 1328 (Fla. 1981), overruling to that extent *Brooks v. Peters*, 25 So.2d 205 (Fla. 1946). See also *F.S.* 83.51 (1981), which may impose on the landlord greater duties, in respect to conditions arising after a tenant's possession, than were addressed in *Mansur*. If other or greater duties are imposed by the statute, this instruction should be modified to express those duties in the terms of the case. This instruction pertains to the landlord's duties, not the tenant's, but the committee calls attention to statutes in *F.S.* Chapter 83 imposing certain duties on the tenant, which may affect the landlord's duties as expressed in this instruction.

2. *Common areas*. With respect to common areas, the landlord's duty to the tenant is stated in instruction 401.20d. The landlord's duty to others in common areas is the same as that owed by any landowner or possessor of land, *e.g.*, instructions 401.16a, 401.16b.

3. *Persons invited on leased residential premises by tenant*. The landlord's duty to persons invited on leased residential premises by the tenant is the same as the landlord's duty to the tenant. *Mansur v. Eubanks*, 401 So.2d 1328 (Fla. 1981).

4. *Waiver*. The committee expresses no opinion about whether a tenant may waive duties owed him by the landlord. Compare*Mansur v. Eubanks*, 401 So.2d 1328 (Fla. 1981), with *F.S.* 83.51(1)(b), 83.51(4), and 83.47 (1981).

e. Municipality's negligence in maintenance of sidewalks and streets:

whether the city negligently failed to maintain its [sidewalk] [or] [street] in a reasonably safe condition or failed to correct or warn (claimant) **of a dangerous condition of which the city either knew or should have known, by the use of**

reasonable care; and, if so, whether that negligence was a legal cause of [loss] [injury] [or] [damage] to (claimant, decedent or person for whose injury claim is made).

NOTE ON USE FOR 401.20e

City of Tampa v. Johnson, 114 So.2d 807 (Fla. 2d DCA 1959); *Schutzer v. City of Miami*, 105 So.2d 492 (Fla. 3d DCA 1958).

801.2 READ-BACK OF TESTIMONY

a. Read-back granted as requested:
Members of the jury, you have asked that the following testimony be read back to you: *(describe testimony)*
The court reporter will now read the testimony, which you have requested.
OR
b. Read-back deferred:
Members of the jury, I have discussed with the attorneys your request to have certain testimony read back to you. It will take approximately (amount of time) **to have the court reporter prepare and read back the requested testimony.**
I now direct you to return to the jury room and discuss your request further. If you are not able to resolve your question about the requested testimony by relying on your collective memory, then you should write down a more specific description of the part of the witness(es)' testimony which you want to hear again. Make your request for reading back testimony as specific as possible.
c. Read-back denied:
Members of the jury, you have asked that the following testimony be read back to you: *(describe testimony)*
I am not able to grant your request because (give reason(s) for denying request).

NOTES ON USE FOR 801.2

1. In civil cases, the decision to allow read-back of testimony lies within the sound discretion of the trial court. *Broward County School Bd. v. Ruiz*, 493 So.2d 474, 479-480 (Fla. 4th DCA 1986). However, the trial court must not tell jurors that they are prohibited from requesting a read-back of testimony. *Johnson v. State*, 53 So.3d 1003 (Fla. 2010).
2. Any read-back of testimony ~~should~~must take place in open court. Transcripts or tapes of testimony ~~should~~must not be sent back to the jury room.

The Florida Bar News
October 15, 2012

Proposed civil jury instructions

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes new Instruction 301.11and proposes amendments to Standard Jury Instructions in Civil Cases 402.4, 501.5, 501.7, and 502.7. Interested parties have until November 15 to submit comments electronically to Judge James Manly Barton II, committee chair, at bartonjm@fljud13.org, with a copy to the committee liaison, Jodi Jennings, jjenning@flabar.org. After reviewing all comments, the committee may submit its proposals to the Florida Supreme Court.

301.11 FAILURE TO MAINTAIN EVIDENCE OR KEEP A RECORD

a. Adverse inference.

If you find that:

(Name of party) **[lost] [destroyed] [mutilated] [altered] [concealed] or otherwise caused the** (describe evidence) **to be unavailable, while it was within [his] [her] [its] possession, custody, or control; and the** (describe evidence) **would have been material in deciding the disputed issues in this case; then you may, but are not required to, infer that this evidence would have been unfavorable to** (name of party)**. You may consider this, together with the other evidence, in determining the issues of the case.**

NOTES ON USE FOR 301.11a

1. This instruction is not intended to limit the trial court's discretion to impose additional or other sanctions or remedies against a party for either inadvertent or intentional conduct in the loss, destruction, mutilation, alteration, concealment, or other disposition of evidence material to a case. See, *e.g., Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 780 (Fla. 4th DCA 2006); *American Hospitality Management Company of Minnesota v. Hettiger*, 904 So.2d 547 (Fla. 4th DCA 2005); *Jost v Lakeland Regional Medical Center*, 844 So.2d 656 (Fla. 2d DCA 2003); *Nationwide Lift Trucks, Inc v. Smith*, 832 So.2d 824 (Fla. 4th DCA 2002); *Torres v. Matsushita Electric Corp.*, 762 So.2d 1014 (Fla. 5th DCA 2000); and *Sponco Manufacturing, Inc. v. Alcover*, 656 So.2d 629 (Fla. 3d DCA 1995).

2. The inference addressed in this instruction does not rise to the level of a presumption. *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987), and Instruction 301.11b.

3. This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence.

b. Burden shifting Presumption.

The court has determined that (name of party) **had a duty to [maintain** (describe

missing evidence)] **[keep a record of** (describe subject matter as to which party had record keeping duty)]. (Name of party) **did not [maintain** (describe missing evidence)] **[or] [keep a record of** (describe subject matter as to which party had record keeping duty)].

Because (name of party) **did not [maintain** (describe missing evidence)] **[or] [keep a record of** (describe subject matter as to which party had a record keeping duty)], **you should find that** (name of invoking party) **established [his] [her]** (describe applicable claim or defense) **unless** (name of party) **proves otherwise by the greater weight of the evidence.**

NOTES ON USE FOR 301.11b

1. This instruction applies only when the court has determined that there was a duty to maintain or preserve the missing evidence at issue and the party invoking the presumption has established to the satisfaction of the court that the absence of the missing evidence hinders the other party's ability to establish its claim or defense. See *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987).

2. This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence.

402.4 MEDICAL NEGLIGENCE

a. Negligence (physician, hospital or other health provider):

Negligence is the failure to use reasonable care. Reasonable care on the part of a [physician] [hospital] [health care provider] is that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers]. Negligence on the part of a [physician] [hospital] [health care provider] is doing something that a reasonably careful [physician] [hospital] [health care provider] would not do under like circumstances or failing to do something that a reasonably careful [physician] [hospital] [health care provider] would do under like circumstances.

[If you find that (describe treatment or procedure) **involved in this case was carried out in accordance with the prevailing professional standard of care recognized as acceptable and appropriate by similar and reasonably careful [physicians] [hospitals] [health care providers], then, in order to prevail,** (claimant) **must show by the greater weight of the evidence that his or her injury was not within the necessary or reasonably foreseeable results of the treatment or procedure.]**

NOTES ON USE FOR 402.4a

1. See *F.S.* 766.102. Instruction 402.4a is derived from *F.S.* 766.102(1) and is intended to embody the statutory definition of "prevailing professional standard of care" without using that expression itself, which is potentially confusing.

2. The second bracketed paragraph is derived from *F.S.* 766.102(2)(a) and should be given only in cases involving a claim of negligence in affirmative medical intervention.

b. Negligence (treatment without informed consent):

[Negligence is the failure to use reasonable care.] Reasonable care on the part of a [physician] [health care provider] in obtaining the [consent] [informed consent] to treatment of a patient consists of

(1). When issue is whether consent was obtained irregularly:

obtaining the consent of the patient [or one whose consent is as effective as the patient's own consent such as (describe)**], at a time and in a manner in accordance with an accepted standard of medical practice among members of the profession with similar training and experience in the same or a similar medical community.**

(2). When issue is whether sufficient information was given:

providing the patient [or one whose informed consent is as effective as the patient's informed consent, such as (describe)**] information sufficient to give a reasonable person a general understanding of the proposed treatment or procedure, of any medically acceptable alternative treatments or procedures, and of the substantial risks and hazards inherent in the proposed treatment or procedure which are recognized by other [physicians] [health care providers] in the same or a similar community who perform similar treatments or procedures.**

NOTE ON USE FOR 402.4b

This instruction is derived from the provisions of *F.S.* 766.103.

c. Foreign bodies:

[Negligence is the failure to use reasonable care.] The presence of (name of foreign body) **in** (patient's) **body establishes negligence unless** (defendant(s)) **prove(s) by the greater weight of the evidence that [he] [she] [it] was not negligent.**

NOTES ON USE FOR 402.4c

1. This instruction is derived from *F.S.* 766.102(3). The statute uses the term "prima facie evidence of negligence." The committee recommends that term not be used as not helpful to a jury. Rather, the committee has used the definition of prima facie. See, *e.g.*, *State v. Kahler*, 232 So.2d 166, 168 (Fla. 1970) ("prima facie" means "evidence sufficient to establish a fact unless and until rebutted").

2. Before this instruction is given, the court must make a finding that the foreign body is one that meets the statutory definition. See *Kenyon v. Miller*, 756 So.2d 133 (Fla. 2d DCA 2000).

d. ~~Failure to make or maintain records:~~

~~**[Negligence is the failure to use reasonable care.] The law requires** (defendant) **as a licensed health care provider to prepare and maintain health care records.**~~

[Because (defendant) **did not [make] [or] [maintain]** (describe the missing record(s))

or

[If you find that a person who was responsible for [making] [or] [maintaining] (describe the missing record(s)) **and failed to do so]**

you should presume (describe the missing records(s)) **contained evidence of negligence unless** (defendant) **proves otherwise by the greater weight of the evidence. You may consider this presumption, together with the other evidence, in determining whether** (defendant) **was negligent.]**

NOTES ON USE FOR 402.4d

1. The second bracketed paragraph should be used if there is no issue about whether the records were made or maintained. If there is an issue about the making or maintenance of the records, then the third bracketed paragraph should be used.

2. This instruction applies only when records are required to be made and maintained and the court determines that the inability or failure to locate a record or records hinders the plaintiff's ability to establish a case. *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987).

(1). Adverse inference.

If you find that:

(Name of party) **[lost] [destroyed] [mutilated] [altered] [concealed] or otherwise caused the** (describe evidence) **to be unavailable, while it was within [his] [her] [its] possession, custody, or control; and the** (describe evidence) **would have been material in deciding the disputed issues in this case; then you may, but are not required to, infer that this evidence would have been unfavorable to** (name of party)**. You may consider this, together with the other evidence, in determining the issues of the case.**

NOTES ON USE FOR 402.4d(1)

1. This instruction is not intended to limit the trial court's discretion to impose additional or other sanctions or remedies against a party for either inadvertent or intentional conduct in the loss, destruction, mutilation, alteration, concealment, or other disposition of evidence material to a case. See, *e.g.*, *Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 780 (Fla. 4th DCA 2006); *American Hospitality Management Company of Minnesota v. Hettiger*, 904 So.2d 547 (Fla. 4th DCA 2005); *Jost v Lakeland Regional Medical Center*, 844 So.2d 656 (Fla. 2d DCA 2003); *Nationwide Lift Trucks, Inc v. Smith*, 832 So.2d 824 (Fla. 4th DCA 2002); *Torres v. Matsushita Electric Corp.*, 762 So.2d 1014 (Fla. 5th DCA 2000); and *Sponco Manufacturing, Inc. v. Alcover*, 656 So.2d 629 (Fla. 3d DCA 1995).

2. The inference addressed in this instruction does not rise to the level of a presumption. *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987), and Instruction 402.4d(2).

3. This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence.

(2). Burden shifting Presumption.

The court has determined that (name of party) **had a duty to [maintain** (describe missing evidence)**] [keep a record of** (describe subject matter as to which party had record keeping duty)**].** (Name of party) **did not [maintain** (describe missing evidence)**] [or] [keep a record of** (describe subject matter as to which party had record keeping duty)**].**

Because (name of party) **did not [maintain** (describe missing evidence)**] [or] [keep a record of** (describe subject matter as to which party had a record keeping duty)**], you should find that** (name of invoking party) **established [his] [her]** (describe applicable claim or defense) **unless** (name of party) **proves otherwise by the greater weight of the evidence.**

NOTES ON USE FOR 402.4d(2)

1. This instruction applies only when the court has determined that there was a duty to maintain or preserve the missing evidence at issue and the party invoking the presumption has established to the satisfaction of the court that the absence of the missing evidence hinders the other party's ability to establish its claim or defense. See *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987).

2. This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence.

e. Res Ipsa Loquitur:

[Negligence is the failure to use reasonable care.] If you find that ordinarily the [incident] [injury] would not have happened without negligence, and that the (describe the item) **causing the injury was in the exclusive control of** (defendant) **at the time it caused the injury, you may infer that** (defendant) **was negligent unless, taking into consideration all of the evidence in the case, you find that the** (describe event) **was not due to any negligence on the part of** (defendant).

501.5 OTHER CONTRIBUTING CAUSES OF DAMAGES

a. Aggravation or activation of disease or defect:

If you find that the (defendant(s)) caused a bodily injury, and that the injury resulted in [an aggravation of an existing disease or physical defect] [or] [activation of a latent disease or physical defect], you should attempt to decide what portion of (claimant's) condition resulted from the [aggravation] [or] [activation]. If you can make that determination, then you should award only those damages resulting from the [aggravation] [or] [activation]. However, if you cannot make that determination, or if it cannot be said that the condition would have existed apart from the injury, then you should award damages for the entire condition suffered by (claimant).

NOTE ON USE FOR 501.5a

This instruction is intended for use in situations in which a preexisting physical condition is aggravated by the injury, or the injury activates a latent condition. See *C. F. Hamblen, Inc. v. Owens*, 172 So. 694 (Fla. 1937). When Instruction 501.5a is given, ~~necessary where~~ Instruction 401.12b~~,~~ (Concurring cause~~,~~) is ~~given~~necessary. See *Hart v. Stern*, 824 So.2d 927, 932–34 (Fla. 5th DCA 2002); *Auster v. Gertrude & Philip Strax Breast Cancer Detection Institute, Inc.*, 649 So.2d 883, 887 (Fla. 4th DCA 1995).

b. Subsequent injuries/multiple events:

You have heard that (claimant) may have been injured in two events. If you decide that (claimant) was injured by (defendant) and was later injured by another event, then you should try to separate the damages caused by the two events and award (claimant) money only for those damages caused by (defendant). However, if you cannot separate some or all of the damages, you must award (claimant) any damages that you cannot separate as if they were all caused by (defendant).

NOTES ON USE FOR 501.5b

1. Instruction 501.5b addresses the situation occurring in *Gross v. Lyons*, 763 So.2d 276 (Fla. 2000). It is not intended to address other situations. For example, see *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977), and *Eli Witt Cigar & Tobacco Co. v. Matatics*, 55 So.2d 549 (Fla. 1951). The committee recognizes that the instruction may be inadequate in situations other than the situation in *Gross*.

2. The committee takes no position on whether the subsequent event is limited to a tortious event, or may be a nontortious event.

501.7 REDUCTION OF DAMAGES TO PRESENT VALUE

Any amount of damages which you allow for [future medical expenses], [loss of ability to earn money in the future], [or] [(describe any other future economic loss which is subject to reduction to present value)] **should be reduced to its present money value and only the present money value of these future economic damages should be included in your verdict.**

The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate (claimant) **for these losses as they are actually experienced in future years.**

NOTES ON USE FOR 501.7

1. Designing a standard instruction for reduction of damages to present value is complicated by the fact that there are several different methods used by economists and courts to arrive at a present-value determination. See, for example, *Delta Air Lines, Inc. v. Ageloff*, 552 So.2d 1089 (Fla. 1989), and *Renuart Lumber Yards v. Levine*, 49 So.2d 97 (Fla. 1950) (using approach similar to calculation of cost of annuity); *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), and *Loftin v. Wilson*, 67 So.2d 185 (Fla. 1953) (lost stream of income approach); *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967) (total offset method); *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982), and *Seaboard Coast Line Railroad v. Garrison*, 336 So.2d 423 (Fla. 2d DCA 1976) (discussing real interest rate discount method and inflation/market rate discount methods);

and *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977) (even without evidence, juries may consider the effects of inflation).

2. Until the Florida Supreme Court or the legislature adopts one approach to the exclusion of other methods of calculating present money value, the committee assumes that the present value of future economic damages is a finding to be made by the jury on the evidence; or, if the parties offer no evidence to control that finding, that the jury properly resorts to its own common knowledge as guided by instruction 501.7 and by argument. See *Seaboard Coast Line Railroad v. Burdi*, 427 So.2d 1048 (Fla. 3d DCA 1983).

3. This instruction conflicts with *F.S.* 768.77(2)(a)2 and should not be given in medical malpractice cases when a party has requested that future damages be paid in periodic payments.

502.7 REDUCTION OF DAMAGES TO PRESENT VALUE

Any amount of damages which you allow for [loss of earnings] [the estate's loss of net accumulations], [or] [(describe any other future economic loss which is subject to reduction to present value)] **should be reduced to its present money value and only the present money value of these future economic damages should be included in your verdict.**

The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate (claimant) **for these losses as they are actually experienced in future years.**

NOTES ON USE FOR 502.7

1. Designing a standard instruction for reduction of damages to present value is complicated by the fact that there are several different methods used by economists and courts to arrive at a present-value determination. See, for example, *Delta Air Lines, Inc. v. Ageloff*, 552 So.2d 1089 (Fla. 1989), and *Renuart Lumber Yards v. Levine*, 49 So.2d 97 (Fla. 1950) (using approach similar to calculation of cost of annuity); *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), and *Loftin v. Wilson*, 67 So.2d 185 (Fla. 1953) (lost stream of income approach); *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967) (total offset method); *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982), and *Seaboard Coast Line Railroad v. Garrison*, 336 So.2d 423 (Fla. 2d DCA 1976) (discussing real interest rate discount method and inflation/market rate discount methods); and *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977) (even without evidence, juries may consider effects of inflation).

2. Until the Supreme Court or the legislature adopts one approach to the exclusion of other methods of calculating present money value, the committee assumes that the present value of future economic damages is a finding to be made by the jury on the evidence; or, if the parties offer no evidence to control that finding, that the jury properly resorts to its own common knowledge as guided by instruction 502.7 and by argument. See *Seaboard Coast Line Railroad v. Burdi*, 427 So.2d 1048 (Fla. 3d DCA 1983).

3. This instruction conflicts with *F.S.* 768.77(2)(a)2 and should not be given in medical malpractice cases when a party has requested that future damages be paid in periodic payments.

APPENDIX C

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
Orlando, FL
Orange County Courthouse

July 8, 2010 (1:00 p.m. to 5:00 p.m.)
July 9, 2010 (8:30 a.m. to noon)

1. SPOLIATION UPDATE

The subcommittee is reviewing the status of the law on spoliation, and is preparing a proposed draft instruction. The proposed instruction will be presented to the full Committee at the next meeting (October 2010). Sass will circulate a case law memo as part of the materials for the next meeting as well.

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
West Palm Beach, FL
Palm Beach County Courthouse
October 21, 2010 (1:00 p.m. to 5:00 p.m.)
October 22, 2010 (8:30 a.m. to noon)

1. SPOILATION:

Famer explained that the Committee previously considered this issue in 2006. Historically, lawyers and judicial decisions often confuse the terms "presumption" and "inference." A presumption requires the jury to conclude something. An inference tells jurors that they may conclude something, but do not have to do so.

In medical malpractice cases, when the defendant fails to maintain medical records, instruction 402.4*d* creates a presumption of negligence. Instruction 402.4*d* is based on Public Health Trust of Dade County v. Valcin, 507 So. 2d 596 (Fla. 1987).

Farmer authored the decision in American Hospital Management v. Hettinger, 904 So. 2d 247 (Fla. 4th DCA 2005). In that case, a defendant lost a ladder. The trial court instructed the jury to presume the defendant was negligent because it destroyed the ladder. The Fourth District reversed and concluded that the Valcin presumption of negligence flows from the defendant's statutory duty to maintain medical records. In contrast, the defendant in Hettinger had no specific statutory or contractual duty to

preserve the ladder. At most, the trial court could instruct the jury that they could draw an inference of negligence from the destruction of the ladder.

In 2006, Farmer suggested that the committee consider the Hettinger decision and drafted an instruction for the committee's consideration (Page 87). The committee ultimately adopted a Valcin instruction for medical malpractice cases. At that time, the committee did not adopt an instruction on spoliation of evidence or adverse inferences.

Reconsidering this issue, Fulford began with Farmer's prior draft and revised it with red-lining (Page 97). Sass also proposed an instruction, but Farmer and Brown felt it did not use sufficiently plain English (Pages 84-85). Farmer believes that the committee should adopt an instruction to address spoliation in situations different than Valcin, where the defendant had a statutory duty to maintain the evidence.

Roth stated that he believes that litigants and courts are struggling with determining the scope of the judicial function and the jury function in spoliation cases. In Roth's recent medical malpractice case with a Valcin issue, he took the position that it was a question for the court whether records had been negligently or intentionally destroyed. It is also unclear whether the remedy for spoliation in other circumstances is an inference or a presumption.

Farmer responded that the draft instruction on page 97 addresses the adverse inference situation. As made clear in Hettinger, the Valcin presumption only applies to medical malpractice cases where there is a statutory duty to maintain records. Burlington responded that a statutory duty to maintain records may arise in other circumstances besides Valcin, for example, corporations may statutory duties to maintain tax records. There are many different levels of duties to maintain documents that create different degrees of fault.

Gunn asked the subcommittee to confirm that the case law treats this as an adverse inference, rather than a presumption. Gunn also asked the subcommittee to draft an instruction for those circumstances where the existence of a duty to maintain evidence is a fact question.

Roth also noted that under Martino v. Wal-Mart Stores, Inc., 908 So. 2d 342 (Fla. 2005), there is no cause of action for spoliation of evidence in a "first party" claim when another party to the lawsuit destroys evidence. However, spoliation claims still lie against third parties. Ingram and Roth observed that the committee may need to draft a separate instruction to address third party spoliation where a non-party destroys evidence.

Griffin countered that a new instruction for third party spoliation claims is unnecessary. A third party spoliation claim would simply use the standard negligence instructions, except for the damages. Farmer agreed.

Burlington pointed out that this issue arises in many contexts. The Fourth District's decision in Jordan v. Masters, 821 So. 2d 342 (Fla. 4th DCA 2002), holds that the jury can draw an adverse inference from a party's failure to produce evidence within his control. Burlington used an instruction from Jordan found on page 72 of the materials during the trial in Golden Yachts v. Hall, 920 So. 2d 777 (Fla. 4th DCA 2006). The instruction did not appear in the published decision in Golden Yachts.

Gunn observed that it the Committee may need to add a note on use that this instruction is not intended to limit the trial court's discretion to impose sanctions on a party for destroying evidence. In addition, the Committee may need to note that this instruction presumes that there is either a contractual or statutory duty to preserve evidence.

Several members suggested plain English revisions. Roth noted that the term "infer" will not be understandable to all jurors. Vargas suggested finding a simpler term for the words "obligated" and "implying."

The committee modified the draft instruction on page 97 as follows:

****

e. Inference from loss, destruction, or failure to preserve evidence.

A party may be obligated to preserve evidence under an express agreement that it will be preserved, or by conduct implying that it will be preserved. If you find that:

a. (name of the party) **[expressly agreed to] [engaged in conduct implying that [he] [she] [it] would] preserve** (describe evidence), **and**

b. (describe evidence) **was [lost] [destroyed] [mutilated] [altered] [or] [concealed], while it was within the control of** (name of party), **and**

c. (describe evidence) **would have been material in deciding the disputed issues in this case,**

then in your discretion you may, but are not required to, infer that this evidence would have been unfavorable to (name of party).

Note on Use

[no changes to note on p. 97]

****

Gunn directed the spoliation subcommittee to make additional plain English revisions to this instruction. In particular, the subcommittee should consider using simpler terms than "infer," "obligated," and "implying." The subcommittee will also research whether the

case law supports an instruction that a fact question can exist on whether a party has a duty to preserve evidence. If the case law supports such an instruction, the subcommittee should draft one. The subcommittee should also draft an instruction applicable to third party spoliation claims when a non-party failed to preserve evidence. Gunn added Roth and Burlington to the spoliation subcommittee.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
Tallahassee, FL
First District Court of Appeal
February 10, 2011 (1:00 p.m. to 5:00 p.m.)
February 11, 2011 (8:30 a.m. to 12:00 p.m)

a. Spoliation:

Sass noted the three issues the Spoliation subcommittee looked at (p. 137 of the materials). Sass then introduced her associate Jennifer Zumarraga (appearing by telephone), who provided a detailed discussion of research she had done on spoliation issues and appropriate remedies under Florida law (her memo is on pp. 125-32 of the materials). After discussing her research, Zumarraga noted that the subcommittee's proposed adverse inference instruction (p. 139 of the materials) begins with "A party is obligated to preserve evidence . . . ." Zumarraga believed this incorrectly implies that a duty to preserve evidence is required for an adverse inference. Zumarraga also believed draft Note on Use 3 is incomplete on what is needed for a Valcin presumption and likely wrong in limiting the source of the duty to statute.

Barton asked if the subcommittee had arrived at a consensus on appropriate instructions for spoliation of evidence. Cass said no and that the subcommittee wanted input from the Committee on whether to expand the current Valcin presumption instruction (402.4d) in addition to preparing an adverse inference instruction. The current Valcin instruction applies only to medical malpractice cases where there is a statutory duty to preserve records. Fulford agreed with expanding the Valcin instruction. Fulford stated there also needs to be an instruction to apply in cases where courts try to level the playing field when evidence is missing. He discussed his proposed adverse inference instruction (p. 139 of the materials). Barton commented that the Notes on Use will be critically important in this context because varying circumstances will require different remedies/instructions; Farmer agreed.

Farmer discussed the importance of the distinction between an inference and a presumption. Farmer believed that, for a Valcin presumption, there must be a strong legal duty breached. Farmer believed that intentional destruction of evidence in litigation should be addressed by the sanction power of the court, while negligent destruction of evidence may warrant an adverse inference that the evidence would be

unfavorable.

Artigliere suggested that trial judges should decide what is appropriate and that they should be given standard instructions for presumptions and inferences to use and apply depending on the circumstances. He also commented that these issues are increasing in importance with e-discovery.

Campo noted that all jury decision-making is by inference and that makes an instruction on an inference huge and essentially a presumption with the voice of the court. Barton noted that is part of the sanction to emphasize.

Kest questioned the type of intent needed for such instructions. He discussed an expert who altered/destroyed evidence as part of the expert's testing and noted that the expert may have intended to alter the evidence but did not intend to alter the evidence in a way adverse to the other side. Fulford stated intent is not the important issue; the key is leveling the playing field.

Fulford questioned whether a violation of any statutory duty should result in a Valcin presumption. Artigliere believed all violations of a statutory duty to preserve should result in a presumption. He discussed the differences between Florida and federal law on when a duty to preserve evidence arises: in Florida, a contract, statute, or discovery request can create a duty to preserve; federal law provides that anticipation of litigation creates a duty to preserve. Farmer stated that he knows of no case requiring a Valcin presumption outside the statutory duty context but believes it should apply to other duties, such as contracts requiring preservation of records.

Artigliere asked if intent to destroy evidence was for the jury or the court to decide. Barton and Farmer believed it was an issue for the court. Artigliere was unsure. Kest noted the need for an evidentiary hearing. Roth noted the law in this area is "squishy."

Roth suggested replacing "infer" with "conclude" in the proposed adverse inference instruction.

Sass asked if the subcommittee should draft an inference instruction and expand the Valcin instruction. Barton agreed and again emphasized the importance of the Notes on Use. The subcommittee will rework the instructions based on the Committee's discussion. Fulford asked about the scope of the subcommittee's report. Barton said the report should boil down to the key discussion points and proposals.

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

Tampa, FL
George Edgecomb Courthouse
July 14, 2011 (1:00 p.m. to 5:00 p.m.)
July 15, 2011 (8:30 a.m. to 12:00 p.m.)

1. SPOLIATION

Sass, along with her associate Jennifer Zumarraga, discussed the status of the spoliation instructions being drafted. Sass reported that the focus has been on preparing an adverse inference instruction; work on the *Valcin* adverse inference instruction has been tabled for the moment. With respect to the current draft of the adverse inference instruction (p. 191 of the materials), Sass indicated that the duty to preserve evidence issue has been taken out because such duty is not needed to create an adverse inference, only for a *Valcin* presumption.

Artigliere suggested bracketing the words "lost, destroyed, mutilated, altered, concealed" in subpart (a) of the draft instruction. Sass agreed and stated that would be fixed. There was also agreement to remove the "or" between "[her]" and "[its]" in subpart (a).

Ingram expressed concern about the lack of a duty to preserve in connection with creating an adverse inference. Artigliere stated the duty issue was for the court and the law on that is in flux. He indicated the court will decide what sanction is appropriate for missing evidence and decide between an inference and presumption where appropriate. Lang believed Artigliere's explanation should be included in a Note on Use.

Barnett questioned whether the term "unavailable" in subpart (a) of the draft instruction should be defined. Artigliere believed a definition was unnecessary. Roth suggested revising it to say "unavailable in whole or in part." After debate, the Committee decided against defining or revising this portion of the draft.

Kest inquired how the matter would be dealt with when a party's agent was the one who destroyed evidence. Hinkle stated the law for agents is different. Sass indicated parties may be liable for their agents. Artigliere believed the use of the word "control" in subpart (a) of the draft instruction necessarily includes agents.

LaRose believed the last sentence of the draft instruction assumes an inference has been drawn when it is the jury's prerogative to decide whether it should be drawn. Artigliere and Costello agreed. **At Costello's suggestion, the Committee decided to remove "inference" and change "of" to "in" in the last sentence of the draft instruction.**

Roth questioned whether "infer" should be changed to "conclude" in the second to last

sentence of the draft instruction. Campo believed "infer" was better for plain English and softer than "conclude."

