

## **Chapter 1    *Spoliation of Evidence (Negligent and Intentional)***

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### **1:1 Elements of the prima facie case of spoliation of evidence**

The essential elements under Florida law to pleading and proving a tort claim of spoliation of evidence are:

1. *Existence of a potential civil action;*
2. *A legal or contractual duty to preserve evidence which is relevant to the potential civil action;*

3. *Destruction of that evidence;*
4. *Significant impairment in the ability to prove the lawsuit;*
5. *A causal relationship between the evidence destruction and the inability to prove the lawsuit; and*
6. *Damages.*<sup>1</sup> [fn: *Continental Ins. Co. v. Herman*, 576 So. 2d 313, 315 (Fla. 3d DCA 1990), *rev. den.*, 598 So. 2d 76 (Fla. 1991); *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673 n.1 (Fla. 3d DCA 1995) (*Miller II*), *rev. den.*, 659 So. 2d 1087 (Fla. 1995).]

Although no Florida court has specifically set out elements for the tort of *intentional* spoliation of evidence, Florida courts have recognized such an action, and presumably the elements above would be the same for both intentional and negligent spoliation causes of action.<sup>2</sup> [fn: *Silhan v. Allstate Ins. Co.*, 236 F.Supp.2d 1303, 1308

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<sup>1</sup> *Continental Ins. Co. v. Herman*, 576 So. 2d 313, 315 (Fla. 3d DCA 1990), *rev. den.*, 598 So. 2d 76 (Fla. 1991); *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673 n.1 (Fla. 3d DCA 1995) (*Miller II*), *rev. den.*, 659 So. 2d 1087 (Fla. 1995).

<sup>2</sup> *Silhan v. Allstate Ins. Co.*, 236 F.Supp.2d 1303, 1308 (N.D. Fla. 2002) (“a cause of action for intentional spoliation has been recognized by Florida courts .... ”)(citing *Bondu v. Gurvich*, 473 So. 2d 1307, 1313 n.5 (Fla. 3d DCA 1984), *disapproved of by Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005), and *Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 26 (Fla. 3d DCA 1990) (*Miller I*), *rev. den.*, 581 So. 2d 1307 (Fla. 1991)). 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 neither specifically 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. Silhan*, 236 F. Supp. 2d at 1308 (citing Florida cases).

(N.D. Fla. 2002) ("a cause of action for intentional spoliation has been recognized by Florida courts .... ") (*citing* *Bondu v. Gurvich*, 473 So. 2d 1307, 1313 n.5 (Fla. 3d DCA 1984), *disapproved of by* *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005), *and* *Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 26 (Fla. 3d DCA 1990) (*Miller I*), *rev. den.*, 581 So. 2d 1307 (Fla. 1991)). 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 neither specifically 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. *Silhan*, 236 F. Supp. 2d at 1308 (*citing* Florida cases).]

These above-stated six elements are only valid for the "*third-party*" claim of spoliation of evidence, in that Florida has now turned its back on the "first party" spoliation tort (after recognizing it for 20 years).<sup>3</sup> [fn: *See generally*, Michael D. Starks, *Deconstructing Damages for Destruction of Evidence: Martino Eradicates the First-*

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<sup>3</sup> *See generally*, Michael D. Starks, *Deconstructing Damages for Destruction of Evidence: Martino Eradicates the First-party Tort of Spoliation of Evidence*, 80 Fla. B.J. 36, 36-43 (July/Aug. 2006) (analyzing *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005)).

*party Tort of Spoliation of Evidence*, 80 Fla. B.J. 36, 36-43 (July/Aug. 2006) (analyzing *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005)).] Accordingly, this chapter therefore addresses only "third-party" spoliation claims; that is, claims where the defendant in the primary claim and the defendant in the spoliation suit are *different* parties. "First party" spoliation claims, which are no longer viable in Florida, are claims where the defendant in the underlying action and in the spoliation claim are the same party. "First party" spoliators are now only on the hook for sanctions, if warranted, not money damages, because Florida courts now prefer to use sanctions, if warranted, to remedy spoliation by the defendant in the underlying claim.<sup>4</sup> [fn: See generally, Michael D. Starks, *Deconstructing Damages for Destruction of Evidence: Martino Eradicates the First-party Tort of Spoliation of Evidence*, 80 Fla. B.J. 36, 36-43 (July/Aug. 2006) (analyzing *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005)). Although counterclaims were not expressly invalidated by the Florida Supreme Court, the author feels they are suspect because the same reasoning used by the Florida Supreme Court in *Martino* applies to counterclaims,

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<sup>4</sup> See generally, Michael D. Starks, *Deconstructing Damages for Destruction of Evidence: Martino Eradicates the First-party Tort of Spoliation of Evidence*, 80 Fla. B.J. 36, 36-43 (July/Aug. 2006) (analyzing *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005)). Although counterclaims were not expressly invalidated by the Florida Supreme Court, the author feels they are suspect because the same reasoning used by the Florida Supreme Court in *Martino* applies to counterclaims, and accordingly are not addressed herein. See Michael D. Starks, *Spoliation or destruction of evidence and the duty to cooperate with third party claims*, § 22D:6 in *9 Fla. Prac.*, Florida Workers' Compensation with Forms (by Patrick John McGinley).

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The most hotly litigated element of the six is the second element, that is, whether or not there is "a legal or contractual duty to preserve evidence which is relevant to the potential civil action."

Spoliation tort claims require a duty to preserve in order to succeed.<sup>5</sup> [fn: However, this is not true for sanctions when in the "first party spoliation" context. See generally, Michael D. Starks, Spoliation or destruction of evidence and the duty to cooperate with third party claims, Section 22D:9 in 9 Fla. Prac., Florida Workers' Compensation with Forms (by Patrick John McGinley).]

A duty to preserve evidence can arise from several sources, including statutes,<sup>6</sup> [fn: See generally, Michael D. Starks, Spoliation or

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<sup>5</sup> However, this is not true for sanctions when in the "first party spoliation" context.. See generally, Michael D. Starks, *Spoliation or destruction of evidence and the duty to cooperate with third party claims*, Section 22D:9 in 9 Fla. Prac., Florida Workers' Compensation with Forms (by Patrick John McGinley).

<sup>6</sup> See generally, Michael D. Starks, *Spoliation or destruction of evidence and the duty to cooperate with third party claims*, Chapter 22D in 9 Fla. Prac., Florida Workers' Compensation with Forms (by Patrick John McGinley) (discussing Fla. Stat.

destruction of evidence and the duty to cooperate with third party claims, Chapter 22D in 9 Fla. Prac., Florida Workers' Compensation with Forms (by Patrick John McGinley) (discussing Fla. Stat. § 440.39(7) which imposes a "duty to cooperate" on employees, employers, and carriers, and which therefore includes the duty to preserve evidence); *Ochoa v. Alie Bros., Inc.*, 2007 WL 2781192, \*5 (M.D.Fla. 2007) ("FLSA and its implementing regulations require an employer to 'make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by [the employer].'" (quoting 29 U.S.C. § 211(c)).] a court order,<sup>7</sup> [fn: See *Rockwell Intern. Corp. v. Menzies*, 561 So. 2d 677 (Fla. 3d DCA 1990) (defendant sanctioned for violation of prior court order prohibiting spoliation).] a duly served discovery request,<sup>8</sup> [fn: *Strasser v. Yalamanchi*, 783 So. 2d 1087,

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§ 440.39(7) which imposes a "duty to cooperate" on employees, employers, and carriers, and which therefore includes the duty to preserve evidence); *Ochoa v. Alie Bros., Inc.*, 2007 WL 2781192, \*5 (M.D.Fla. 2007) ("FLSA and its implementing regulations require an employer to 'make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by [the employer].'" (quoting 29 U.S.C. § 211(c)).

<sup>7</sup> See *Rockwell Intern. Corp. v. Menzies*, 561 So. 2d 677 (Fla. 3d DCA 1990) (defendant sanctioned for violation of prior court order prohibiting spoliation).

<sup>8</sup> *Strasser v. Yalamanchi*, 783 So. 2d 1087, 1093 (Fla. 4th DCA 2001) ("While we agree that Appellants were under no statutory or contractual duty to maintain such evidence, a party does have an affirmative responsibility to preserve any items or documents that are the subject of a duly served discovery request."), *rev. den.*, 805 So. 2d 810 (Fla. 2001). See also, *Figgie Intern., Inc. v. Alderman*, 698 So. 2d 563, 567 (Fla. 3d DCA 1997), *rev. disp.*, 703 So. 2d 476 (Fla. 1997).

1093 (Fla. 4th DCA 2001) (“While we agree that Appellants were under no statutory or contractual duty to maintain such evidence, a party does have an affirmative responsibility to preserve any items or documents that are the subject of a duly served discovery request.”), *rev. den.*, 805 So. 2d 810 (Fla. 2001). *See also*, *Figgie Intern., Inc. v. Alderman*, 698 So. 2d 563, 567 (Fla. 3d DCA 1997), *rev. disp.*, 703 So. 2d 476 (Fla. 1997).] an administrative regulation,<sup>9</sup> [See, e.g., *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 601 (Fla. 1987) (administrative duty to preserve medical records).] or a contract to preserve.<sup>10</sup> [fn: *Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 27 (Fla. 3d DCA 1990) (*Miller I*) (holding that insurer’s breach of oral agreement to preserve the car and to make it available for inspection by plaintiff’s experts created a duty to preserve evidence), *rev. den.*, 581 So. 2d 1307 (Fla. 1991). However, Florida law is conflicting as to whether a mere promise (not a contract with mutuality of obligation)

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<sup>9</sup> *See, e.g., Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 601 (Fla. 1987) (administrative duty to preserve medical records).

