Spoliation, or destruction of evidence, has been performed on evidence of all types — paper records, electronic records, hard drives, and mechanical devices. Spoliation can be negligent, intentional, or in bad faith, and can be committed by plaintiffs, defendants, or third parties such as governmental entities or insurance companies. The remedy for spoliation can be various sanctions, adverse inferences, rebuttable presumptions, or tort damages. The duty to preserve evidence flouted by the spoliator can arise from a court order, a discovery request, a statute or administrative regulation, a contract, and perhaps common law. This article discusses the most recent and most dramatic change in Florida spoliation law.

On July 7, 2005, in the case of Martino v. Wal-Mart Stores, Inc., 908 So. 2d 342 (Fla. 2005), the Florida Supreme Court reversed two decades of Florida precedent by holding there is no longer a “first-party” tort cause of action for spoliation of evidence. The rationale of the Florida Supreme Court was that sanctions, an adverse inference, and a rebuttable presumption of negligence were sufficient to remedy past and deter future spoliation by defendants. This article examines the Martino decision, what Martino did and did not do, and the ramifications of the decision for the Florida practitioner in Florida’s state and federal courts.

Third District Creates New Florida Spoliation Tort and the Spoliation Presumption in Two Different Opinions

Spoliation of evidence burst onto Florida’s legal landscape in 1984 as an independent tort claim with the Third District Court of Appeal’s opinion of Bondu v. Gurvich, 473 So. 2d 1307 (Fla. 3d DCA 1984), disapproved of by Martino v. Wal-Mart Stores, Inc., 908 So. 2d 342 (Fla. 2005). In Bondu, the Third District Court of Appeal relied on two California cases which had recognized the “third-party” tort of spoliation of evidence, occurring when evidence was destroyed by a third party, and not a party to the underlying lawsuit. The Third District expanded those California cases to create Florida’s negligent spoliation tort in the “first-party” context. The Third District reasoned that

[i]f ... an action for failure to preserve evidence or destruction of evidence lies against a party who has no connection to the lost prospective litigation, then, a fortiori, an action should lie against a defendant which, as here, stands to benefit by the fact that the prospect of successful litigation against it has disappeared along with the crucial evidence.

The Florida Supreme Court did not review Bondu. On the same day the Third District decided Bondu, it also decided Valcin v. Public Health Trust, 473 So. 2d 1297 (Fla. 3d DCA 1984), quashed in part and aff’d in part, 507 So. 2d 596 (Fla. 1987). The Third District in Valcin did not address tort remedies for spoliation as it did in Bondu. Instead, the Third District in Valcin applied evidentiary presumptions to remedy alleged spoliation, holding that if the finder of fact found the defendant’s spoliation to have been merely negligent, then a rebuttable presumption of negligence applied. If the spoliation were found to be intentional, then an irrebuttable presumption of negligence arose.

Upon review of Valcin, the Florida Supreme Court approved of the Third District’s rebuttable presumption of negligence when faced with negligent spoliation, with some clarifications. However, the Florida Supreme Court in Valcin quashed the Third District’s irrebuttable presumption to remedy intentional spoliation, holding that an irrebuttable presumption would violate due process and short circuit the jury’s role unnecessarily. Instead, the Valcin court held that an adverse inference and sanctions under Florida Rule of Civil Procedure 1.380(b)(2) were available for intentional spoliation, and that a rebuttable presum-
tion of negligence was available for negligent spoliation by defendants. The Third District followed Bondu with Continental Ins. Co. v. Herman, 576 So. 2d 313 (Fla. 3d DCA 1990), in which it identified the six elements of a negligent spoliation tort claim: 1) Existence of a potential civil action; 2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; 3) destruction of that evidence; 4) significant impairment in the ability to prove the lawsuit; 5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and 6) damages. Other Florida district courts of appeal followed Bondu and Herman, particularly the Fourth District Court of Appeal.10

Second and Fourth Districts Disagree with Third District

The tide began to turn on January 29, 2003, with the Fourth District Court of Appeal’s reversal of positions on the existence of the spoliation tort in Martino v. Wal-Mart Stores, Inc., 835 So. 2d 1251 (Fla. 4th DCA 2003), approved, 908 So. 2d 342 (Fla. 2005). The Fourth District held that, “[d]espite 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.”11 The Fourth District in Martino noted that the California Supreme Court itself decided in 1998 to renounce the lower California court’s recognition of the intentional tort of spoliation in the first-party context (upon which Bondu had relied).12 The Fourth District found persuasive the California Supreme Court’s reasoning that the existence of “the adverse inferences and the myriad of other available sanctions adequately remedy the wrong suffered by the plaintiff as the result of the loss of the evidence,” as well as the California high court’s concerns about the various pitfalls of the tort. The Fourth District pointed out that the Florida rules governing attorneys prohibit tampering with evidence, and noted that any number of sanctions are available to the wronged plaintiff, including adverse inferences and presumptions.13 The Fourth District certified conflict with the Third District’s Bondu opinion.