Rosenbloum questioned whether the term "material" in subpart (b) of the draft instruction should be defined? **Sass stated the case law actually uses the word "critical" and that term should be revised accordingly.** Kest and Campo noted the big difference between "material" and "critical." Roth believed some cases use the term "hinder." It was noted that "hinder" was used in *Valcin.*

The Committee then discussed revisions to draft Note on Use 1. Roth then questioned whether draft Note on Use 1 and draft Note on Use 4 were necessary. Lang agreed Note on Use 1 was not necessary. **The Committee decided to remove draft Note on Use 1.** Barton stated draft Note on Use 4 was necessary to clarify the law for judges unfamiliar with it. **The Committee agreed with Roth's suggestion to change "created by" to "addressed in" in draft Note on Use 4. The Committee also agreed with a suggestion from Artigliere and Sass that draft Note on Use 2 was not necessary and should be removed.**

The revised draft adverse inference instruction, including Notes on Use, now reads:

> ***Inference from loss, destruction, or failure to preserve evidence.***
>
> **If you find that:**
>
> **a) (name of party) [lost] [destroyed] [mutilated] [altered] [concealed] or otherwise caused the (describe evidence) to be unavailable, while it was within [his] [her] [its] possession, custody or control; and**
>
> **b) the (describe evidence) would have been critical in deciding the disputed issues in this case;**
>
> **then you may, but are not required to, infer that this evidence would have been unfavorable to (name of party). You may consider this, together with the other evidence, in determining the issues in the case.**
>
> *Notes on use*:
>
> **This instruction is not intended to limit the trial court's discretion to impose additional or other sanctions or remedies against a party for either inadvertent or intentional conduct in the loss, destruction, mutilation, alteration, concealment or other disposition of evidence material to a case. For example see: *Jost v Lakeland Regional Medical Center*, 844 So.2d 656 (Fla. 2nd DCA 2003); *Sponco Manufacturing, Inc. v. Alcover*, 656 So.2d 629 (Fla. 3rd DCA 1995); *Nationwide Lift Trucks, Inc v. Smith*, 832 So.2d 824 (Fla. 4th DCA 2002); *Torres v. Matsushita Electric Corp.*, 762 So.2d 1014 (Fla. 5th DCA 2000); *Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 780 (Fla. 4th DCA**

2006); and *American Hospitality Management Company of Minnesota v. Hettiger*, 904 So.2d 547 (Fla. 4th DCA 2005).

The inference addressed in this instruction does not rise to the level of a presumption. *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987); and 402.4 d., FSJI.

Barton stated the revised draft of the adverse inference instruction should be published and sent up to the Supreme Court. Barton asked Sass and the Subcommittee to now work on the *Valcin* presumption instruction.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)
MINUTES

Coral Gables, FL
Office of DeMahy Labrador Drake Victor Payne & Cabeza
October 20, 2011 (1:00 p.m. to 5:00 p.m.)
October 21, 2011 (8:30 a.m. to 12:00 p.m.)

1. *VALCIN* INSTRUCTION

Sass submitted her proposed *Valcin* instruction (pp. 32-33 of the materials) and asked the Committee for comments. Sass noted that the proposal broadened the instruction beyond the statutory duty to preserve evidence to now include other sources of a duty to preserve evidence.

Russo stated that both plaintiffs and defendants can raise the *Valcin* presumption, so she suggested that the proposal be revised accordingly. DeMahy agreed. Alternatives in bracketed language for plaintiff and defendant will be provided.

Gertz inquired when there was a duty to "make" evidence. Sass indicated that language is from the case law. Russo noted that it may refer to hospitals having a duty to make records.

Gertz suggested removing "prima facie" from the third sentence of the proposal. Sass noted that language is from the *Valcin* case and asked for alternatives. Gertz suggested "hinders ability to prove the claim or defense." Russo stated that the jury does not need to be instructed on whether the court has found that a party's ability to prove its case has been hindered by missing evidence because that is a court decision. She suggested removing that third sentence from the proposal; Gertz agreed. Hinkle believed there should be context for the instruction, which that language provides. The Committee ultimately concluded that the third sentence of proposal should be removed.

Sales stated that there may be an incorrect suggestion with this proposal that a party is limited to a *Valcin* instruction and not other remedies in circumstances such as this. He believes a Note on Use should be added to explain that other remedies are available, per the Supreme Court's *Martino* decision. Roth observed that this same discussion occurred with respect to the other spoliation instruction and a Note on Use was added. For the benefit of the new members, Sass provided background for the Committee's efforts to revise the spoliation and *Valcin* instructions. Sales believed the Note on Use added to the spoliation instruction is perfect and should be added for the *Valcin* instruction.

Lang inquired about the appropriate place in the book to include the *Valcin* instruction – in the professional negligence section or the chapter for all cases? Barton and Sass believed both or the latter.

Gertz believed the language in the last sentence of the proposal about "acted negligently" should be qualified with a description of the tortious conduct – "acted negligently in (describe tortious conduct)" – otherwise it could be thought to refer to negligence in not maintaining the records. Gertz also believed a period is needed after that clause and before "unless (name of defendant) proves otherwise by the greater weight of the evidence" to create a separate sentence. Gertz suggested something like "unless you find . . ." DeMahy suggested using the word "presume" because it is a presumption. Russo did not necessarily agree with the proposed separate sentence.

Barton inquired if the first sentence of the proposal (regarding duties to preserve evidence) is something the jury should be told. DeMahy believed juries should not hear about duties, as the judge will decide whether a duty exists. Barton thus suggested moving that sentence to a Note on Use. Roth stated that the subject sentence should also include a court order as a source of a duty to preserve evidence. DeMahy questioned whether there are even more bases for the duty; the list is not exhaustive. Sass stated that a memo was previously provided on the scope of the duties.

DeMahy noted that this proposal concerns a rebuttable presumption, and the jury should be told it is rebuttable. Hinkle noted that there is an instruction on presumptions.

Lang inquired why the current *Valcin* instruction is not being used as a starting point if the goal is to add only additional sources of duty. Sass stated that, based on the case law, it was her belief that the burden shifting language in the current instruction was incorrect. Gertz noted that that prior instruction was to presume evidence of negligence was in the missing evidence, but now it is that negligence is presumed when evidence is missing.

DeMahy observed that there is a difference between cases where evidence is missing and a plaintiff cannot prove its case at all (where the presumption applies to the whole case) and cases where a plaintiff can prove a case but is missing critical evidence (where the presumption is that the missing evidence is adverse to the spoliating party's case). Sales noted that the inference instruction makes that distinction and stated that there are more severe sanctions for more harmful conduct.

Roth believed there was a need to harmonize the law on medical records and other forms of spoliation in this instruction. DeMahy and Sass agreed that is where the Committee is currently at. Barton stated that the Committee is providing choices for trial judges to choose from in situations of evidence spoliation. The Notes on Use should make that clear.

The Committee's discussion regarding revisions to Sass's proposed instruction resulted in the following proposal:

Proposed "*Valcin Presumption*" Instruction

d. Failure to make or maintain records:

The court has determined that (name of party) **had a duty to maintain** (describe missing evidence). **The** (name of party) **did not [make] [or] [maintain]** (describe missing evidence).[1]

Because (name of party) **did not [make] [or] [maintain]** (describe the missing evidence) **you should presume that the** (name of defendant) **acted negligently in** (describe tortious conduct). **That means you should find** (name of party) **acted negligently unless** (name of party) **proves otherwise by the greater weight of the evidence.**[2]

[1] The determination of whether there is a "duty" is for the judge, not the jury. See Valcin, 507 So.2d at 598-99. The Court adopted the Third DCA's standard regarding a rebuttable-presumption, with one modification: it would only apply where the missing evidence hindered the plaintiff's ability to prove his *prima facie* case. Because the Third DCA held that the *judge* was to make the determination of whether there was a duty, that holding remained unchanged by the Supreme Court's decision.

[2] The Supreme Court adopted the Third DCA's standard regarding a rebuttable–presumption, and thus, like the Third DCA opinion, it approved shifting the burden of proof on the ultimate issue of negligence. See Valcin (3rd DCA) at 1306 (where defendant violates its duty to preserve evidence, it "shall have the burden of proving that the treatment ... was performed non-negligently."); Valcin (Supreme Court) at 600-601; see also, Martino, (Supreme Court) (where the loss of evidence hinders a party's ability to establish a *prima facie* case, the *Valcin Presumption* shifts the burden of "**the underlying tort.**")(emphasis added).

Barton asked Sass to go back and revise the proposal per the Committee's discussion. Sass will consider the issues with the subcommittee.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

Orlando, FL
Orange County Courthouse
March 8, 2012 (1:00 p.m. to 5:00 p.m.)
March 9, 2012 (8:30 a.m. to 12:00 p.m.)

Instructions Published for Comment

Barton noted the recent publication of the new proposed 201.2 Introduction of Parties (uninsured motorist addition) and 700 Closing Instructions. Barton noted the prior publication of proposals for 201.2 Introduction of Parties (pro se parties), 301.11 Spoliation, 401.20 Premises Liability, 801.2 Read Back of Testimony, 402.4 (*Stuart v. Hertz*), Punitive Damages, Model Instructions, and various Errors & Omissions. Lang believed the next report to the Supreme Court could include almost all of these pending proposals. Lang suggested sending up the E&O corrections soon, as comments repeatedly come in on those. Vargas noted the additional E&O issue on this meeting's agenda is critical and should go up soon. Sass noted the spoliation proposal is not ready to be sent up. **Barton directed that a report go up before next meeting; Lang agreed.**

* * *

NEGLIGENCE SUBCOMMITTEE

i. *Valcin* Instruction

Russo noted Sass's Proposed "*Valcin Presumption*" Instruction discussed at the last meeting (pp. 9 and 28 of the materials). Russo then distributed a new proposal:

d. *Failure to maintain evidence or keep a record*

The court has determined that (name of party) **had a duty to [maintain** (describe missing evidence)] **[keep a record of** (describe subject matter as to which party had record keeping duty)]. **The** (name of party) **did not [maintain** (describe missing evidence)] **[or] [keep a record of** (describe subject matter as to which party had record keeping duty)].

Because (name of party) **did not [maintain** (describe missing evidence)] **[or] [keep a record of** (describe subject matter as to which party had a record keeping duty)], **you should find that** (name of party) **was negligent in** (describe negligent conduct) **unless** (name of party) **proves otherwise by the greater weight of the evidence.**

Russo noted one issue with the prior proposal was its use of "[make] [or] [maintain]" records. She believed that language came from *Valcin*. She suggested using only "maintain." She also omitted the prior proposal's express reference to a presumption. She believed it best to just tell jurors you should find negligence unless the party proves otherwise. The Negligence subcommittee has not yet considered Russo's new proposal.

Barnett believed the second paragraph of Russo's proposal does not account for scenarios where a plaintiff loses his/her original MRI records – is the presumption that they are normal? Barton stated he has seen the issue arise but has not had a request for a *Valcin* instruction. Barnett noted a situation where surgery was performed before a compulsory medical examination, destroying evidence of the pre-surgical state of the plaintiff. Sales believed this distinction was addressed at the last meeting – *Martino* states that there are different remedies available besides a *Valcin* instruction. Artigliere said the issue was whether there was a duty to preserve that evidence; if not, there is no problem with failing to preserve it. But if there is a duty, and the evidence was negligently lost, there may be a remedy, but that it outside of *Valcin*. The case law appears to mix up spoliation and failure to preserve. The difficult question would arise where a nurse misses one vital sign check of many.

Barton inquired where this instruction fits in the reorganized book. The current *Valcin* instruction is found in 402.4d – medical negligence. The goal of the new proposal is to make the instruction more general to fit other situations, thus it was probably best to find a new place for it in the book. Ingram believed it should not be included as a preemptive instruction. Barton believed it could go in the Evidence section 300, as the new spoliation instruction is going to be 301.7.

Artigliere questioned why the proposal references negligence if it is supposed to be generally applicable. Barnett agreed it should not be limited to negligence. Artigliere questioned the other remedies available to a judge in addition to such an instruction. He suggested a note on use that the instruction should be used only when there was a duty and the presumption is appropriate, as opposed to other remedies; the remedy is supposed to meet the conduct. Russo suggested removing "was negligent in" from the second paragraph and replacing with a parenthetical "(describe appropriate presumption)".

Sass asked to go back and revisit these issues with the subcommittee. **Barton asked the subcommittee to provide a final recommended proposal for the next meeting, including notes on use.** Ingram inquired if the goal was a new *Valcin* or a new presumption instruction. Sass noted that the *Valcin* instruction needed to be tweaked, which led to the other proposal. Sass will take it back to the subcommittee and bring a final proposal to next meeting.

Farmer noted that *Valcin* is limited to hospital record cases, so "keep" and "maintain" are not alone, because in *Valcin* there was a duty to "make" or "create" the record, which was not done.

Farmer believed "keep" points in the direction of already in existence. Artigliere noted the advent of digital records makes this issue very important.

PROFESSIONAL MALPRACTICE

Kolter comment on medical malpractice damages on the verdict form

Kolter believed the standard instruction requiring reduction of future economic damages to present money value on the verdict form may conflict with section 768.77(2)(a)(2), Florida Statutes, on periodic payment of damage awards. The periodic payment provision allows defendants to pay on a periodic basis after judgment, under certain conditions. Lang has dealt with the issue, and the verdict must come in gross numbers, not reduced, with the number of years, and the judge must then work backwards – it is cumbersome. Russo suggested a note on use for when a defendant wants this procedure, as it is seldom used. Hinkle noted that plaintiffs and defendants can ask for it. Barton asked if it is limited. Roth said the statute is limited to medical malpractice cases. Rosenbloum noted that, read literally, the statute requires a gross amount verdict in each medical malpractice case. Hinkle agreed a note on use may be best, as no one really uses this provision and there is thus no need for a standard instruction. Roth noted problems with how a judge will apply the statute with conflicting evidence. Kest believed the note on use must be clear that it will affect the verdict form and to plan accordingly. Barton noted that section 768.77 is unequivocal on what must be done and what must be on the verdict form; but if no one requests it, it is not a problem. The issue arises when this procedure is requested. Rosenbloum agreed the best thing is to alert the bench and Bar and allow them to handle it. Barton inquired whether this should be done in the standard instructions or the verdict form. Kest and Russo believed both. Rosenbloum believed the note should go with the reduction to present value instruction – 501.7 and 502.7. Roth was not sure anything is needed; if people want to use this procedure, they should bring it to the court and make their proposal; that is especially true because no Committee member has ever faced the issue and there is no appellate guidance. Hinkle noted that defendants are really reluctant to use it, especially insurers. Ingram questioned whether the Committee has an obligation to provide a note on use. Barton asked how long the provision has been in effect; Roth answered since 1986. Lang believed a note may be helpful but was fine not adding one. Russo believed a note may be helpful, if properly worded to address the circumstance. Artigliere noted that the lawyer inquiring has an issue, and further noted that some judges may stick to the standard (mistakenly) if a note is not there directing them that this could be a proper thing to do in certain circumstances. Russo agreed. Sales observed that plaintiffs and defendant-insurers really never want to use this procedure. Even so, Ingram still believed a note is appropriate. The note would say that if these procedures are employed by the parties, the reduction to present value instruction may be inapplicable. Dukes, Roth, and Fox believed it is so obscure that no note is needed. Artigliere suggested a note be drafted to allow the Committee to

consider whether it is necessary. **At Barton's suggestion, Roth will look into the legislative history of the subject statute. The subcommittee will then draft a note on use for the Committee to consider at the next meeting.** Barton noted that it is perfectly acceptable for the Committee to do nothing if that is the general wisdom.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

Tampa, FL
Hillsborough County Edgecomb Courthouse
July 12, 2012 (1:00 p.m. to 5:00 p.m.)
July 13, 2012 (8:30 a.m. to 12:00 p.m.)

a.

Reports to Florida Supreme Court

Lang stated that two reports are ready to be submitted to the Florida Supreme Court. One is the Errors & Omissions report, which Lang would like to send through for quick approval without being held up by other substantive proposals. The report will include the E&O revisions published for comment on October 1, 2011 and April 15, 2012. The second report will send up proposals regarding instructions 201.2 (introducing *pro se* parties), 801.2 (read back of testimony), 201.2 (uninsured motorist addition), and 700 (deleting portion of closing instruction). Lang noted the Committee is still working on the *Stuart v Hertz*, premises liability, and spoliation proposals. Although the adverse inference spoliation proposal has been published for comment, it is being held back to be reported along with the revised *Valcin* instruction being worked on by the Committee.

* * *

2. NEGLIGENCE SUBCOMMITTEE

a. *Valcin* Instruction

Barnett directed the Committee to the new proposed *Valcin* instruction (p. 31 of the materials):

301.11 FAILURE TO MAINTAIN EVIDENCE OR KEEP A RECORD

The court has determined that (name of party) **had a duty to [maintain** (describe missing evidence)] **[keep a record of** (describe subject matter as to which party had record keeping duty)]. **The** (name of party) **did not [maintain** (describe missing evidence)] **[or] [keep a record of** (describe subject matter as to which party had record keeping duty)].

The (name of party invoking presumption) **has established to the satisfaction of the court that the absence of** (describe missing evidence) **hinders** (name of invoking party's) **ability to establish [his] [her]**(describe applicable claim or defense).

Because (name of party) **did not [maintain** (describe missing evidence)**] [or] [keep a record of** (describe subject matter as to which party had a record keeping duty)**], you should find that** (name of invoking party) **established [his] [her]** (describe applicable claim or defense)**] unless** (name of party) **proves otherwise by the greater weight of the evidence.**

NOTE ON USE FOR 301.11

This instruction applies only where the Court has determined that there was a duty to maintain or preserve the missing evidence at issue.

Barnett then turned the discussion over to Sass. Sass directed the Committee to the *Valcin* proposal discussed at the last meeting (p. 7 of the materials):

d. *Failure to maintain evidence or keep a record*

The court has determined that (name of party) **had a duty to [maintain** (describe missing evidence)**] [keep a record of** (describe subject matter as to which party had record keeping duty)**]. The** (name of party) **did not [maintain** (describe missing evidence)**] [or] [keep a record of** (describe subject matter as to which party had record keeping duty)**].**

Because (name of party) **did not [maintain** (describe missing evidence)**] [or] [keep a record of** (describe subject matter as to which party had a record keeping duty)**], you should find that** (name of party) **was negligent in** (describe negligent conduct) **unless** (name of party) **proves otherwise by the greater weight of the evidence.**

Sass stated that the current proposal added the second paragraph, removed the reference to negligence to be more plain English, and added a Note on Use. Zumarraga stated the second paragraph (hinder language) was added because it is a requirement of *Valcin*, and the negligence reference was removed to make the instruction broader than just negligence claims.

Sass referenced a new Second DCA case *Osmulski v. Oldsmar Fine Wines* that addressed spoliation issues. Artilgiere observed that *Osmulski* was a premises liability case. The defendant's representative watched the video of the slip-and-fall but then destroyed it, which the plaintiff claimed was spoliation because the business should have reasonably anticipated litigation. Artigliere noted that the spoliation occurred before the litigation commenced and there was thus no duty to preserve the evidence under Florida law. Artigliere also pointed out arguable *dicta* in the case stating that the plaintiff could have sent a written request to preserve, which may have changed the outcome. He further noted the court's discussion of a potential need for legislation in the area. Sass and Artigliere do not believe *Osmulski* should require changes to the *Valcin* proposal.

Sass believes the current proposal is ready to be submitted. Barnett agreed. Barton asked Sass to read the proposal as a final test of its readiness to be submitted. After the read-

through, the Committee decided to remove "the" before the party names in the first and second paragraphs. Dukes suggested using parallel language, changing "name of party invoking presumption" to always be "name of invoking party."

Burlington questioned the phrase "to satisfaction of the court" in the second paragraph. He suggested "has established." Barnett analogized it to directed verdict instructions. Barton stated that normally the instructions do not explain why they are being given; Costello agreed. Barnett agreed with removing "to the satisfaction of the court." Dukes suggested removing the whole second paragraph. Sass suggested making the second paragraph a Note on Use instead, since the language is straight from *Valcin*. Burlington also noted that it is a comment on the evidence, brings more emphasis to the hindrance issue than needed, and may result in confusion. He thus agreed with removing that paragraph. Barton observed that the paragraph is telling the jury from the court that the spoliating party did something bad. Zumarraga agreed that the second paragraph could be removed but that it should be a Note on Use because it is a requirement of *Valcin*.

Sales asked for the source of the presumption language at the end of the last paragraph. Zumarraga noted the language it is straight from *Valcin*.

Artigliere questioned whether the proposal applies to situations where a record was not created, in addition to situations where a record that was created was not kept. Dukes noted that not creating the record was *Valcin*'s facts, which required the presumption. Sales stated that *Valcin* applies when there is an inability to prove a case because of spoliation. He believed intent to spoliate is irrelevant. Roth believed the situation where the whole record is lost is *Valcin*, but missing a few entries on the record is not *Valcin* and should not shift the burden. Sass suggested using the second paragraph of the proposal as a Note on Use to address these issues. Sales suggested adding it to the proposal's current note. The Committee agreed.

Sales questioned whether the different types of presumptions (bubble bursting or burden shifting) are covered by this proposal. Dukes believed *Valcin* instructions apply when the court determines that the burden must be shifted.

Barton asked if cases should be cited in the proposed, revised Note on Use. Artigliere suggested citing *Valcin*; Hinkle agreed. It will be added to the Note.

Roth suggested taking a step back to the initial purpose for the Committee revising the *Valcin* instruction currently in the book. He believed the intent was to broaden the instruction to cover different situations. Sass agreed, but noted that, in revising, it became apparent that the current instruction (402.4d) is not accurate. Barton read the current *Valcin* instruction in the book, which all agreed is narrow.

Sales discussed how there is a difference between an adverse inference instruction (where the judge tells the jury that it can infer that lost evidence is adverse to the spoliating party) and a burden shifting presumption. Different facts require different sanction remedies. Lang noted that an adverse inference instruction has been prepared and ready to submit to the Florida Supreme Court. Lang observed that there is probably a need for a discussion about which type of sanction instruction applies to a particular case. Artigliere suggested that the judge

will decide which instruction to give based on the magnitude of prejudice; if the missing evidence destroys a party's ability to prove its case, the presumption instruction should be used. Sales agreed the test is whether the missing evidence hinders the other side's ability to make a case before the presumption instruction is given.

Sales, Artigliere, and Lang discussed the source of the duty to preserve and how that factors into the analysis of which sanction instruction should be used. It was noted that *Valcin* concerned a statutory duty. Artigliere noted that the duty to preserve issue is unique in Florida, which does not recognize a duty to preserve evidence upon only anticipation of litigation. He further noted that law probably may not be keeping up with modern electronic evidence realities. LaRose noted that the remedy may depend, in part, on whether the spoliation was negligent or intentional; the extent of the remedy may be based on the culpability of conduct. Sales noted that the *Osmulski* case focuses on the absence of a statutory duty to preserve as the trigger for when the presumption is used as opposed to an inference. Lang noted that the historical thinking was to limit presumption instructions except when clearly called for. Artigliere reiterated his belief that the matter should be left to the discretion of the trial judge to determine whether to give a presumption or inference instruction depending on the facts of the case.

Burlington noted that Florida law on duties to preserve is unclear. He believed *Valcin* is only based on a statutory or regulatory duty and not a contractual one. He has seen cases where lawyers are allowed to argue inferences in the absence of an instruction. When there is an arguable duty, other than statutory or regulatory, then courts will give an inference instruction. Hinkle noted that a party should only get a presumption instruction if the party cannot proceed without the missing evidence.

Barton stated that spoliation proposals being worked on should become instructions 301.11a (inference) and 301.11b (presumption).

Sales noted it is a hard line to draw when you get the inference instruction and when you get the presumption instruction. He suggested a Note on Use for the presumption instruction that hindering the party's ability to proceed is a prerequisite to the presumption/burden-shifting instruction. Roth believed the line is drawn at, if the missing evidence hinders a party's ability to proceed, the burden-shifting instruction is given; if the missing evidence is important (makes a difference and something the jury needs to know), the inference instruction should be given.

Lang asked if it was a good idea to publish both proposals (inference and presumption) together, even though the inference instruction has already been published. Barton and others believed it was a good idea. The Committee also agreed the title for the *Valcin* instruction should be "burden shifting presumption" while the other instruction should be titled "adverse inference." **Ingram moved to approve the revised *Valcin* instruction as 301.11b and to publish it with the previously-published inference instruction as 301.11a. Roth seconded the motion. The motion carried with one dissent.**

Hinkle asked if the Committee should leave the old *Valcin* instruction in the book for medical malpractice cases. Sales believed the revised one can be used for medical malpractice cases and all others. Dukes believed there may be confusion if the medical malpractice *Valcin*

instruction in 402.4d is not removed. Fox suggested taking the current *Valcin* instruction out of the medical malpractice instructions and kept all together in a separate, discrete location; Sales agreed. Dukes suggested removing the old *Valcin* instruction entirely. Lang agreed it would be confusing to have two *Valcin* instructions in the book. Sass noted the old *Valcin* instruction was erroneous anyway. Artigliere suggested repeating the new *Valcin* proposal in both places – 402.4d and 301.11b. Ingram noted that if only 301.11b is put in 402.4d, that may suggest that you do not get the inference instruction in medical malpractice cases. Sales stated the language should be the same for all scenarios. Barton noted that a factual issue is built into the current *Valcin* instruction in 402.4d, where the jury may need to decide if the evidence was spoliated. Artigliere believed the instruction should be replicated in 301.11b and 402.4d, rather than a direction in 402.4d to go see 301.11b. **Sales moved to replace 402.4d with 301.11b; Barnett seconded. Ingram proposed a modified motion to replace 402.4d with both 301.11a and 301.11b to be 402.4d(1) and 402.4d(2). The Committee unanimously approved the modified motion.**

Artigliere re-raised the issue of who decides whether a record has not been maintained. Sales does not believe that issue will arise, as it is always clear if evidence existed or did not exist. Ingram noted a case where the question of the existence of the evidence was raised. Artigliere suggested a Note on Use to the new proposal that there may be a factual issue of whether the evidence exists. Sales proposed the following Note to cover the scenario: "This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence." Artigliere agreed it should go with all of the spoliation instructions. The Committee agreed.

The Committee approved the following spoliation of evidence proposals to be 301.11a & 301.11b and 402.4d(1) & 402.4d(2):

[301.11] [402.4d] FAILURE TO MAINTAIN EVIDENCE OR KEEP A RECORD

[a.] [(1).] ***Adverse inference.***

If you find that:

(Name of party) [lost] [destroyed] [mutilated] [altered] [concealed] or otherwise caused the (describe evidence) to be unavailable, while it was within [his] [her] [its] possession, custody, or control; and the (describe evidence) would have been material in deciding the disputed issues in this case; then you may, but are not required to, infer that this evidence would have been unfavorable to (name of party). You may consider this, together with the other evidence, in determining the issues of the case.

NOTES ON USE FOR [301.11a] [402.4d(1)]

1. This instruction is not intended to limit the trial court's discretion to impose additional or other sanctions or remedies against a party for either inadvertent or intentional conduct in the loss, destruction, mutilation, alteration, concealment, or other disposition of evidence material to a case. *See, e.g., Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 780 (Fla. 4th DCA 2006); *American Hospitality Management Company of Minnesota v. Hettiger*, 904 So.2d 547 (Fla. 4th DCA

2005); *Jost v Lakeland Regional Medical Center*, 844 So.2d 656 (Fla. 2d DCA 2003); *Nationwide Lift Trucks, Inc v. Smith*, 832 So.2d 824 (Fla. 4th DCA 2002); *Torres v. Matsushita Electric Corp.*, 762 So.2d 1014 (Fla. 5th DCA 2000); and *Sponco Manufacturing, Inc. v. Alcover*, 656 So.2d 629 (Fla. 3d DCA 1995).

2. The inference addressed in this instruction does not rise to the level of a presumption. *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987), and Instruction [301.11b] [402.4d(2)].

3. This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence.

[b.] [(2).] *Burden shifting presumption.*

The court has determined that (name of party) had a duty to [maintain (describe missing evidence)] [keep a record of (describe subject matter as to which party had record keeping duty)]. (Name of party) did not [maintain (describe missing evidence)] [or] [keep a record of (describe subject matter as to which party had record keeping duty)].

Because (name of party) did not [maintain (describe missing evidence)] [or] [keep a record of (describe subject matter as to which party had a record keeping duty)], you should find that (name of invoking party) established [his] [her] (describe applicable claim or defense)] unless (name of party) proves otherwise by the greater weight of the evidence.

NOTES ON USE FOR [301.11b] [402.4d(2)]

1. This instruction applies only when the court has determined that there was a duty to maintain or preserve the missing evidence at issue and the party invoking the presumption has established to the satisfaction of the court that the absence of the missing evidence hinders the other party's ability to establish its claim or defense. *See Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987).

2. This instruction may require modification in the event a factual dispute exists as to which party or person is responsible for the loss of any evidence.

b. Stuart v. Hertz

Barnett directed the Committee to the current proposed *Stuart v. Hertz* instruction and Note on Use (p. 28 of the materials):

501.5 OTHER CONTRIBUTING CAUSES OF DAMAGES

[version published in the Florida Bar News October 1, 2011]

[underlined text added after 5/29/12 subcommittee conference call]

* * *

c. Subsequent injuries caused by medical treatment:

If you find that (defendant(s)) **caused [loss] [injury] [or] [damage] to** (claimant), **then** (defendant(s)) **[is] [are] also responsible for any additional [loss] [injury] [or] [damage] caused by medical care or treatment reasonably obtained by** (claimant).

NOTE ON USE FOR 501.5c

This instruction is intended for use in cases involving additional injury caused by subsequent medical treatment. See, *e.g.*, *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977); *Pedro v. Baber*, 83 So.3d 912 (Fla. 2d DCA 2012); *Tucker v. Korpita*, 77 So.3d 716, 720 (Fla. 4th DCA 2011); *Nason v. Shafranski*, 33 So.3d 117 (Fla. 4th DCA 2010); *Dungan v. Ford*, 632 So.2d 159 (Fla. 1st DCA 1994).

The subcommittee's debate concerned the Note on Use. Some subcommittee members felt more cases should be cited (as in the proposal above); some felt only *Stuart v. Hertz* should be cited. Artigliere asked if the law in this area is developing. Barnett said cases are being released construing and extending *Stuart*, and that is why she advocates (with Russo) for not citing any cases other than *Stuart*. Artigliere asked if the language of the proposed instruction is straight from *Stuart* or from the other cases cited. Barnett said the instruction is not from the language of *Stuart*.