<sup>10</sup> *Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 27 (Fla. 3d DCA 1990) (*Miller I*) (holding that insurer’s breach of oral agreement to preserve the car and to make it available for inspection by plaintiff’s experts created a duty to preserve evidence), *rev. den.*, 581 So. 2d 1307 (Fla. 1991). However, Florida law is conflicting as to whether a mere promise (not a contract with mutuality of obligation) can create such a duty. *Compare Brown v. City of Delray Beach*, 652 So. 2d 1150, 1153 (Fla. 4th DCA 1995) (court finding that “a special relationship and corresponding duty to an individual is created when a law enforcement officer promises or agrees to take some specific action at the individual’s request.”), *with Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 n.2 (Fla. 4th DCA 2004) (“In the complaint, Royal did allege that LMC ‘agreed’ to preserve the evidence. However, without more, this allegation is not sufficient to establish that there was a contractual duty.”).

can create such a duty. *Compare* Brown v. City of Delray Beach, 652 So. 2d 1150, 1153 (Fla. 4th DCA 1995) (court finding that “a special relationship and corresponding duty to an individual is created when a law enforcement officer promises or agrees to take some specific action at the individual's request.”), *with* Royal & Sunalliance v. Lauderdale Marine Center, 877 So. 2d 843, 845 n.2 (Fla. 4th DCA 2004) (“In the complaint, Royal did allege that LMC ‘agreed’ to preserve the evidence. However, without more, this allegation is not sufficient to establish that there was a contractual duty.”).]

It is an open question whether a presuit duty can also arise under Florida common law, at least without formal notice of intent to sue.<sup>11</sup> [fn: Uncertainty lies when no duty-source is present in the facts of the case, but evidence has nevertheless been spoliated. Robert D. Peltz, *The Necessity of Redefining Spoliation of Evidence Remedies in Florida*, 29 Fla. St. U. L. Rev. 1289, 1321 (Summer 2002) [Hereinafter *Redefining Spoliation*] (“Although it is easy to find such a legal duty where there is a court order, a promise to preserve evidence, a

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<sup>11</sup> Uncertainty lies when no duty-source is present in the facts of the case, but evidence has nevertheless been spoliated. Robert D. Peltz, *The Necessity of Redefining Spoliation of Evidence Remedies in Florida*, 29 Fla. St. U. L. Rev. 1289, 1321 (Summer 2002) [Hereinafter *Redefining Spoliation*] (“Although it is easy to find such a legal duty where there is a court order, a promise to preserve evidence, a statute, or administrative regulation requiring documents to be maintained, the existence of such a duty is much more difficult to find (and justify) in the absence of such circumstances.”) (citing cases) (citations omitted).

statute, or administrative regulation requiring documents to be maintained, the existence of such a duty is much more difficult to find (and justify) in the absence of such circumstances.”) (citing cases) (citations omitted).] Thus, the duty element is primarily disputed in cases where no specific statute, regulation, contract, court order or discovery request imposes such a duty but, nevertheless, evidence has been spoliated. The issue of whether there exists in Florida a common law presuit duty to preserve evidence, in the absence of any other source of duty, has been the source of much scholarly and judicial debate. However, the Fourth District itself has stated that neither of its cases commonly alleged to have created a common law duty to preserve evidence actually did so.<sup>12</sup> [fn: *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 846 (Fla. 4th DCA 2004) (“neither *Hagopian* nor *Brinson* establishes a duty to preserve evidence when litigation is merely anticipated.”).] The Fourth District has recently, definitively stated that there is no such common law, pre-suit duty to preserve evidence.<sup>13</sup> [fn: *Gayer v. Fine Line Const. & Elec., Inc.*, 970 So. 2d 424, 426 (Fla. 4th DCA 2007) (“Because a duty to

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<sup>12</sup> *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 846 (Fla. 4th DCA 2004) (“neither *Hagopian* nor *Brinson* establishes a duty to preserve evidence when litigation is merely anticipated.”).

<sup>13</sup> *Gayer v. Fine Line Const. & Elec., Inc.*, 970 So. 2d 424, 426 (Fla. 4<sup>th</sup> DCA 2007) (“Because 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.”).

preserve evidence does not exist at common law, the duty must originate either in a contract, a statute, or a discovery request.".)] On the other hand, 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.<sup>14</sup> [fn: *Pennsylvania Lumberman's Mut. Ins. Co. v. Florida Power & Light Co.*, 724 So. 2d 629, 630 (Fla. 3d DCA 1998). See also, *Silhan v. Allstate Ins. Co.*, 236 F.Supp.2d 1303, 1309 (N.D. Fla. 2002); *James v. U.S. Airways, Inc.*, 375 F.Supp.2d 1352, 1354 (M.D. Fla. 2005).] On the other hand, the Fifth DCA has apparently applied such a presuit duty.<sup>15</sup> [fn: See *Torres v. Matsushita Elec. Corp.*, 763 So. 2d 1014 (Fla.5th DCA 2000).] To date, however, the Florida Supreme Court has not decided whether there is a presuit common law duty to preserve evidence, with or without notice.<sup>16</sup> [fn: See *Starks, Deconstructing Damages*, 80 Fla. B.J. at 40-41 (discussing need for the Florida Supreme Court to decide whether there is a presuit duty to preserve under common law and whether an adverse inference requires a

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<sup>14</sup> *Pennsylvania Lumberman's Mut. Ins. Co. v. Florida Power & Light Co.*, 724 So. 2d 629, 630 (Fla. 3d DCA 1998). See also, *Silhan v. Allstate Ins. Co.*, 236 F.Supp.2d 1303, 1309 (N.D. Fla. 2002); *James v. U.S. Airways, Inc.*, 375 F.Supp.2d 1352, 1354 (M.D. Fla. 2005).

<sup>15</sup> See *Torres v. Matsushita Elec. Corp.*, 763 So. 2d 1014 (Fla.5<sup>th</sup> DCA 2000).

<sup>16</sup> See *Starks, Deconstructing Damages*, 80 Fla. B.J. at 40-41 (discussing need for the Florida Supreme Court to decide whether there is a presuit duty to preserve under common law and whether an adverse inference requires a breach of duty before imposition against the spoliator).

breach of duty before imposition against the spoliator).]

For the Florida practitioner in federal court, it should be noted that there *may* be a presuit duty to preserve in federal court.<sup>17</sup> [fn: *Banco Latino, S.A.C.A. v. Gomez Lopez*, 53 F.Supp.2d 1273, 1277 (S.D. Fla. 1999) (“A litigant is under a duty to preserve evidence which it knows, or reasonably should know, is relevant in an action. ... Sanctions may be imposed upon litigants who destroy documents while on notice that they are or may be relevant to litigation *or potential litigation*, or are reasonably calculated to lead to the discovery of admissible evidence.”) (emphasis added).] However, this has been held by some courts to be the case only if the spoliator was on prior explicit notice that a lawsuit is or will be filed.<sup>18</sup> [fn: *Silhan v. Allstate Ins. Co.*, 236 F.Supp.2d 1303, 1309 (N.D. Fla. 2002) (“The more prudent approach would be for a duty to arise when the

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<sup>18</sup> *Silhan v. Allstate Ins. Co.*, 236 F.Supp.2d 1303, 1309 (N.D. Fla. 2002) (“The more prudent approach would be for a duty to arise when the possessor of the evidence is informed by the plaintiff that a lawsuit will be (or is) filed.”) (interpreting Florida law). *See also, Hickman*, 2005 WL 3675961 at \*2 (“Other courts have recognized that more than the mere happening of an accident must occur for a duty [to preserve] to be created.”) (citing *Silhan*, 236 F.Supp.2d at 1309, and *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845-46 (Fla. 4th DCA 2004)).

possessor of the evidence is informed by the plaintiff that a lawsuit will be (or is) filed.”) (interpreting Florida law). See also, Hickman, 2005 WL 3675961 at \*2 (“Other courts have recognized that more than the mere happening of an accident must occur for a duty [to preserve] to be created.”) (citing Silhan, 236 F.Supp.2d at 1309, and Royal & Sunalliance v. Lauderdale Marine Center, 877 So. 2d 843, 845-46 (Fla. 4th DCA 2004)).] Unfortunately, there is a regrettable lack of clarity in federal court about whether there is, or is not, a presuit duty to preserve, and/or about whether the mere filing of a complaint triggers such a duty.<sup>19</sup> [fn: Floeter v. City of Orlando, 2007 WL 486633, \*5 & n.6 (M.D.Fla. 2007) (“There may be additional circumstances from which a duty may arise if a party is on notice that documents or tangible items may be relevant or discoverable in pending or imminent litigation. ... Whether merely filing litigation raises a duty to preserve evidence is an open question under federal law in this circuit. While some cases upon which the parties relied speak of such a duty, each of