Not quite two months later, on March 12, 2003, in Jost v. Lakeland Regional Medical Center, Inc., 844 So. 2d 656 (Fla. 2d DCA 2003), rev. dism., 888 So. 2d 622 (Fla. 2004), the Second District Court of Appeal “aligned” itself with the Fourth District’s Martino opinion and renounced the tort of spoliation when it is the defendant in the underlying action who is accused of spoliating.14

Florida Supreme Court Sides with the Fourth District

The Florida Supreme Court granted review of Martino and Jost, and consolidated the cases for purposes of oral argument, which it heard on April 6, 2004.15 The Jost case settled after oral argument, and the appeal was dismissed.16 But 15 months after oral argument, the Florida Supreme Court approved the Fourth District’s holding in Martino and held that there was no longer a tort cause of action for first-party spoliation in Florida. Thus, 20 years after Bondu established spoliation tort damages in the first-party context, the Florida Supreme Court disapproved of Bondu and held that Valcin’s rule-based and evidentiary-based methods of handling intentional and negligent spoliation were the preferable way to handle spoliation by “first-party” defendants.17

Martino Analyzed Under Four Different Rubrics

Conceptually, spoliation can rear its head in a myriad of factual circumstances. Therefore, for the purposes of fully explaining the Martino decision, it is necessary to analyze spoliation in a “big picture” way. Accordingly, spoliation needs to be analyzed under four interrelated axes or rubrics: Remedy (sanctions or tort damages); identity (plaintiff, defendant or third-party spoliator); culpability (intentional, negligent, or bad faith); and duty (is one required for a remedy, and if so, what is the source of the duty?). The Martino decision affects all of these aspects of Florida spoliation law in some manner, directly or indirectly.

• Remedy — There are basically two types of remedies for spoliation — sanctions or tort damages. As for sanctions, in addition to remedies available pursuant to Florida Rule of Civil Procedure 1.380, “chief among these sanctions are the adverse evidentiary inferences and adverse presumptions.” In fact, the concept of spoliation began as an evidentiary presumption to punish a defendant for disposal or concealment of evidence.20 While it destroyed the first-party spoliation tort, the Florida Supreme Court’s Martino decision reaffirmed its earlier decision in Valcin v. Public Health Trust, 507 So. 2d 596 (Fla. 1987), holding that sanctions under Rule 1.380(b)(2) of the Florida Rules of Civil Procedure and adverse inferences, or evidentiary presumptions, were the appropriate ways to handle spoliation by a defendant.21 The Florida Supreme Court, therefore, in no way approved of spoliation, and indeed in Martino was arguably signaling to lower courts to be bolder in applying Rule 1.380(b)(2) sanctions, Valcin’s adverse inferences and presumptions in appropriate cases.

For the Florida practitioner in federal court, the issue of “remedy” has been a little simpler, in that there is no “federal” tort of spoliation.22 Therefore, unless state tort law applies to the case,23 the federal court is limited to sanctions as the sole remedy for spoliation. This is not, however, a weak remedy, as the federal courts can sanction “bad faith” spoliation pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure24 or use their own inherent power utilizing such sanctions as adverse inferences or striking of pleadings.25 Martino, of course, does not affect a federal court’s ability to handle litigation abuse in its own forum through sanctions.

• Identity — The second type of spoliation remedy consists of a tort claim for money damages. In the case law, the two types of spoliation tort claims generally mentioned are “first-party” and “third-party” spoliation claims. A “first-party” spoliation claim is one “in which the defendant who allegedly lost, misplaced, or destroyed the evidence was also a tortfeasor in causing the plaintiff’s injuries or damages.” Martino did away with such claims.

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The other subcategory of spoliation tort claims normally mentioned in the case law is “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” — in which case “[t]he plaintiff attempts to recover for the loss of a probable expectancy of recovery against the first-party tortfeasor.”