Lytal noted that the law in this area is developing beyond medical malpractice and the proposed instruction covers the developing law and accurately states it. Dukes disagreed, stating the proposed instruction does not include negligence aspects of the subsequent treatment. Lytal does not believe negligence is required. Barnett cited *Dungan*, which she stated involved negligence in performing the subsequent surgery. But thereafter, Barnett stated, the cases do not appear to require negligence in the subsequent medical treatment. Lytal and Dukes noted that the key to *Stuart v. Hertz* is acting reasonably in obtaining treatment. The question is whether the subsequent medical treatment had to be negligent or just that it caused injury. Hinkle stated that the current instruction tracks the law and should be used until the Florida Supreme Court undertakes to review the situation.

Rosenbloum noted that this issue has been discussed numerous times. He does not believe the Committee should revisit the instruction. The only issue at hand is whether to add the additional cases to the Note that are underlined in the proposal. Barnett agreed that the only issue at hand is the Note on Use, but she also believed the instruction should be revisited because it is not accurate in her opinion. Dukes agreed. Roth noted the subcommittee addressed the issue again and voted to leave the instruction as is.

Rosenbloum moved to include the additional citations to *Pedro*, *Tucker*, and *Dungan* in the Note; Fox seconded; the Committee approved by a 15 to 3 vote. A question was asked whether the revised Note would need to be republished. Jennings was unsure. **Barton did not believe there was a need to republish the revised Note; the Committee agreed.**

Rosenbloum asked when the proposal will be submitted to the Florida Supreme Court. Committee members noted a current need for the instruction, as it is coming up in many contexts. **Lang said he will prepare a report to the Court, but he and Jennings noted there will likely be a need for a minority report. Jennings will send Lang an example of how a**

report would look with a minority position set forth in the report's narrative. Artigliere sees value in setting forth the minority position for the Court. Barnett noted there are minority views on both the instruction and the Note on Use. Rosenbloum noted a minority view about the need for a Note on Use that the instruction does not apply when the issue is the reasonableness of seeking out the treatment.

NEGLIGENCE SUBCOMMITTEE

Wagner Letter Regarding 401.12b and 501.5a

Barnett stated that former Committee member Alan Wagner sent a letter (pp. 29-30 of the materials) stating his belief that, if instruction 501.5a (aggravation or activation of disease or defect) is given, it must be accompanied by instruction 401.12b (concurring cause).

Barnett reported that, when the subcommittee discussed Wagner's letter, Lytal noted his belief that there is a larger issue with the language of instruction 501.5a and its Note on Use. Lytal described the scenario put forth by Wagner, where the plaintiff had a preexisting condition (weak bones) caused by osteoporosis. The plaintiff sustained a T-12 burst fracture from an accident. The accident did not aggravate or activate the osteoporosis. Wagner stated in his letter that 501.5a did not apply because the accident did not aggravate an existing disease or activate a latent disease or defect. Lytal stated that he believes there does not need to be aggravation of the cause of the condition (osteoporosis), just aggravation of the condition (weak bones). So, he believes the language should be revised to accord with aggravation of the preexisting condition. He also does not believe the aggravation is just physical, but can be emotional, as well. Roth explained why he believed the current language is appropriate, but asked if there are instructions for explaining the "eggshell plaintiff" doctrine to the jury. Barnett stated her belief that 501.5 covers that scenario.

Barton noted that the issue raised by Wagner was whether the Note on Use for 501.5a is backwards and should be flipped. It currently states that 501.5a should be given whenever 401.12b is given, but he believes it should state that 401.12(b) should be given whenever 501.5(a) is given. Lang and Rosenbloum agreed with Wagner. **Roth moved; Artigliere seconded; and the Committee unanimously approved Wagner's proposed revision to the Note on Use for 501.5a to state: "Where instruction 501.5(a) is given, instruction 401.12(b), Concurring Cause, is necessary."**

PROFESSIONAL MALPRACTICE

Kolter Comment on Medical Malpractice Damages on the Verdict Form

Roth directed the Committee to a proposed Note on Use (p. 33 of the materials) to instructions 501.7 and 502.7 (reduction of damages to present money value) to address the situation where a party requests periodic payments under section 768.77(2)(a)(2), Florida Statutes:

It is noted that this instruction may conflict with §768.77(2)(a)(2), Fla. Stat., in medical malpractice cases where a party has requested that future damages be paid by periodic payments. No standard instruction or statute has been adopted as this statute is seldom used.

Rosenbloum asked if the language should be stronger than "may conflict." Roth agreed "conflicts" should be used. **Artigliere agreed and suggested revising to:**

This instruction conflicts with *F.S.* 768.77(2)(a)2. and should not be given in medical malpractice cases when a party has requested that future damages be paid in periodic payments.

Hinkle moved to approve Artigliere's proposal; many seconded; unanimously approved by the Committee as an additional Note on Use for instructions 501.7 and 502.7.

APPENDIX D

MEMORANDUM

TO: Jury Instruction/Spoliation Committee

FROM: Cynthia N. Sass, Esq.

DATE: 06/22/2010

RE: Florida Law Regarding Jury Instructions for Spoliation of Evidence[1]

ISSUES

What standards does Florida state case law set forth for providing jury instructions regarding spoliation of evidence?

What standards does Florida federal case law set forth for providing jury instructions regarding spoliation of evidence?

FLORIDA STATE SPOLIATION CASE LAW

The leading Florida state law case on jury instructions for spoliation is the Florida Supreme Court's decision in *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342 (Fla. 2005). The Court held that where there is evidence that a first-party intentionally destroys, loses, or misplaces evidence, a trial court may use sanctions listed in Florida Rule of Civil Procedure 1.380(b)(2) and/or an instruction allowing a jury to draw a negative inference from the absence of the evidence. If evidence is lost due to negligence, and the lost evidence hinders a plaintiff's ability to establish a prima facie case, then a rebuttable presumption which shifts the burden of proof may be applied. The rebuttable presumption is not overcome until the trier of fact believes the presumption has been overcome by whatever degree of persuasion is required by the substantive law of the case. Unfortunately, neither the *Martino* case nor the case law it cites explains what the phrase "whatever degree of persuasion is required by the substantive

[1] Thanks to James W. Jones of the Law Offices of Cynthia N. Sass, P.A. for his assistance in the preparation of these materials.

law of the case" means. If anyone knows of any case law that explains this phrase or has experience with what this phrase means, please share it with the group.

The following is a summary of the pre and post-*Martino* Florida case law on jury instructions regarding spoliation of evidence.

Pre-Martino Florida Case Law On Spoliation of Evidence

Public Health Trust of Dade County v. Valcin, 507 So. 2d 596 (Fla. 1987) The Florida Supreme Court reviewed the issue of spoliation of evidence in a medical malpractice case. Gregoria Valcin and her husband brought a negligence action against a public hospital after the patient suffered a ruptured tubal pregnancy a year and a half after the hospital has performed a procedure upon the patient that was supposed to prevent tubal pregnancies. The hospital was unable to produce an operative report that was supposed to be completed by Valcin's surgeon that would have assisted Valcin's expert in determining if the surgery was negligently performed. The court held in the "extremely rare instances that the evidence establishes an intentional interference with a party's access to critical medical records, a wide range of sanctions are available to the trial court under Florida Rule of Civil Procedure 1.380(b)(2) (citations omitted.) Further, a jury could well infer from such a finding that the records would have contained indications of negligence". *Id.* at 599.

The court further held, however, that if medical records were unavailable due to an adverse party's negligence, a rebuttable presumption could apply. However, before applying the rebuttbable presumption, the court held that a plaintiff must first prove to the court that the absence of the records will hinder his ability to establish a prima facie case. *Id.* at 599. Once that is established, a rebuttable presumption, "as recognized in section 90.302, Florida Statutes, affects the burden of proof, shifting the burden to the party against whom the presumption operates to prove the nonexistence of the fact presumed. When evidence rebutting such a presumption is introduced, the presumption does not automatically disappear. It is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case." *Id.* at 600.

Jordan v. Masters, 821 So. 2d 342 (Fla. 4th DCA 2002) The Fourth DCA declined to use the *Valcin* rebuttable presumption in a sexual battery case brought against a reverend by the guardian of an incompetent. The victim accused the reverend of sexual abuse but later recanted. The recantation was recorded on audiotape and also allegedly recorded on videotape. During discovery, the church could not produce the alleged videotape recording. The trial court gave the following jury instruction regarding the video tape based on *Valcin*:

> "where a party fails to produce evidence within his control, an adverse inference may be drawn that the withheld evidence would be unfavorable to the party failing to produce it."

Id. at 346.

The Fourth DCA found that the trial court erred in providing this instruction because (1) the absence of the video tape did not impair the victim's ability to prove his prima facie case since the victim could still testify about his recantation and there was an audio tape of it, (2) the trial court had failed to determine if the video tape ever truly existed, and (3) while lawyers are free to make adverse inference arguments in their closing statements about evidence, a court interferes with the province of the jury when it instructs the jury as to what facts it can find. *Id.* at 347. The court further found that the *Valcin* rebuttable presumption which shifts the burden of proof implements the public policy of ensuring that adequate notes of medical operations be kept, a public policy consideration that was absent in this case. *Id.*

Martino v. Wal-Mart Stores, 835 So. 2d 1251 (Fla. 4th DCA 2003) The Fourth DCA addressed the issues of adverse inferences that could be drawn from the spoliation of evidence. Martino was a Wal-Mart customer who sued Wal-Mart because she was injured by a faulty shopping cart. Despite Martino instructing the store manager to preserve the shopping cart and video surveillance tape, Wal-Mart failed to preserve this evidence. Martino's counsel asked the trial court for a jury instruction that Wal-Mart's failure to produce the shopping cart created an inference that evidence of the cart's condition would have been unfavorable to Wal-Mart. Martino's counsel also cited the *Valcin* decision for the proposition that Wal-Mart's failure to produce the cart created a rebuttable presumption of negligence and requested such a presumption be applied by the trial court. The trial court rejected both requests and directed a verdict in favor of Wal-Mart. On appeal, Martino's counsel argued that a directed verdict was improper in light of the destroyed evidence. The Fourth DCA first noted that the *Valcin* presumption of negligence instruction was predicated upon the healthcare provider's failure to maintain required medical records. However, unlike the *Valcin* presumption of negligence, the Fourth DCA held that "the adverse inference concept is not based on a strict legal "duty" to preserve evidence. Rather, an adverse inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence." Given that an adverse inference regarding the missing cart and video may have led a jury to find for Martino, the Fourth DCA found she was entitled to a new trial. However, the Fourth DCA did not find that Martino was entitled to an adverse inference jury instruction. Instead, the court held that while counsel is free to make arguments concerning the adverse inference created by Wal-Mart's failure to produce the shopping cart and videotape, a jury instruction on this matter is not appropriate." *Id.* at 1257, fn 2.

Palmas Y Bambu v. E.I. Dupont Nemours & Company, Inc., 881 So.2d 565 (Fla. 3rd DCA 2004) The Third DCA found that the use of a *Valcin* rebuttable presumption jury instruction was not proper in a negligence case brought by nurseries against fungicide manufacturer DuPont for a defective fungicide that damaged plants. The trial court issued the following adverse jury instruction regarding Dupont's missing fungicide test results:

> **The Court has determined that** DuPont performed tests using Benlate DF and Benlatae WP on ornamental plants at Monte Vista, Costa Rica... The Court has determined that DuPont had an obligation to maintain and not destroy the results of those tests. Finally, **the Court has also determined that,** notwithstanding this obligation, the defendant destroyed the results of those tests. Because of the

defendant's improper destruction of those Benlate tests results, the Court instructs you that you may infer that the results of those tests were adverse or unfavorable to DuPont. You may consider this adverse inference, together with all the other evidence in the case, in considering the issues before you.

I emphasize maybe because it's not a requirement that you do so.

Id. at 580. (emphasis added).

The Third DCA found that jury instruction set forth above was an improper invasion of the province of the jury because it assumed the truth of disputed facts. The Third DCA then gave examples of adverse inference jury instructions from other courts it believed were proper:

> The Plaintiff claims that the railroad failed to maintain inspection and maintenance records from the train cars involved in the accident. **If you find that**: (1) the records at issue would be relevant to the claims made by the plaintiff; (2) that the records were destroyed; and (3) by the time the records were destroyed, the railroad knew or reasonably should have known they would be relevant in litigation that was reasonably foreseeable, then you may infer that the contents of these destroyed records would be harmful to the railroad's position in this case. You need not draw this inference. I merely instruct you that you may. *Id.* at 581 citing *Peace v. Nat'l R. Passenger Corp.*, 291 F.Supp. 2d 93, 97 (D. Conn. 2003)(emphasis added).
>
> **You have heard testimony** about evidence which has not been produced. Counsel for Plaintiffs have argued that this evidence as in Defendant's control and would have proven facts material to the matter in controversy.
>
> **If you find the Defendant could have produced the evidence, and that the evidence was within his control, and that this evidence would have been material in deciding among the facts in dispute in this case, then you are permitted, but not required, to infer that the evidence would have been unfavorable to the Defendant.**
>
> In deciding whether to draw this inference, you should consider whether the evidence not produced would merely have duplicated other evidence already before you. You may also consider whether the Defendant has a reason for not producing this evidence, which was explained to your satisfaction. Again, any inference you decide to draw should be based on all of the facts and circumstances in this case. *Id.* at 581 citing *Gilbert v. Cosco Inc.*, 989 F.2d 399, 405 n. 5 (10th Cir. 1993) (emphasis added).

The Third DCA went on to find that this case was wholly distinguishable from *Valcin*. In *Valcin*, the missing documents hindered the plaintiff from proving a prima facie case which justified the use of a presumption to shift the burden of proof to the spoliating party regarding

that element of the claim. In contrast, the Third DCA noted that the trial court had not found that the nurseries' ability to prove a prima facie case was hindered by DuPont's loss of the fungicide tests. As such, the use of the *Valcin* presumption was not justified. *Id.* at 582.

American Hospitality Management Company of Minnesota v. Hettiger, 904 So.2d 547 (4th DCA 2005) Decided a month before the Florida Supreme Court's *Martino* decision, the Fourth DCA rejected the idea of using the *Valcin* remedy of a rebuttable presumption that shifts the burden of proof outside of the medical malpractice context. Hettiger was a repairman who was injured on hotel's property while using one of the hotel's ladders. Hettiger brought claims of negligence and spoliation of evidence against the hotel operator which could not produce the ladder involved in the repairman's accident. The trial court provided the following *Valcin* rebuttable presumption jury instruction:

> The Court has determined and now instructs you, as a matter of law, that American Hospitality is responsible for any negligence of the Holiday Inn Express agents and/or employees.
>
> The defendant, American Hospitality disposed of the ladder involved in plaintiff, Edward Hettiger's claim on the date that he was injured. The disposal makes it difficult for the plaintiff to prove that American Hospitality was negligent with regard to the latter in its condition or that such a condition caused plaintiff's injury.
>
> In situations such as this, the Court has the discretion to shift the burden of proof from the plaintiff, Edward Hettiger, to defendant, American Hospitality. The Court has done so.
>
> As a result of American Hospitality destroying the ladder which is the subject of this lawsuit, the Court has entered a presumption of negligence against Holiday Inn and has determined as a matter of law the following:
>
> 1, the ladder is presumed defective
>
> 2, the defective ladder is presumed to have caused Edward Hettiger to fall.
>
> This is a rebuttable presumption of negligence and the burden is on the defendant to overcome this presumption by the greater weight of the evidence.
>
> If the defendant does not meet this burden by the greater weight of the evidence, then you must find the defendant negligent. This ruling does not eliminate defendant's right to prove negligence on the part of other parties involved in this case, whether named or not, as well as presenting proof to rebut the presumption of negligence I have instructed you on." *Id.* at 548.

The Fourth DCA held that this *Valcin* jury instruction should not have been provided by the trial court. The Fourth DCA reasoned that the *Valcin* remedy of the rebuttable presumption was "fashioned in part because of the unique duties of health care practitioners with regard to patient's medical records" and that the circumstances of Hettiger's claim did not warrant the application of a rebuttable presumption. *Id.* at 549-550.

Instead, the Fourth DCA reasoned that its own *Jordan* decision and the Third DCA's *Palmas* decision were more applicable to Hettiger's case. However, the Fourth DCA recognized that unlike the *Jordan* and *Palmas* decisions, where the missing evidence did not prevent the plaintiffs from proving their prima facie cases, the missing ladder in this case was a crucial piece of evidence. Therefore, the Fourth DCA found it would not be per se error for the trial court to provide an adverse inference jury instruction regarding the missing ladder and suggested that the trial court issue something like the following sample adverse inference jury instruction:

> "You have heard testimony about potential evidence which the party having custody failed to produce. Plaintiffs have argued that this evidence was in defendant's control and would have proven facts material to the issue of negligence.
>
> If you find that this evidence was within defendant's control, that defendant could have preserved this evidence so that it was available for the parties in preparing for trial in this case, and that this evidence would have been material in deciding the facts in dispute in this case, then you are permitted, but not required, to infer that the evidence would have been unfavorable to defendant."

Id. at 551.

Florida Supreme Court's Martino Decision and Post-Martino Case Law

Martino v. Wal-Mart Stores, 908 So.2d 342 (Fla. 2005). After rendering the *Martino* decision noted above, the Fourth DCA certified a conflict with the Third DCA as to whether an independent cause of action for spoliation of evidence exists against first-parties. The Florida Supreme Court held that the proper remedy against a first-party defendant for spoliation of evidence is not an independent cause of action, but rather discovery sanctions and a rebuttable presumption of negligence for the underlying tort claim. The court revisited its *Valcin* decision on spoliation. In following *Valcin*, the court again held when evidence is intentionally lost, misplaced, or destroyed by a party, trial courts may rely on sanctions found in Florida Rule of Civil Procedure 1.380(b)(2) and that a jury could well infer from such a finding that the records would have contained indications of negligence. *Id.* at 347. As it did in *Valcin*, the court again held that if the loss of evidence was due to negligence, then a rebuttable presumption of negligence for the underlying tort applied. However, the rebuttable presumption would only apply where the absence of records hinders the plaintiff's ability to prove a prima facie case. The rebuttable presumption will shift the burden of proof under section 90.302, Florida Statutes (1985), so that the presumption is not overcome until the trier of fact believes the presumed negligence has been overcome by the required degree of persuasion required by the

case's substantive law. The case is significant in that not only did it find that there was no independent cause of cause of action against first-party spoliators, it applied the *Valcin* method of handling both intentional and negligent spoliation outside of the medical malpractice context.

Golden Yachts, Inc. v. Hall, 920 So.2d 777 (Fla. 4th DCA 2006) The Fourth DCA held that a trial court could give a jury instruction permitting the jury to draw an adverse inference from a party's spoliation of evidence. William Hall was injured while aboard a boat at Golden Yachts that was supported by a boat cradle which collapsed. While Hall instructed Golden Yachts to preserve the components of the damaged cradle, Golden Yachts failed to do so. The trial court allowed an adverse inference jury instruction and the jury found Golden Yachts liable. Golden Yachts appealed.

In deciding whether the adverse jury instruction was proper, the Fourth DCA held that "[p]rior to a court exercising any leveling mechanism due to spoliation of evidence, the court must answer three threshold questions: 1) whether the evidence existed at one time, 2) whether the spoliator had a duty to preserve the evidence, and 3) whether the evidence was critical to an opposing party being able to prove its prima facie case or a defense. *Id.* at 780. In applying these threshold questions, the Fourth DCA upheld the trial court's use of the adverse inference jury instruction because: (1) the component parts of the cradles did exist at one time and were last in Golden Yacht's possession, (2) Hall had informed Golden Yachts of the need to preserve the cradles, and (3) despite being instructed to preserve the cradles that were in its possession, Golden Yacht failed to preserve the cradles. *Id.*

The Fourth DCA also noted a distinction between adverse presumption jury instructions and adverse inference jury instructions. The court found that "[u]nlike an adverse presumption instruction, where the court must find that the spoliator was duty-bound to preserve the evidence, 'an adverse inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either losses or destroys the evidence." *Id* at 781 citing *Martino*, 835 So.2d at 1257.

The Fourth DCA also cited the Florida Supreme Court's *Martino* decision for the proposition that '[i]n cases involving negligent spoliation, courts prefer to utilize adverse evidentiary inferences and adverse presumptions during trial to address the lack of evidence. In cases in involving intentional spoliation, courts more often strike pleadings or enter default judgments." *Id.* at 780 citing *Martino*, 908 So.2d 342, 346-7 (Fla. 2005)

Fini v. Glascoe, 936 So.2d 52 (Fla. 4th DCA 2006) The Fourth DCA followed the Florida Supreme Court's *Martino* decision in finding that no independent cause of action for spoliation exists for first-party spoliation. Fini was a truck owner who brought a negligence claim against a car dealership on a claim of negligent installation of a vehicle alarm. Fini's was injured in an accident when his car accelerated uncontrollably shortly after the car dealership installed a vehicle alarm system. Following the accident, an employee of the car dealership broke into the police impound lot where the truck was stored after the accident and destroyed evidence of the installation of the alarm system. While the Fourth DCA followed the Florida Supreme

Court's *Martino* decision in rejecting Fini's claim for an independent cause of action for first-party spoliation against the defendants, the court held that "the supreme court made clear that sanctions and a presumption of negligence, rather than an independent cause of action were the appropriate remedy for first-party spoliation. Relying on [*Valcin*] the court explained that where the first-party intentionally loses, misplaces or destroys the evidence, trial courts are to rely on sanctions found in Florida Rule of Civil Procedure 1.380(b) (2) and a jury inference of negligence from a finding of intentional destruction. However, where the spoliation of evidence was merely negligent, a presumption of negligence applies." *Id.* at 55 citing *Martino*, 908 So.2d at 347.

FLORIDA FEDERAL SPOLIATION CASE LAW

The Eleventh Circuit has held that federal law governs the imposition of spoliation sanctions, but a federal court's opinion may be "informed" by state law so long as state law is consistent with federal law. See *Flury v. Daimler Chrysler Corp*, 427 F.3d 939, 944 (11th Cir. 2005). Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation or potential litigation...and destroys such documents and information. See *Optowave Co. v. Nikitin*, 2006 WL 3231422 at *7 (M.D. Fla. 2006).

The elements of a spoliation claim are: (1) the 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. In addition, the Eleventh Circuit has held that sanctions for evidence spoliation are only appropriate when the absence of the evidence is based on bad faith. Mere negligence in losing or destroying evidence is not enough for an adverse inference as negligence does not sustain an inference of consciousness of a weak case. *See Swofford v. Eslinger*, 671 F.Supp. 2d 1274 citing *Green Leaf Nursery e. E.I. DuPont De Nemours and Co.*, 341 F.3d 1292, 1308 (11th Cir. 2003) and *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997).

Sanctions that a federal court may impose include, but are not limited to, adverse inference or rebuttable presumption instructions to a jury. *Id.* citing *Flury*, 427 F.3d at 945.

The following is a summary of Florida federal case law regarding spoliation jury instructions.

Cases Allowing Adverse Inference and/or Rebuttable Presumption Jury Instructions Or Dismissal of the Claim

Swofford v. Eslinger, 671 F.Supp.2d 1274 (M.D. Fla. 2009) The United States District Court for the Middle District of Florida found that both adverse inference and rebuttable presumption jury instructions were to be imposed against sheriff department and deputies who shot a home owner on his property during an investigation of a car theft. There was evidence that the sheriffs had destroyed the laptop computer, e-mails, radios, guns, and uniforms used at the time of the incident. The court found that was bad faith due to the fact that even though the sheriff's in-house counsel had received letters from plaintiff's counsel instructing them to preserve evidence, the sheriff's office took no action whatsoever to preserve evidence.

The court made the following findings with respect to each item of destroyed evidence.

Laptop computer: The sheriff's department allowed a laptop computer used on the night of the incident to be sent away and erased as part of the department's routine of purging older computers. The court held that the jury could be instructed that it may infer that the laptop computer contained information detrimental to the sheriff's department's case. *Id.* at 1284.

E-mails: The sheriff's department continued to allow individual employees to be able to delete e-mails when it could have had its IT department disable that delete function once it received the litigation hold letters. There was evidence that various deputies deleted e-mails regarding the incident. The Court held that the jury could be instructed that the destroyed e-mails contained information detrimental to all of the defendants in the case. *Id.* at 1285.

Radios: The sheriff's department failed to produce the radios used by the deputies until the court held an evidentiary hearing. Even then, the sheriff's department failed to produce the radio accessories such as the radio microphones and earpieces. The sheriff's department claimed that sanctions were not warranted because the litigation hold letters only requested preservation of radio transmissions, not radios. The court rejected this argument and found that requesting the preservation of radio transmissions was enough to put the sheriff's department on notice that radios were relevant evidence. As a sanction, the court imposed a presumption in favor of the plaintiff that the radios and their missing accessories would yield evidence adverse to the defendants if produced. Plaintiff would be allowed to submit good faith arguments to the jury as to what adverse conclusion the jury may draw while defendants could rebut plaintiff's arguments with appropriate, relevant evidence. *Id.* at 1285-1286.

Guns: The sheriff's department returned the guns used during the incident to the firearms manufacturer who completely disassembled the weapons upon their return. The court decided the guns were not relevant to any material facts in dispute in the matter. Therefore, the court declined to impose an adverse inference jury instruction regarding the guns. *Id.* at 1286.

Uniforms: The litigation hold letters did not specify that uniforms worn by the sheriff's during the incident should be preserved. Because there was no evidence to suggest the defendants should have been aware the uniforms were relevant to the case, the court declined to impose any adverse jury instruction regarding the uniforms. *Id.*

Southeastern Mechanical Services, Inc. v. Brody, (M.D. Fla. 2009) The United States District Court for the Middle District of Florida found that an adverse inference jury instruction was warranted against former employees who wiped their Blackberries' hard drives after their former employer filed action against them alleging misappropriation of trade secrets and confidential information. The court found that the destruction of e-mails, calendar items, text messages, and telephone records from the Blackberries was done in bad faith. A computer forensics expert who examined the Blackberries indicated that the explanation for the "wiped" state of the devices could only be explained by deliberate and intentional acts. Since the intentional destruction of the data from the Blackberries constituted bad faith, the court held that the appropriate sanction was an "adverse jury instruction regarding individual Defendants' failure to preserve data on their Blackberries that would have been advantageous to [plaintiff] and disadvantageous to [defendants]." *Id.* at 1302.

Optowave Co., Ltd v. Nikitin, 2006 WL 3231422 (M.D. Fla. 2006) The United States District Court for the Middle District Court of Florida held that an adverse inference jury instruction was an appropriate spoliation sanction. Optowave had a contract with defendant Dmitri Nikitin d/b/a Precision Technology Group ("PTG") regarding the sale of equipment used to manufacture infared glass filters. *Id.* at *1. Optowave claims that PTG breached the contract by failing to have the equipment meet certain specifications. *Id.* Optowave sought to compel the discovery of electronic documents and e-mails regarding the contract. *Id.* Optowave moved for spoliation sanctions and claimed that PTG had intentionally allowed the destruction of internal e-mails which would have supported Optowave's position that PTG had drafted the contract and that the contract had incorporated the equipment specifications. *Id.*

The court found that while federal law controls spoliation sanctions, its opinion may be informed by state law that is consistent with federal law. The court made the following citations to Florida state case law on spoliation: "Under Florida law, the remedy for a party failing to produce crucial but unfavorable evidence that is destroyed or inexplicably disappears is an adverse inference or discovery sanctions. *Martin v. Wal-Mart Stores, Inc.*, 908 So.2d 342, (Fla. 2005). Prior to the court exercising any leveling mechanism due to spoliation of evidence, the court must decide: 1) whether the evidence existed at one time, 2) whether the spoliator had a duty to preserve the evidence, 3) whether the evidence was critical to an opposing party being able to prove its prima facie case or defense. *Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 781 (Fla. 4th DCA 2006)." *Id.* at *8. The court further noted that in addition

to the factors set forth by Florida courts, the Eleventh Circuit only allows an adverse inference sanction to be applied where there is evidence of bad faith. *Id.*

Applying these factors, the court found that e-mails and other electronic documents existed at one time that was directly relevant to the construction of the terms of the parties' disputed contract. The court further found that PTG had a duty to preserve these missing items after they had received litigation hold letters from Optowave. Further, the court found that PTG had shown bad faith by allowing the hard drives of its employees computers to be reformatted without first preserving relevant files despite the fact it was on notice to preserve evidence and despite the fact that given PTG's level of computer technology sophistication, it was aware that the reformatting would destroy evidence on the hard drives.

The court ordered that an adverse inference jury instruction "directing the jury that the destroyed evidence would have supported the Plaintiff's case on the following two issues: 1) the parties understood that acceptance tests, or the contract specifications, were incorporated into the Contract, and 2) the Contract must be construed against PTG, who drafted the Contract." *Id.* at. *12. The court held that the actual language of the adverse inference jury instruction was to be left to the discretion of the district court judge. *Id.*

Flury v. Daimler Chrysler Corporation, 427 F.3d 939 (11th Cir. 2005) The Eleventh Circuit held that the district court erred in allowing a mere rebuttable presumption jury instruction to be the sole spoliation sanction in a case where a motorist suing an automobile manufacturer for injury caused by an alleged manufacturing defect allowed the vehicle in question to be sold for salvage, effectively destroying the evidence without giving the manufacturer a chance to inspect it. *Id.* at 945-946. Instead, the Eleventh Circuit found that dismissal of the motorist's case was the proper spoliation sanction. *Id.* *947. The district court had provided the following spoliation instruction to the jury:

> The term "spoliation" refers to the failure to preserve evidence that is necessary to contemplated or pending litigation. The law provides that spoliation creates a rebuttable presumption that the evidence not preserved was unfavorable to the party responsible for the spoliation. Thus, if you find that Plaintiff disposed of the vehicle before providing Defendant an opportunity to inspect it, you may presume that the vehicle was not defective, however, Plaintiff may rebut that presumption.
>
> *Id.* at 943.

Cases Denying Spoliation Sanctions Due To Lack of Evidence of Bad Faith

Calixto v. Watson Bowman Acme Corp., 2009 WL 3823390 (S.D. Fla. 2009) The United States District Court for the Southern District of Florida found that spoliation sanctions were not appropriate where the was no evidence of bad faith destruction of emails that may have been relevant to the case. The court found that where there is no direct evidence of bad faith, bad faith may still be proven by circumstantial evidence where: "(1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3)

the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator." *Id.* at *16. The court found that there was no evidence of bad faith where party's IT personnel destroyed e-mail pursuant to its routine business practice of deleting e-mail mailboxes of departed employees and there was no evidence that the IT personnel had knowledge of the lawsuit or any of the matters at issue in the lawsuit. *Id.* at *17. Since there was no evidence of bad faith, no spoliation sanctions were warranted.