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<sup>19</sup> *Floeter v. City of Orlando*, 2007 WL 486633, \*5 & n.6 (M.D.Fla. 2007) (“There may be additional circumstances from which a duty may arise if a party is on notice that documents or tangible items may be relevant or discoverable in pending or imminent litigation. ... Whether merely filing litigation raises a duty to preserve evidence is an open question under federal law in this circuit. While some cases upon which the parties relied speak of such a duty, each of the cases also had other facts, such as pending discovery requests, from which such a duty might arise independent of the filing of a complaint.”); *Banco Latino, S.A.C.A. v. Gomez Lopez*, 53 F.Supp.2d 1273, 1277 (S.D. Fla. 1999) (“A litigant is under a duty to preserve evidence which it knows, or reasonably should know, is relevant in an action. ... Sanctions may be imposed upon litigants who destroy documents while on notice that they are or may be relevant to litigation or *potential litigation*, or are reasonably calculated to lead to the discovery of admissible evidence.”) (emphasis added).

the cases also had other facts, such as pending discovery requests, from which such a duty might arise independent of the filing of a complaint.”); *Banco Latino, S.A.C.A. v. Gomez Lopez*, 53 F.Supp.2d 1273, 1277 (S.D. Fla. 1999) (“A litigant is under a duty to preserve evidence which it knows, or reasonably should know, is relevant in an action. ... Sanctions may be imposed upon litigants who destroy documents while on notice that they are or may be relevant to litigation or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence.”) (emphasis added).] It seems, however, that when the alleged spoliator is *the plaintiff* (who is usually more aware of the plaintiff's intent to sue than the defendant), a finding of this notice of anticipated litigation (and therefore a duty to preserve) is more likely.<sup>20</sup> [fn: *St. Cyr v. Flying J Inc.*, 2007 WL 1716365, \*3 (M.D.Fla. 2007) (“As to the second element, the St. Cyrs argue that they were not under a ‘duty to preserv[e] evidence just in anticipation of possible litigation.’ [citing Florida law] ...

Notwithstanding this contention, federal law, which controls, makes

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<sup>20</sup> *St. Cyr v. Flying J Inc.*, 2007 WL 1716365, \*3 (M.D.Fla. 2007) (“As to the second element, the St. Cyrs argue that they were not under a ‘duty to preserv[e] evidence just in anticipation of possible litigation.’ [citing Florida law] ... Notwithstanding this contention, federal law, which controls, makes clear that a litigant ‘is under a duty to preserve what it knows, or reasonably should know, is relevant [to litigation or potential litigation] ....’ [citing federal law] Thus, the duty to preserve evidence may arise prior to commencement of litigation. Indeed, the Court finds that the St. Cyrs contemplated litigation and that it was reasonably foreseeable that the van would be relevant to the litigation. Thus, the St. Cyrs were under a duty to preserve the van.”).

clear that a litigant ' 'is under a duty to preserve what it knows, or reasonably should know, is relevant [to litigation or potential litigation] ....' ' [citing federal law] Thus, the duty to preserve evidence may arise prior to commencement of litigation. Indeed, the Court finds that the St. Cyrs contemplated litigation and that it was reasonably foreseeable that the van would be relevant to the litigation. Thus, the St. Cyrs were under a duty to preserve the van.".)]

The third element is "destruction" of evidence. It has been that, in order to have a viable spoliation claim, the third party must have *destroyed* the evidence, not merely *concealed* it.<sup>21</sup> [fn: It has been held that mere "concealment" does not count as "spoliation." *Green Leaf Nursery v. E.I. DuPont De Nemours and Co.*, 341 F.3d 1292, 1308

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<sup>21</sup> It has been held that mere "concealment" does not count as "spoliation." *Green Leaf Nursery v. E.I. DuPont De Nemours and Co.*, 341 F.3d 1292, 1308 (11th Cir. 2003) ("Plaintiffs' spoliation claim rests more on concealment than actual destruction. Plaintiffs argue that concealment of evidence may constitute spoliation; however, no Florida case has ever held that concealment of evidence constitutes spoliation. ... Concealment does not constitute spoliation because such conduct is covered by the litigation privilege.") (quoting *Jost v. Lakeland Regional Med. Ctr.*, 844 So. 2d 656, 658 (Fla. 2d DCA 2003) ("Concealment of evidence, however, does not form a basis for a claim of spoliation."). *But see, Floeter v. City of Orlando*, 2007 WL 486633, \*5 (M.D.Fla. 2007) ("'Spoliation' is the 'intentional destruction, mutilation, alteration, or *concealment of evidence.*'") (quoting *Optowave Co. v. Nikitin*, 2006 WL 3231422, \*7 (M.D.Fla. 2006) (quoting Black's Law Dictionary 1437 (8th ed.2004))) (emphasis added); *Wells v. Orange County School Bd.*, 2006 WL 4824479, \*3 (M.D.Fla. 2006) ("Plaintiff has identified no specific documents which were spoliated which would give rise to ... any adverse inference of spoliation. Accordingly, the matter of any additional sanctions, including whether at trial to allow evidence regarding the School Board's *delay in production of documents*, is left for the presiding District Judge to determine in the contest [sic] of the issues as they develop at trial. At this point, the delay in production is too ephemeral or collateral to the employment discrimination matters at issue.") (emphasis added).

(11th Cir. 2003) ("Plaintiffs' spoliation claim rests more on concealment than actual destruction. Plaintiffs argue that concealment of evidence may constitute spoliation; however, no Florida case has ever held that concealment of evidence constitutes spoliation. ... Concealment does not constitute spoliation because such conduct is covered by the litigation privilege.") (quoting *Jost v. Lakeland Regional Med. Ctr.*, 844 So. 2d 656, 658 (Fla. 2d DCA 2003) ("Concealment of evidence, however, does not form a basis for a claim of spoliation.")). But see, *Floeter v. City of Orlando*, 2007 WL 486633, \*5 (M.D.Fla. 2007) ("Spoliation' is the 'intentional destruction, mutilation, alteration, or concealment of evidence.'") (quoting *Optowave Co. v. Nikitin*, 2006 WL 3231422, \*7 (M.D.Fla. 2006) (quoting Black's Law Dictionary 1437 (8th ed.2004))) (emphasis added); *Wells v. Orange County School Bd.*, 2006 WL 4824479, \*3 (M.D.Fla. 2006) ("Plaintiff has identified no specific documents which were spoliated which would give rise to ... any adverse inference of spoliation. Accordingly, the matter of any additional sanctions, including whether at trial to allow evidence regarding the School Board's delay in production of documents, is left for the presiding District Judge to determine in the contest [sic] of the issues as they develop at trial. At this point, the delay in production is too ephemeral or collateral to the employment discrimination matters at issue.") (emphasis added).]

The fourth, fifth and sixth elements of the spoliation tort appear to be related, which are, in order, a significant impairment in the ability to prove the underlying lawsuit, proximate causation, and damages. The damage caused by a third party's spoliation of evidence has been likened to the damages incurred due to a lawyer's legal malpractice, because the injury suffered from both of these torts is the same--the loss of probable expectancy of damages from an underlying claim.<sup>22</sup> [fn: *Columbia v. Brewer*, 2008 WL 4643815, \*3 (Fla. 1st DCA 2008) ("Appellee draws a more fitting analogy, arguing that a legal malpractice injury is akin to the injury suffered from spoliation of evidence. We accept this approach, as the injury suffered from both of these torts is the same--the loss of probable expectancy of damages from an underlying claim."). Cf. *Kay v. Bricker*, 485 So. 2d 486, 487 (Fla.1986) (noting that, in a legal malpractice action, "the measure of damages is the amount which the client would have recovered but for the attorney's negligence").] Accordingly, in a third party spoliation

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<sup>22</sup> *Columbia v. Brewer*, 2008 WL 4643815, \*3 (Fla. 1<sup>st</sup> DCA 2008) ("Appellee draws a more fitting analogy, arguing that a legal malpractice injury is akin to the injury suffered from spoliation of evidence. We accept this approach, as the injury suffered from both of these torts is the same--the loss of probable expectancy of damages from an underlying claim."). Cf. *Kay v. Bricker*, 485 So. 2d 486, 487 (Fla.1986) (noting that, in a legal malpractice action, "the measure of damages is the amount which the client would have recovered but for the attorney's negligence").

suit, the measure of damages is the amount which the plaintiff would have recovered in the underlying suit but for the spoliation.<sup>23</sup> [fn: *Columbia v. Brewer*, 2008 WL 4643815, \*3 (Fla. 1st DCA 2008) (citing *Kay v. Bricker*, 485 So. 2d 486, 487 (Fla.1986)).] Therefore, the type of evidence spoliated affects spoliation elements four, five and six. For instance, spoliation principles certainly apply to “secondary evidence,” such as medical records, x-rays, and other documents, destruction of which can certainly impact a plaintiff’s ability to prove an underlying case and therefore proximately cause damage.<sup>24</sup> [fn: See *Rockwell Intern. Corp. v. Menzies*, 561 So. 2d 677, 681 (Fla. 3d DCA 1990).] But proximate causation of damages, which is the significant impairment in the ability to prove a lawsuit, is more likely to exist when the spoliated evidence is “primary evidence” as in, for instance, products liability cases where the device that allegedly caused the injury is destroyed, missing or tampered with. This is so, because, “[i]n today’s product liability trial, we frequently rely heavily on Maxwellian often hyper-technical, expert opinions[,] [t]hus, small, seemingly insignificant items... can become large factors in the

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<sup>23</sup> *Columbia v. Brewer*, 2008 WL 4643815, \*3 (Fla. 1<sup>st</sup> DCA 2008) (citing *Kay v. Bricker*, 485 So. 2d 486, 487 (Fla.1986)).