Martino specifically stated that it was not considering whether there is a cause of action against a third party for spoliation of evidence.

The third potential type of spoliation tort claim not even mentioned in Martino is actually a counterclaim against a spoliating plaintiff. Certainly spoliating plaintiffs have been sanctioned by Florida courts for spoliation, but spoliation counterclaims have also been indirectly mentioned in some Florida cases, without disapproval or approval. Martino does not address spoliation counterclaims at all, but to the extent spoliation counterclaims were ever valid in Florida, pre- or post-Martino, the same policy justifications for prohibiting first-party spoliation claims against defendants, apply with at least as much logical force to spoliation counterclaims against plaintiffs. In both first-party spoliation claims and spoliation counterclaims, the spoliator is before the court and under its jurisdiction, and can be sanctioned as the court deems appropriate. It is unclear whether tort counterclaims ever were cognizable, but post-Martino, their validity is extremely doubtful.

Because there is no “federal” tort of spoliation, the foregoing analysis of “identity” applies whether the spoliation tort is pled in Florida’s state or federal courts because any spoliation tort claim would derive from state law.

• Culpability — The third way to categorize spoliation claims is by degree of culpability of the alleged spoliator, and once again, Martino makes its presence felt. There is no question that negligent spoliation can be the source of a tort claim (of course, post-Martino, not in the first-party context), but there is also Florida authority for intentional spoliation tort claims. Although Martino involved negligent first-party spoliation, the Florida Supreme Court did not limit its abolition of first-party claims to the accidental variety, and indeed, specifically differentiated the ways it prescribed that trial courts should remedy both negligent and intentional first-party spoliation.

The logical conclusion is that, post-Martino, there are no more first-party spoliation claims of any kind. However, Martino did not consider the continued validity of third-party spoliation claims, be they negligent or intentional, so they continue to be viable. Spoliation counterclaims are not directly affected by Martino, but their viability, regardless of the level of culpability, is in doubt as described above.

As to the remedy of sanctions, however, the issue of “culpability” post-Martino is clearer. In Martino, the Florida Supreme Court reiterated that courts should follow its direction in Valcin, and held that when the spoliation is intentional, sanctions under Rule 1.380(b)(2) and an adverse inference are the appropriate remedies. On the other hand, the Martino court held that when the spoliation is negligent, the Valcin rebuttable presumption of negligence should be applied.

For the Florida practitioner in federal court dealing with a spoliation tort claim, there would be no difference on this “culpability” issue because the federal courts follow Florida spoliation tort law. On the other hand, for sanctions, federal courts (when applicable) have a higher threshold for “culpability” and only recognize bad faith spoliation as sanctionable. It would appear then, at least for accidental spoliators, federal court is theoretically a more favorable venue, at least as to sanctions on which federal law governs.

However, there are two Federal Rules of Civil Procedure now being considered for amendment which are relevant to this sanctions discussion, namely Rules 11 and 37, which may change the favorability of federal courts. Rule 11’s proposed amendment was included in the House’s Lawsuit Abuse Reduction Act of 2005, which was passed by the U.S. House of Representatives on October 27, 2005. The House’s proposed Rule 11 amendment enhances the rule to apply to any state court proceeding which substantially affects interstate commerce, and, among other things, subjects “whoever willfully destroys documents sought in any federal proceeding” to mandatory sanctions and contempt. On the other hand, other proposed amendment related to spoliation is the creation of Rule 37(f) of the Federal Rules of Civil Procedure which, as described in the committee notes, “focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use,” and states, “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” The Supreme Court has approved the proposed Rule 37(f) (along with other amendments to the Federal Rules of Civil Procedure related to electronic data discovery) and it has been sent to Congress, which, unless opposed, will take effect on December 1, 2006.

• Duty — Spoliation tort claims require a duty to preserve in order to succeed, in that a duty is the second of five elements needed to state a tort claim. Most other leveling or calibrating mechanisms used by Florida courts to remedy spoliation, such as sanctions and rebuttable presumptions, also require a breached duty to preserve. But adverse inferences, on the current state of Florida law, do not. The Florida Supreme Court did not address this issue in Martino, which drew the ire of Justice Wells.