Kimbough v. City of Cocoa, 2006 WL 3500873 (M.D. Fla. 2006) The United States District Court for the Middle District of Florida found that spoliation sanctions were not warranted where the party seeking the sanctions could not show the missing evidence was crucial to their case or that there was bad faith that could be attributed to the spoliating party. However, the court cited the Florida 4th DCA decision in *Martino v. Wal-Mart Stores, Inc.*, 835 So.2d 1251 (Fla. DCA 4th 2003) for the proposition that it was within the discretion of the deciding district judge as to whether he would allow counsel to present evidence of spoliation and argue to the jury that an adverse inference could be drawn from the defendant's failure to produce the evidence.

See also, additional cases denying spoliation sanctions because there was no evidence of "bad faith"

Slattery v. Precision Response Corp., 167 F.Appx. 139, 141 (11th Cir. 2006)(employer's failure to produce discovery in Equal Pay Act suit did not warrant adverse inferences since there was no evidence that the employer had withheld or tampered with requested documents in bad faith)

Assimack v. J.C. Penny Corp, 2005 WL 2219422 (M.D. Fla. 2005) (Plaintiff struck by falling floor to ceiling pole known as an "autopole" in J.C. Penny Store was not entitled to adverse inference jury instruction. Although the store failed to mark autopole that struck her and put it back into use with countless other autopoles, thereby making it impossible to identify the exact autopole that hit her, the store's handling of the autopole did not amount to bad faith. Therefore, an adverse inference jury instruction was not warranted.)

Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997) (estate of plaintiff who was struck by train while passing through pedestrian railroad crossing not entitled to adverse inference that train was traveling at excessive speeds where there was no evidence that unexplained absence of train's speed tape was due to bad faith).

Corporate Financial Inc. v. Principal Life Insurance Company, 2006 WL 3365606 (S.D. Fla 2006) (no adverse inference jury instruction warranted where was no evidence that missing documents destroyed in ordinary course of business were destroyed in bad faith and there was no evidence that documents destroyed were actually relevant to the case)

Penalty Kick Management Ltd v. Coca Cola, Co, 318 F.3d 1284 (11th Cir. 2003) (neither defendant's inability to produce bottle label it provided to printer to develop window's label promotion, nor fact that same employee who received plaintiff's disclosures approached printer to produce labels, warranted inference that defendant had misappropriated trade secrets allegedly disclosed by plaintiff regarding its label process where there was no evidence of bad faith)

DRAFT

PROPOSED STANDARD CIVIL JURY INSTRUCTON
REGARDING SPOLIATION OF EVIDENCE

a. Instruction if evidence was intentionally destroyed, lost, or misplaced by party

Members of the jury, [spoliating party] had a duty to preserve [list evidence] but instead has intentionally [lost, misplaced, destroyed, caused to be destroyed] the [list the evidence] that existed that would have assisted [non-spoliating party] in establishing its [case/defense].

You are being instructed that you may make an inference from the absence of this evidence. An inference is logical and reasonable conclusion of fact not presented by direct evidence but which, by process of logic and reason, you may conclude exists from the established facts. Here the established fact is that [spoliating party] intentionally [lost, misplaced, destroyed, caused to be destroyed] the [list the evidence].

You are instructed that you may infer that [list the evidence] contained information that was detrimental to [spoliating party]'s [case/defense] if it had been presented because it would have established [insert non-spoliating party's good faith arguments as to what adverse conclusions the jury may draw]. You need not draw this inference. I merely instruct you that you may.

Authorities:
Public Health Trust of Dade County v. Valcin, 507 So.2d 596 (Fla. 1987)
Martino v. Wal-Mart Stores, Inc., 908 So.2d 342 (Fla. 2005)
Golden Yachts v. Hall, 920 So.2d 777 (Fla. 4th DCA 2006)
American Hospitality Management Company of Minnesota v. Hettiger, 904 So.2d 547 (Fla. 4th DCA 2005)
Black's Law Dictionary, 6th Edition (1990)

b. Instruction if evidence was negligently destroyed by party

Members of the jury, [spoliating party] had a duty to preserve [list evidence] that existed that would have assisted [non-spoliating] in establishing its [case/defense] but failed to do so.

You are being instructed that you may make a presumption about this missing evidence. A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in this case.

You are allowed to presume that if [list evidence] had been produced, it would have been adverse to [spoliating party]'s [case/defense] because it would have established [insert non-spoliating party's good faith arguments as to what adverse conclusions the jury may have drawn].

This presumption is rebuttable. This means that you are not required to find that [list evidence] would have established [insert non-spoliating party's good faith arguments as to what adverse conclusions the jury may have drawn].

[Spoliating party] has presented evidence to rebut the presumption described above.

Therefore, you should consider [spoliating party]'s evidence that [insert spoliating party's good faith rebuttal]. If you find that the greater preponderance of the evidence supports [spoliating party]'s rebuttal, then you may not draw any conclusion that [list the evidence] would have been adverse to [spoliating party]'s [case/defense].

However, if you find that the greater preponderance of the evidence does not support [spoliating party]'s rebuttal, then you may find that the [list the evidence] would have been adverse to [spoliating party]'s [case/defense] because it would have established [insert non-spoliating party's good faith arguments as to what adverse conclusions the jury may have drawn].

Authorities:
Public Health Trust of Dade County v. Valcin, 507 So.2d 596 (Fla. 1987)
Martino v. Wal-Mart Stores, Inc., 908 So.2d 342 (Fla. 2005)
Golden Yachts v. Hall, 920 So.2d 777 (Fla. 4th DCA 2006)
Black's Law Dictionary, 6th Edition (1990)

From: Jeff Fulford [mailto:Jeff@fulfordlaw.com]
Sent: Tuesday, June 22, 2010 2:31 PM

Cynthia

We do have some standard spoliation instructions which are limited to the issue of lost/destroyed medical records in the med mal context, at 404.2 d. The sub and full committee spent hours in arriving at the language used, as well as focusing on the difference in presumptions and inferences. This is what we came up with, and is included in the current version:

d Failure to make or maintain records:

[Negligence is the failure to use reasonable care.] The law requires (defendant) **as a licensed health care provider to prepare and maintain health care records.**

[Because (defendant) did not **[make]** [**or**] [**maintain**] (describe the missing record(s))

or

[If you find that a person who was responsible for [making] [or] [maintaining] (describe the missing record(s)) **and failed to do so]**

you should presume (describe the missing records(s)) **contained evidence of negligence unless** (defendant) **proves otherwise by the greater weight of the evidence. You may consider this presumption, together with the other evidence, in determining whether** (defendant) **was negligent.]**

NOTES ON USE FOR 402.4d

1. The second bracketed paragraph should be used if there is no issue about whether the records were made or maintained. If there is an issue about the making or maintenance of the records, then the third bracketed paragraph should be used.

2. This instruction applies only when records are required to be made and maintained and the court determines that the inability or failure to locate a record or records hinders the plaintiff's ability to establish a case. *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987).

Perhaps this is a good starting point for creation of general spoliation instructions, with the recognition that this instruction is premised on and limited to *Valcin* cases.

Jeff

Cynthia and subcommittee members:

Attached are the notes from the med mal and spoliation subcommittees (preceding the creation of the instruction at 402.4d, which I'll refer to as the *Valcin* instruction). It may help the new members review our process and thoughts in arriving at the *Valcin* instruction. Obviously, the *Valcin* instruction pertains to the very specific facts of medical record loss, destruction, etc. We were able to finalize a very simple and brief instruction for the complex legal issues involved. Because we are dealing with complex issues in the general spoliation cases also, that

most Juries would not fully understand, I think it makes it even more imperative that we draft a simple instruction for these cases as well.

Since we already have a DCA opinion suggesting an instruction for general spoliation cases, I think it makes sense to start, and/or work, from that suggested instruction. Without a standard instruction, I think a trial judge would find it difficult to use an instruction that materially differed from the one Judge Farmer mentions below (and wrote about) in *American Hospital Mgt Co vs. Hettiger.*

I am also attaching a red-lined draft version of the general spoliation instruction (that I think may have been prepared by Judge Farmer in our *Valcin* discussion (but can't find a specific reference/author in my saved notes from that discussion). The revised version of the general spoliation instruction is included below, for easy reference. Does this seem to be a good starting point??
Jeff

Spoliation of evidence:

A party may be obligated to preserve evidence under an express agreement that specified evidence will be preserved, or by conduct implying that [certain] **evidence will be preserved. If you find that:**

a. defendant [expressly agreed] [engaged in conduct implying that [he] [she] [it] **would undertake] to preserve specific evidence,**

b. that the specified evidence was within the control of defendant but is now [unpreserved] [missing],

c. that the specified evidence would have been material in deciding the disputed issues in this case,

then in your discretion you may, but are not required to do so, infer that the subject evidence would have been unfavorable to defendant on the issue of [negligence].

Comment on X.9e.

This instruction follows the suggested instructions proposed by the courts in *American Hospitality Management Co. v. Hettiger*, 904 So.2d 547 (Fla. 4th DCA 2005), and *Palmas y Bambu S.A. v. E.I. DuPont de Nemours & Co.*, 881 So.2d 565 (Fla. 3d DCA 2004). It allows the jury to infer, but not to presume, the fact in issue.

From: Judge Gary M. Farmer [mailto:FarmerG@flcourts.org]
Sent: Monday, July 12, 2010 11:58 AM

Spoliation Subcommittee:

I do not like the proposed instruction. It is too lengthy and its wording is unclear. It is not a good idea to try to explain the legal meaning of inferences and presumptions. I would prefer something resembling the one in *American Hospitality Management Company of Minnesota v. Hettiger*, 904 So.2d 547 (4th DCA 2005).

The accompanying memo expresses some confusion about the meaning of the phrase "whatever degree of persuasion is required by the substantive law of the case." That phrase originated in *Caldwell v. Division of Retirement*, 372 So.2d 438 (Fla. 1979), where the court explained:

> "When evidence rebutting such a presumption is introduced, the presumption does not automatically disappear. It is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case. *This may be by a preponderance of the evidence or by clear and convincing evidence*, as the case may be." [e.s.]

372 So.2d at 440. The court is saying that, because the presumption is meant by public policy to be an evidentiary conclusion used as a default setting (so to speak), it can be defeated only by directly conflicting evidence satisfying the general burden of proof in the case.

When the general burden of proof in the case is the greater weight of the evidence, then the jury must find that the directly conflicting evidence defeats the presumption by the greater weight of all the evidence in the case. If the general burden of proof in the case is clear and convincing, then the jury must find that the directly conflicting evidence defeats the presumption by the clear and convincing weight of all the evidence in the case. In short the presumption in these civil cases can be defeated only by evidence meeting the applicable burden of proof. That is obviously the intended meaning of the phrase.

Finally, I don't understand the memo's reliance on federal court decisions. At best a federal decision might be persuasive but it cannot be authoritative about Florida law for purposes of state law jury instructions. On the other hand, the decision of a Florida DCA is authoritative and must be applied throughout the state until contradicted by the DCA having jurisdiction over the trial court or overruled by the Florida Supreme Court.

G M Farmer

7/21/10

I find spoliation instructions to be a fascinating issue, and I appreciate the input thus far from the subcommittee. This area is particularly important because of the looming significance of electronic discovery in state court in the absence of specific rules to deal with such evidence. You probably know that the issue of spoliation (largely discussed as "duty of preservation") in the eDiscovery area is a big deal because of the ephemeral nature of electronic records and the prevalence of routine destruction of emails and other computer documents due to storage and performance issues. In the absence of civil rules on electronic discovery addressing preservation, our instructions may be of some use as guidance on the common law of spoliation/preservation in Florida.

Judge Farmer is correct that we should be careful looking at federal cases, as I think the duty of preservation in the federal arena is clearly stated by rule and broader than it seems to be in Florida state law. In Florida, the duty to preserve flows ONLY from an agreement, statute, court order, or discovery rule. The concurring opinion of Justice Wells joined by Justice Bell in Martino seems to clearly delineate the duty of preservation in Florida. "It is fundamental to the entire legal basis for spoliation of evidence that the owner or possessor of property have a legally defined duty to maintain or preserve the property. ... [T]here should be no use of the *Valcin* presumption or sanctions because Wal-Mart had no duty to maintain or preserve the cart or videotape. In this case there was no statute or regulation which required Wal-Mart to preserve the evidence. Suit was not filed for two years after the incident at the Wal-Mart store, and during that two-year period, no court order or discovery rule required Wal-Mart to maintain or preserve the cart or videotape... ." Martino, 908 So. 2d 342, 347-50 (Fla. 2005). Cynthia's memo at p. 4 contains some language from a Third DCA case relating to the "reasonable foreseeability" of the relevance of records to a claim, but that language comes from a federal case and seems to be beyond Florida common law authority of preservation/spoliation. The case is Palmas Y Bambu v. E.I. Dupont Nemours & Company, Inc., 881 So.2d 565, 580-2 (Fla. 3rd DCA 2004). If I am wrong, please tell me.

I have a fundamental question. I am sorry if this was answered at the last meeting, which I missed. I understand the duty to preserve is a threshhold issue for the court. Our current proposal also assumes the judge has determined that records necessary to proving a case have been destroyed and the judge has already distinguished between intentional versus negligent destruction, which affects the remedies available and the nature of the instruction. Why is the issue of intent not a jury issue? I am not advocating that it should be. I just want to know the legal grounds for the judge to make the determination of intent, which to me has always seemed to be an issue we try to leave to the jury.

Again, good work so far.

Ralph Artigliere

From: Judge Gary M. Farmer [FarmerG@flcourts.org]
Sent: Monday, December 04, 2006 3:31 PM
To: Lumish, Wendy F.; Larry Stewart; Jeff; Sammy Cacciatore; lcbrown@co.palm-beach.fl.us; Judge Jaqueline R. Griffin
Cc: Vanessa McCurry; Dan Mitchell; Dick Caldwell; Gerry Rose; James Barton; Lang, Joseph H.; Ralph Artigliere; Judge Terry P. Lewis; Tom Edwards
Subject: RE: Valcin Memo (2).doc
Spoliation Subcommittee and Medical Malpractice Subcommittee:

After considering the exchanges of views and the proposed instruction, I have drafted my own proposals. I offer two suggestions: one for medical malpractice cases, and another for spoliation of evidence cases. They are attached as a separate document to this message.

I think the debate over a presumption vs. a simple inference is foreclosed by the cases. The only authority for a rebuttable presumption is *Valcin* which is indisputably based on a specific statute creating a duty in certain health care providers to make and maintain records of treatment. To enforce the statutory duty, *Valcin* took the extraordinary step of a rebuttable presumption in medical malpractice cases where the provider did not make or maintain such records. In cases involving the loss of evidence, however, the courts are not pretty much aligned on allowing only an inference and rejecting the use of a presumption. Thus the separate proposal for spoliation cases.

I recognize the arguments preferring a presumption, but I think the cases view that as too much of an interference with the province of the jury.

GMF

From: Lumish, Wendy F. [mailto:WLumish@CarltonFields.com]
Sent: Thursday, November 30, 2006 9:07 PM
To: Larry Stewart; Jeff; Sammy Cacciatore; lcbrown@co.palm-beach.fl.us; Judge Jaqueline R. Griffin; Judge Gary M. Farmer
Cc: Vanessa McCurry; Dan Mitchell; Dick Caldwell; Gerry Rose; James Barton; Lang, Joseph H.; Ralph Artigliere; Judge Terry P. Lewis; Tom Edwards
Subject: RE: Valcin Memo (2).doc

looks like there is no time next week when we can get more than 2 or three people. I suggest that we reschedule in January after the holidays. In the meantime, please feel free to share any thoughts by email to the group.

From: Lumish, Wendy F.
Sent: Friday, November 17, 2006 3:52 PM

To: 'Larry Stewart'; Jeff; Sammy Cacciatore; lcbrown@co.palm-beach.fl.us; griffinj@flcourts.org; 'Judge Gary M. Farmer'
Cc: Vanessa McCurry; Dan Mitchell; Dick Caldwell; Gerry Rose; James Barton; Lang, Joseph H.; Ralph Artigliere; Terry Lewis; Tom Edwards
Subject: RE: Valcin Memo (2).doc

with apologies to anyone receiving this twice, at the last meeting, the spoiliation subcommittee and med mal subcommittee were asked to address instructions for med mal specifically and spoilation generally. I beleive the original emails were to the med mal subcommittee asking the spoiliationcommittee to discuss. I think the best way to accomplish this is to have anyone on spoiliation or med mal who wants to discuss participate in a call. we have tentatively set Tuesday Nov 28at 10:00. I will circulate a call in number

om: Larry Stewart [mailto:lsstewart@stfblaw.com]
Sent: Friday, November 17, 2006 3:04 PM
To: Lumish, Wendy F.; Jeff; Sammy Cacciatore
Cc: Vanessa McCurry; Dan Mitchell; Dick Caldwell; Gerry Rose; James Barton; Lang, Joseph H.; Ralph Artigliere; Terry Lewis; Tom Edwards
Subject: RE: Valcin Memo (2).doc

Wendy: Spoliation subcomm is Lumish, Artigliere, Brown, Farmer, Griffin and Mitchell.

Larry S. Stewart
Stewart Tilghman Fox & Bianchi, P.A.
One Southeast Third Avenue, Suite 3000
Miami, Florida 33131
Phone: 305-358-6644
Fax: 305-373-8048

-----Original Message-----
From: Lumish, Wendy F. [mailto:WLumish@CarltonFields.com]
Sent: Friday, November 17, 2006 11:06 AM
To: Larry Stewart; Jeff; Sammy Cacciatore
Cc: Vanessa McCurry; Dan Mitchell; Dick Caldwell; Gerry Rose; James Barton; Lang, Joseph H.; Ralph Artigliere; Terry Lewis; Tom Edwards
Subject: RE: Valcin Memo (2).doc

yes but i am not entirely sure if this distribution list is correct. I also assume those on med mal have been included. gerry perhaps you can help us sort out who is on these two committes

---

From: Larry Stewart [mailto:lsstewart@stfblaw.com]
Sent: Friday, November 17, 2006 11:04 AM
To: Lumish, Wendy F.; Jeff; Sammy Cacciatore
Cc: Vanessa McCurry; Dan Mitchell; Dick Caldwell; Gerry Rose; James Barton; Lang, Joseph H.; Ralph Artigliere; Terry Lewis; Tom Edwards
Subject: RE: Valcin Memo (2).doc

O.K. by me -- is this a meeting of the spoliation subcomm?

Larry S. Stewart
Stewart Tilghman Fox & Bianchi, P.A.
One Southeast Third Avenue, Suite 3000
Miami, Florida 33131
Phone: 305-358-6644
Fax: 305-373-8048

-----Original Message-----
From: Lumish, Wendy F. [mailto:WLumish@CarltonFields.com]
Sent: Friday, November 17, 2006 10:50 AM
To: Jeff; Larry Stewart; Sammy Cacciatore
Cc: Vanessa McCurry; Dan Mitchell; Dick Caldwell; Gerry Rose; James Barton; Lang, Joseph H.; Ralph Artigliere; Terry Lewis; Tom Edwards
Subject: RE: Valcin Memo (2).doc

how is tuesday november 28th at 10 for everyone i can circulate call in info if enough people can participate

---

From: Jeff [mailto:jeff@fulfordkinglaw.com]
Sent: Friday, November 17, 2006 10:42 AM
To: Larry Stewart; Lumish, Wendy F.; Sammy Cacciatore
Cc: Vanessa McCurry; Dan Mitchell; Dick Caldwell; Gerry Rose; James Barton; Lang, Joseph H.; Ralph Artigliere; Terry Lewis; Tom Edwards
Subject: RE: Valcin Memo (2).doc

I'm only available Tuesday morning following Thanksgiving. Monday, Tuesday afternoon, Wednesday and Thursday are out. Jeff

---

From: Larry Stewart [mailto:lsstewart@stfblaw.com]
Sent: Friday, November 17, 2006 10:16 AM
To: Lumish, Wendy F.; Jeff; Sammy Cacciatore
Cc: Vanessa McCurry; Dan Mitchell; Dick Caldwell; Gerry Rose; James Barton; Lang, Joseph H.; Ralph Artigliere; Terry Lewis; Tom Edwards
Subject: RE: Valcin Memo (2).doc

I can do it mon or tue -- not available the rest of the week. On Mon we already have a book reorg con call at noon.

Larry S. Stewart
Stewart Tilghman Fox & Bianchi, P.A.
One Southeast Third Avenue, Suite 3000
Miami, Florida 33131
Phone: 305-358-6644
Fax: 305-373-8048

-----Original Message-----
From: Lumish, Wendy F. [mailto:WLumish@CarltonFields.com]
Sent: Thursday, November 16, 2006 4:33 PM
To: Larry Stewart; Jeff; Sammy Cacciatore
Cc: Vanessa McCurry; Dan Mitchell; Dick Caldwell; Gerry Rose; James Barton; Lang, Joseph H.; Ralph

Artiglere; Terry Lewis; Tom Edwards
Subject: RE: Valcin Memo (2).doc

I suggest that we set up a call to discuss this issue rather than try to do this by email. Gerry, would it be possible to look at the minutes from prior meetings as we addressed presumptions. it msy have come up in the context of our discussion of Cassisi.

How do schedules look for the week after Thanksgiving.

Wendy F. Lumish
Carlton Fields, P.A.
4000 Bank of America Tower
100 SE Second St.
Miami, FL 33131
(305) 539-7266 or (305) 530-0050
Fax: (305) 530-0055
http://www.carltonfields.com
email: wlumish@carltonfields.com

From: Larry Stewart [mailto:lsstewart@stfblaw.com]
Sent: Thursday, November 16, 2006 4:04 PM
To: Jeff; Sammy Cacciatore; Lumish, Wendy F.
Cc: Vanessa McCurry; Dan Mitchell; Dick Caldwell; Gerry Rose; James Barton; Lang, Joseph H.; Ralph Artiglere; Terry Lewis; Tom Edwards
Subject: RE: Valcin Memo (2).doc

Jeff: You raise an interesting point and I have several observations.

First, to my knowledge, the Med Mal subcomm has not previously discussed or decided to use any specific language in this instruction, so the subject is definitely open for discussion..

Secondly, In going back over Valcin, Fla Stat 90.302 and Am Hosp Mgt, I think that the proposed instruction contains a terminology error and an omission. The terminology error is that Valcin makes clear that this is a "rebuttal presumption" so it seems to me that the instruction should use "presume" instead of "infer". The omission is that the instruction does not deal with inadequate records, only missing records.

Third, I foo several reasons I do not think that the Am Hosp Mgt suggested insrtuction gets us to the right point:

(1) For at least med mal cases, the next to the last paragraph in Valcin ("As a final note....") seems to be fairly clear that it is the court, not the jury, that must determine whether the record is missing or inadequate and, if so, whether it has hindered the plaintiff's ability to proceed. If the answers are "yes" then the presumption applies. Therefore, I do not think that the first 2/3rds of the insruction is for the jury to decide.

(2) The instruction states that the jury may "infer" and this is a presumption.

(3) The last sentence of the insructionleaves it for the jury to make the "inference" when, as a matter policy, the law is imposing a presumption.

Finally, how to deal with a shifting or rebuttable burden of proof in a jury instruction has always been a diffcult issue. In FSJI 4.11 it is not mentioned and the jury is simple to told to consider the evidence of negligence together with the other evidence -- whatever that means. I think the rational for that language was that the burden was shift by the presumption of negligence, so that if the defendant does not come forward with proof that it was not negligence, the presumption is going to carry the day. The language in 4.11 may also have been influenced by the fact that these instructions deleted references to the "burden of proof". It would, however, be a lot clearer if the jury was instructed along the lines of your rebuttal presumtion instruction.

Putting all that together, I think that the instruction and comment should be amended to read as follows:

> **[Negligence is the failure to use reasonable care.] If you find that a person who was responsible for [making] or [maintaining]** (describe the missing evidence) **failed to [make] or [maintain] [such a record] or [an adequate record], you may presume that the missing evidence contained proof of negligence. Under such circumstances,** (defendant) **must establish by the greater weight of the evidence that [he] [she] [it] was not negligent.**

Comment on X.9d

This instruction only applies where the records are required to be made and maintained and the court determines that the missing or inadequate record hinders the plaintiff's ability to establish a case. *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987).

Larry S. Stewart
Stewart Tilghman Fox & Bianchi, P.A.
One Southeast Third Avenue, Suite 3000
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Phone: 305-358-6644
Fax: 305-373-8048

-----Original Message-----
From: Jeff [mailto:jeff@fulfordkinglaw.com]
Sent: Thursday, November 16, 2006 1:30 PM
To: Sammy Cacciatore; wlumi@carltonfields.com
Cc: Vanessa McCurry; Dan Mitchell; Dick Caldwell; Gerry Rose; James Barton; Joe Lang; Larry Stewart; Ralph Artigliere; Terry Lewis; Tom Edwards
Subject: RE: Valcin Memo (2).doc

Sammy & Wendy:
I have been struggling with this proposed instruction. First, however, I do like its simplicity. I recognize it is offered exclusively in a med mal context when the medical records were lost, destroyed or not maintained as required by law. (using Valcin as the guide) However, I read Valcin as creating a rebuttable presumption of negligence under these specific facts, as opposed to the use of an adverse

inference or the shifting of the burden of producing evidence. That law is still good, I believe, even though there have been many cases dealing with exceptions under different circumstances.

Judge Farmer's opinion in American Hospital Mgt v Hettiger, 904 So2d 547 (Fla 4th DCA 2005) shows one type of exception in a spoliation case dealing with critical evidence. It specifically distinquished Valcin, which dealt with the issue of medical records. Judge Farmer's opinion offered a suggested instruction under the facts of the spoliation case (attached hereto). I offered a similar proposal in a case last year dealing with the loss of hospital equipment that was defective, resulting in the death of the patient. That court refused to give a rebuttable presumption instruction, but agreed to give an adverse inference instruction similar to that as prepared by Judge Farmer. The case settled before it could be used.

My struggle with the proposal by the med mal subcommittee deals with the use of only an inference as opposed to a rebuttable presumption. Of course, the rebuttable presumption creates a more difficult situation for the party failing to maintain records. Valcin and others (including Hettiger) agree that is appropriate for a medical records case because of the unique duty of a health care provider to create and maintain those records. Attached is a rebuttable presumption instruction I have used on several occasions.

So, in my roundabout way, I am wondering if the med mal committee (before I joined) had already discussed this and decided that the inference instruction is appropriate, rather than a rebuttable presumption instruction? I am attaching a version of a rebuttable presumption instruction which I have used in several cases, which I now recognize would not pass muster with this prestigious committee. But it generally displays the elements needed for this type of instruction, I think...
Let me know if I am missing something. Thanks
Jeff

From: Sammy Cacciatore [mailto:sammy@nancelaw.com]
Sent: Friday, November 10, 2006 11:15 AM
To: wlumi@carltonfields.com
Cc: Vanessa McCurry; Dan Mitchell; Dick Caldwell; Gerry Rose; James Barton; Jeff; Joe Lang; Larry Stewart; Ralph Artigliere; Terry Lewis; Tom Edwards
Subject: Valcin Memo (2).doc

Wendy,
The following is A Memo regarding the Valcin instruction. It is tailored uniquely for use in a medical negligence situation. Scott asked that our Sub Comm run it by your spoilation Sub Comm. We would appreciate any input your comm may have. We are currently working on this project so as to be able to present it to the full Comm in Feb.

Sammy

Nov. 9, 2006

TO: Spoliation Subcommittee

FROM: Medical Malpractice Subcommittee

RE: Valcin Instruction

As you know, the Medical Malpractice subcommittee is reorganizing the medical malpractice jury instructions. As part of that work, the subcommittee has proposed adding an instruction dealing with failure to make or maintain records under *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987).

At the November meeting it was requested that we submit our proposal to the Spoliation subcommittee for its review. While the *Valcin* doctrine might apply in other types of cases, this issue is unique to medical malpractice cases.

Valcin held that, subject to certain limitations, the failure to make and/or maintain required records gives rise to a "presumption" of negligence. The limitations are that (1) the missing records need to be required to be made so that the presumption does not apply to just any missing records and (2) that the absence of the records hinders the plaintiff's ability to make a case so that the presumption will not apply in very case of missing required records. *Valcin* makes it clear that the trial court must make these preliminary determinations. *Valcin* at 601.

The instruction and accompanying Comment that we propose is as follows:

d. *Failure to make or maintain records:*

[Negligence is the failure to use reasonable care.] If you find that a person who was responsible for [making] or [maintaining] (describe the missing evidence) **failed to [make] or [maintain] such a record, you may infer that the missing evidence contained proof of negligence and that may be considered by you together with the other facts and circumstances, in determining whether** (defendant) **was negligent.**

Comment on X.9d

This instruction only applies where the missing records are required to be made and maintained and the court determines that the missing record hinders the plaintiff's ability to establish a case. *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987).

d. Failure to prepare or maintain health care records:

The law specifies that certain health care providers are required to prepare and maintain health care records. [If you find that defendant failed to maintain such records] [Defendant having failed to maintain such records, I now instruct you that] you should presume that such missing records contained evidence of medical negligence, unless defendant proves by the greater weight of the evidence that [he] [she] [it] **was not negligent.**

Comment on X.9d.

This instruction applies only in claims of medical negligence where the law requires health care records to be made and maintained by the defendant and the absence of such records has impaired claimant's ability to prove a prima facie case. *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596, 600-01 (Fla. 1987). As provided by *Valcin*, it requires the jury to presume the fact in issue unless persuaded by the greater weight of evidence to the contrary.

e. Spoliation of evidence:

A party may be obligated to preserve evidence under an express agreement that specified evidence will be preserved, or by conduct implying that [certain] evidence will be preserved. If you find that:

a. defendant [expressly agreed] [engaged in conduct implying that [he] [she] [it] would undertake] to preserve specific evidence,

b. that the specified evidence was within the control of defendant, but is now [unpreserved] [missing],

c. that the specified evidence would have been material in deciding the disputed issues in this case,

then in your discretion you may, but are not required to do so, infer that the subject evidence would have been unfavorable to defendant on the issue of [negligence].

Comment on X.9e.

This instruction follows the suggested instructions proposed by the courts in *American Hospitality Management Co. v. Hettiger*, 904 So.2d 547 (Fla. 4th DCA 2005), and *Palmas y Bambu, S.A. v. E.I. DuPont de Nemours & Co.*, 881 So.2d 565 (Fla. 3d DCA 2004). It allows the jury to infer, but not to presume, the fact in issue.