<sup>24</sup> See *Rockwell Intern. Corp. v. Menzies*, 561 So. 2d 677, 681 (Fla. 3d DCA 1990).

outcome of a trial."<sup>25</sup> [fn: *Rockwell Intern. Corp. v. Menzies*, 561 So. 2d 677, 680-81 (Fla. 3d DCA 1990) (“ . . . *Valcin* did not involve the destruction and loss of primary physical evidence as in this case.”).] Therefore, spoliation of primary evidence arguably will support more of a causal relationship between the evidence destruction and the significant impairment in the ability to prove the lawsuit, and thus more damages. For instance, spoliation of *primary* evidence, such as the very product that is a subject of an underlying tort claim, will *generally* cause more “significant impairment” of the plaintiff’s ability to prove the lawsuit, and therefore “proximately cause” more “damages,” than destruction of *secondary* evidence such as photographs of a product or documents discussing a product. But these are all jury issues that will vary on the facts of each case’s spoliation.

These six elements can also be asserted by a defendant as a third party claim against a third party who has spoliated evidence, and which spoliation has harmed the defendant’s ability to defend against the plaintiff’s underlying claim. This is discussed immediately below in the defenses section.

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<sup>25</sup> *Rockwell Intern. Corp. v. Menzies*, 561 So. 2d 677, 680-81 (Fla. 3d DCA 1990) (“...*Valcin* did not involve the destruction and loss of primary physical evidence as in this case.”).

## 1:2 Defenses to the prima facie case of spoliation of evidence

This Chapter was written by **Michael D. Starks**, a senior counsel in the Orlando office of Holland & Knight LLP. He practices primarily commercial and product liability law. He received his J.D. degree *magna cum laude* from the Florida State University College of Law and his B.S. degree *cum laude* from the University of Florida. Portions of this Chapter's material first appeared in Michael D. Starks, *Deconstructing Damages for Destruction of Evidence: Martino Eradicates the First-party Tort of Spoliation of Evidence*, 80 Fla. B.J. 36, 36-43 (July/Aug. 2006) [Hereinafter *Deconstructing Damages*] (and is reprinted here with permission).

A party may prevail on a cause of action only by pleading and proving all of the requisite elements of the civil action.<sup>26</sup> [fn: **Omission of element is fatal to claim.** See, e.g., *Doyle v. Flex*, 210 So. 2d 493, 494-95 (Fla. 4th DCA 1968).] This is, of course, true for a claim of spoliation, and therefore, one (albeit not technically)

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<sup>26</sup> **Omission of element is fatal to claim.** See, e.g., *Doyle v. Flex*, 210 So. 2d 493, 494-95 (Fla. 4th DCA 1968).

"defense" is the assertion that the plaintiff failed to properly plead and prove the six elements of the cause of action as enumerated in the previous section.

The statute of limitations for a claim of spoliation is four years.<sup>27</sup> [fn: **Limitations.** §95.11(3)(p) ("(p) Any action not specifically provided for in these statutes" of limitations has a statute of limitations of four years).] A defense based upon the statute of limitations is also normally an affirmative defense which should be raised in an answer, but it may be asserted in a motion to dismiss under Florida Rule of Civil Procedure 1.140(b) if the defense appears on the face of a prior pleading.<sup>28</sup> [fn: **Limitations – Pleading Requirements.** *Pontier v. Wolfson*, 637 So. 2d 39 (Fla. 2d DCA 1994) (*citing* Fla.R.Civ.P. 1.110(d)) *and* *Hofer v. Ross*, 481 So. 2d 939 (Fla. 2d DCA 1985)).]

But the cause of action for spoliation does not accrue (and therefore the statute of limitations does not begin to run) when the actual destruction of evidence occurs; instead the cause of action

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<sup>27</sup> **Limitations.** §95.11(3)(p) ("(p) Any action not specifically provided for in these statutes" of limitations has a statute of limitations of four years).

<sup>28</sup> **Limitations – Pleading Requirements.** *Pontier v. Wolfson*, 637 So. 2d 39 (Fla. 2d DCA 1994) (*citing* Fla.R.Civ.P. 1.110(d)) *and* *Hofer v. Ross*, 481 So. 2d 939 (Fla. 2d DCA 1985)).

accrues when the lawsuit against the primary or "first-party" defendant has been completed and the plaintiff has therefore suffered some diminution in value in the underlying tort claim cause by the third-party spoliator.<sup>29</sup> [fn: *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673-74 (Fla. 3d DCA 1995) (*Miller II*), *rev. den.*, 659 So. 2d 1087 (Fla. 1995); *Yates v. Publix Super Markets*, 924 So. 2d 832 (Fla. 4th DCA 2005).] The damage caused by a third party's spoliation of evidence has been likened to the damages incurred due to a lawyer's legal malpractice.<sup>30</sup> [fn: *Columbia v. Brewer*, 2008 WL 4643815, \*3 (Fla. 1<sup>st</sup> DCA 2008) ("Appellee draws a more fitting analogy, arguing that a legal malpractice injury is akin to the injury suffered from spoliation of evidence. We accept this approach, as the injury suffered from both of these torts is the same--the loss of probable expectancy of damages from an underlying claim."). *Cf. Kay v. Bricker*, 485 So. 2d 486, 487 (Fla.1986) (noting that, in a legal malpractice action, "the measure of damages is the amount which the client would have recovered but for the attorney's negligence").

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<sup>29</sup> *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673-74 (Fla. 3d DCA 1995) (*Miller II*), *rev. den.*, 659 So. 2d 1087 (Fla. 1995); *Yates v. Publix Super Markets*, 924 So. 2d 832 (Fla. 4th DCA 2005).

<sup>30</sup> *Columbia v. Brewer*, 2008 WL 4643815, \*3 (Fla. 1<sup>st</sup> DCA 2008) ("Appellee draws a more fitting analogy, arguing that a legal malpractice injury is akin to the injury suffered from spoliation of evidence. We accept this approach, as the injury suffered from both of these torts is the same--the loss of probable expectancy of damages from an underlying claim."). *Cf. Kay v. Bricker*, 485 So. 2d 486, 487 (Fla.1986) (noting that, in a legal malpractice action, "the measure of damages is the amount which the client would have recovered but for the attorney's negligence").

Because of this accrual issue, another defense to a spoliation claim is that the spoliation claim, when brought before or concurrently with the underlying tort claim, is "premature," or not yet ripe. The most common scenario is that a plaintiff wishes to sue a products liability defendant for negligence or strict liability but a third party, such as an employer, law enforcement agency, or insurance company, has lost the product or other evidence. The plaintiff therefore wishes to sue the third party spoliator at the same time that the plaintiff sues the defendant in the underlying tort claim, but the alleged third party spoliator argues that the spoliation claim is "premature," "not ripe," or that the plaintiff has failed to "exhaust his or her remedies." The issue is one of timing - can the plaintiff sue the spoliation defendant (a) *before* the primary tortfeasor; (b) *after* the primary tortfeasor; (c) *simultaneously in separate lawsuits* with the primary tortfeasor; and/or (d) *simultaneously in the same lawsuit* with the primary tortfeasor.

There appears to be no dispute that a plaintiff *can* pursue a spoliation claim against a third party spoliator for destroying evidence necessary for the underlying tort claim against the primary defendant

after suing the primary defendant for the underlying injuries.<sup>31</sup> [fn: *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673-74 (Fla. 3d DCA 1995) (*Miller II*), *rev. den.*, 659 So. 2d 1087 (Fla. 1995); *Yates v. Publix Super Markets*, 924 So. 2d 832 (Fla. 4th DCA 2005).] For the same reason, it also seems clear that a plaintiff *cannot* pursue the spoliation claim before pursuing the underlying or primary defendant where a “viable means exists to pursue the underlying products liability claim” first.<sup>32</sup> [fn: *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673-74 (Fla. 3d DCA 1995) (*Miller II*) (“... where a viable means exists to pursue the underlying products liability claim, that cause of action must be pursued prior to, or together with, the spoliation of evidence claim. Even in a products liability setting where evidence has been lost, the primary wrongdoer is the manufacturer of the defective product. The person who lost the evidence has created problems of proof for the plaintiff, but the entire liability should not shift from the manufacturer to the person who lost the evidence unless the loss of evidence has so

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<sup>31</sup> *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673-74 (Fla. 3d DCA 1995) (*Miller II*), *rev. den.*, 659 So. 2d 1087 (Fla. 1995); *Yates v. Publix Super Markets*, 924 So. 2d 832 (Fla. 4th DCA 2005).