Although it is clear that such a duty can be found in a statute, administrative regulation, contract, court order, or “duly served discovery request,” uncertainty lies when these duty-sources are not present in the facts of the case, as in Martino, but evidence has nevertheless been spoliated. In fact, the lack of a specific duty to preserve the evidence is the reason the trial court in Martino refused to allow the plaintiff either a first-party tort claim or sanctions in
the form of an adverse inference or Valcin rebuttable presumption.69 The Fourth District in Martino, however, affirmed the trial court’s “[i]rrespective of the duty issue” and instead decided to do away with first-party spoliation claims in toto on policy grounds.54 As for the sanctions issues, however, the Fourth District admitted that the defendant under the facts of Martino had no duty to preserve evidence, and noted that the defendant’s lack of a duty precluded plaintiff from being entitled to a Valcin rebuttable presumption of negligence. The Fourth District, however, reversed the trial court’s entry of a directed verdict in favor of the defendant, holding that the plaintiff was entitled to an adverse inference due to the defendant’s spoliation of evidence despite the lack of a duty to preserve on the part of the defendant:

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.55

Justice Wells’ specially concurring Martino opinion referenced the Fourth District’s earlier decision in New Hampshire Insurance Co. v. Hall, 920 So. 2d 777, 781 (Fla. 4th DCA 2006). First, the Fourth District inferred that a duty to preserve was required for all spoliation sanctions by including duty to preserve in its three-factor test to be used prior to “exercising any leveling mechanism due to spoliation of evidence.” But in the very next sentence, the Fourth District explicitly stated that a duty to preserve was not required for an adverse inference.59 In the next sentence, however, the Fourth District stated, “The trial court was able to answer the three threshold questions in the affirmative, thereby justifying the use of the adverse inference instruction.”60

Although this contradictory language is confusing, judging by the more direct language, no duty to preserve is required for an adverse inference to be awarded, despite the strong advice of Justice Wells’ concurring opinion in Martino, which is not precedential authority.61 Accordingly, in the absence of later interdistrict conflict, the Fourth District’s holding that no duty to preserve is required for imposition of an adverse inference is Florida law and binding on all trial courts,62 at least in cases of intentional spoliation, to which the Florida Supreme Court limited such adverse inferences.63

Common Law Presuit Duty?

There is, however, a broader question that remains open post-Martino. That question is whether there is a common law duty to preserve evidence in the absence of any other source of a duty to preserve, an issue that has been the source of much scholarly and judicial debate.64 Two cases from the Fourth District and one from the Third District have been quoted as potentially creating a presuit, common law duty to preserve evidence.65 However, the Fourth District itself has recently stated that neither case created a common law duty to preserve evidence.66 Moreover, the Third District has held that absent formal notice of an intent to file suit to the alleged spoliator (and adequate proof thereof), there is no common law duty to preserve evidence.67 To date, however, the Florida Supreme Court has not considered whether there is a presuit common law duty to preserve evidence, with or without notice.

As noted by Justice Wells, the issue of duty to preserve is a critical one because “storage space, both in warehouses and in computers, have finite limits.”68 The uncertainty as to whether the courts will find a presuit common law duty at all, or, if notice is required, whether such notice was “adequate” to create the duty, presents great problems and risks for businesses who are subject to the “constant threat of litigation.”69

For the Florida practitioner in federal court, it should be noted that there may then be a presuit duty to preserve in federal court.70 However, this is only the case if the spoliator was on prior explicit notice that a lawsuit is or will be filed.71

Other Areas of Law Affected by Presuit Duty to Preserve

As questioned by one commentator, if there is a presuit common law duty to preserve, “Would a landowner be guilty of spoliation of evidence simply because he fills in a hole in his premises that someone tripped in to make his property safer? [or] Is a store owner guilty of destroying evidence because he cleans up a spill in which a patron fell or because he retiles the floor to make it safer?”72 If the answers to these questions are held to be “Yes,” then other areas of law would be called into question.

For instance, F.S. §90.407 and Federal Rule 407, which prohibit admission of “subsequent remedial measures” to prove liability, will be rendered meaningless for defendants if there is always a presuit duty to preserve. “The policy behind [this exclusion] is to encourage repairs, recognizing that if the evidence were admissible against the person making the repair, the person would be penalized for an
attempt to prevent future injuries."²² A common law duty to preserve evidence would not only make the "subsequent remedial measure" (i.e., spoliation) taken by the defendant potentially admissible, but it would also potentially render the defendant who performed the "subsequent remedial measure" subject to sanctions, an adverse inference, or a rebuttable presumption of negligence. At least one federal court has rejected such a result.⁷⁴

Plaintiffs also would not escape the conundrum created by the prospect of a presuit common law duty to preserve evidence. For instance, it is common knowledge that plaintiffs have a duty to mitigate their damages under the doctrine of "avoidable consequences."²⁵ But it has been asserted that if a plaintiff does so, for instance, by making necessary but nonemergency repairs, that plaintiff should be sanctioned.²⁶ A finding of a common law duty to preserve evidence would put plaintiffs in the untenable position of either being accused of failing to mitigate damages, or being accused of spoliation. Clearly the issue of the existence vel non of a presuit common law duty to preserve evidence is one that needs to be resolved by Florida's highest court.