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908 So.2d 342, 30 Fla. L. Weekly S536
(Cite as: 908 So.2d 342)

H

Supreme Court of Florida.
Ronna MARTINO, et al., Petitioners,
v.
WAL-MART STORES, INC., Respondent.
No. SC03-334.

July 7, 2005.

Background: Patron brought action against department store to recover for injuries sustained when shopping cart collapsed, asserting claims of negligence and **spoliation** of evidence. The Fifteenth Judicial Circuit Court, Palm Beach County, Howard Harrison, J., dismissed **spoliation** claim, and entered directed verdict in favor of department store on negligence claims. Patron appealed. The District Court of Appeal, 835 So.2d 1251, affirmed in part, reversed in part, remanded, and certified direct conflict of decisions.

Holding: The Supreme Court held that the remedy against a first-party defendant for **spoliation** of evidence is not an independent cause of action for **spoliation** of evidence, and instead the available remedies are discovery sanctions and a rebuttable presumption of negligence for the underlying tort, disapproving of *Bondu v. Gurvich*, 473 So.2d 1307.
Dismissal of cause of action approved; remanded.

Wells, J., filed an opinion concurring specially, in which Bell, J., concurred.

West Headnotes

Evidence 157 ⚿78

157 Evidence
157II Presumptions
157k74 Evidence Withheld or Falsified
157k78 k. Suppression or **Spoliation** of Evidence. Most Cited Cases

Pretrial Procedure 307A ⚿434

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(E) Production of Documents and Things and Entry on Land
307AII(E)6 Failure to Comply; Sanctions
307Ak434 k. In General. Most Cited Cases

Torts 379 ⚿309

379 Torts
379III Tortious Interference
379III(D) Obstruction of or Interference with Legal Remedies; **Spoliation**
379k309 k. Nature and Form of Remedy. Most Cited Cases
The remedy against a first-party defendant for **spoliation** of evidence is not an independent cause of action for **spoliation** of evidence; rather, the available remedies are discovery sanctions and a *Valcin* rebuttable presumption of negligence for the underlying tort; disapproving of *Bondu v. Gurvich*, 473 So.2d 1307. West's F.S.A. RCP Rule 1.380(b)(2).

***342** Philip M. Burlington of Caruso, Burlington, Bohn and Compiani, P.A., and ***343**Steven W. Halvorson of Schuler and Halvorson, P.A., West Palm Beach, FL, for Petitioner.

Rosemary B. Wilder of Marlow, Connell, Valerius, Abrams, Adler and Newman, Coral Gables, FL, for Respondent.

David J. Sales of Searcy, Denney, Scarola, Barnhart and Shipley, West Palm Beach, FL, on behalf of George R. Harper, III d/b/a Rusty Harper Ferneries; Robert Stone d/b/a Robert Stone Ferneries; L. Charles Herring d/b/a H & H Greens; Lars Hagstrom and Lorna Jean Hagstrom d/b/a Lars Hagstrom Partnership; Lars Hagstrom d/b/a Lars Hagstrom Ferneries; T. Larry Jones, Inc.; Morris Hagstrom and Fred Weston d/b/a Hagstrom and Weston Ferneries; Morris Hagstrom and Lars Hagstrom d/b/a Hagstrom and Hagstrom Ferneries; Morris A. Hagstrom d/b/a Morris A. Hagstrom Ferneries; Sunstate Ferneries, Inc.; Robert I. Stokes and Phillip A. Stokes d/b/a Richfern Growers; Albin Hagstrom and Son, Inc.; Raiford G. Hagstrom d/b/a Raiford G. Hagstrom Ferneries; Hugo R. Massy d/b/a Hugo R. Massy

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(Cite as: 908 So.2d 342)

Ferneries; Richard Hagstrom, d/b/a Richard Hagstrom Ferneries; Dean Hagstrom d/b/a Dean Hagstrom Ferneries; Geneva Herring d/b/a Lemuel C. Herring Ferneries; Superior Greens, SA; Paradise Greens, SA; Helechos Ornamentales La Margarita, SA; Inversiones La Mara, SA; Helechos Ornamentalesde San Isidro, SA; Corporacion Lums, SA; Agritica, SA; Paraiso Verdes, SA; Haciendo Rio Puries, SA; Fine Foliago Production; Jack B. Shuman d/b/a Shuman Farms; Steve Shuman d/b/a Steve Shuman Greens; Joann Burnsed d/b/a Lane Burnsed Ferneries; Donaldson Ornamentals, Inc.; R. Scott Jones d/b/a High Point Farms; Jones Brothers Ferneries; Helechos de Paraiso, SA; Verdes de Perfecta Calidad, SA; Stacy Jones d/b/a Stacy Jones Ferneries; Norma Jones d/b/a Ronald Jones Ferneries; Frank E. Underhill, Jr. and Jean F. Underhill d/b/a/ Underhill Ferneries; Terry Taylor Enterprises, Inc.; James O. Taylor, Co., Inc.; US Fern, SA; Estate of Patricia Richardson c/o F.A. Ford, Jr.; O. Freeman Greenlund, Jr. d/b/a Freeman Greenlund Ferneries; Robert F. Greenlund d/b/a Robert F. Greenlund Ferneries; David G. Dreggors; John Flowers; Greg James Ferneries, Inc.; James Baldauff and Patricia S. Baldauff d/b/a J & P Properties; James Martin d/b/a James Martin Ferneries; Michael E. Ott d/b/a Manor Way Ferns; James and Scarlett Warner d/b/a James K. Warner Ferneries: Thomas J. Lawrence, Jr., and Estate of Thomas J. Lawrence, Sr., d/b/a T.J. Enterprises; Sunridge, Inc.; Lawrence Farms, Inc.; Harold Dwayne Cohen and Carol Lynn Cohen d/b/a Cohen Foliage; Brian Foxx and Kent Foxx d/b/a Foxx Fernery; Fancy Foliage, Inc.; Robin C. Lennon and Wanda G. Lennon d/b/a Central Florida Foliage; Robert Harper d/b/a Robert Harper Ferneries; Helechos Poliforma, S.A.; Helechos Internacionales, S.A.; Helechos Expreso, S.A.; Helechos Tropicales, S.A.; Marsell, S.A.; Proyectos de Desarrollo de Fraijanes, S.A.; Finco Los LLanos de Ciruelas, S.A.; Finca D.J. SA; Plantas Ornamentales de Guanacaste, S.A.; Florida Helechos, S.A.; Helechos de Costa Rica, S.A.; A y H Helechose, SA; Helechos de Oro, SA; Foliage Incorporado, SA; Helechos de Poas, S.A.; Fernexport, SA; Costa Rican Flower Corporation, SA; American Flower Shippers, Inc.; American Flower Corporation, SA; Flowertree Nursery, Inc.; Botanics Wholesale, Inc., as successor in interest to J.W.M., Inc., d/b/a Botanics Wholesale and Foliage Co-Op, Inc.; Full Bloom Farms, LLC., f/k/a Lovell Farms, Inc., Fred Henry Paradise Orchid; Paul M. Booker, Jr.; Green Acres Fernery and Citrus, Inc.; Lake Harris Greens, Inc. d/b/a Green Acres Fernery and Citrus, Inc., Tree Factory, Inc., Rivers Foliage, Inc., Greenleaf Foliage,*344 Inc., G & B Nursery, Inc., Weeks, d/b/a Weeks Farm, Jamaican Floral Experts LTD., Kim's Nursery, Inc., Continental Wholesale Florist, Inc., KHD, LTD,; William Keebler, Coconut Orchids, Inc.; and Sagaert Orchids, Inc., as Amici Curiae.

Roy D. Wasson, Miami, FL, on behalf of Academy of Florida Trial Lawyers as Amicus Curiae.

Tracy Raffles Gunn and Ceci Berman of Fowler, White, Boggs and Banker, P.A., and James E. Tribble, Tallahassee, FL, on behalf of Florida Defense Lawyers' Association as Amicus Curiae.

PER CURIAM.

We have for review the decision in *Martino v. Wal-Mart Stores, Inc.*, 835 So.2d 1251 (Fla. 4th DCA 2003), which certified conflict with the decision in *Bondu v. Gurvich*, 473 So.2d 1307 (Fla. 3d DCA 1984). We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const.

FACTS

In March 1997, petitioner Ronna Martino (Martino) went to a Wal-Mart store in Royal Palm Beach. In addition to other items, Martino placed two forty-pound bags of salt in her shopping cart. When checking out, Martino placed all of her items except the bags of salt on the counter for the cashier. According to Martino's testimony, the cashier then asked Martino to lift up the bags of salt so that the cashier could scan the price code. Martino attempted to comply with the cashier's request, placing one bag of salt on the top of the shopping cart where a child would sit. As she placed the salt on top of the shopping cart, the cart collapsed, and Martino injured her arm. Martino then completed the sale and went home.

Martino testified that once she returned home, she called the Wal-Mart store and asked to speak to the manager. Her call was answered by the assistant manager, who advised her to go to the hospital to have her arm checked and then return to Wal-Mart to fill out an incident report. Martino testified that during the conversation with Wal-Mart's assistant manager, Martino informed him where he could find the

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shopping cart in the parking lot.

After her visit to the hospital, Martino returned to Wal-Mart and filled out an incident report. Martino testified that while she was at the store, she showed the assistant manager where the shopping cart was in the parking lot and requested that he obtain the videotape of the incident from the surveillance camera inside the store.

Thereafter, on August 26, 1999, Martino brought an action against Wal-Mart, alleging that Wal-Mart was negligent in its inspection and maintenance of the store's shopping carts (the "negligent maintenance" theory) and in failing to properly train store employees regarding appropriate procedures for scanning and customer handling of heavy items (the "negligent mode of operation" theory). Martino's husband also asserted a claim for loss of consortium.

During discovery, Martino requested the shopping cart and a copy of the video surveillance tape. When Wal-Mart could not produce either item, Martino filed a second amended complaint, alleging a separate claim for **spoliation** of evidence. Wal-Mart thereafter filed a motion to dismiss Martino's claim for **spoliation** of evidence, asserting that Martino's complaint failed to state a cause of action because Martino failed to allege ultimate facts indicating that Wal-Mart had a legal or contractual duty to preserve the evidence. The trial court granted Wal-Mart's motion ***345** to dismiss Martino's **spoliation** claim on the basis that Wal-Mart had no contractual or statutory duty to preserve the evidence.

The case then proceeded to trial on Martino's negligence claims.[FN1] Prior to the presentation of evidence, Martino argued that she was entitled to a **jury instruction** on the inference of negligence because of Wal-Mart's failure to preserve the evidence. The trial court rejected Martino's argument and ruled that Martino was not entitled to an inference of negligence based on the **spoliation** of evidence. The trial court granted Wal-Mart's motion for directed verdict.

> FN1. The parties agreed to a bifurcated trial on the issues of liability and damages.

Martino appealed the trial court's decision to the Fourth District Court of Appeal, arguing that (1) the trial court erred in granting Wal-Mart's motion to dismiss Martino's **spoliation**-of-evidence claim; (2) the trial court erred in granting a directed verdict in Martino's negligent maintenance claim because there was an adverse inference that the shopping cart and videotape would have been unfavorable to Wal-Mart that should have been drawn from Wal-Mart's failure to produce the shopping cart and videotape; and (3) the trial court erred in granting a directed verdict on the negligent mode of operation claim.

With respect to the first claim, the Fourth District framed the issue to be:

> Here, the Martinos allege that Wal-Mart's failure to preserve evidence has impaired their ability to prevail in the very negligence claim they have brought against Wal-Mart. These facts raise an issue that this district has never squarely addressed-whether an independent cause of action for **spoliation** of evidence is proper when the defendant in the **spoliation** claim is also the defendant in the underlying claim allegedly impaired by the loss or destruction of the evidence.

Martino, 835 So.2d at 1254. The Fourth District concluded that when the defendant who allegedly caused the **spoliation** of evidence is also the defendant who allegedly committed the underlying tort causing injury or damages, the plaintiff cannot maintain a cause of action against that defendant for damages on the basis of **spoliation** of evidence.

The Fourth District certified conflict with *Bondu*, in which the Third District Court of Appeal held that a first-party [FN2] **spoliation** of evidence cause of action was cognizable under Florida law. 473 So.2d at 1313. The relief sought by Bondu was the right to maintain a **spoliation** action against a hospital for the hospital's negligent loss of medical records because that loss allegedly kept Bondu from being able to maintain a medical malpractice action against the hospital and others. The district court recognized that this tort previously had not been identified but concluded that the hospital had both ***346** an administrative and a statutory duty to maintain and furnish Bondu's medical records, and held:

> FN2. First-party **spoliation** claims are claims in which the defendant who allegedly lost, misplaced, or destroyed the evidence was also a tortfeasor in causing the plain-

> tiff's injuries or damages. These actions are contrasted with third-party **spoliation** claims, which occur when a person or an entity, though not a party to the underlying action causing the plaintiff's injuries or damages, lost, misplaced, or destroyed evidence critical to that action. *See* Miller v. Allstate Ins. Co., 573 So.2d 24 (Fla. 3d DCA 1990). The plaintiff attempts to recover for the loss of a probable expectancy of recovery against the first-party tortfeasor. Humana Worker's Comp. Servs. v. Home Emergency Servs., Inc., 842 So.2d 778, 781 (Fla.2003). It is important to note that in this decision we are not considering whether there is a cause of action against a third party for **spoliation** of evidence. Our present decision is limited to claims for **spoliation** of evidence against first-party defendants.

Since Mrs. Bondu alleges that this duty was breached by the hospital when it failed to furnish Mr. Bondu's records to her, and that this breach caused her damage in that she lost "a medical negligence lawsuit when [she] could not provide expert witnesses," her complaint states a cause of action.

Id. In the instant case, the Fourth District stated:

Despite the decision in *Bondu*, having now squarely confronted the issue, we side with those courts that have held that an independent cause of action for **spoliation** of evidence is unnecessary and will not lie where the alleged spoliator and the defendant in the underlying litigation are one and the same.

Martino, 835 So.2d at 1256. In reaching its decision, the Fourth District relied upon the California Supreme Court decision in Cedars-Sinai Medical Center v. Superior Court, 18 Cal.4th 1, 74 Cal.Rptr.2d 248, 954 P.2d 511 (1998). In *Cedars-Sinai*, the California court rejected cases from lower California appellate courts which had approved a first-party **spoliation** cause of action. One of the cases *Cedars-Sinai* overruled was Smith v. Superior Court, 151 Cal.App.3d 491, 198 Cal.Rptr. 829 (1984), which had been relied upon by the Third District in *Bondu*.

On issue two, Martino's negligent maintenance claim, the Fourth District agreed with Martino that a proper consideration of the "adverse inferences" which may arise when a party fails to produce pertinent evidence within its control required that the negligent maintenance claim in this case be presented to the jury. On issue three, Martino's negligent mode of operation claim, the Fourth District also agreed with Martino that the trial court erred in directing a verdict on behalf of Wal-Mart.

ANALYSIS

In this opinion, we only consider the issue on which conflict was certified: whether an independent cause of action should exist for first-party **spoliation** of evidence. We addressed a similar issue in Public Health Trust of Dade County v. Valcin, 507 So.2d 596 (Fla.1987).

In *Valcin*, the plaintiff sued the defendant hospital for, *inter alia*, its negligent performance of a sterilization procedure. The Third District found that "the lack of an 'operative report' by the surgeon in Valcin's file impaired the expert's ability to determine whether the operation had been performed with due care," and thus Valcin had been hindered in proving a prima facie case of negligence against the defendant hospital. *Id.* at 597. The Third District created a set of presumptions which were to apply so that the plaintiff could still maintain the negligence action against the defendant despite the absence of this key evidence. If the defendant demonstrated that the loss of evidence was only negligent, a rebuttable presumption that the defendant was negligent in the underlying action was to apply. If the loss was intentional, however, a conclusive, irrebuttable presumption of negligence was to be entered against the defendant. *Id.* at 598.

On appeal, this Court held that "the rules fashioned by [the district] court sweep wider than necessary." *Id.* at 599. First, we held that when evidence was *intentionally* lost, misplaced, or destroyed by one party, trial courts were to rely on sanctions found in Florida Rule of Civil Procedure 1.380(b)(2) and that "a jury could well infer from such a finding that the records would have contained indications of negligence." *Id.; see* Mercer v. Raine, 443 So.2d 944, 946 (Fla.1983) (willful***347** violation of trial court's discovery order justified imposition of harsh sanction of default judgment against noncomplying party). If the

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loss of the evidence was determined to be *negligent*, the Third District's rebuttable presumption of negligence for the underlying tort applied. However, we clarified that the presumption only applied when "the absence of the records hinders [the plaintiff's] ability to establish a prima facie case." *Id.* This rebuttable presumption shifted the burden of proof under section 90.302(2), Florida Statutes (1985), so that the presumption "is not overcome until the trier of fact believes that the presumed [negligence] has been overcome by whatever degree of persuasion is required by the substantive law of the case." *Id.* at 600-01 (quoting *Caldwell v. Division of Retirement*, 372 So.2d 438, 440 (Fla.1979)).

Interestingly, the Third District released its decisions in *Valcin* and *Bondu*, the case certified for conflict with the instant case that recognized an independent cause of action for **spoliation** of evidence, on the same day, June 5, 1984, and denied rehearing in both cases on the same day, August 20, 1985. Though they dealt with substantially the same issue, these two cases were distinguishable because of the plaintiffs' different forms of requested relief from summary judgment. In order to avoid summary judgment, Bondu attempted to amend her complaint against the hospital to add a **spoliation** of evidence claim and had also filed a separate cause of action for **spoliation**. She was denied leave to amend her complaint in the first case, and a judgment on the pleadings was entered against her in the separate action. In *Valcin*, the plaintiffs were simply appealing from a summary judgment of the underlying tort action against the hospital.

The Third District did not note this distinction between the two cases in deciding that in *Bondu* there was a cause of action and in *Valcin* there was a presumption which was to be applied in the underlying action. We did not review the Third District's decision in *Bondu* or reference the *Bondu* decision in our opinion in *Valcin*. Now that we consider whether the remedy against a first-party defendant for **spoliation** of evidence should be the *Valcin* presumption and sanctions, if found to be necessary, or an independent cause of action, we decide in favor of the *Valcin* presumption and sanctions. Martino has not demonstrated that there is any need to change our reliance on the *Valcin* presumption and instead recognize an independent cause of action for first-party **spoliation** of evidence. We disapprove *Bondu* to the extent that it conflicts with this decision.

In sum, for reasons stated in this opinion, we approve the Fourth District's dismissal of the cause of action for **spoliation** of evidence. This case is remanded to the district court for further proceedings consistent with this opinion.

It is so ordered.

WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.
WELLS, J., concurs specially with an opinion, in which BELL, J., concurs.
PARIENTE, C.J., recused.WELLS, J., specially concurring.
I concur with the majority's opinion and reasoning in affirming the Fourth District Court of Appeal's decision that there is no separate cause of action against a first-party defendant for **spoliation** of evidence. In instances in which it is demonstrated that a first-party defendant has a duty by reason of statute, regulation, court order, or discovery rule to maintain and preserve ***348** evidence, I believe this Court has already decided that the presumption from *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596, 601 (Fla.1987), or sanctions should be used by the trial court. No separate cause of action, therefore, should be found to exist.

However, in the instant case, I believe that in addition to the decision that no cause of action exists, there should be no use of the *Valcin* presumption or sanctions because Wal-Mart had no duty to maintain or preserve the cart or videotape. In this case there was no statute or regulation which required Wal-Mart to preserve the evidence. Suit was not filed for two years after the incident at the Wal-Mart store, and during that two-year period, no court order or discovery rule required Wal-Mart to maintain or preserve the cart or videotape.

For this reason, I disagree with the majority's decision not to decide the related issue of whether the Fourth District Court of Appeal's decision to reverse the trial court's directed verdict for Wal-Mart on the negligent maintenance theory was proper. I would decide that issue and quash the decision of the Fourth District.

It is fundamental to the entire legal basis for **spolia-**

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tion of evidence that the owner or possessor of property have a legally defined duty to maintain or preserve the property. Both *Valcin* and *Bondu v. Gurvich*, 473 So.2d 1307 (Fla. 3d DCA 1984), clearly recognized as their foundation the statutory and regulatory duty to maintain hospital records. Unless there is a legally defined duty, I believe that presumptions or sanctions against owners or possessors of property for **spoliation** of evidence have serious due process concerns under both the United States and Florida Constitutions. *See* U.S. Const. amend. V & XIV; art. I, § 9, Fla. Const. Both constitutions expressly protect the freedom to use property, and this necessarily includes the freedom to dispose of property, unless there is a legally defined duty requiring maintenance or preservation of the property.

One law review article succinctly stated the importance of the existence of a duty to maintain evidence in these situations:

> Regardless of whether a separate cause of action is recognized or whether **spoliation** remedies are limited to presently existing alternatives, the first issue that must be addressed in any analysis is whether a duty exists on the part of the possessor to preserve or maintain the evidence. Without such a duty, there can be no valid legal basis for the imposition of sanctions, much less the striking of pleadings or the award of damages. Likewise, without a clear delineation of the parameters of the duty to preserve evidence, one cannot determine whether they are subjecting themselves to liability by cleaning up a spilled substance on a grocery store's floor, moving a damaged car off the road, or disposing of a broken chair.

Robert D. Peltz, *The Necessity of Redefining Spoliation of Evidence Remedies in Florida*, 29 Fla. St. U.L.Rev. 1289, 1320 (2002). The Supreme Court of Kansas made the point in *Koplin v. Rosel Well Perforators, Inc.*, 241 Kan. 206, 734 P.2d 1177, 1181-82 (1987):

> Appellant urges that this court should not hesitate to adopt the new tort or any other new remedy whenever a person suffers loss at the hands of a "wrongdoer." The problem with this argument is that, absent a duty to preserve the T-clamp, appellee is not a wrongdoer and had an absolute right to preserve or destroy its own property as it saw fit.

It appears to me that the district court in its decision in the instant case attempts ***349** to skirt Wal-Mart's lack of duty by making an erroneous distinction between a *Valcin* presumption and an "adverse inference." The district court made the following remarkable statement:

> Unlike the presumption of negligence which may arise under *Valcin*, the adverse inference concept is not based on a strict legal "duty" to preserve evidence. Rather, an adverse inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence. *Cf.* [*New Hampshire Ins. Co. v. Royal Ins. Co.*, 559 So.2d 102, 103 (Fla. 4th DCA 1990)].

Martino, 835 So.2d at 1257. I have carefully read the Fourth District's earlier decision in *New Hampshire Insurance Co.*, to which it cites, and I do not find a basis for the above statement in that case. Nor have I found any other authority for that statement. To the contrary, *New Hampshire Insurance Co.* had to do with the failure to produce an insurer's underwriting file in an instance in which the court had ordered the underwriting file to be produced. The Fourth District expressly held in that case that *Valcin* provided the remedy. The Fourth District in that case in no way dispensed with the duty basis for the *Valcin* presumption, sanctions, or adverse inferences.

I understand that there is a real need by those who are injured to have evidence preserved so that claims can be pursued. I recognize that the freedom to use property should be tempered by this need. However, just as tort claims have duty as a fundamental element, so must any presumptions, sanctions, or adverse inferences arising from failure to maintain or preserve property have duty as a basis. This Court has historically only recognized such a duty when there is a statute, regulation, court order, or discovery rule which provides the duty. *Valcin*, 507 So.2d at 601; *Mercer v. Raine*, 443 So.2d 944, 945 (Fla.1983).

This is an exceedingly important issue which should be confronted by this Court. Businesses as well as individuals must have regular record and property disposition policies. Obviously, storage space, both in warehouses and in computers, have finite limits. Practically, what was Wal-Mart to do when it was notified by Martino in March 1997? Was Wal-Mart

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to take the cart out of service? Was Wal-Mart to store the cart? How many warehouses would it take to store all of the property involved for the four-year statute of limitations period when Wal-Mart receives a notice of a possible claim? [FN3]

FN3. An article concerning **spoliation** issues in the electronics age explains this problem:

> At some point, society must be willing to cut back on the search for truth to take account of other values the litigation matrix serves, including the utilitarian concern for efficiency, the need to preserve the procedural-substantive balance, and the need to provide predictable standards of primary behavior. An absolute strict liability retention standard, triggered by the mere potential of suit, would severely threaten attainment of all three goals.
>
> For commercial enterprises that face the constant threat of litigation, adoption of such a standard effectively would mean that the enterprise would be required to constantly review its backup tapes for documents that could, at some later point in the litigation process, be deemed relevant; and if the enterprise predicted incorrectly, it would risk imposition of severe sanctions. The expense of such a process could easily prove prohibitive, because it would require the devotion of an enormous and unending number of person-hours, by knowledgeable individuals, to complete a careful review of unorganized backup tapes. Yet the only realistic alternative to such a burden would be a policy of total retention indefinitely-a practice that, given the geometric increases in document volume in the electronic age, could lead to the physical overrunning of a company with electronic equipment and severe retrieval burdens if and when the documents actually were needed in litigation. These are difficulties never faced in the age of pre-electronic storage. Yet to this point, at least, few courts seem willing to consider the possible need to adjust **spoliation** standards. The need for such a reconsideration is well at hand.
>
> ....
>
> Although reasonable debate is possible over which moment should trigger the duty to preserve-the moment of a discovery request or the moment of a discovery order-it should be clear that any earlier point in the litigation process would be inadvisable. Use of any earlier demarcation point could lead to unlimited and chaotic disruption of electronic recordkeeping, as well as to the imposition of unfair and unpredictable standards of behavior on defendants. If defendants were obligated to preserve documents the moment they became aware that a suit might be filed, large companies that regularly face the possibility of suit would be required constantly to disrupt their normal practices, presumably adopted because of their efficiency, merely because a suit was threatened. Nor is the time of filing a complaint a more appropriate demarcation point for the obligation to preserve electronically stored evidence, again because the disruption for industries regularly subject to suit could be enormous.
>
> Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 623-25 (2001) (footnotes omitted).

*350 I believe these problems are highlighted in this case by the fact that Wal-Mart was notified of the incident in March of 1997, but suit was not filed until August of 1999. From March of 1997 until August of 1999, there was no duty by reason of statute, regulation, court order, or discovery rule to maintain or preserve this property. There is no legal basis upon which to impose a *Valcin* presumption, sanction, or adverse inference when suit is filed two years after an incident because a putative defendant did not preserve the property for those two years. Making Wal-Mart subject to any of these measures in this situation causes very serious constitutional and practical concerns and issues, and frankly, is unfair and wrong.

BELL, J., concurs.
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Supreme Court of Florida.
PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a Jackson Memorial Hospital, Petitioner,
v.
Gregoria VALCIN, et al., Respondents.
No. 67673.

April 30, 1987.

Patient and her husband brought action against public hospital after patient suffered ruptured tubal pregnancy one and one half years after hospital staff had performed tubal ligation on her. The Circuit Court, Dade County, Jon I. Gordon, J., entered summary judgment in hospital's favor, and appeal was taken. The District Court of Appeal, 473 So.2d 1297, affirmed in part, reversed in part and remanded. On application for review, the Supreme Court, Adkins, (Ret.), J., held that: (1) substantial issue of material fact existed as to whether patient was advised of risk of tubal pregnancy, precluding summary judgment; (2) absence of surgical records did not create conclusive presumption of negligence, but rather, created rebuttable presumption; and (3) hospital could be held liable for significant omissions of its employee doctors.

Approved in part, quashed in part and remanded.

McDonald, C.J., concurred in result only.

West Headnotes

[1] Judgment 228 ⚿181(33)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort Cases in General. Most Cited Cases
In action against public hospital by patient, who suffered ruptured tubal pregnancy one and a half years after tubal ligation had been performed on her by hospital staff, substantial issue of material fact existed as to whether patient, prior to executing consent to procedure, was advised of risk of tubal pregnancy, thereby precluding summary judgment in favor of hospital on claim that consent was not informed. West's F.S.A. § 768.46(3)(a)1, 2, (4)(a).

[2] Health 198H ⚿817

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk815 Evidence
198Hk817 k. Presumptions. Most Cited Cases
(Formerly 204k8 Hospitals)
Although no conclusive presumption exists which establishes liability when operation records are shown to be missing due to deliberate acts or omissions of hospital or employee doctor, rebuttable presumption of negligence exists if patient demonstrates absence of records hinders patient's ability to establish prima facie case.

[3] Health 198H ⚿782

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(F) Persons Liable
198Hk781 Hospitals or Clinics
198Hk782 k. In General. Most Cited Cases
(Formerly 204k7 Hospitals)
Hospital could be held liable for surgeon's significant omissions, where hospital was left as sole defendant in case to answer for doctor's carelessness because operating doctor, as agent employee of public hospital, was properly dismissed under community statutes. West's F.S.A. § 768.28(9)(a).

[4] Health 198H ⚿782

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(F) Persons Liable

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198Hk781 Hospitals or Clinics
198Hk782 k. In General. Most Cited Cases
(Formerly 204k7 Hospitals)
Generally hospital may not fairly be held liable for patient's entire damages solely based on omissions of independent contractor doctor by merely granting doctor practicing privileges in hospital.

***597** Miller Walton and George W. Chesrow of Walton, Lantaff, Schroeder & Carson, Miami, for petitioner.

William A. Bell, Tallahassee, for intervenor/petitioner, Florida Hosp. Ass'n.

Arnold R. Ginsberg of Horton, Perse & Ginsberg, and Virgin & Kray, P.A., Miami, for respondents.

ADKINS (Ret.) Justice.

In reversing in part the summary judgment resolving all issues in a medical malpractice action in favor of defendant/petitioner Public Health Trust of Dade County, d/b/a Jackson Memorial Hospital (Hospital) and against plaintiff/respondent Gregoria Valcin (Valcin), the district court adopted a scheme of evidentiary presumptions to be utilized when the absence of surgical operative notes impairs the plaintiff's ability to establish his case. *Valcin v. Public Health Trust*, 473 So.2d 1297 (Fla. 3d DCA 1984). Because the scheme involved an irrebuttable presumption, found violative of due process in *Straughn v. K & K Land Management, Inc.*, 326 So.2d 421 (Fla.1976), we find jurisdiction based on conflict. Art. V, § 3(b)(3), Fla. Const. We approve in part and quash in part the decision under review.