<sup>32</sup> *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673-74 (Fla. 3d DCA 1995) (*Miller II*) (“... where a viable means exists to pursue the underlying products liability claim, that cause of action must be pursued prior to, or together with, the spoliation of evidence claim. Even in a products liability setting where evidence has been lost, the primary wrongdoer is the manufacturer of the defective product. The person who lost the evidence has created problems of proof for the plaintiff, but the entire liability should not shift from the manufacturer to the person who lost the evidence unless the loss of evidence has so fatally impaired the products liability claim that to bring a products liability action would be frivolous.”), *rev. den.*, 659 So. 2d 1087 (Fla. 1995).

fatally impaired the products liability claim that to bring a products liability action would be frivolous.”), *rev. den.*, 659 So. 2d 1087 (Fla. 1995).] The question then arises as to whether there is *not* a “viable means” to first pursue the primary defendant so that the plaintiff is excused from first suing the primary defendant so that “ripeness” is not an available defense. One situation where it would not be viable to first sue the primary defendant, and thus the ripeness defense would fail, is where the evidence that has been spoliated includes the *identity* of the primary defendant,<sup>33</sup> [fn: See *Kimball v. Publix Super Markets, Inc.*, 901 So. 2d 293 (Fla. 2d DCA 2005).] so that without the evidence, the plaintiff does not know who to sue in the underlying, primary case.

A corollary to the prior rule is that a plaintiff should also not *simultaneously* pursue the underlying, primary defendant and the third party spoliator *in two different suits* because of the danger that the case against the spoliator may reach judgment first, at a time before the cause of action for spoliation has even accrued because the underlying claim against the primary defendant has not been completed.<sup>34</sup> [fn: *Townsend v. Conshor, Inc.*, 832 So. 2d 166, 168

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<sup>33</sup> See *Kimball v. Publix Super Markets, Inc.*, 901 So. 2d 293 (Fla. 2d DCA 2005).

<sup>34</sup> *Townsend v. Conshor, Inc.*, 832 So. 2d 166, 168 (Fla. 2d DCA 2002) (“We doubt [the employee] even had an accrued cause of action against [his employer] for

(Fla. 2d DCA 2002) (“We doubt [the employee] even had an accrued cause of action against [his employer] for spoliation at the time summary judgment was entered by the trial court because the [separate] action against [the manufacturer of the ladder] was not ‘completed’ at that time.”). Consolidation of such cases might be considered to solve the problem. See *Yoder v. Kuvin*, 785 So. 2d 679, 681 (Fla. 3d DCA 2001).]

The most common dispute is whether the spoliation claim against the third party spoliator may be brought simultaneously *in the same lawsuit* with the underlying tort claims against a primary, underlying defendant. The Third District has held that such simultaneous assertion is not only allowable, but preferable;<sup>35</sup> [fn: *Miller v. Allstate Ins. Co.*, 573 So. 2d 24 (Fla. 3d DCA 1990) (*Miller I*), *rev. den.*, 581 So. 2d 1307 (Fla.1991); *Yoder v. Kuvin*, 785 So. 2d 679, 681 (Fla. 3d DCA 2001). See also, *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673 (Fla. 3d DCA 1995) (*Miller II*) (quoting *Miller I*, 573

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spoliation at the time summary judgment was entered by the trial court because the [separate] action against [the manufacturer of the ladder] was not ‘completed’ at that time.”). Consolidation of such cases might be considered to solve the problem. See *Yoder v. Kuvin*, 785 So. 2d 679, 681 (Fla. 3d DCA 2001).

<sup>35</sup> *Miller v. Allstate Ins. Co.*, 573 So. 2d 24 (Fla. 3d DCA 1990) (*Miller I*), *rev. den.*, 581 So. 2d 1307 (Fla.1991); *Yoder v. Kuvin*, 785 So. 2d 679, 681 (Fla. 3d DCA 2001). See also, *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673 (Fla. 3d DCA 1995) (*Miller II*) (quoting *Miller I*, 573 So. 2d at 31, n. 13), *rev. den.*, 659 So. 2d 1087 (Fla. 1995).

So. 2d at 31, n. 13), *rev. den.*, 659 So. 2d 1087 (Fla. 1995).] but the Fourth District has displayed some inconsistency on the issue.<sup>36</sup> [fn: Cf. *Steinberg v. Kearns*, 907 So. 2d 691, 694 (Fla. 4th DCA 2005), with *Jimenez v. Community Asphalt Corp., et. al*, 968 So. 2d 668 (Fla. 4th DCA 2007). In the absence of an en banc opinion from the Fourth District, an argument can be made that inconsistency in the later opinion is perhaps improper. See *Fleischer v. Hi-Rise Homes, Inc.*, 536 So. 2d 1101, 1102 (Fla. 4th DCA 1988) (en banc).]

In fact, it has been held that the trial court abused its discretion in denying a motion to consolidate the spoliation case against the third party spoliator with the primary, product liability case against the manufacturer of the ladder because consolidation does not deny the defendant in the spoliation case a substantive right.<sup>37</sup> [fn: *Yoder v. Kuvin*, 785 So. 2d 679, 681 (Fla. 3d DCA 2001).] Courts have reasoned that consolidation serves to preserve judicial economy and to prevent piecemeal litigation because “a jury trying the concurrent

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<sup>36</sup> Cf. *Steinberg v. Kearns*, 907 So. 2d 691, 694 (Fla. 4th DCA 2005), with *Jimenez v. Community Asphalt Corp., et. al*, 968 So. 2d 668 (Fla. 4th DCA 2007). In the absence of an en banc opinion from the Fourth District, an argument can be made that inconsistency in the later opinion is perhaps improper. See *Fleischer v. Hi-Rise Homes, Inc.*, 536 So. 2d 1101, 1102 (Fla. 4th DCA 1988) (en banc).]

<sup>37</sup> *Yoder v. Kuvin*, 785 So. 2d 679, 681 (Fla. 3d DCA 2001).

claims in a single proceeding may be in the best position to determine issues of causation and damages.”<sup>38</sup> [fn: *Yoder v. Kuvin*, 785 So. 2d 679, 681 (Fla. 3d DCA 2001) (quoting *Miller I*, 573 So. 2d at 28, n. 7).] Moreover, courts have reasoned that it is more efficient to try the spoliation and product liability claims together because the jury will only proceed to the spoliation claim if the plaintiff's product case is significantly impaired.<sup>39</sup> [fn: *Yoder v. Kuvin*, 785 So. 2d 679, 681 (Fla. 3d DCA 2001) (citing *Miller I*, 573 So. 2d at 31, n. 13); *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673 (Fla. 3d DCA 1995) (*Miller II*) (quoting *Miller I*, 573 So. 2d at 31, n. 13), *rev. den.*, 659 So. 2d 1087 (Fla. 1995).]

On the other hand, the Second District has directed dismissal without prejudice of spoliation claims asserted simultaneously with the underlying claim because the spoliation claim had not yet accrued.<sup>40</sup>

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<sup>38</sup> *Yoder v. Kuvin*, 785 So. 2d 679, 681 (Fla. 3d DCA 2001) (quoting *Miller I*, 573 So. 2d at 28, n. 7).

<sup>39</sup> *Yoder v. Kuvin*, 785 So. 2d 679, 681 (Fla. 3d DCA 2001) (citing *Miller I*, 573 So. 2d at 31, n. 13); *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673 (Fla. 3d DCA 1995) (*Miller II*) (quoting *Miller I*, 573 So. 2d at 31, n. 13), *rev. den.*, 659 So. 2d 1087 (Fla. 1995).

<sup>40</sup> *Jost v. Lakeland Regional Medical Center, Inc.*, 844 So. 2d 656, 658 (Fla. 2d DCA 2003) (“[W]e believe that Ms. Jost's claim against ACIC is premature...Thus, Ms. Jost's spoliation allegations against ACIC will not be ripe until the underlying medical malpractice case has been resolved. Accordingly, the trial court is directed to dismiss these claims without prejudice so that, if appropriate, they can be raised at a later date.”), *rev. disp.*, 888 So. 2d 622 (Fla. 2004). This is also the Fourth DCA's *new* approach. *Jimenez v. Community Asphalt Corp.*, 968 So. 2d 668 (Fla. 4th DCA 2007). *But see*, *Steinberg*, 907 So. 2d at 694.

[fn: *Jost v. Lakeland Regional Medical Center, Inc.*, 844 So. 2d 656, 658 (Fla. 2d DCA 2003) (“[W]e believe that Ms. Jost's claim against ACIC is premature . . . . Thus, Ms. Jost's spoliation allegations against ACIC will not be ripe until the underlying medical malpractice case has been resolved. Accordingly, the trial court is directed to dismiss these claims without prejudice so that, if appropriate, they can be raised at a later date.”), *rev. disp.*, 888 So. 2d 622 (Fla. 2004). This is also the Fourth DCA's new approach. *Jimenez v. Community Asphalt Corp.*, 968 So. 2d 668 (Fla. 4th DCA 2007). But see, *Steinberg*, 907 So. 2d at 694.] Federal courts *generally* seem to favor the Second District's approach.<sup>41</sup> [fn: See *James v. U.S. Airways, Inc.*, 375 F.Supp.2d 1352, 1354 (M.D.Fla. 2005) (In *Jost*, the court dismissed the first party spoliation claims while permitting the plaintiffs' third party claims to be raised at a latter date.); *Landmark American Ins. Co. v. Moulton Properties, Inc.*, 2006 WL 2038554, \*2 (N.D.Fla. 2006) (citing *Jost* for