Conclusion

The Florida Supreme Court's Martino decision reversed 20 years of Florida precedent by eradicating "first-party" spoliation tort claims — that much is clear. But because spoliation is such a complex and wide-ranging issue, it will be years before many other questions are answered, creating uncertainty and additional expenses, both in storage costs and litigation expenses.


⁵ This article will not attempt to retell the history of spoliation, but instead refers the reader directly to the following sources: Robert D. Felts, The Necessity of Redefining Spoliation of Evidence Remedies in Florida, 29 FLA. ST. U. L. REV. 1289 (Summer 2002) (hereinafter Redefining Spoliation); Stefan Rubin, Toward a Call for Florida to Scale Back its Independent Tort for the Spoliation of Evidence, 51 FLA. L. REV. 345 (Apr. 1999) (hereinafter Tort Reform); Bard D. Rockenbach, Spoliation of Evidence, A Double-Edged Sword, 75 FLA. B.J. 34 (Nov. 2003) (hereinafter Double-Edged Sword); James T. Sparkin & John W. Reis, Spoliated Evidence: Better than the Real Thing?, 71 FLA. B.J. 22 (July/Aug. 1997); Cavendish, Strasser, 76 FLA. B.J. at 14-16.


⁷ Bondu, 473 So. 2d at 1312.

⁸ Martino, 908 So. 2d at 247.

⁹ The Third District also denied rehearing in both cases on the same day. Martino, 908 So. 2d at 347.

¹⁰ Valcin, 473 So. 2d at 1305-07.

¹¹ Valcin, 507 So. 2d at 599.

¹² The Florida Supreme Court explicitly recognized the spoliation tort and adopted the Third District's elements in St. Mary's Hospital, Inc. v. Brinson, 685 So. 2d 33 (Fla. 4th DCA 1996). See also Hagopian v. Publix Supermarkets, Inc., 788 So. 2d 1088 (Fla. 4th DCA 2001).

¹³ Martino, 835 So. 2d at 1256.

¹⁴ Id. at 1254-55 (citing Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511 (Cal. 1998) (California Supreme Court renouncing intentional first-party spoliation tort, disapproving thereof with Superior Court, 198 Cal. Rptr. 829 (Cal. App. 1984), and denying that it recognized a spoliation tort in footnote 1 of Williams v. California, 664 F.2d 137 (Cal. 1983)).

¹⁵ Martino, 835 So. 2d at 1254-56.

¹⁶ Jost, 844 So. 2d at 658.

¹⁷ The oral argument can be viewed and read at www.wfsu.org/gavel2gavel/archives/04-04.html#APR6.

¹⁸ Jost v. Lakeland Regional Medical Center, Inc., 888 So. 2d 622 (Fla. 2004) (dismissing review).

¹⁹ Martino v. Wal-Mart Stores, Inc., 908 So. 2d 342, 347 (Fla. 2005) ("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 [as established in Bondu], we decide in favor of the Valcin presumption and sanctions.").

²⁰ The sanctions listed in Fla. R. Civ. P. 1.380(b)(2), as applied to spoliators, inter alia include a court order establishing certain facts as claimed by the nonspoliating party, forbidding the spoliator from supporting or opposing designated claims or defenses, prohibiting the spoliator from introducing designated matters into evidence, striking the spoliator's pleadings, entering dismissal or default judgment against the spoliator, finding the spoliator in contempt, and/or awarding costs and attorneys' fees caused by the spoliation to the nonspoliating party.


²³ Florida courts, in fact, have historically sanctioned defendants for spoliation in appropriate cases. See Nationwide Lift Trucks, Inc. v. Smith, 832 So. 2d 824, 826 (Fla. 4th DCA 2001); DePuy, Inc. v. Acover, 656 So. 2d 629, 630 (Fla. 3d DCA 1995); Metropolitan Dade County v. Bermudez, 648 So. 2d 197, 200-01 (Fla. 1st DCA 1994); Rockwell Int'l Corp. v. Menzies, 561 So. 2d 677, 678 (Fla. 3d DCA 1990); DePuy, Inc. v. Eches, 427 So. 2d 306, 308 (Fla. 3d DCA 1983).