A year and one-half after undergoing tubal ligation surgery in an effort to be sterilized, respondent Valcin suffered a ruptured ectopic pregnancy which nearly caused her death. She, joined by her husband, sued petitioner Hospital on the grounds that its agents had 1) breached an alleged warranty as to the effectiveness of the operation, 2) failed to obtain a truly informed consent, and 3) negligently performed the operation. While the district court found the summary judgment on the first claim proper in the absence of the written guarantee required under section 725.01, Florida Statutes (1981), it found genuine issues of material fact requiring jury resolution in the latter two claims.

First, the district court found the alleged oral warranties sufficient to raise a question of fraud vitiating an informed consent under the statute then in effect, section 768.46(4)(a), Florida Statutes (1981). The statute provided as follows:

A consent which is evidenced in writing and meets the requirements of subsection (3) shall, if validly signed by the patient or another authorized person, be conclusively presumed to be a valid consent. This presumption may be rebutted if there was a fraudulent misrepresentation of a material fact in obtaining the signature.

The court found the existence of an informed consent additionally called into question by Valcin's statement that she had never been informed of the specific risk of an ectopic pregnancy.

Second, the court reversed the summary judgment on the claim of negligent performance of the operation, which the trial court had apparently granted on the basis that a deposition of Valcin's sole medical witness "conclusively showed that he could not testify that the sterilization procedure departed from acceptable medical standards, or that any such departure proximately caused Valcin's subsequent ectopic pregnancy." 473 So.2d at 1303.

While noting the general rule that it is the plaintiff's burden to establish medical malpractice, *Atkins v. Humes*, 110 So.2d 663 (Fla.1959), the district court found that the lack of an "operative report" by the surgeon in Valcin's file impaired the expert's ability to determine whether the operation had been performed with due care. Some question exists in the instant case as to the existence or adequacy of an operative note in the case. Although such a note "normally records the preoperative diagnosis, a detailed record of his [the surgeon's] procedure (cut by cut and stitch by stitch ***598** almost), the operative findings, and the condition in which the patient was transferred to the recovery ward ... following surgery," J. McQuade, *Medical Practice for Trial Lawyers* § 2-20 (2d ed. 1985), the district court found that the failure of the instant note to do any of these things hindered the plaintiff's ability to proceed.

Finding a statutory duty to maintain such records, and holding that "where evidence peculiarly within the

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knowledge of the adversary is, as here, not made available to the party who has the burden of proof, other rules must be fashioned," 473 So.2d at 1305 (footnote omitted), the district court created the following rules. If the hospital is unable to produce the records, a burden is preliminarily placed upon it to prove by the greater weight of the evidence that "the records are not missing due to an intentional or deliberate act or omission" of the hospital or its employees. *Id.* at 1306. If the fact-finder determines that the hospital has met this burden, "the fact that the record is missing will merely raise a presumption that the surgical procedure was negligently performed, which presumption may be rebutted by the hospital by the greater weight of the evidence." *Id.* However, if the employee doctor is found to have deliberately omitted making the report, or the hospital is found to have deliberately failed to maintain it, "then a conclusive, irrebuttable presumption that the surgical procedure was negligently performed will arise, and judgment as to liability shall be entered in favor of Valcin." *Id.*

We agree that material issues of fact have been raised in regard to the latter two claims, necessitating resolution of those issues by trial. *Whitten v. Progressive Casualty Insurance Co.*, 410 So.2d 501 (Fla.1982). We must, however, quash in part the district court's holdings as to the law to be applied in resolving these issues upon remand.

We turn first to the issue of informed consent. Prior to the operation Valcin signed two consent forms, the first indicating the general hazards of surgery and reciting that "surgery is not an exact science, and I acknowledge that no guarantees have been made to me concerning the results of the operation or procedure." The second form, a "Consent for Authorization for Sterilization," stated that "It has been explained to me by Doctor Sharpe that this operation [a bilateral tubal ligation] is intended to result in sterility, but this is not guaranteed."

[1] In spite of these signed consent forms, the district court properly found material questions of fact raised by Valcin's allegations of oral warranties as to the effectiveness of the operation, *Morganstine v. Rosomoff*, 407 So.2d 941 (Fla. 3d DCA 1981), and her claim, unrefuted by the language of the signed consent forms, that she had not been informed of the particular risk of an ectopic pregnancy. *Thomas v. Berrios*, 348 So.2d 905 (Fla. 2d DCA 1977). We agree that Valcin's allegations were sufficient to withstand a motion for summary judgment, at least in the absence of the defendant's having conclusively established either that an ectopic pregnancy was not a "substantial risk[ ] ... inherent in the proposed treatment," section 768.46(3)(a)2, Florida Statutes (1985), or that failure to so inform the patient "was in accordance with an accepted standard of medical practice ... in the same or similar medical community." § 768.46(3)(a)1.

Upon remand, Valcin will be required to establish through expert testimony the information which should have been conveyed to her under the circumstances. *Valcin*, 473 So.2d at 1302, citing *Ditlow v. Kaplan*, 181 So.2d 226 (Fla. 3d DCA 1965); *Ritz v. Florida Patient's Compensation Fund*, 436 So.2d 987 (Fla. 5th DCA 1983), *review denied*, 450 So.2d 488 (Fla.1984).

We note, too, that the relevant statute as presently amended will control the resolution of the issue of informed consent at trial. Section 768.46(4)(a), Florida Statutes (1985), now provides that:

A consent which is evidenced in writing and meets the requirements of subsection (3) shall, if validly signed by the patient or another authorized person, raise a *rebuttable presumption* of a valid consent.

*599 (Emphasis supplied.) As we affirm the general principle that "an appellate court, in reviewing a judgment on direct appeal, will dispose of the case according to the law prevailing at the time of the appellate disposition," *State v. Hospital District of Hardee County*, 201 So.2d 69 (Fla.1967); *Florida East Coast Railway v. Rouse*, 178 So.2d 882, 883 (Fla. 3d DCA 1965), *quashed on other grounds*, 194 So.2d 260 (Fla.1966), we note that no conclusive presumption of valid consent, rebuttable only upon a showing of fraud, will apply to the case. The alleged oral warranties, of course, if accepted by the jury may properly rebut a finding of valid informed consent.

[2] We next turn to the issue of the negligent performance of the operation and the related presumptions involving the absence of surgical operative notes. While we share the district court's concerns as to fairness when "evidence peculiarly within the knowledge of the adversary is ... not made available to the party which has the burden of proof," 473

So.2d at 1305, we find that the rules fashioned by that court sweep wider than necessary. For reasons more fully expressed below, we strike down the conclusive presumption establishing liability when the records are shown to be missing due to the deliberate acts or omissions of the hospital or employee doctor. We adopt, with some modification, the shifting of the burden of producing evidence when essential records are found to be either missing or inadequate through the defendant's negligence.

We find the conclusive presumption invalid for two reasons. First, it violates due process in its failure to provide the adverse party any opportunity to rebut the presumption of negligence. *Straughn v. K & K Land Management, Inc.*, 326 So.2d 421 (Fla.1976); *Bass v. General Development Corp.*, 374 So.2d 479 (Fla.1979). Second, such a drastic "short circuiting" of the jurors' function is simply unnecessary. In those extremely rare instances that the evidence establishes an intentional interference with a party's access to critical medical records, a wide range of sanctions is available to the trial court under Florida Rule of Civil Procedure 1.380(b)(2). *See, e.g., Mercer v. Raine*, 443 So.2d 944 (Fla.1983). Further, a jury could well infer from such a finding that the records would have contained indications of negligence. *See* § 90.301(3), Fla.Stat. (1985); J. McQuade, *Medical Practice for Trial Lawyers* § 2-20 (2d ed. 1985) ("Rarely, and usually only in malpractice cases, the findings [in a surgical note] are inadequately described or omitted altogether. This is a suspicious circumstance.")

Although we approve the district court's adoption of the rebuttable presumption, applicable when essential medical records are unavailable due to the adverse parties' negligence, we must clarify its application in certain respects. We first stress the limited function of the presumption. The absence of a surgical note will not necessarily bear on the issues in a malpractice action based solely on, for example, failure to obtain an informed consent or failure to properly diagnose an illness. It should apply only when necessary to serve the purposes of justice. In other words, a plaintiff must first establish to the satisfaction of the court that the absence of the records hinders his ability to establish a prima facie case. In *Patrick v. Sedwick*, 391 P.2d 453, 457 (Alaska 1964), for example, the Alaska Supreme Court noted that "it was incumbent upon the appellee surgeon to have described accurately and fully in his report of the operation everything of consequence that he did and which his trained eye observed during the operation ... [i]f these requirements had been met the report would ... more likely ... have supplied sufficient facts to have permitted expert witnesses to testify on the question of negligence."

We stress this point in order to avoid the potential problems involved in confusing the absence of the records with the true issues at trial. Negligence in failing to make or maintain medical records does not necessarily bear at all on the question of whether the medical procedure involved has been conducted negligently. The presumption, shifting the burden of producing the evidence, is given life only to equalize the parties' respective positions in regard ***600** to the evidence and to allow the plaintiff to proceed.

Our shifting of burdens of producing evidence in the context of medical malpractice actions is not unprecedented. Several of the policies underlying our decision of *Marrero v. Goldsmith*, 486 So.2d 530 (Fla.1986), in which we shifted the burden of "initial explanation" to the defendant doctor when the faultless plaintiff had been injured while unconscious during surgery, are present in this case. As in *Marrero*, the doctor's exclusive knowledge as to the medical procedures involved, the relative ignorance of the plaintiff, and the lack of direct evidence of negligence in the absence of complete medical records compel a shifting of the burden of producing evidence as a matter of public policy.

At this point, we should clarify the type of rebuttable presumption necessitated under this decision. The instant problem should be resolved either by applying a shift in the burden of producing evidence, section 90.302(1), Florida Statutes (1985), or a shift in the burden of proof. § 90.302(2), Fla.Stat. (1985). While the distinction sounds merely technical, it is not. In the former, as applied to this case, the hospital would bear the initial burden of going forward with the evidence establishing its nonnegligence. If it met this burden by the greater weight of the evidence, the presumption would vanish, requiring resolution of the issues as in a typical case. *See Gulle v. Boggs*, 174 So.2d 26 (Fla.1965); C. Ehrhardt, *Florida Evidence* § 302.1 (2d ed. 1984). The jury is never told of the presumption.

In contrast, once the burden of proof is shifted under

section 90.302(2), the presumption remains in effect even after the party to whom it has been shifted introduces evidence tending to disprove the presumed fact, and "the jury must decide whether the evidence introduced is sufficient to meet the burden of proving that the presumed fact did not exist." Ehrhardt at § 302.2, citing *Caldwell v. Division of Retirement*, 372 So.2d 438 (Fla.1979).

A vanishing presumption will not assist a plaintiff in proving his case. If the plaintiff is in fact sufficiently "hindered" by the absence of an operative note, odds are that the defendant's production of some evidence of nonnegligence will not place the plaintiff in a better position. Testimony based on the selective recollections of the surgeon and his staff would be considered "substantial" enough to "burst the bubble," thus keeping the presumption from the jury. *See Gulle v. Boggs*, 174 So.2d 26 (Fla.1965); *see also Baughman v. Vann*, 390 So.2d 750 (Fla. 5th DCA 1980); *Brethauer v. Brassell*, 347 So.2d 656 (Fla. 4th DCA 1977). Plaintiff could rarely prove negligence by a preponderance of the evidence when the presumption has given him nothing more than the self-serving testimony of the defendant.

Finally, in the usual case where a vanishing presumption is employed to facilitate the determination of an action, the underlying facts giving rise to the presumption also form the basis for a logical inference of the fact presumed. Such a logical inference remains after a vanishing presumption disappears only where the underlying facts are sufficiently connected to and thus probative of the inferred fact. *See* Ehrhardt at § 302.1. In a case such as this, however suspicious the absence of surgical records may appear to a jury, this fact alone would seem insufficient to form the basis for a logical inference that the operation was performed negligently. Thus, in most cases such as the one at bar, where there is no other evidence of negligence, once credible evidence of nonnegligence is introduced, a directed verdict for the defendant would likely follow. *See* Ehrhardt at § 302.1.

The second type of rebuttable presumption, as recognized in section 90.302(2), Florida Statutes, affects the burden of proof, shifting the burden to the party against whom the presumption operates to prove the nonexistence of the fact presumed. "When evidence rebutting such a presumption is introduced, the presumption does not automatically disappear. It is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required***601** by the substantive law of the case." *Caldwell*, 372 So.2d at 440. Rebuttable presumptions which shift the burden of proof are "expressions of social policy," rather than mere procedural devices employed "to facilitate the determination of the particular action." *Id. See also*, §§ 90.303 and 90.304, Fla.Stat. (1985).

A section 90.302(2) presumption shifts the burden of proof, ensuring that the issue of negligence goes to the jury. This interpretation appears to best implement public policy that adequate operative notes be kept.

We must next explore the district court's observations as to the hospital's direct rather than vicarious liability for a surgeon's failure to create an operative note. While a hospital is indeed statutorily required to maintain medical records including, under Florida Administrative Code chapter 10D-28.59(3), "medical and surgical treatment notes and reports," *see* 473 So.2d at 1305, n. 7, only surgeons may in fact prepare such operative notes, and generally such surgeons are only independent contractors granted the privilege of practicing in the hospitals rather than employees. Vicarious liability does not therefore necessarily attach to the hospital for the doctors' acts or omissions. *Pinillos v. Cedars of Lebanon Hospital Corp.*, 403 So.2d 365 (Fla.1981); *Wilson v. Lee Memorial Hospital*, 65 So.2d 40 (Fla.1953); *Reed v. Good Samaritan Hospital Association, Inc.*, 453 So.2d 229 (Fla. 4th DCA 1984).

[3] The facts underlying the district court's broad observations as to the hospital's direct liability reflect an atypical situation. That party was left as the sole defendant in the case to answer for the doctor's carelessness because the operating doctor, an agent/employee of the public hospital, was properly dismissed under the immunity provisions of section 768.28(9)(a), Florida Statutes (Supp.1980). In this clear employer/employee context, the hospital may properly be held liable for the significant omission of its employee doctors committed within the scope of their employment.

[4] Generally, however, a hospital may not fairly be held liable for a plaintiff's entire damages solely

based on the omissions of an independent contractor merely granted practicing privileges in the hospital. Because the relationship between hospital and doctor is often unclear and raises a question for the jury, though, *Irving v. Doctors Hospital of Lake Worth, Inc.*, 415 So.2d 55 (Fla. 4th DCA), *review denied*, 422 So.2d 842 (Fla.1982); *Garcia v. Tarrio*, 380 So.2d 1068 (Fla. 3d DCA 1980), every hospital would do well to ensure that a patient's medical records contain a sufficient operative note.

We note, too, that in practice no such unfairly imposed "direct liability" will be ordinarily found; if the doctor is found to be an independent contractor, the hospital may not be found liable for any negligence on his part, and in fact will not properly be a party in the case. We make these observations in order to ensure that no hospital not otherwise properly involved as a defendant in a case is made so based on its purported "direct liability" for its failure to ensure the existence or adequacy of operative notes.

As a final note, we point out that upon remand the trial court should consider the existence or adequacy of any operative note (which it has not yet done in this case), and determine whether or not the absence of an adequate note sufficiently hinders plaintiff's ability to proceed, thus shifting the burden of producing evidence on the merits of the claim. Apparently, conflicting evidence exists as to both of these points in the pretrial record.

We therefore approve in part and quash in part the decision here under review, and remand for further proceedings consistent with this opinion.

It is so ordered.

OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur.
McDONALD, C.J., concurs in result only.

Fla.,1987.
Public Health Trust of Dade County v. Valcin
507 So.2d 596, 69 A.L.R.4th 895, 12 Fla. L. Weekly 211

END OF DOCUMENT

"Jeff Fulford" <jeff@fulfordlaw.com>
01/30/2011 11:05 AM

To "James Barton" <bartonjm@fljud13.org>
cc "Cynthia Sass " <csass@sasslawfirm.com>, "Gary Farmer " <farmergm@att.net>, "Jacqueline Griffin " <griffinj@flcourts.org>, "Jodi @ TFB " <jjenning@flabar.org>,
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Subject FW: Spoliation Committee - Proposed Instructions and Issues

From: Candy Stead [mailto:cstead@sasslawfirm.com]
Sent: Wednesday, January 26, 2011 11:45 AM
To: Donald Hinkle; Jeffrey Fulford; Judge Artigliere; Judge Brown ; Judge Farmer; Judge Griffin; Neal Roth; Pete L. DeMahy; Philip Burlington; Tracy Gunn
Subject: Spoliation Committee - Proposed Instructions and Issues

Dear Committee Members:

I think we can all agree that we are still at a point of not having a finalized instruction. There also has been some discussion (below) about possibly drafting a more expansive *Valcin Presumption* instruction. In order to make informed suggestions regarding both issues, I asked my associate, Jennifer Zumarraga, to review all of the relevant case law and outline the key issues raised by those cases. I have attached that memorandum to this e-mail. After reviewing the same, it appears to me that we still have several issues to discuss prior to finalizing an adverse inference instruction and/or deciding if a more expansive *Valcin Presumption* is appropriate. (See attached). If everyone is agreeable, I propose that we submit this memorandum (or a version of it) to the full board for their consideration.

As for below, I agree with Jeff that the *Valcin Presumption* is applicable to cases beyond those involving a duty to preserve certain medical records. However, for the reasons stated more thoroughly in the attached memorandum:

> (1) I think it is possible, based on the case law, that Valcin may be applicable in cases where there is ANY duty to preserve—not just a statutory duty. (Given the current case law, however, I do not know what authority we would have to extend Valcin beyond negligence cases).
>
> (2) The discussion below does not address the issue of the non-producing party's "intent" when the evidence was destroyed. Courts have interpreted Valcin to stand for the proposition that, where the evidence is *intentionally* destroyed an adverse inference is applied, but where the evidence is *negligently* destroyed the *Valcin Presumption* is applied. That being said, and for the reasons more thoroughly stated in the attached memorandum, I believe this is not a correct interpretation of Valcin. In short, I think the Court intended to create one "sanction" when a party with a duty to preserve evidence destroys evidence critical to the other party's case—the *Valcin Presumption* —and that that "presumption" is applicable regardless of the non-producing party's intent.
>
> (3) I think the Committee also has to address the Martino/Hettiger/Golden Yachts decisions out of the Fourth DCA that stand for the proposition that there is no prerequisite that the nonproducing party have a "duty to preserve" when applying an adverse inference.

Let me know your thoughts.

--Cynthia

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Memo 2 to Spoliation Committee 01.25.11.pdf

MEMORANDUM

To: Jury Instruction/Spoliation Committee

From: Cynthia N. Sass, Esquire

Re: Proposed Jury Instructions

Date: January 25, 2011

As we all know, there have been several discussions back and forth among the Committee Members about what is the appropriate language to use in drafting the proposed "adverse inference" jury instruction, including questions relating to a "duty to preserve," and other such issues. There has also been a more recent discussion as to whether a more expansive *Valcin Presumption* instruction should be drafted. In order to make informed suggestions regarding the "adverse inference" instruction and/or to aide the Committee in its decision regarding whether to draft a more expansive *Valcin Presumption* instruction, I have again reviewed all of the pertinent case law and outlined the key issues raised by these cases below in Section I. Although this memo starts with the basics (i.e., definition of spoliation & duty), I believe a review of such information is helpful in understanding the proper application of an adverse inference as opposed to the *Valcin Presumption.* I also think we may need to discuss some issues that I do not believe we have addressed to date, such as whether a duty to preserve is even necessary to an adverse inference instruction and the necessity of considering the "intent" of the nonproducing party when deciding whether the *Valcin Presumption* or adverse inference instruction is proper. You will see in Section II, I have made suggestions based upon the information in Section I. Hopefully this memorandum will be helpful to the discussion.

SECTION I: Important Information to Understand in Order to Suggest Changes

A. Definition of Spoliation and Purpose of Sanctions:

Under Florida law, spoliation is defined as the "destruction, mutilation, alteration, or concealment of evidence." Golden Yachts, Inc. v. Hall, 920 So.2d 777, 780 (Fla. 4th DCA 2006) (quoting *Black's Law Dictionary* 1437 (8th ed. 2004)). Spoliation sanctions are imposed in Florida "to assure that the non-spoliator does not bear an unfair burden." Reed v. Alpha Prof'l Tools, 975 So.2d 1202, 1204 (Fla. 4th DCA 2008). Another reason for spoliation sanctions is their "deterrent effect on miscreant defendants." Perez v. La Dove, Inc., 964 So.2d 777, 780 (Fla. 3d DCA 2007).

B. When is There a Duty to Preserve Evidence:

In Florida, "[a] duty to preserve evidence can arise by contract, by statute, or by a properly served discovery request (after a lawsuit has already been filed)." Royal &

Sunalliance v. Lauderdale Marine Ctr., 877 So.2d 843, 845 (Fla. 4th DCA 2004)[1]. Most Florida courts have held that there is no common law duty to preserve evidence *before* litigation has commenced. Id. (holding that "we find Royal's argument that there was a common law duty to preserve the evidence in anticipation of litigation to be without merit"); Gayer v. Fine Line Constr. & Electric Inc., 970 So.2d 424, 426 (Fla. 4th DCA 2007)(holding that "[b]ecause a duty to preserve evidence does not exist at common law, the duty must originate either in a contract, a statute, or a discovery request"); but see, Pen Lumberman's Mutual Ins. v. Fla. Power & Light Co., 724 So.2d 629, 630 (Fla. 3d DCA 1999)(neither rejecting nor accepting the argument that there might be "some type of common law duty to preserve [evidence] after being notified of possible legal action").

C. The *Valcin Presumption* May Be Applied When a Duty-Bound Party Destroys Evidence.

When a party who has a duty to preserve evidence destroys, mutilates, alters or conceals such evidence, a burden shifting, adverse presumption may be applied against the non-producing party. This "adverse presumption" has become known as the "*Valcin Presumption*" after the Florida Supreme Court issued its decision in Public Health Trust of Dade County v. Valcin, 507 So.2d 596 (Fla. 1987). In order for the *Valcin Presumption* to apply, the party seeking to invoke the presumption has to establish to the satisfaction of the court that: (1) the non-producing party had a duty to preserve the records at issue; and (2) that the absence of those particular records hindered his ability to establish a claim or defense.[2] Once established, the non-producing party bears the burden of proof under Section 90.302(2), Florida Statutes, to establish non-liability. In other words, even if the non-producing party is able to submit evidence rebutting the presumption, the trier of fact must ultimately decide whether the presumption was sufficiently overcome. According to the Court, the purpose of such an extreme measure was intended to "equalize the parties' respective positions."

D. The *Valcin Presumption* is Arguably Applicable to More Than Medical Negligence Cases.

The Valcin case arose out of a medical malpractice action against a public hospital, wherein the hospital had a statutory duty to maintain the operative report that was ultimately not produced. At least one court has since held that Valcin is limited to cases involving a statutory duty to maintain medical records. American Hospitality Mang't Co. of Minnesota v. Hettiger, 904 So.2d 547 (Fla. 4th DCA 2005)(*Valcin presumption* not applicable in negligence claim against hotel operator). However, other district court cases (both before and after the issuance of Hettiger) indicate that the *Valcin Presumption*

[1] Although Hagopian v. Public Supermarkets, Inc., 788 So.2d 1088, 1090 (Fla. 4th DCA 2001) has been relied upon for the proposition that there may be a duty to preserve evidence where litigation is foreseeable, the Court in Royal rejected this interpretation.

[2] The Court rejected the Third DCA's standard of a non-rebuttable, conclusive presumption in cases of intentional destruction of evidence and adopted the Third DCA's standard regarding a rebuttable-presumption, with a modification: that it would only apply where the missing evidence was material to a claim or defense. Because the Third DCA held that the *judge* (rather than the jury) was to first make the determination of whether the non-producing party had a duty to preserve, this element (i.e., that duty is a question of law) remained unchanged by the Supreme Court's decision.

may have a much broader application. See, e.g., Jordan ex. Rel. Shealey v. Masters, 821 So.2d 342, 347 (Fla. 4th DCA 2002)(in contemplating whether the *Valcin Presumption* applied to case involving sexual battery, false imprisonment and other non-medical negligence claims against church and deacon, court determined that *Valcin Presumption* did not apply because elements of Valcin were not met. Specifically, there was no evidence that videotape in question existed and no evidence that it was essential to plaintiff's claims); Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co., Inc., 881 So.2d 565 (Fla. 3d DCA 2004)(in contemplating whether *Valcin Presumption* applied to case involving product defect, negligence, and common law fraud, court determined that *Valcin Presumption* did not apply because Defendant's failure to produce evidence of fungicide testing did not hinder Plaintiff's ability to establish a prima facie case.); Bulkmatic Transport Co. v. Taylor, 860 So.2d 436, 449 (Fla. 1st DCA 2003)(held that *Valcin Presumption* was not warranted with regard to data in vehicle's black box because the evidence did not hinder Plaintiff's ability to establish prima facie case.); Fini v. Glascoe, 936 So.2d 52 (Fla. 4th DCA 2006)(states that plaintiff may be entitled to *Valcin Presumption* in case against car dealership involving negligently installed car alarm system.).

Perhaps more importantly, the Florida Supreme Court seems to favor a more expansive approach. Approximately one month after Hettiger, the Florida Supreme Court issued its decision in Martino v. Wal-Mart Stores, 908 So.2d 342 (Fla. 2005), wherein the Court resolved an inter-district conflict regarding whether an independent cause of action should exist for first-party spoliation of evidence. The Court rejected an independent cause of action and ruled that the proper remedy for first-party spoliation "should be the *Valcin Presumption* and sanctions, if found to be necessary." Id., at 347 (emphasis added). Unlike Valcin, however, the underlying facts in Martino did not involve a claim of medical negligence; rather, the plaintiff in Martino brought a negligence claim against Wal-Mart to recover for injuries she sustained when a shopping cart collapsed. The Court remanded the case to the district court for further proceedings "consistent with" its opinion. While the sole issue before the Court was to resolve a conflict among the districts, its conclusions regarding the applicability of the *Valcin Presumption* in the context of a non-medical negligence claim is significant.[3]

E. An "Adverse Inference" May Be Applicable Where a Spoliator Had No Duty to Preserve.

In accordance with Valcin and Martino, the Fourth District Court of Appeal has held that the *Valcin Presumption* is only applicable in cases where the non-producing party is

[3] In his specially concurring opinion that was joined by Justice Bell, Justice Wells concurs with the majority to the extent it holds that the *Valcin Presumption* is applicable in "instances in which it is demonstrated that a first-party defendant has a duty by reason of statute, regulation, court order, or discovery rule to maintain and preserve evidence." Id., at 347-48. Again, Justice Wells in no way proposes a limitation of Valcin's application to cases involving a statutory duty to maintain medical records. However, Justice Wells takes issue with the application of the *Valcin Presumption* under the particular facts of Martino because "Wal-Mart had no duty to maintain or preserve" the evidence at issue. Id., at 348. A review of Valcin leaves little doubt that a "duty" to maintain records is a critical element of the applicability of the *Valcin Presumption*. (While valid, Justice Wells' concerns regarding a finding of "duty" could have been addressed by the district court, when it conducted "further proceedings consistent" with the Supreme Court's instruction to follow the requirements of Valcin.)

duty-bound to preserve evidence. In cases where there is no duty to preserve, however, a jury is still free to draw an "adverse inference" against the non-producing party.[4] See e.g., Golden Yachts, Inc. v. Hall, 920 So.2d 777, 77X (Fla. 4th DCA 2006)(unlike the presumption of negligence which may arise under Valcin, the adverse inference concept is not based on a strict legal "duty" to preserve evidence. Rather, an adverse inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence); Martino v. Wal-Mart Stores, Inc., 835 So.2d 1251,1257 (Fla. 4th DCA 2003)(fact that plaintiff showed Wal-Mart the defective cart prior to lawsuit and asked Wal-Mart to keep it safe is not sufficient to give rise to a *Valcin Presumption*, but is sufficient for the jury to make an adverse inference based upon the cart's loss); but see, Martino, 908 at 348-49 (Justice Wells, specially concurring)(stating that a duty to preserve is a fundamental element of the *Valcin Presumption* **and** any adverse inference instruction).

F. When is an *Adverse Inference* Jury Instruction Proper?

1. *Where There is No Duty to Preserve (and presumably in cases where Valcin would not apply, such as non-negligence cases, regardless of duty).*

As mentioned above, the Fourth District Court of Appeal has found that an *adverse inference* is proper even where there is no duty to preserve evidence. (Again, as mentioned above, Justice Wells strongly disagreed with this assertion in his concurring opinion in Martino. Because it is a concurring opinion, Justice Wells' opinion is not binding on the district courts).[5] While the parties are free to assert that the jury should make adverse inferences based upon missing evidence in their closing arguments, a jury instruction on the issue is not always proper. See Martino, 835 at 1257, n.2 (noting that, while counsel is free to make arguments concerning the adverse inference created by missing evidence, a jury instruction was not appropriate; Jordan ex. Rel. Shealey v. Masters, 821 So.2d 342, 346-48 (Fla. 4th DCA 2002) (noting that a court interferes with the jury's function when it gives an instruction about facts that are controverted).

2. *Only Where Missing Evidence is "Critical."*

That being said, the court in Hettiger concluded that it "is not *per se* error" to issue an adverse inference instruction where the lost evidence was "critical to prove the other party's claim." Id., 904 So.2d at 550. As such, the *Valcin Presumption* and the concept of adverse inference are similar in that a jury instruction is only proper where the lost evidence is critical and/or material to the other party's claim or defense.

[4] Unlike the *Valcin Presumption*, an "adverse inference" does not shift the burdens of proof.

[5] While the current state of the case law seems to indicate that an adverse inference may be drawn even where there is no "duty to preserve," the Committee may want to discuss Justice Wells' concurring opinion in Martino prior to finalizing the adverse inference instruction. Moreover, if the current state of the case law is that an adverse inference may be drawn even where there is no duty to preserve, the Committee may want to delete any part of the proposed instruction or notes accompanying the instruction that states otherwise.

At least one court has held that the issue of whether or not the missing evidence is "Critical" is a question for the jury. Hettiger, at 551. (compare to, Valcin, where the court said the question is for the judge's determination).

3. *Where Defendant was in Control of Missing Evidence.*

In addition to showing that the missing evidence is "critical," the missing evidence must also presumably be under the "control" of the non-producing party. Hettiger, at 550. Again, at least one court has determined that this is an issue for the jury. Id., at 551.