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<sup>41</sup> See *James v. U.S. Airways, Inc.*, 375 F.Supp.2d 1352, 1354 (M.D.Fla. 2005) (In *Jost*, the court dismissed the first party spoliation claims while permitting the plaintiffs' third party claims to be raised at a latter date.); *Landmark American Ins. Co. v. Moulton Properties, Inc.*, 2006 WL 2038554, \*2 (N.D.Fla. 2006) (citing *Jost* for the proposition that “a claim for spoliation of evidence would not ripen until the underlying medical malpractice case had been resolved.”). However, one federal court in a removal/remand/fraudulent joinder context refused to anticipate how the Florida Supreme Court would resolve this Florida inter-district conflict, but noted that the plaintiffs had *not* fraudulently joined the non-diverse, alleged third party spoliator in the suit with the diverse manufacturer defendants, meaning removal to federal court was improper, because “arguable confusion in the applicable state law supports remand. They have failed to meet their burden of demonstrating that there is not even arguably a reasonable basis for predicting that Florida law would permit a spoliation claim to proceed before the conclusion of the underlying case.” *Bryant v. Zimmer, Inc.*, 2006 WL 2362360, \*2 (M.D.Fla. 2006).

the proposition that “a claim for spoliation of evidence would not ripen until the underlying medical malpractice case had been resolved.”). However, one federal court in a removal/remand/fraudulent joinder context refused to anticipate how the Florida Supreme Court would resolve this Florida inter-district conflict, but noted that the plaintiffs had not fraudulently joined the non-diverse, alleged third party spoliator in the suit with the diverse manufacturer defendants, meaning removal to federal court was improper, because “arguable confusion in the applicable state law supports remand. They have failed to meet their burden of demonstrating that there is not even arguably a reasonable basis for predicting that Florida law would permit a spoliation claim to proceed before the conclusion of the underlying case.” *Bryant v. Zimmer, Inc.*, 2006 WL 2362360, \*2 (M.D.Fla. 2006).]

In sum, a spoliation claim against the spoliating third party definitely may be pursued *after* pursuing the underlying, primary tortfeasor, may never be pursued *before* filing suit against the underlying, primary tortfeasor, and should not be pursued *simultaneously but in separate suits* due to the danger of the spoliation case concluding first, *i.e.*, before the cause of action for spoliation has even accrued. Finally, if in state court, it depends on

what district the case is in as to whether the spoliation claim may be pursued *simultaneously in the same suit* with the underlying, primary tortfeasor claim,<sup>42</sup> [fn: *Compare* *Miller v. Allstate Ins. Co.*, 573 So. 2d 24 (Fla. 3d DCA 1990) (*Miller I*), *rev. den.*, 581 So. 2d 1307 (Fla.1991); *Yoder v. Kuvin*, 785 So. 2d 679, 681 (Fla. 3d DCA 2001); *Steinberg v. Kearns*, 907 So. 2d 691, 694 (Fla. 4th DCA 2005); *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673 (Fla. 3d DCA 1995) (*Miller II*) (quoting *Miller I*, 573 So. 2d at 31, n. 13), *rev. den.*, 659 So. 2d 1087 (Fla. 1995), *with* *Jost v. Lakeland Regional Medical Center, Inc.*, 844 So. 2d 656, 658 (Fla. 2d DCA 2003).] but in federal court, it appears possible that simultaneous assertion in the same suit *may* not be allowed.<sup>43</sup> [fn: See *James v. U.S. Airways, Inc.*, 375 F.Supp.2d 1352, 1354 (M.D.Fla. 2005) (In *Jost*, the court dismissed the first party spoliation claims while permitting the plaintiffs' third party claims to be raised at a latter date); *Landmark American Ins. Co. v. Moulton*

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<sup>42</sup> *Compare* *Miller v. Allstate Ins. Co.*, 573 So. 2d 24 (Fla. 3d DCA 1990) (*Miller I*), *rev. den.*, 581 So. 2d 1307 (Fla.1991); *Yoder v. Kuvin*, 785 So. 2d 679, 681 (Fla. 3d DCA 2001); *Steinberg v. Kearns*, 907 So. 2d 691, 694 (Fla. 4th DCA 2005); *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673 (Fla. 3d DCA 1995) (*Miller II*) (quoting *Miller I*, 573 So. 2d at 31, n. 13), *rev. den.*, 659 So. 2d 1087 (Fla. 1995), *with* *Jost v. Lakeland Regional Medical Center, Inc.*, 844 So. 2d 656, 658 (Fla. 2d DCA 2003).

<sup>43</sup> See *James v. U.S. Airways, Inc.*, 375 F.Supp.2d 1352, 1354 (M.D.Fla. 2005) (In *Jost*, the court dismissed the first party spoliation claims while permitting the plaintiffs' third party claims to be raised at a latter date); *Landmark American Ins. Co. v. Moulton Properties, Inc.*, 2006 WL 2038554, \*2 (N.D.Fla. 2006) (citing *Jost* for the proposition that "a claim for spoliation of evidence would not ripen until the underlying medical malpractice case had been resolved."). *But see*, *Bryant v. Zimmer, Inc.*, 2006 WL 2362360, \*2 (M.D.Fla. 2006) (noting confused state of Florida Law on timing issue).

Properties, Inc., 2006 WL 2038554, \*2 (N.D.Fla. 2006) (citing *Jost* for the proposition that “a claim for spoliation of evidence would not ripen until the underlying medical malpractice case had been resolved.”). *But see*, *Bryant v. Zimmer, Inc.*, 2006 WL 2362360, \*2 (M.D.Fla. 2006) (noting confused state of Florida Law on timing issue).]

Another potential defense is that the alleged spoliator is the primary, underlying defendant, and such claims have been barred by the Florida Supreme Court in *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005).<sup>44</sup> [fn: See generally, Michael D. Starks, *Deconstructing Damages for Destruction of Evidence: Martino Eradicates the First-party Tort of Spoliation of Evidence*, 80 Fla. B.J. 36, 36-43 (July/Aug. 2006) (analyzing *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005)). See also, Michael D. Starks *Spoliation or destruction of evidence and the duty to cooperate with third party claims*, § 22D:6 in 9 Fla. Prac., Florida Workers' Compensation with Forms (by Patrick John McGinley), part of the West Florida Practice Series, 2008-09 edition et seq. ] Similarly, if the

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<sup>44</sup> See generally, Michael D. Starks, *Deconstructing Damages for Destruction of Evidence: Martino Eradicates the First-party Tort of Spoliation of Evidence*, 80 Fla. B.J. 36, 36-43 (July/Aug. 2006) (analyzing *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005)). See also, Michael D. Starks *Spoliation or destruction of evidence and the duty to cooperate with third party claims*, § 22D:6 in 9 Fla. Prac., Florida Workers' Compensation with Forms (by Patrick John McGinley), part of the *West Florida Practice Series*, 2008-09 edition et seq.

alleged spoliator is in reality an "agent" of the primary, underlying defendant, the alleged spoliator is still considered to be the "first party spoliator" and such a claim is barred.<sup>45</sup>

If the claim is that the third party spoliator did not actually spoliator evidence, but instead allegedly did not *prevent* the spoliation, a defense may be that there was no duty to do so.<sup>46</sup> [fn: See *Barbosa v. Liberty Mut. Ins. Co.*, 617 So. 2d 1129, 1129-30 (Fla. 3d DCA 1993) (a carrier who has never had access to the evidence has no duty to acquire it and preserve it); *Gayer v. Fine Line Const. & Elec., Inc.*, 2008 WL 583455, 1 (Fla. 4th DCA 2008) ("As for Labor Finders, it was undisputed that it never obtained possession of the ladder despite multiple attempts to do so. We hold that Labor Finders had no duty

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<sup>45</sup> *McGrath v. Ward North America, Inc.*, 955 So. 2d 25, 25 (Fla. 3d DCA 2007) ("In this proceeding, the plaintiff, who was injured when a chair at the Holiday Isle Resort and Marina in Islamorada collapsed under him, raised a claim of actionable spoliation against Ward North America, Inc., the corporate adjuster for Holiday Isle's liability insurer. The basis of the action was that a Ward adjuster took possession of and failed to preserve the chair, purportedly resulting in a reduction of the value of his claim for damages against Holiday Isle. We affirm the dismissal of the action. Even if, as it must be assumed, the alleged facts are all true, it is apparent that the 'spoliation' complained of was committed only by agents or representatives of Holiday Isle, which would give rise, at most, to a presumption of negligence and possible sanctions in the case against the hotel itself, and does not support an independent action for spoliation.").

<sup>46</sup> *See Barbosa v. Liberty Mut. Ins. Co.*, 617 So. 2d 1129, 1129-30 (Fla. 3d DCA 1993) (a carrier who has never had access to the evidence has no duty to acquire it and preserve it); *Gayer v. Fine Line Const. & Elec., Inc.*, 2008 WL 583455, 1 (Fla. 4<sup>th</sup> DCA 2008) ("As for Labor Finders, it was undisputed that it never obtained possession of the ladder despite multiple attempts to do so. We hold that Labor Finders had no duty under section 440.39(7) to acquire and preserve evidence that was never in its possession.").

under section 440.39(7) to acquire and preserve evidence that was never in its possession.".)].]

The final defenses go to merely reducing the amount of damages.