²⁴ See Sterbenz v. Attina, 205 F.Supp. 2d 65, 74 (E.D.N.Y. 2002) ("Whatever else it may mean, the 'inherent power' doctrine does not effectively afford a federal cause of action for spoliation where a state law claim does not exist.").


²⁶ Rule 37(b)(2) of the Federal Rules of Civil Procedure is substantively similar to Florida Rule 1.380(b)(2). Accordingly, for federal sanctions phased as applied to spoliators, see note 18.


²⁸ Martino, 908 So. 2d at 345 n.2.

²⁹ Spoliation counterclaims against plaintiffs have not been titled "numerically" by any court, but perhaps it makes sense to fill in the numerical gap by designating spoliation counterclaims as "second-party" claims.


³¹ See Deaktor v. Menendez, 830 So. 2d 124, 126 (Fla. 3d DCA 2002); Yoder v. Kuvin, 785 So. 2d 679, 680 (Fla. 3d DCA 2001).

³² Cf. Unigard Sec. Ins. Co. v. Lakewood Engineering & Mfg. Corp., 982 P.2d 363, 371 (9th Cir. 1992) ("As the district court noted, the spoliation tort has only been applied when a defendant — or a third-party with a duty to the plaintiff — has spoliated evidence. ... Whether the (plaintiff's) filing of the suit after having available evidence harmed the defendant is a Rule 11 issue, however; it does not present a valid spoliation claim."). On the other hand, a defendant faced with a spoliating plaintiff or third party would be wise to assert such spoliation as an affirmative defense. See McCorvey v. Baxter Healthcare Corp., etc.
298 F.3d 1253, 1259 (11th Cir. 2002) ("[s]poliation was never pleaded as an af-
firmed cause of action by the defendants, and therefore it is not considered a spoliation case."). (Emphasis added).
33 Rubin, Tort Reform, 51 Fla. L. Rev. 345, 354-55, Peltz, Redefining Spoliation, 29 Fl.
35 Martino, 908 So. 2d at 346-47.
36 See Peltz, Redefining Spoliation, 29 Fla. St. U. L. Rev. at 323 (citing cases).
37 Martino, 908 So. 2d at 346.
38 The Fourth District recently missed the Florida Supreme Court’s distinction in Martino between adverse inferences and presumptions as to the “culpability” issue by lumping “adverse evidentiary inferences and adverse presumptions” together as remedy alternatives to negligent spoliation. Golden Yachts, Inc. v. Hall, 920 So. 2d 777 (Fla. 4th D.C.A. 2006) (citing Martino, 908 So. 2d at 346-47).
39 However, one federal court, a few days before the Florida Supreme Court’s Martino opinion, contrary to Florida case law recognizing such a claim, expressed doubt as to whether intentional spoliation has ever been a valid tort cause of action in Florida because the Florida courts had not defined or applied its elements. James v. U.S. Airways, Inc., 375 F. Supp. 2d 1352 (M.D. Fla. 2005). James, however, stands alone on that issue. Cf. Sifton, 236 F. Supp. 2d at 1303 (citing Florida cases).
40 See, e.g., Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997) (citing Vick v. Texas Employment Comm’n, 514 F.2d 734, 737 (5th Cir. 1975); Banco Latino, 53 F. Supp. 2d at 1277.
41 Martinez v. Brink’s, Inc., 2006 WL 551239, *5 n.7 (11th Cir. 2006).
42 See Robert G. Seidenstein, Dogger in Fed Bill?, 14 N.J. LAW: WEEKLY NEWSPAPER 2301 (Nov. 21, 2005); Marshall H. Tanick, Commentatory: Cases, Congress Consider Counsel Culpability, Daux Raco, St. Louis, MO: St. Louis County (February 25, 2006).
46 Golden Yachts, Inc. v. Hall, 920 So. 2d 777, 781 (Fla. 4th D.C.A. 2006).
48 See, e.g., Calvín v. Public Health Trust, 507 So. 2d 596, 601 (Fla. 1987).
49 Continental Ins. Co., 576 So. 2d 24, 27 (Fla. 3d D.C.A. 1990). However, Florida law is

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