4. *Potentially: Where Missing Evidence was "Intentionally" Destroyed.*

Finally, there is the important issue of whether or not the adverse inference instruction may only be given where the non-producing party *intentionally* lost the evidence, as opposed to *negligently* misplacing the evidence. Because this issue of "intent" also relates to the *Valcin Presumption*, it is dealt with separately below.

G. How the Non-Producing Party's "Intent" Impacts the Applicability of the *Valcin Presumption* and the Concept of *Adverse Inference*

In Valcin and Martino, the Florida Supreme Court indicated that where the evidence is "intentionally lost, misplaced, or destroyed" the appropriate sanctions would be found in Fla.R.Civ.P. 1.380(b)(2) and may also include applying an adverse jury inference. Where the loss of the evidence was determined to be negligent, however, a "rebuttable presumption of negligence for the underlying tort" applies. Martino, 908 So.2d at 346; Fini v. Glascoe, 936 So.2d 52, 55 (Fla. 4th DCA 2006). In other words, it appears as if the applicability of either "sanction" (if you can call it that) turns on the non-disclosing party's intent when it "lost" the evidence at issue.

In my opinion, I do not think this is what the Court intended to do in Valcin. Again, in Valcin, the defendant was accused of not producing operative records of the plaintiff. The Third DCA submitted an instruction to the jury stating: (1) if the jury determined that the non-production was *intentional*, there was a conclusive, non-rebuttable presumption that the defendant was negligent; and (2) if the jury determined that the non-production was *negligent*, there was a rebuttable presumption that the defendant was negligent.

In rejecting the dichotomy presented by the Third DCA, the Supreme Court said that the institution of any conclusive, non-rebuttable presumption was too "drastic" a remedy and short circuited the function of the jury. According to the Court, in the "rare instance" records are intentionally destroyed, a court could sanction the destroying party using the sanctions in Fla.R.Civ.P. 1.380. As almost an aside, the Court stated that "further" a jury could "well infer from such a finding that the records would have contained indications of negligence."

The Court went on to adopt the Third DCA's rebuttable presumption standard (i.e., the *Valcin Presumption)*, with the limited exception of stating that it is only applicable where

the missing evidence hinders the plaintiff's ability to prove her claims. The Court then remanded the case back to the lower court with specific instructions to determine whether the absence of the missing evidence "*sufficiently hinders plaintiff's ability to proceed, thus shifting the burden of producing evidence on the merits of the claim.*" Id., at 601 (emphasis added). Notably, in instructing the lower court to determine whether the burden should be shifted, the Supreme Court did not ask the lower court to make any determination as to whether the evidence was destroyed intentionally or negligently. Rather, according to the plain language of the Court's opinion, the applicability of the burden shifting was to turn solely on the lower court's determination of whether the missing evidence hindered the plaintiff's ability to proceed. To the extent the evidence was destroyed intentionally, the lower court could always take the additional step of sanctioning the non-producing party in accordance with Fla.R.Civ.P. 1.380.

In short, I believe the Court intended to create one standard—the *Valcin Presumption*—regardless of the non-producing party's intent in destroying the evidence. Otherwise, we would have to conclude that the Supreme Court intended to give the lighter sanction (adverse inference) for the more egregious conduct (intentional destruction) and a more burdensome sanction (*Valcin Presumption)* for the less egregious conduct (negligent destruction). (Because it literally shifts the burden of proof, the *Valcin Presumption* is clearly the more severe "sanction" for the destruction of key evidence). See e.g., In re Electric Machinery vs. Hunt Construction Group, 416, B.R. 801, 875 (M.D. Fla. 2009)(recognizing that the adverse inference concept is a "lighter sanction" than the *Valcin Presumption.*)

Finally, even if Valcin stands for the proposition that an adverse inference is the remedy when evidence is destroyed intentionally, I do not think the Court intended to limit the application of an adverse inference to **only** those situations involving intentional destruction of evidence. In other words, an adverse inference instruction would arguably be appropriate in situations where the evidence is negligently lost, but where a court has determined that the *Valcin Presumption* is not otherwise applicable. For example, where there is no duty to preserve, the *Valcin Presumption* would not be applicable, even if the evidence at issue was destroyed negligently. In such a case, I would think a party could still argue that the jury can draw an adverse inference as a result of the lost evidence.[6]

Section II: Suggestions to Proposed Instruction

(1) Based on the above, we may want to propose a more expansive *Valcin Presumption* instruction.

(2) As for the "adverse inference" instruction we have been working on, below is the latest proposed instruction. My thoughts are in red font..

[6] The Committee may want to decide whether an explanatory note is necessary for the adverse inference instruction regarding the breadth of applicability of the instruction.

e. Inference from loss, destruction, or failure to preserve evidence.

A party is obligated to preserve evidence under an agreement that it will be preserved, or by conduct implying that it will be preserved. (I am unsure where this language originated. My concern is that this seems very similar to asking the jury to decide that the non-producing party had a duty to preserve. While I ultimately think Justice Wells may be correct here, I believe the Fourth DCA is the only "law" on this issue, and it has held no duty is needed for an adverse inference. Plus, even if a duty IS required, are we sure it is a question for the jury?) If you find that:

a. (name of the party) **[agreed to] [engaged in conduct implying that [he] [she] [it] would] preserve** (describe evidence), **and (same thoughts)**

b. (describe evidence) **was [lost] [destroyed] [mutilated] [altered] [or] [concealed], while it was within the control of** (name of party), **and (Would it be more accurate, given the case law, that we make (a) and (b) as follows:**

(a) was (describe evidence) [lost] [destroyed] [mutilated] [altered] or [concealed] by (name of the party)?

(b) if so, was (describe evidence) within the control of (name of party) at the time of its [destruction]?

c. (describe evidence) **would have been material in deciding the disputed issues in this case. (I think we should change "material" with "critical" based upon the fact that "critical" is more plain language and the same term used by the Fourth DCA).**

then you may, but are not required to, infer that this evidence would have been unfavorable to (name of party).

You may consider this inference, together with the other evidence, in determining the issues of the case.

Notes on Use

1) This instruction is applicable for those cases where the court has determined that a party has a legal duty to preserve evidence (e.g. by contract, agreement or conduct), followed by the loss, destruction, alteration or other disposition of material evidence caused by that party. (First, I think it is questionable whether there is a legal duty requirement, per above. Second, to me, it seems like we are asking the court and the jury to make the same determination—that there was a duty to preserve. My gut is that, if a duty to preserve is a requirement to adverse inference, it should follow Valcin on this issue, and leave it to the judge to determine).

2) This instruction is not intended to limit the trial court's discretion to impose sanctions against a party for either inadvertent or intentional conduct in the loss, destruction, alteration, or other disposition of evidence material to a case. For example see Sponco Manufacturing, Inc. v. Alcover, 656 So. 2d 629 (Fla. 3d DCA 1995); and Nationwide Lift Trucks, Inc v. Smith, 832 So. 2d 824 (Fla. 4th DCA 2002).

3) The inference created by this instruction does not rise to the level of a presumption. or cases involving breach of a statutory duty to preserve evidence or application of an evidentiary presumption for lost, destroyed or altered evidence, see *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987); and 402.4 d., FSJI.
This language is problematic to me for the following reasons:

First: I think it describes Valcin too narrowly. As argued above, I think Valcin may apply so long as there is any duty—statutory or otherwise.

Second: even if Valcin is applicable to cases beyond medical negligence, it may still be limited to negligence cases, insofar as I haven't found any non-negligence cases where the presumption was applied. This note makes it seem like it may be applicable to even non-negligence cases (so long as there is a statutory duty).

Third: are there cases applying an adverse inference instruction to cases that do not involve negligence? I would assume it would be applicable, but wondered if we needed some authority to define the scope of applicability of this instruction.

Fourth: there is an issue as to whether the *Valcin Presumption* can only be applied where the evidence is "negligently" lost. In other words, if there is a duty to preserve and the non-producing party lost the evidence "intentionally," arguably, under Valcin (and Martino), an adverse inference may be applied—not the *Valcin Presumption.* (Again, as explained above, I personally think this is an irrational outcome—but it appears in line with the language of Valcin and at least one Fourth DCA opinion).

----- Original Message -----
From: Jeff Fulford
To: 'Ralph Artigliere'
Sent: Friday, January 21, 2011 12:00 PM
Subject: RE: Spoliation - proposed instructions and issues

Ralph
As always, you raise good points. The medical records requirement is a case right on point, but we did already deal with that issue with the Valcin instruction, as you know. (402.4 d) And remember that we used a different standard (presumption, as opposed to the inference standard we are creating now). I would think that for any failure to keep/maintain records based on a statutory requirement, then there would be a good argument that a 'presumption' (like Valcin) exists, as opposed to an 'inference'. However, I don't know if the law supports my supposition. I do recall that Valcin did also discuss the personal and fiduciary relationship between the provider and patient, but don't believe that was the cornerstone of the opinion/decision.

Questions:
1) Will violation of other statutory duties be more akin to the Valcin instruction? If so, then we still probably need to craft the inference instructions we are working on.
2) Do we want to take on drafting a general Valcin type instruction (based on failure to follow statutory law) applicable to non-med mal cases?

Is it ok if I send your comments to the committee. It raises some good questions for committee dialog.
Jeff

From: Ralph Artigliere [mailto:skywayra@tds.net]
Sent: Wednesday, January 19, 2011 3:35 PM
To: Jeff Fulford
Subject: Re: Spoliation - proposed instructions and issues

Jeff,

Working on something else, I came across more preservation req'ts:

The existence of statutes and regulations requiring preservation of evidence extend the duty of preservation to some unlikely or perhaps unrecognized categories of records, especially in light of exploding use and application of electronic tools, media, and environments. For example, public records requirements for government agencies and the duty to preserve public records may implicate activities on government computers that were never intended or understood to be public records subject to preservation and disclosure. See AGO Opinion 2009-19 (Fla. Attorney General)(social networking on city's Facebook Page performed on municipal computers subject to Ch. 119 Public Records Laws and so the city is obligated to follow a public records retention schedule as set forth in the State of Florida General Records Schedule).

AN INTERESTING SUBJECT, TO SAY THE LEAST.
Ralph Artigliere
skywayra@tds.net

706-632-6035
706-851-4121

From: Ralph Artigliere [mailto:skywayra@tds.net]
Sent: Tuesday, January 18, 2011 4:37 PM
To: Jeff Fulford
Subject: Re: Spoliation - proposed instructions and issues

Jeff,

Do you need me to find specific statutes that require preservation of records? Unfortunately, I do not think the statutory triggers the court refers to in the cases were written for "preservation" of evidence as much as they were the requirement to keep and maintain records for the well-being of patients, etc., such as medical records at a hospital. Another example are public records required to be kept by governmental agencies. Here is what I wrote recently (not yet published) on the triggers for preservation of electronic records in Florida.

The duty to preserve evidence in anticipation of litigation does not exist under Florida common law. Accordingly, the duty must emanate from a statute, a contract, or a discovery request. *See* Gayer v. Fine Line Constr. & Elec., Inc., 970 So.2d 424, 426 (Fla. 4th DCA 2007). Royal v. Sunalliance v. Lauderdale Marine Center, 877 So.2nd. 843 (Fla. 4th DCA 2004). At least one Florida court has expressly held in the context of preservation of ESI that absent a contractual or statutory duty to preserve information, a party does not have affirmative preservation responsibilities unless a document request is served. *See* Eugene Strasser, M.D., P.A. v. Bose Yalamanchi, M.D., P.A., 783 So.2d 1087, 1093-4 (Fla. 4th DCA 2001)(Strasser II). Accordingly counsel in Florida should be prompt in filing comprehensive discovery requests regarding ESI. Another approach is to enter in an agreement with potential opposing or third parties to preserve relevant information. A pre-suit or pre-discovery "preservation letter" may not act as a trigger for duty of preservation unless the parties agree to preserve relevant information pending a potential suit. However, at a minimum, the preservation letter will identify the scope of potential relevant information, and destruction or alteration of such information by the opposing party would be difficult to explain to the court. The preservation demand may later assist in establishing spoliation or fraud on the court. Also such a demand if it goes unanswered may be construed as an implied contract or agreement or be used to work an estoppel on the party who fails to preserve electronically stored information in the face of such a reasonable request. *See, e.g.,* Royal & Sunalliance v. Lauderdale Marine Center, 877 So.2d 843, 847 (Fla. 4th DCA 2004).

Judicial Note:

Florida's limited preservation responsibilities, as compared with federal courts and other state jurisdictions, appear for the time being solidly established. However, Florida law seems not to have reached a level of maturation and under some circumstances Florida limited preservation dues may not appear fair or in the interests of justice. Florida courts dealing with bad facts may be tempted to adopt the more liberal federal position that the duty to preserve electronically stored information arises when litigation is reasonably anticipated. However, such efforts, albeit not in the context of electronically stored information, have not met with success on appeal. *See* Royal & Sunalliance v. Lauderdale Marine Ctr., 877 So.2d 843,845-6 (Fla. 4th DCA 2004)(clarifying the holding in Hagopian v. Publix Supermarkets, Inc., 788 So.2d 1088 (Fla. 4th DCA 2001), and refusing to find a "common law duty to preserve evidence before litigation has begun").

Warning:

For many reasons, lack of a formal legal foundation for preservation of electronically stored information under Florida law (statute, contract, or discovery request) which was developed in the context of physical objects, should not be construed as license to destroy electronically stored information that may be relevant to a potential claim. Florida courts have not squarely addressed preservation of electronically stored information in the context of anticipated litigation. Further, cases may be brought or removed to federal court, where the duty to preserve exists and sanctions for failing to preserve ESI are available whether or not Florida requirements to preserve are met. On the issue of preservation, like other emerging issues involving ESI, federal precedent may persuade the court to exercise discretion in favor of sanctioning destruction of records. Perhaps most importantly, while Florida law establishes an affirmative duty to preserve evidence when required by statute, contract, or discovery request, it does not follow that the lawyer or client is free to dispose of potentially relevant or discoverable evidence just because a formal duty has not yet arisen by statute, discovery request, or contract. Consider the circumstance of a known potential claim against a client that is likely to be litigated. Would the client be free to dispose of physical evidence or shred documents just because a formal discovery request has not occurred? If a party intentionally alters or destroys relevant evidence in order to thwart justice, the party may face severe sanctions for fraud on the court. *See* Tramel v. Bass, 672 So.2d 78, 85 (Fla.1st DCA 1996)(trial court did not abuse its discretion in striking defendant's answer and defenses and entering default judgment for fraud on the court where defendant altered video evidence even though conduct was not violation of discovery order under Fla. R. Civ. P. 1.380). Further, an attorney who counsels or condones destruction of evidence is subject to sanction that includes disciplinary action against the license to practice law. *See* Fla. R. Prof. Cond. 4-1.2(d)(A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent).

Once a duty to preserve is triggered, the party in possession and control of relevant electronically stored information must take affirmative actions to preserve the information. *See* Eugene Strasser, M.D., P.A. v. Bose Yalamanchi, M.D., *P.A.*, 783 So.2d 1087,1093 (Fla. 4th DCA (2001)(a party has an affirmative responsibility to preserve any items or documents that are the subject of a duly served discovery request); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) ("*Zubulake IV*"). Destroying, converting to an unusable format, or hiding evidence in to the face of a discovery request constitutes a misuse of discovery at a minimum and is potentially a fraud on the court. For the attorney engaging in such conduct, monetary and disciplinary sanctions are available. For the client engaging in or participating in such conduct, there is a full array of potential sanctions depending on the circumstances, from monetary relief to dismissal of claims or defenses.

Ralph

From: Ralph Artigliere [mailto:skywayra@tds.net]
Sent: Tuesday, January 18, 2011 3:56 PM
To: Jeff Fulford
Subject: Re: Spoliation - proposed instructions and issues

Requirement under licensing statutes of hospitals to keep medical records.
Ralph Artigliere
skywayra@tds.net
706-632-6035
706-851-4121

----- Original Message -----
From: Jeff Fulford
To: 'Ralph Artigliere' ; 'Cynthia Sass' ; 'Gary Farmer' ; 'Jacqueline Griffin ' ; 'Jodi @ TFB ' ; 'Lucy Brown ' ; 'Neal Roth ' ; 'Philip Burlington' ; 'Tracy Gunn'
Sent: Tuesday, January 18, 2011 1:33 PM
Subject: RE: Spoliation - proposed instructions and issues

Ralph
That is a good point. I think we were really dealing with the sole situation (initially) of the spoliation following an express or implied agreement to maintain evidence. However, I think the instruction we set out below would also be applicable under your scenarios of a discovery duty to preserve/ or a statutory duty to preserve. We would need to just change the language regarding the origination of the duty.
Jeff
By the way, do you have any specific examples of when a duty to preserve evidence by statute arises? I am blanking on any examples applicable...

From: Ralph Artigliere [mailto:skywayra@tds.net]
Sent: Monday, January 17, 2011 1:22 PM
To: Cynthia Sass; Jeff Fulford; Gary Farmer; Jacqueline Griffin ; Jodi @ TFB ; Lucy Brown ; Neal Roth ; Philip Burlington; Tracy Gunn
Subject: Re: Spoliation - proposed instructions and issues

What about other duties to preserve: when evidence is requested in discovery and when preservation is required by statute?
Ralph Artigliere
skywayra@tds.net
706-632-6035
706-851-4121
----- Original Message -----
From: Cynthia Sass
To: Jeff Fulford ; Gary Farmer ; Jacqueline Griffin ; Jodi @ TFB ; Lucy Brown ; Neal Roth ; Philip Burlington ; Ralph Artigliere ; Tracy Gunn
Sent: Monday, January 17, 2011 12:45 PM
Subject: RE: Spoliation - proposed instructions and issues

I have taken a look at the work that was done by the committee and Jeff – thank you. I am putting my comments in pink below and ask that others give me their comments so that I can finalize a draft before the 31st.

Cynthia N. Sass, Esquire
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From: Jeff Fulford [mailto:jeff@fulfordlaw.com]
Sent: Friday, January 14, 2011 11:31 AM
To: Cynthia Sass; Gary Farmer; Jacqueline Griffin ; Jodi @ TFB ; Lucy Brown ; Neal Roth ; Philip Burlington; Ralph Artigliere; Tracy Gunn
Subject: FW: Spoliation - proposed instructions and issues

Cynthia and subcommittee members:

This is the original email I sent last month on our spoliation project. Cynthia, as chair, you may wish to step in and add to or amend this initial offering of thoughts from me. Any thoughts or input by others on the subcommittee? I note that Jodi requests all materials for the next meeting to be submitted by month's end. Jeff

---

Spoliation committee members:

Please let me start the discussion with the projects we were given to complete, as I understand from notes and minutes of the meeting.

1) Draft an adverse inference instruction where there is a fact question for the jury of destruction or loss of evidence, along with 'notes on use'.

2) Determine whether there can be a factual issue as to whether a party has a duty to preserve evidence (a prerequisite for the instruction we are drafting), such that a preliminary instruction may be needed for the jury on the factual issue of 'duty'.

3) Determine whether a different instruction is needed (and if so prepare a draft), in the case of 3rd party spoliation, when a non-party fails to preserve evidence.

Some general thoughts of mine at the outset:

- Since we are only dealing with adverse inferences (and not presumptions as involved in Valcin and our instruction at 402.4 d), then a note on use may be appropriate to steer users to the use of a Valcin type presumption, if appropriate under the law of that case.
- A note on use is probably appropriate to advise that the trial court is not limited in its discretionary use of sanctions should intentional evidentiary destruction exist (as opposed to negligent conduct).
- In case we want to use a different term, in lieu of infer, then here are some thoughts on synonyms of 'infer' (per Tracy's suggestion and the application of plain English):

Synonym Discussion of *INFER*

Infer, deduce, conclude, judge, gather mean to arrive at a mental conclusion. infer implies arriving at a conclusion by reasoning from evidence; if the evidence is slight, the term comes close to *surmise* <from that remark, I *inferred* that they knew each other>. deduce often adds to infer the special implication of drawing a particular inference from a generalization <denied we could *deduce* anything important from human mortality>. conclude implies arriving at a necessary inference at the end of a chain of reasoning <*concluded* that only the accused could be guilty>. judge stresses a weighing of the

evidence on which a conclusion is based <*judge* people by their actions>. gather suggests an intuitive forming of a conclusion from implications <*gathered* their desire to be alone without a word

Based on this research and the possible use of other synonyms, I still prefer the term 'infer', with 'conclude' coming in a close second; and believe that those words are well within plain English usage. However, I am certainly open to different variations, if desired.

---

1) 1) Draft an adverse inference instruction where there is a fact question for the jury of destruction or loss of evidence, along with 'notes on use'.

This is the full committee's comments/modifications to the initial draft presented to it at the October meeting: I am not sure if we should be giving this instruction – I am currently researching whether it is a jury or judge question if a party had an obligation to preserve. I kinda think it should be a judge question – but I am looking to see what the case law says. If it is a jury question – I suggest the following change. Also do you think we need to have some definition of "control of"

e. Inference from loss, destruction, or failure to preserve evidence.

A party may be obligated to preserve evidence under an express agreement that it will be preserved, or by conduct implying that it will be preserved. If you find that:

a. (name of the party) **[expressly agreed to] [engaged in conduct implying that [he] [she] [it] would] preserve** (describe evidence), **and**

b. (describe evidence) **was [lost] [destroyed] [mutilated] [altered] [or] [concealed], while it was within the control of** (name of party), **and**

c. (describe evidence) **would have been material in deciding the disputed issues in this case,**

then in your discretion you may, but are not required to, infer that this evidence would have been unfavorable to (name of party).

My initial thoughts to the above are as follows:

1- The first sentence should state that 'a party is obligated', instead of 'may be obligated'. We should be stating that there is an affirmative obligation (rather than 'may be an obligation') to preserve evidence IF the following 3 criteria are met. Agreed – others?

2- I favor removing the adjective of 'express' agreement, as I think it may be confusing to the jury. Agreed – others?

3- Do we want to change the word 'material' in sub c, for plain English issues? IF so, would an appropriate substituted words include 'important, essential, vital, significant or decisive'; and still properly convey the same meaning? I vote for significant

4- I added the last sentence of the instruction (below), as it was adopted in the Valcin instruction at 402.4 d (slightly modified), and seemed to make sense. I took out in your discretion – because I think may indicates the jury has the discretion.

Thus a modified version based on my initial preference would read as follows:

e. Inference from loss, destruction, or failure to preserve evidence.

A party is obligated to preserve evidence under an agreement that it will be preserved, or by conduct implying that it will be preserved. If you find that:

a. (name of the party) **[agreed to] [engaged in conduct implying that [he] [she] [it] would] preserve** (describe evidence), **and**

b. (describe evidence) **was [lost] [destroyed] [mutilated] [altered] [or] [concealed], while it was within the control of** (name of party), **and**

c. (describe evidence) **would have been material in deciding the disputed issues in this case,**

then in your discretion you may, but are not required to, infer that this evidence would have been unfavorable to (name of party).

You may consider this inference, together with the other evidence, in determining the issues of the case.

Notes on Use

1) This instruction is applicable for those cases where the court has determined that a party has a legal duty to preserve evidence (e.g. by contract, agreement or conduct), followed by the loss, destruction, alteration or other disposition of material evidence caused by that party.

2) This instruction is not intended to limit the trial court's discretion to impose sanctions against a party for either inadvertent or intentional conduct in the loss, destruction, alteration, or other disposition of evidence material to a case. For example see *Sponco Manufacturing, Inc. v. Alcover*, 656 So. 2nd 629 (Fla. 3rd 1995); and *Nationwide Lift Trucks, Inc v. Smith*, 832 So. 2nd 824 (Fla. 4th DCA 2002).

3) The inference created by this instruction does not rise to the level of a presumption. For cases involving breach of a statutory duty to preserve evidence or application of an evidentiary presumption for lost, destroyed or altered evidence, see *Public Health Trust of Dade County v. Valcin*, 507 So.2nd 596 (Fla. 1987); and 402.4 d., FSJI.

THOUGHTS AND OTHER PROPOSALS??

---

2) Determine whether there can be a factual issue as to whether a party has a duty to preserve evidence (a prerequisite for the instruction we are drafting), such that a preliminary instruction may be needed for the jury on the factual issue of 'duty'.

The question of whether a jury instruction is needed (for a factual issue of whether a **legal duty** to preserve evidence exists in a case) arose in our last meeting.

I have doubts that an instruction is needed on this point. I believe that the court would actually determine the existence of a legal duty by the facts of the case, and then apply the inference jury instruction (above) to the case, if applicable. Also, doesn't the inference instruction itself require the jury to factually determine whether an agreement or conduct existed to preserve evidence, etc. If so, then do we really need to pursue a specific instruction on this point?

If anyone has believes there is a need for this type instruction, then we should definitely discuss this more thoroughly

---

3) Determine whether a different instruction is needed (and if so prepare a draft), in the case of 3rd party spoliation, when a non-party fails to preserve evidence.. If the 1st party did not have any control over the situation, I don't see a need for this instruction – it seems that the only recourse a plaintiff would have is to bring a separate claim against the third party?

I believe this issue was raised by Neal and Phil at the meeting. The minutes indicate that Judges Farmer and Griffin did not believe a separate instruction was needed, but that primarily the negligence instructions would be applicable with a change in the damages sought and allowed.

The question is whether we need to prepare a 3rd party spoliation (set of?) instruction, where a non-party was responsible for the spoliated evidence. I also agree that normal negligence instructions should be applicable and usable, with the understanding that there will probably be a threshold judicial/legal finding of whether the defendant had a duty to preserve the evidence needed in the other, underlying claim.

Tracy, if you or the others have specific thoughts on this project, then they would be appreciated.

Conclusion: I know this is a lengthy email, but we were given multiple tasks to review and work on. I wanted to put forth my ideas as a starting point, knowing there will be many good suggestions and comments for changes.

Best regards
Jeff

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Inference from loss, destruction, or failure to preserve evidence.

If you find that:

a) (name of party) lost, destroyed, mutilated, altered, concealed or otherwise caused the (describe evidence) to be unavailable, while it was within [his] [her] or [its] possession, custody or control; and

b) the (describe evidence) would have been material in deciding the disputed issues in this case;

then you may, but are not required to, infer that this evidence would have been unfavorable to (name of party). You may consider this inference, together with the other evidence, in determining the issues of the case

---

Notes on use:

This instruction is applicable where potentially material evidence appears to have been destroyed, mutilated, altered or concealed resulting in an unfair advantage to one party over the other. It may be used even where the party responsible for the loss had no legal duty to preserve the evidence at issue.

Spoliation is defined as the "destruction, mutilation, alteration or concealment of evidence." *Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 780 (Fla. 4th DCA 2006).

This instruction is not intended to limit the trial court's discretion to impose additional or other sanctions or remedies against a party for either inadvertent or intentional conduct in the loss, destruction, mutilation, alteration, concealment or other disposition of evidence material to a case. For example see: *Jost v Lakeland Regional Medical Center*, 844 So.2d 656 (Fla. 2nd DCA 2003); *Sponco Manufacturing, Inc. v. Alcover*, 656 So.2d 629 (Fla. 3rd DCA 1995); *Nationwide Lift Trucks, Inc v. Smith*, 832 So.2d 824 (Fla. 4th DCA 2002).; *Torres v. Matsushita Electric Corp.*, 762 So.2d 1014 (Fla. 5th DCA 2000); *Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 780 (Fla. 4th DCA 2006); and *American Hospitality Management Company of Minnesota v. Hettiger*, 904 So.2d 547 (Fla. 4th DCA 2005).

The inference created by this instruction does not rise to the level of a presumption. *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987); and 402.4 d., FSJI.

Proposed "*Valcin Presumption*" Instruction

d. Failure to make or maintain records:

A duty to preserve evidence can arise by contract, by statute, or by a properly served discovery request.[1]

The court has determined that (name of defendant) **had a duty to maintain** (describe missing evidence). **The** (name of defendant) **did not [make] [or] [maintain]** (describe missing evidence).[2]

The (name of plaintiff) **has established to the satisfaction of the court that the absence of** (describe missing evidence) **hinders** (plaintiff's) **ability to establish a *prima facie* case.**[3]

Because (name of defendant) **did not [make] [or] [maintain]** (describe the missing evidence) **you should presume that the** (name of defendant) **acted negligently unless** (name of defendant) **proves otherwise by the greater weight of the evidence.**[4]

Rationale/Items for Discussion Relating to Proposed Instruction:

- *Expanded Application Beyond Statutory Duty.*

  While no Florida court has applied the *Valcin Presumption* beyond cases where there is a statutory duty to preserve, a number of courts have contemplated its application so long there is **any** duty to preserve. See e.g., Fini v. Glascoe, 936 So.2d 52 (Fla. 4th DCA 2006) (negligent car alarm installation). The Florida Supreme Court also seems to favor a more expansive approach. Martino v. Wal-Mart Stores, 908 So.2d 342, 347 (Fla. 2005) (in context of non-medical negligence claim, court ruled proper remedy for first-party spoliation "should be the *Valcin Presumption* and sanctions.").

[1] Royal & Sunalliance v. Lauderdale Marine Ctr., 877 So.2d 843, 845 (Fla. 4th DCA 2004).

[2] The determination of whether there is a "duty" is for the judge, not the jury. See Valcin, 507 So.2d at 598-99. The Court adopted the Third DCA's standard regarding a rebuttable-presumption, with one modification: it would only apply where the missing evidence hindered the plaintiff's ability to prove his *prima facie* case. Because the Third DCA held that the *judge* was to make the determination of whether there was a duty, that holding remained unchanged by the Supreme Court's decision.

[3] This language is taken almost verbatim from the Valcin opinion. Id. at 599.

[4] The Supreme Court adopted the Third DCA's standard regarding a rebuttable–presumption, and thus, like the Third DCA opinion, it approved shifting the burden of proof on the ultimate issue of negligence. See Valcin (3rd DCA) at 1306 (where defendant violates its duty to preserve evidence, it "shall have the burden of proving that the treatment ... was performed non-negligently."); Valcin (Supreme Court) at 600-601; see also, Martino, (Supreme Court) (where the loss of evidence hinders a party's ability to establish a *prima facie* case, the *Valcin Presumption* shifts the burden of "**the underlying tort**.")(emphasis added).

- *Did Not Address the "Intent" Issue.*

  We do not propose including any reference to the "intent" issue we discussed (and as is referenced in our memo), as the law in this area is unclear/open for interpretation.