When primary evidence, such as an allegedly defective product has been spoliated (that is, is missing, destroyed or tampered with), the damage to the ability to prosecute the underlying suit is generally much greater<sup>47</sup> [fn: *Rockwell Intern. Corp. v. Menzies*, 561 So. 2d 677, 680-81 (Fla. 3d DCA 1990) ("In today's product liability trial, we frequently rely heavily on Maxwellian often hyper-technical, expert opinions. Thus, small, seemingly insignificant items, like simple bolts, can become large factors in the outcome of a trial. ...*Valcin* did not involve the destruction and loss of primary physical evidence as in this case.".)].] than if the spoliated evidence is merely "secondary evidence," such as documents, medical records, x-rays, etc.,<sup>48</sup> [fn:

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<sup>47</sup> *Rockwell Intern. Corp. v. Menzies*, 561 So. 2d 677, 680-81 (Fla. 3d DCA 1990) ("In today's product liability trial, we frequently rely heavily on Maxwellian often hyper-technical, expert opinions. Thus, small, seemingly insignificant items, like simple bolts, can become large factors in the outcome of a trial. ...*Valcin* did not involve the destruction and loss of primary physical evidence as in this case.").

<sup>48</sup> See *Rockwell Intern. Corp. v. Menzies*, 561 So. 2d 677, 681 (Fla. 3d DCA 1990).

See *Rockwell Intern. Corp. v. Menzies*, 561 So. 2d 677, 681 (Fla. 3d DCA 1990).] where the damage to the underlying tort claim is generally much less. Obviously, spoliation applies to “secondary evidence” such as medical records. But spoliation principles arguably apply even more strongly to “primary evidence,” as in, for instance, products liability cases where the device that caused injury is missing or tampered with.<sup>49</sup> [fn: *Rockwell Intern. Corp. v. Menzies*, 561 So. 2d 677, 680-81 (Fla. 3d DCA 1990) (“In today’s product liability trial, we frequently rely heavily on Maxwellian often hyper-technical, expert opinions. Thus, small, seemingly insignificant items, like simple bolts, can become large factors in the outcome of a trial. ...*Valcin* did not involve the destruction and loss of primary physical evidence as in this case...”)].]

Accordingly, for instance, if the product still exists but contemporaneous photographs of the product have been destroyed, any significant impairment to the plaintiff’s ability to prove the underlying claim, and proximate causation to damages, are generally going to be less than if the reverse were true.<sup>50</sup> [fn: This primary

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<sup>49</sup> *Rockwell Intern. Corp. v. Menzies*, 561 So. 2d 677, 680-81 (Fla. 3d DCA 1990) (“In today’s product liability trial, we frequently rely heavily on Maxwellian often hyper-technical, expert opinions. Thus, small, seemingly insignificant items, like simple bolts, can become large factors in the outcome of a trial. ...*Valcin* did not involve the destruction and loss of primary physical evidence as in this case...”).

<sup>50</sup> This primary versus secondary evidence issue is also discussed in the preceding section when discussing spoliation cause of action elements four through six.

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An additional defense in a spoliation case to reduce the alleged damages caused by spoliation of evidence is that the alleged spoliator can argue that the impairment to the plaintiff's underlying tort claim is reduced because the plaintiff will be entitled to a product defect inference, called a *Cassisi* or *Greco* inference. It should be noted that whether a *Cassisi* or *Greco* inference is available to assist the plaintiff in third party spoliation cases (as opposed to when the product is destroyed by its own defect), depends on the Florida District Court of Appeal the case is in, but federal law seems to allow such an inference when a third party is the spoliator.<sup>51</sup> [fn: *McCorvey v. Baxter*

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<sup>51</sup> *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1259 n.4 (11th Cir. 2002) (noting dispute between the Third and Fifth Districts regarding the applicability of the *Cassisi* product defect inference in spoliation cases, and comparing *Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014 (Fla. 5th DCA 2000) (holding *Cassisi* (a/k/a *Greco*) inference improper in spoliation cases because to hold otherwise would invite fraud in a case where the plaintiff was the spoliator), with *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673 (Fla. 3d DCA 1995) (*Miller I*) (applying *Cassisi* or *Greco* inference to spoliation case whether the alleged spoliator was a third party), *rev. den.*, 659 So. 2d 1087 (Fla. 1995)). The Eleventh Circuit distinguished *Torres* in part on the basis that in *McCorvey*, unlike it *Torres*, it was a third party's spoliation and not the plaintiff's spoliation that destroyed the evidence. *Id.* Cf. *Caswell v. Ford Motor Co.*, 2005 WL 3372882, \*4 (M.D.Fla. 2005) ("Additionally, Plaintiffs are barred from receiving a *Cassisi* inference because Plaintiffs' own actions resulted in the destruction of both the Explorer and its tire."); *Reed v. Alpha Professional Tools*, 975 So. 2d 1202, 1204 (Fla. 5<sup>th</sup> DCA 2008) (heavily distinguishing *Torres*, and noting that the presence of photographs, as well as the ability to define the product at issue, has been held by the Fifth District to be one reason a case where the plaintiff's counsel spoliated evidence "is not a *Greco/Cassisi* case."). Of course, even in cases

*Healthcare Corp.*, 298 F.3d 1253, 1259 n.4 (11th Cir. 2002) (noting dispute between the Third and Fifth Districts regarding the applicability of the *Cassisi* product defect inference in spoliation cases, and comparing *Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014 (Fla. 5th DCA 2000) (holding *Cassisi* (a/k/a *Greco*) inference improper in spoliation cases because to hold otherwise would invite fraud in a case where the plaintiff was the spoliator), with *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673 (Fla. 3d DCA 1995) (*Miller II*) (applying *Cassisi* or *Greco* inference to spoliation case whether the alleged spoliator was a third party), *rev. den.*, 659 So. 2d 1087 (Fla. 1995)). The Eleventh Circuit distinguished *Torres* in part on the basis that in *McCorvey*, unlike it *Torres*, it was a third party's spoliation and not the plaintiff's spoliation that destroyed the evidence. *Id. Cf. Caswell v. Ford Motor Co.*, 2005 WL 3372882, \*4 (M.D.Fla. 2005) ("Additionally, Plaintiffs are barred from receiving a *Cassisi* inference because Plaintiffs' own actions resulted in the destruction of both the Explorer and its tire."); *Reed v. Alpha Professional Tools*, 975 So. 2d 1202, 1204 (Fla. 5<sup>th</sup> DCA 2008) (heavily distinguishing *Torres*, and noting that the presence of photographs, as well as the ability to define the product at issue, has been held by the Fifth District to be one reason a case where the

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plaintiff's counsel spoliated evidence "is not a *Greco/Cassisi* case.").

Of course, even in cases of third party spoliation, the *Cassisi* inference may not be applicable in a particular case for other reasons.]

Although not technically a "defense," the underlying, or primary tortfeasor in the underlying tort claim can also sue a third party spoliator for reducing the primary defendant's ability to defend the underlying claim. In such cases, an additional defense available to the third party spoliator to reduce the alleged damages caused by spoliation of evidence is that the third party spoliator can argue that the prejudice to the underlying defendant is mitigated by the presence of photographs, and therefore the underlying defendant was "unable to defend completely," but it was not "completely unable to defend."<sup>52</sup>

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<sup>52</sup> See *Reed v. Alpha Professional Tools*, 975 So. 2d 1202, 1204 (Fla. 5<sup>th</sup> DCA 2008) ("Unlike *Torres*, in this case, extensive photographs of the item had been made and the plaintiff has asserted that he can prove his claim based on the photographs and other specimens of the allegedly defective product. Unlike *Torres*, identification of the product is not an issue. Unlike *Torres*, in this case, the parties can be placed on an equal footing by limiting the plaintiff to the physical evidence available to both parties, *i.e.* the photographs. Although the defendant will not be able to inspect the product, it will benefit from the inherent limitations on the plaintiff's proof and will be able to match the plaintiff's access to the available evidence. To some extent, the issue on which the trial judge focused is a problem of syntax. In *Torres*, without the spoliated product, the defendant was left *completely unable to defend*. This case, on the other hand, is more like a situation where the defendant is unable to defend completely. The defendant enumerates a variety of testing and inspections that it cannot do because it does not have the product. To the extent that *Torres* contemplates dismissal based on prejudice to the defendant, its reach is to the complete inability to defend, not the inability to defend completely. Spoliation is not a strict liability concept-'lose the evidence, lose the case'-no matter whether the plaintiff or the defendant was responsible for the loss. For a variety of

[fn: See *Reed v. Alpha Professional Tools*, 975 So. 2d 1202, 1204 (Fla. 5<sup>th</sup> DCA 2008) ("Unlike *Torres*, in this case, extensive photographs of the item had been made and the plaintiff has asserted that he can prove his claim based on the photographs and other specimens of the allegedly defective product. Unlike *Torres*, identification of the product is not an issue. Unlike *Torres*, in this case, the parties can be placed on an equal footing by limiting the plaintiff to the physical evidence available to both parties, *i.e.* the photographs. Although the defendant will not be able to inspect the product, it will benefit from the inherent limitations on the plaintiff's proof and will be able to match the plaintiff's access to the available evidence. To some extent, the issue on which the trial judge focused is a problem of syntax. In *Torres*, without the spoliated product, the defendant was left *completely unable to defend*. This case, on the other hand, is more like a situation where the defendant is unable to defend completely. The defendant enumerates a variety of testing and inspections that it cannot do because it does not have the product. To the extent that

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reasons, the product is not always available after the incident causing injury. Depending on the circumstances, a products liability claim may nevertheless be proven. The goal in spoliation cases is to assure that the non-spoliator does not bear an unfair burden.") (emphasis in original). However, contrary to the *Reed* holding, there *were* product photographs in *Torres*, but the photographs' existence did not preclude dismissal or the bar on the plaintiff's use of the *Greco/Cassisi* inference. See *Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014 (Fla. 5th DCA 2000) (the Fifth District Court of Appeal affirmed the dismissal of plaintiff's claims based on her counsel's loss of the product and the defendant's inability to completely set forth its defense without this critical evidence, and the existence of photographs mentioned in the opinion did not change this result).