- *Shifts the Burden of Proof*

  The Current "*Valcin Presumption*" Instruction reads as follows:

  Instruction 402.4d

  d. Failure to make or maintain records:

  [Because (defendant) **did not [make] [or] [maintain]** (describe the missing record(s))
  or
  [If you find that a person who was responsible for [making] [or] [maintaining] (describe the missing record(s)) **and failed to do so]**
  you should presume (describe the missing records(s)) **contained evidence of negligence unless** (defendant) **proves otherwise by the greater weight of the evidence. You may consider this presumption, together with the other evidence, in determining whether** (defendant) **was negligent.]**

  This instruction shifts the burden of proof on *the particular piece of missing evidence* but does not appear to shift the burden of proof on the "ultimate issue" as to whether the defendant performed the medical procedure at issue negligently. Instead, it appears that the burden of proof as to the ultimate issue of negligence remains with the plaintiff (and that, if not rebutted, the jury may presume this one missing document contains evidence of negligence, but that this missing document is only one factor the jury can consider together with all the evidence).

  Our reading of Valcin is that the Court intended to shift the burden of proof on the ultimate issue of negligence, not just the particular piece of evidence. See id. at 600-601. In Martino, the Supreme Court clarified that this was its intention. See page 346 of that opinion, wherein the Court states that the *Valcin Presumption* shifts the burden of "**the underlying tort.**"

MEMORANDUM

To: **SJI Committee**
Judge Barton

From: **Elizabeth Russo**
Chair, Negligence Subcommittee

Date: **February 20, 2012**

Re: **Report for Meeting of March 8-9, 2012**

This memorandum is submitted to report on assignments given to the Negligence Sub-Committee at the last meeting in October of 2011.

Assignment # 1 - Consider deletion of the word "substantially" from the legal cause instructions - 401.12 (a),(b), and (c)

The Subcommittee was asked to review a 10.12.11 e-mail from Michele Rennert, Esquire - forwarded by Marvin Weinstein, Esquire with an inquiry as to whether the word "substantially" should be deleted from the legal cause instructions - 401.12 (a),(b), and (c). For ease of reference, the instruction is reproduced below, with "substantially" in bold.

a. Legal cause generally:

Negligence is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes **substantially** to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the negligence, the [loss] [injury] [or] [damage] would not have occurred.

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] negligence need not be the only cause. Negligence may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the negligence contributes **substantially** to producing such [loss] [injury] [or] [damage].

c. Intervening cause:

Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring

APPENDIX D – PART 3

cause:*

*[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], negligence need not be its only cause.] Negligence may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the negligence occurs if [such other cause was itself reasonably foreseeable and the negligence contributes **substantially** to producing such [loss] [injury] [or] [damage]] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the negligence and the negligence contributes substantially to producing it].

Ms. Rennert suggested that having the word "substantially" in the legal cause instructions conflicts with the legal reasoning set out in *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993). The concern seemed to be over whether multiple participants' fault can each "contribute substantially" to producing loss, injury, or damage, such that jury confusion might be engendered by the meaning of "substantially" in that context.

After discussion, the Subcommittee's recommendation is that the word "substantially" be retained in the legal cause instructions. The thinking was that the word serves a legitimate purpose, the origin of its inclusion having been to distinguish between proximate and remote causes. The Subcommittee noted that the instructions are of long standing, both pre and post *Fabre*, with no apparent jury confusion.

Subcommittee's Recommendation re Assignment #1- Do not delete "substantially" from legal cause instructions.

* * *

Assignment #2. - Revise *Valcin* instruction

The Subcommittee's second assignment was to review the discussions about drafting a *Valcin* instruction from our last meeting. Cynthia Sass had submitted a draft, which was the subject of various comments during the meeting, and Judge Barton had asked that she prepare another draft. Cynthia had not had the time to do so, and the undersigned's best intentions to prepare a draft have not come to fruition as of the time of submitting this report. Undersigned will try to have something for circulation at the March 8-9, 2012 meeting.

The rough draft of a *Valcin* Instruction that had resulted from discussions during the last meeting, as reflected in the Minutes, was:

Proposed "*Valcin* Presumption" Instruction

d. Failure to make or maintain records:

The court has determined that (name of party) **had a duty to maintain** (describe missing evidence). **The** (name of party) **did not [make] [or] [maintain]** (describe missing evidence).[1]

Because (name of party) **did not [make] [or] [maintain]** (describe the missing evidence) **you should presume that the** (name of defendant) **acted negligently in** (describe tortious conduct). **That means you should find** (name of party) **acted negligently unless** (name of party) **proves otherwise by the greater weight of the evidence.**[2]

[1] The determination of whether there is a "duty" is for the judge, not the jury. *See Valcin*, 507 So. 2d at 598-99. The Court adopted the Third DCA's standard regarding a rebuttable-presumption, with one modification: it would only apply where the missing evidence hindered the plaintiff's ability to prove his *prima facie* case. Because the Third DCA held that the *judge* was to make the determination of whether there was a duty, that holding remained unchanged by the Supreme Court's decision.

[2] The Supreme Court adopted the Third DCA's standard regarding a rebuttable presumption, and thus, like the Third DCA opinion, it approved shifting the burden of proof on the ultimate issue of negligence. *See Valcin* (3rd DCA) at 1306 (where defendant violates its duty to preserve evidence, it "shall have the burden of proving that the treatment ... was performed non-negligently."); Valcin (Supreme Court) at 600-601; *see also, Martino*, (Supreme Court) (where the loss of evidence hinders a party's ability to establish a *prima facie* case, the *Valcin Presumption* shifts the burden of "**the underlying tort.**")(emphasis added).

* * *

Assignment #3 - Review Ch. 2011-215, Laws of Florida

Ch. 2011-215, Laws of Florida is the amendment to the comparative fault statute, §768.81(3), Fla. Stat., that abolishes joint and several liability. The Subcommittee was asked to review the amendment to see whether it creates the need for changes to the jury instructions.

Preliminary discussions did not result in any recommendations from the Subcommittee at this time. It was noted, however, that there are existing jury instructions that explain the pertinent concepts to the jury that may or may not just need changes in the titles, or additional titles if they are to be included elsewhere in the instructions. A number of them appear in 412 Contribution Among Tortfeasors. The below is an example, but there are a number of places in the 412 instructions that refer to the need for the jury to determine each defendant's percentage of the "total negligence."

412.1 CONTRIBUTION SOUGHT BY CROSS-CLAIMS BETWEEN DEFENDANT TORTFEASORS IN INJURED PARTY'S ORIGINAL ACTION

This instruction should follow 506.10, Joint Liability of Joint Tortfeasors.
[Note to the F. & O Subcommittee - this appears to be the wrong number - 501.9 (personal injury) and SJI 502.8 (wrongful death) are the current Joint Liability of Joint Tortfeasors instructions]

Even though any damages you award (claimant) must be found in a single amount against the defendant or defendants whom you find to be liable to (claimant), if the greater weight of the evidence shows that more than one defendant was negligent and that their negligence contributed as a legal cause of injury and damage to (claimant), you should determine by your verdict what percentage of the total negligence of [both] [all] defendants (name them) was caused by each.

NOTE ON USE FOR 412.1

Model Instruction No. 6 illustrates the use of this instruction.

Also pertinent are the JOINT LIABILITY OF JOINT TORTFEASORS instructions - SJI 501.9 (personal injury) and SJI 502.8 (wrongful death).

501.9 JOINT LIABILITY OF JOINT TORTFEASORS

a. Comparative negligence cases (special verdicts):

Even if you decide that [both] [more than one] of the defendant[s] were negligent, you should determine [(claimant's)]

[each claimant's] damages in a single total amount, and write that amount, in dollars, on the verdict form.

b. Cases not requiring special verdicts:

If you find for (claimant) against [both] [more than one] of the defendant[s], you should assess (claimant's) damages in a single amount against [both defendants] [the defendants whom you find to be liable to (claimant)].

502.8 JOINT LIABILITY OF JOINT TORTFEASORS

a. Comparative negligence cases (special verdicts):

Even if you decide that [both] [more than one] of the defendant[s] were negligent, you should determine [(claimant's)] [each claimant's] damages in a single total amount, and write that amount, in dollars, on the verdict form.

b. Cases not requiring special verdicts:

If you find for (claimant) against [both] [more than one] of the defendant[s], you should assess (claimant's) damages in a single amount against [both defendants] [the defendants whom you find to be liable to (claimant)].

The Subcommittee discussed whether we would not at least have to amend the titles of 501.9 and 502.8. Undersigned believes the change is needed because there is no more joint liability. Louis Rosenbloum disagreed, and sent the following comments by e-mail after the Subcommittee's telephone conference:

> I want to follow up on the question whether we should amend the titles to 501.9 ("Joint Liability of Joint Tortfeasors") and 502.8 (same) in light of the abolition of joint and several liability.
>
> Section 768.81(3) provides: "In a negligence action, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability." (emphasis supplied). I suggested during today's conference call that "joint liability" and "joint and several liability" are not the same thing. The definitions from Black's quoted below support my position:

> Joint and several liability. (1819) Liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. • Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties. See solidary liability. [Cases: Contracts 181; Negligence 484; Torts 135.] Joint liability. (18c) Liability shared by two or more parties. [Cases: Negligence 484; Torts 135.]

Based on these definitions, the term "joint liability" used in the titles to 501.9 and 502.8 are still accurate notwithstanding the abolition of joint and several liability.

Louis

* * *

Assignment #4 - Review E & O revisions to 501.1 and 502.1

As Rebecca Mercier-Vargas brought up at the last meeting in October of 2011, the E & O Subcommittee had discovered a wording problem with 501.1 and 501.2, the introductions to the personal injury and wrongful death damages instructions. Rebecca noted that, due to a cutting and pasting error, the personal injury instruction 501.1c includes some incorrect language that was inadvertently copied wrongful death instruction 502.1c.

The E & O Subcommittee had been good enough to devise two options to remedy the problem, and the Negligence Subcommittee was asked to review the options and decide how the problem should be resolved.

Negligence Subcommittee's Recommendation as to Assignment #4 - Adopt Option #1 proposed in the in July 2011 Errors and Omissions Subcommittee Report. Option # 1 showing the proposed changes is set out below.

Memorandum

TO: PROFESSIONAL MALPRACTICE SUBCOMMITTEE OF THE STANDARD CIVIL JURY INSTRUCTION COMMITTEE

FROM: NEAL A. ROTH, ESQ.

DATE: FEBRUARY 16, 2012

This memo summarizes our discussion from our conference call a couple of weeks ago. There were five items on our agenda and I will set forth now what we decided to do about the various issues which had been raised. If you think I got anything wrong, please let me know.

1. There is an inquiry from Michael Kotler regarding an apparent conflict between the Florida Standard Jury Instructions on damages and the Florida statute which concerns itself with periodic payment of damage awards. The specific issue relates to the instruction requiring future economic damages being reduced to present money value. After discussion, it was decided that this should be taken up by the whole committee for discussion.

2. Jeffrey Fenster had written a letter regarding the standard jury instructions on professional negligence and informed consent. It was clear that Jeff did not understand that what had been published related to corrections that were made and not to the substantive instruction itself. I personally talked with Jeff Fenster and explained what was going on and he appreciated the call, but still believes that as worded the instruction is not correct.

3. Emergency room standard of care – As we concluded our discussion, we agreed that at a minimum we would need to publish some alert to the lawyers and judges that the current instruction does not accurately set forth the current law on the emergency room standard of care. We also would consider in that publication alerting everyone to the Third District decision which clearly suggests that the Good Samaritan statute should be raised as an affirmative defense and that it is the burden of proof of the defendant to establish each element of the defense. In the interim, I have asked David Sales to see if he could come up with an instruction based on the current law. In a separate e-mail, I will send his draft and we can discuss this during our conference call on Tuesday, February 21st.

4. There was an inquiry regarding §768.118 which relates to the caps on non-economic damages in medical malpractice cases. We agreed that we would table any work on this matter because the Florida Supreme court was going to hear oral argument, which it did, on the caps on February 9, 2012.

5. John Williams had sent an e-mail to Judge Barton which was included in our materials regarding jury instruction 402.4 and raised the issue that the instruction appeared to be in conflict with the case of *Auster v. Strax Breast Cancer Institute*, 649 So.2d 883. Although there was discussion on this matter, no one had read the case. I then suggested that everybody read the case and that we discuss it in advance of the March meeting. This will be included on the agenda for Tuesday's call.

Memorandum

TO: PROFESSIONAL MALPRACTICE SUBCOMMITTEE OF THE STANDARD CIVIL JURY INSTRUCTION COMMITTEE

FROM: NAR

DATE: FEBRUARY 27, 2012

This brief memo summarizes a follow-up discussion which took place among some of the members of this committee on February 21, 2012. There were principally two outstanding issues of concern which were discussed and they are as follows:

1. Emergency Room Standard of Care: We reviewed the draft of the proposed instruction done by David Sales and concluded that while it was a noble attempt we still do not feel comfortable with the language because of the inherent difficulties in the statute itself. Accordingly, we are back to our recommendation which is in Paragraph 3 of my memo of February 16, 2012 which has three parts and they are as follows:

a) We simply have been unable to come up with a plain language instruction based on the inherent difficulty with this statute.

b) A notice should be sent out alerting the bench and bar that the current instruction does not comport with current law.

c) This report should indicate that when this statute is invoked it is an affirmative defense and the burden of proof is on the defendant who raises this defense.

Perhaps the court itself will try to come up with an instruction.

2. We looked carefully at the case of *Auster v. Strax Breast Cancer Institute*, 649 So.2d 883 in combination with Standard Jury Instruction 402.4 and §766.102 of the Florida Statutes. We believe that this issue is appropriate for discussion among the general committee because there does appear to be a conflict between the case law and the instruction. Moreover, subpart (b) of that instruction does not seem to be an accurate statement of the law.

It was suggested that we can contact some of the members who are involved with the drafting of this instruction and accordingly before the next meeting we intend to have some of those discussions.

"Barton, James"
<BARTONJM@fljud13.org>
10/05/2011 11:51 AM

To Michael Kotler <mkotler@sgczklaw.com>
cc "jjenning@flabar.org" <jjenning@flabar.org>, "jkolm@sgczklaw.com" <jkolm@sgczklaw.com>
bcc
Subject RE: Question Regarding Jury Verdict/Medical Malpractice

Our Civil Jury Instruction Committee meets later this month. I will have the issue you raise added to our agenda and will let you know the result of our discussion. Thanks for bring this matter to our attention.

From: Michael Kotler [mkotler@sgczklaw.com]
Sent: Sunday, October 02, 2011 12:07 PM
To: Barton, James
Cc: jjenning@flabar.org; jkolm@sgczklaw.com
Subject: Question Regarding Jury Verdict/Medical Malpractice

Dear Judge Barton; I noticed that you are chairing the committee on proposed changes to jury instructions in civil cases. I am involved in a medical malpractice/death case that is coming up for trial in November. In preparing our verdict form, I noticed what I thought may be a discrepancy between the standard jury instructions, the verdict form and Florida Statute §768.77(2)(a)(2) as it relates to whether economic damages are shown on the verdict form in present value dollars or future value dollars. I have inquired of several other sources (attorneys and economists) but I have been unable to get a good answer. In short, Standard Jury Instructions 502.2, 502.3, 502.6 and 502.7 when taken together seem to indicate that all elements of economic loss shall be reduced to present value. Florida Statute §768.77 provides that in a wrongful death action, damages shall be itemized on the verdict form including "future economic losses, not reduced to present value, and the number of years or part thereof for which the award is intended to cover."
Fla. Stat.§768.77(2)(a)(2). I apologize for asking this question of you, however I not only want to get the issue right for my trial, but if there really is a conflict (and not just my misunderstanding the issue), it may be an issue that should be taken up by your committee.

Thank you for your consideration and assistance with this matter. I am sure that you are busy with many other things, but I thought you might be the right source from whom to get the correct answer about this issue.

Sincerely,
Michael I. Kotler
Schwartz, Gold, Cohen, Zakarin and Kotler, P.A.
54 SW Boca Raton Boulevard
Boca Raton, Florida 33432
561-361-9600
561-361-9770 (Facsimile)
www.sgczklaw.com

Negligence Subcommittee Report for Meeting of July 12-13, 2012

Elizabeth Russo to: Barton, James 06/18/2012 03:54 PM

Cc: "Alan Wagner", "Bruce Jacobus", "Charles Ingram", "Cynthia Sass", "Dedee Costello", "Edward LaRose", "Jeffrey Fulford", "Jennifer Bailey", "Jodi Jennings", "John Kest", "Joseph Amos", "Karen

2 attachments

501.5c with note on use revised 5-29-12.doc 3-22-12 Wagner to Barton re 401.2(b) vs. 501.5 Notes on Use.pdf

Dear Judge Barton –

The Negligence Sub-Committee had three assignments from the last meeting, as to which the following report is submitted.

(1) Stuart v Hertz Instruction – We were to consider whether any changes were necessary to the proposed 'Stuart v Hertz' instruction that was published in the Florida Bar News on October 1, 2011 in light of recent additional decisions. It was decided by the majority of the Sub-Committee that the proposed instruction needed no further revisions, but that the Sub-Committee would recommend adding citations to the recent case law to the Note on Use – as reflected on the attached draft that Louis Rosenbloum was kind enough to prepare. For whatever it means, Karen Barnett and the undersigned dissent, and believe that the Note on Use should refer to Stuart v Hertz only as the rest of the cited cases (a) address situations other than that for which Stuart v Hertz was intended; and (b) are known to be put to the improper use of precluding defense evidence that medical treatment selected by a plaintiff and/or 'treating' physicians was unnecessary and was undertaken/prescribed solely for secondary gain purposes.

(2) December 13, 2011 facsimile from Jeff Fulford to Judge Barton positing the need for an additional premises liability instruction to cover the duty to exercise reasonable care to reduce, minimize, or eliminate foreseeable risks before they manifest as a dangerous condition on premises.

Louis Rosenbloum recalled discussing this topic and the case that prompted Jeff's inquiry - Asher v. Wal-Mart Stores, Inc., 39 So. 3d 484 (Fla, 3d DCA 2010 - at a prior meeting. Jodi Jennings checked and determined that the topic was discussed at the February 2011 meeting. Lake Lytal accordingly sent the following e-mail to Jeff Fulford:

> May 29, 2012 E-mail from Lake Lytal to Jeff Fulford re his inquiry as to changing the premises liability instruction
>
> A sub committee took up your suggestion regarding a need for a change in the premises liability jury instruction based on the mode operation theory today. Louis Rosenbloum mentioned that the Asher decision was discussed at the last meeting and it was decided that the current instruction is sufficient as it mentions liability can be based on a failure to maintain the premises. I missed the last meeting but the minutes do confirm Louis' comment. We have another telephone conference scheduled for 6/5. I am sure the

subcommittee would welcome any comments you may have if you disagree with the decision of the full committee. Liz Russo is the chair of the subcommittee and can be reached at Liz@russoappeals.com.

I have not heard anything further from Jeff Fulford, and the Sub-Committee accordingly believes that this matter as been adequately addressed.

(3) March 22, 2012 letter from Alan Wagner to Judge Barton concerning what he sees as a mistake in the Notes on Use to 401.12b and 501.5a (copy attached).

To consider his issue, the materials needed are Instructions 401.12b and 501.5a and their Notes on Use, which are included below with the pertinent portions highlighted.

Bottom line, Alan thinks that the highlighted portion of the 501.5(a) Note on Use should be changed to: "Where instruction 501.5(a) is given, instruction 401.12(b) is necessary."

Lake Lytal suggested that in light of the Note on Use to Instruction 401.12b highlighted below, we could instead simply eliminate the portion of the current 501.5(a) Note on Use highlighted below.

The consensus was that the change suggested by Alan Wagner to the wording of the 501.5(a) Note on Use should be implemented.

In the course of considering this issue, Lake Lytal developed a larger concern over the wording of 501.5(a) and its Note on Use, which he will present to the full Committee when he has formulated a proposal to address his concern.

****

This concludes our report. We look forward to seeing you at the meeting.

Respectfully,

Liz Russo

401.12 LEGAL CAUSE

b. Concurring cause:

In order to be regarded as a legal cause of [loss] [injury] [or] [damage] negligence need not be the only cause. Negligence may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] if the negligence contributes substantially to producing such [loss] [injury] [or] [damage].

NOTES ON USE FOR 401.12

1. Instruction 401.12a (legal cause generally) is to be given in all cases. Instruction 401.12b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her negligence by reason of some other cause concurring in time and contributing to the same damage. Instruction 401.12c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider instruction 401.12a not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 401.12b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries/multiple events, instructions 501.5a or 501.5b should be given as well. See Hart v. Stern, 824 So. 2d 927, 932–34 (Fla. 5th DCA 2002); Marinelli v. Grace, 608 So.2d 833, 835 (Fla. 4th DCA 1992).

* * *

501.5 OTHER CONTRIBUTING CAUSES OF DAMAGES

a. Aggravation or activation of disease or defect:

If you find that the (defendant(s)) caused a bodily injury, and that the injury resulted in [an aggravation of an existing disease or physical defect] [or] [activation of a latent disease or physical defect], you should attempt to decide what portion of (claimant's) condition resulted from the [aggravation] [or] [activation]. If you can make that determination, then you should award only those damages resulting from the [aggravation] [or] [activation]. However, if you cannot make that determination, or if it cannot be said that the condition would have existed apart from the injury, then you should award damages for the entire condition suffered by (claimant).

NOTE ON USE FOR 501.5a

This instruction is intended for use in situations in which a preexisting physical condition is aggravated by the injury, or the injury activates a latent condition. See C. F. Hamblen, Inc. v. Owens, 172 So. 694 (Fla. 1937). Instruction 501.5a is necessary where Instruction 401.12b, Concurring cause, is given. See Hart v. Stern, 824 So.2d 927, 932–34 (Fla. 5th DCA 2002); Auster v. Gertrude & Philip Strax Breast Cancer Detection Institute, Inc., 649 So.2d 883, 887 (Fla. 4th DCA 1995).

501.5 OTHER CONTRIBUTING CAUSES OF DAMAGES

[version published in the Florida Bar News October 1, 2011]

[underlined text added after 5/29/12 subcommittee conference call]

* * *

c. Subsequent injuries caused by medical treatment:

If you find that (defendant(s)) caused [loss] [injury] [or] [damage] to (claimant), then (defendant(s)) [is] [are] also responsible for any additional [loss] [injury] [or] [damage] caused by medical care or treatment reasonably obtained by (claimant).

NOTE ON USE FOR 501.5c

This instruction is intended for use in cases involving additional injury caused by subsequent medical treatment. See, *e.g.*, *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977); *Pedro v. Baber*, 83 So.3d 912 (Fla. 2d DCA 2012); *Tucker v. Korpita*, 77 So.3d 716, 720 (Fla. 4th DCA 2011); *Nason v. Shafranski*, 33 So.3d 117 (Fla. 4th DCA 2010); *Dungan v. Ford*, 632 So.2d 159 (Fla. 1st DCA 1994).

March 22, 2012

By *Hand Delivery*

Honorable James M. Barton, II
George Edgecomb Courthouse
800 E. Twiggs Street, Room 512
Tampa, FL 33602

RE: *Civil Jury Instructions* 401.2(*b*) *vs.* 501.5: *Notes on Use*

Dear Judge Barton:

I am writing because of an issue that recently arose in a case that Kevin McLaughlin and I are preparing for trial. Our case involves an issue where a woman with osteoporosis was injured in a boating accident that produced a T-12 burst fracture. The proof is clear that if she did not have osteoporosis, there would have been no injury – your so-called "eggshell-skull plaintiff." Likewise, the evidence is clear that she had osteoporosis both before and after the accident and that her osteoporosis was not activated or aggravated by the accident itself.

Certainly, Jury Charge 401.2(b) (Concurring Cause) applies to our case. That charge instructs a jury on the issue of concurring cause, namely, that negligence need not be the only cause to be regarded as a legal cause of injury. Negligence may be a legal cause of injury, even though it operates in combination with some natural cause (i.e., a pre-existing osteoporotic condition), if the negligence contributes substantially to producing such injury. The Note on Use 3 states, I believe accurately, that if there is an issue of aggravation of a pre-existing condition or of subsequent injuries/multiple events, Instruction 501.5(a) or 501.5(b) should be given.

Jury Instruction 501.5 (Other Contributing Causes of Damages) which is given for aggravation or activation of a disease does not apply to our case. By its terms, the instruction applies when there has been an aggravation of an existing disease or an activation of a latent disease or physical defect. Neither is present in my case, and all the doctors have so testified.

www.WagnerLaw.com
601 Bayshore Blvd., Suite 910 • Tampa, Florida 33606 • P 813.225.4000 • F 813.225.4010
Bill Wagner • Roger Vaughan • John McLaughlin • Alan Wagner • Kevin McLaughlin • Michael McLaughlin • Jason Whittemore

The Note on Use for 501.5(a), though, is at odds with Note on Use 3 for 401.12. The Note on Use for 501.5(a) states that the instruction is necessary where Instruction 401.12(b), Concurring Cause, is given. That cannot be accurate, especially when the negligence has contributed substantially to producing the injury but there is, in fact, no aggravation and no activation of a disease or physical defect. In addition, the cited cases do not support the proposition stated and, in fact, stand for the opposite proposition.

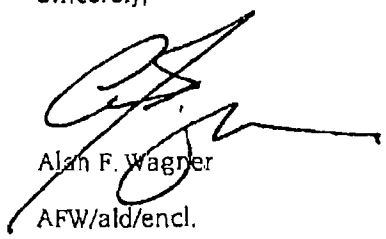
It is not that 401.2(b) requires 501.5(a); rather, the aggravation instruction requires the concurring cause instruction. Hart v. Stern, 824 So.2d 927, 933-4 (Fla. 5th DCA 2002) (plaintiff "argues that when the aggravation instruction is required ... the concurring cause instruction should also be given." The plaintiff "is correct."). Marinelli v. Grace, 608 So.2d 833 (Fla. 4th DCA 1992) ("the instruction on assessing damages, standing alone, is patently insufficient protection against the risk of confusion arising by a failure to give the concurring causation instruction."). Both cases are referenced in the Notes on Use.

In my judgment, the Note on Use for Instruction 501.5(a) is inaccurate. I think we got it backwards, in fact. I would suggest that it be altered to read as follows:

> Where instruction 501.5(a) is given, instruction 401.12(b), Concurring Cause, is necessary.

I wish I could say I was not a "legal cause" of the troublesome note problem here, but I was there when this one headed out the door and to the Court. Undoubtedly, I was a "substantial contributing cause." Oops!

Sincerely,



Alan F. Wagner

AFW/ald/encl.

P.S. I today noticed that the jury instruction book and the instructions online contain an error for Instruction 501.1 (Personal Injury and Property Damage). The online instruction contains a subparagraph "c" which was not part of the submission to the Court or its approved instruction. It seems to have been erroneously reproduced from Instruction 502.1.

301.11 FAILURE TO MAINTAIN EVIDENCE OR KEEP A RECORD

The court has determined that (name of party) **had a duty to [maintain** (describe missing evidence)] **[keep a record of** (describe subject matter as to which party had record keeping duty)]. **The** (name of party) **did not [maintain** (describe missing evidence)] **[or] [keep a record of** (describe subject matter as to which party had record keeping duty)].

The (name of party invoking presumption) **has established to the satisfaction of the court that the absence of** (describe missing evidence) **hinders** (name of invoking party's) **ability to establish [his] [her]**(describe applicable claim or defense).

Because (name of party) **did not [maintain** (describe missing evidence)] **[or] [keep a record of** (describe subject matter as to which party had a record keeping duty)], **you should find that** (name of invoking party) **established [his] [her]** (describe applicable claim or defense)] **unless** (name of party) **proves otherwise by the greater weight of the evidence.**

NOTE ON USE FOR 301.11

This instruction applies only where the Court has determined that there was a duty to maintain or preserve the missing evidence at issue.

Memorandum

TO: JOSEPH LANG, LAKE LYTAL, AND DAVID SALES

FROM: NEAL A. ROTH, ESQ.

RE: PROFESSIONAL NEGLIGENCE SUBCOMMITTEE

DATE: JUNE 11, 2012

Gentlemen, thank you for taking the time to participate in today's call. This memo will summarize our recommendations with respect to the outstanding issues which are reflected in the minutes from our last meeting:

1. Insofar as Larry Stewart's letter is concerned in which he points out that certain notes on use were deleted on the instructions relating to professional negligence, it is the suggestion of the Professional Negligence Subcommittee that these notes on use not be reincorporated into the Standard Jury Instructions. It is felt that it would be a rare circumstance where a party would request either of the instructions outlined in Larry's letter.

2. The subcommittee considered once again the issue of Florida Statute §768.13 relating to immunity with respect to emergency care. There are two proposed notes which the Subcommittee would like the full committee to consider and they are as follows:

a. This statute was amended in 2003 and the following instructions should be used only in cases which the statute, prior to the amendments, apply. The Standard Jury Instruction Committee has considered the statute as amended over a considerable length of time. The Committee has concluded that it cannot draft a plain English instruction pertaining to §768.13(2)(b)(3) without interpreting legislative intent and conflicting with recognize principles of tort laws adopted by Florida courts. The Committee will again consider an appropriate instruction for the statute once guidance is available from decisions of the Florida appellate courts.

The alternative note would read as follows:

a. Florida Statute §768.13(b)(3) was amended in 2003. The Committee has attempted to write a plain English instruction which would

represent a correct statement of the law. It cannot do so without rendering an interpretation of legislative intent which is beyond the purview of the Committee.

Additionally, inasmuch as the Third District issued an opinion in *Public Health Trust of Miami-Dade County v. Rolle* (36 Fla.L.Weekly D2139), it is the view of the Subcommittee that an additional note should be included in the instructions. It would read as follows:

> Pursuant to *Public Health Trust of Miami-Dade County v. Rolle,* (36 Fla.L.Weekly D2139), the immunity provided for in §768.13(b)(3) must be pled as an affirmative defense and the burden of proof rests with the defendants to establish every element of the defense.

3. The Subcommittee also considered the issue of the standard jury instruction relating to reduction of damages to present money value and as it relates to §768.77. The Subcommittee recommends the following note:

a. It is noted that this instruction may conflict with §768.77(2)(a)(2), Fla. Stat., in medical malpractice cases where a party has requested that future damages be paid by periodic payments. No standard instruction or statute has been adopted as this statute is seldom used.

We believe that we have appropriately covered the outstanding issues which were discussed at the last full committee meeting as well as the additional matter of Larry Stewart's letter to Judge Barton.

If anyone has any additional thoughts or questions, please let me know and I will share them with the rest of the Subcommittee.