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In many situations, however, it is a flawed notion to suggest that photographs can sufficiently cure the prejudice to the non-spoliator,

especially in a products liability case, as has been recognized by a number of courts.<sup>53</sup> [fn: *See Cooper v. Meridian Yachts, Ltd.*, 2008 WL 2229552, \*6 (S.D.Fla. 2008) (finding waiver of consulting, non-testifying expert privilege due to spoliation of evidence, and holding, "Consequently, although Third-Party Plaintiffs retain all of the parts removed from the *M/Y Meduse*' s food lift and have provided Third-Party Defendants with photographs of Freeman & Partners' inspection process, as well as a copy of Freeman & Partners' Report, Third-Party Defendants can never have the opportunity to examine the food lift in

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<sup>53</sup> *See Cooper v. Meridian Yachts, Ltd.*, 2008 WL 2229552, \*6 (S.D.Fla. 2008) (finding waiver of consulting, non-testifying expert privilege due to spoliation of evidence, and holding, "Consequently, although Third-Party Plaintiffs retain all of the parts removed from the *M/Y Meduse*' s food lift and have provided Third-Party Defendants with photographs of Freeman & Partners' inspection process, as well as a copy of Freeman & Partners' Report, Third-Party Defendants can never have the opportunity to examine the food lift in the condition in which it apparently was following the accident and at the time of Freeman & Partners' inspection of it. Because the cause of the incident involving the food lift constitutes a central issue in the instant litigation, this impairment is not insignificant. Indeed, the Court finds it to constitute precisely the type of situation in which other courts have found 'exceptional circumstances."): *American Family Ins. Co. v. Village Pontiac-GMC, Inc.*, 585 N.E. 2d 1115, 1118-19 (Ill. App. Ct. 1992) (although allegedly defective wires and photographs of vehicle were retained, remainder of vehicle was salvaged by plaintiffs' insurance company, so court barred all direct and circumstantial evidence concerning the condition of the vehicle -- holding that photographs are not an acceptable substitute for the real thing); *Cincinnati Ins. Co. v. General Motors Corp.*, 1994 WL 590566, \*\*5-6 (Ohio Ct. App. 1994) (although blown motor which allegedly caused auto fire and photographs of vehicle were retained by plaintiffs, remainder of vehicle was destroyed before suit was filed and accordingly court precluded all expert testimony as to the origin and cause of the fire, and it did not matter that photographs of lost evidence were available); *Johnson v. Harvard University*, 1996 WL 1186805, \*\*2-3 (Mass. Super. Ct. 1996) (court precluded evidence of condition of floor prior to its replacement because "photographs of the threshold will not be as persuasive as the actual threshold"). *See also, Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014 (Fla. 5th DCA 2000) (the Fifth District Court of Appeal affirmed the dismissal of plaintiff's claims based on her counsel's loss of the product and the defendant's inability to completely set forth its defense without this critical evidence, and the existence of photographs mentioned in the opinion did not change this result).

the condition in which it apparently was following the accident and at the time of Freeman & Partners' inspection of it. Because the cause of the incident involving the food lift constitutes a central issue in the instant litigation, this impairment is not insignificant. Indeed, the Court finds it to constitute precisely the type of situation in which other courts have found 'exceptional circumstances.'"); *American Family Ins. Co. v. Village Pontiac-GMC, Inc.*, 585 N.E. 2d 1115, 1118-19 (Ill. App. Ct. 1992) (although allegedly defective wires and photographs of vehicle were retained, remainder of vehicle was salvaged by plaintiffs' insurance company, so court barred all direct and circumstantial evidence concerning the condition of the vehicle -- holding that photographs are not an acceptable substitute for the real thing); *Cincinnati Ins. Co. v. General Motors Corp.*, 1994 WL 590566, \*\*5-6 (Ohio Ct. App. 1994) (although blown motor which allegedly caused auto fire and photographs of vehicle were retained by plaintiffs, remainder of vehicle was destroyed before suit was filed and accordingly court precluded all expert testimony as to the origin and cause of the fire, and it did not matter that photographs of lost evidence were available); *Johnson v. Harvard University*, 1996 WL 1186805, \*\*2-3 (Mass. Super. Ct. 1996) (court precluded evidence of condition of floor prior to its replacement because "photographs of the threshold will not be as persuasive as the actual threshold"). *See also*,

*Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014 (Fla. 5th DCA 2000) (the Fifth District Court of Appeal affirmed the dismissal of plaintiff's claims based on her counsel's loss of the product and the defendant's inability to completely set forth its defense without this critical evidence, and the existence of photographs mentioned in the opinion did not change this result).] As these courts have recognized, the non-spoliating primary defendant cannot perform its own tests or adequately contradict the tests performed by the plaintiff or its expert, even if a third party is at fault for the spoliation, and similarly has no ammunition to defend often specious and unsupported claims by the plaintiff, which can typically be refuted if the product were still available. Moreover, photographs, especially in the digital age, can be altered.<sup>54</sup> [fn: *Cf. Brian Barakat and Bronwyn Miller, Authentication of Digital Photographs Under the 'Pictorial Testimony' Theory*, 78 Fla. B.J. 38 (Aug. 2006) (citing Jill Witkowski, *Can Juries Really Believe What They See? New Foundational Requirements for the Authentication of Digital Images*, 10 Wash. U. J. L. & Pol'y 267 (2002); Mark Hansen, *'Digitally Enhanced' Evidence Draws Challenges from Defense*, 88-AUG

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<sup>54</sup> *Cf. Brian Barakat and Bronwyn Miller, Authentication of Digital Photographs Under the 'Pictorial Testimony' Theory*, 78 Fla. B.J. 38 (Aug. 2006) (citing Jill Witkowski, *Can Juries Really Believe What They See? New Foundational Requirements for the Authentication of Digital Images*, 10 WASH. U. J. L. & POL'Y 267 (2002); Mark Hansen, *'Digitally Enhanced' Evidence Draws Challenges from Defense*, 88-AUG A.B.A.J. 24 (2002); Michael Cherry, *Informal Opinion, Reasons to Challenge Digital Evidence and Electronic Photography*, 27-JUL CHAMPION 42 (2003); David Beckman & David Hirsch, *Imaging Software can Help your Pictures Tell the Story*, 89-AUG A.B.A. J. 62)) [Hereinafter *Digital Photographs*].

A.B.A.J. 24 (2002); Michael Cherry, *Informal Opinion, Reasons to Challenge Digital Evidence and Electronic Photography*, 27-JUL Champion 42 (2003); David Beckman & David Hirsch, *Imaging Software can Help your Pictures Tell the Story*, 89-AUG A.B.A. J. 62)) [Hereinafter *Digital Photographs*]. ]

As with any cause of action, it is wise to consider whether any of the following affirmative defenses could be relevant to a defense against a spoliation claim, because pursuant to the Florida Rules of Civil Procedure 1.110, the following must be set forth affirmatively in the answer or (in most circumstances) will be waived: accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.<sup>55</sup> [fn: **Defenses required to appear in answer to complaint.** See Florida Rule of Civil Procedure 1.110(d).] These and other more general defenses, which are available to many other causes of action, are discussed elsewhere in this treatise. Some of

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<sup>55</sup> **Defenses required to appear in answer to complaint.** See Florida Rule of Civil Procedure 1.110(d).

them, such as discharge in bankruptcy, release, res judicata and others, might at times be useful in defending spoliation claims.

### **1:3 Research assistance for spoliation liability against the third party spoliator**

For further research, the author recommends:

Michael D. Starks, *Spoliation or destruction of evidence and the duty to cooperate with third party claims*, Chapter 22D in *9 Fla. Prac.*, Florida Workers' Compensation with Forms (by Patrick John McGinley) (2007 ed. et seq.)

Michael D. Starks, *Deconstructing Damages for Destruction of Evidence: Martino Eradicates the First-party Tort of Spoliation of Evidence*, 80 Fla. B.J. 36, 36-43 (July/Aug. 2006)

Thomas D. Sawaya, 6 Fla. Prac., *Personal Injury & Wrongful Death Actions* § 26:1 et. seq. (2008-2009 ed.)

Michael D. Starks, *Meta-discovery or discovery about discovery: is it proper to discover an opposing party's efforts to comply with discovery requests?*, 29 *Company Lawyer* 309 (Sept. 2008)

#### **1:4 Jury verdicts involving spoliation of evidence liability against the third party spoliator**

My co-author for this chapter is Michael D. Starks, a senior counsel in the Orlando office of Holland & Knight LLP. He practices primarily commercial and product liability law. He received his J.D. degree *magna cum laude* from the Florida State University College of Law and his B.S. degree *cum laude* from the University of Florida.

The following survey of jury verdicts presents some examples that are either zero, not verdicts at all but sanctions, or are in the "first party" spoliation tort context which is no longer viable in Florida. Spoliation can be a tort claim against a third party, or sanctions (which can include attorney's fees) against a primary defendant, and their analysis is somewhat different. Nevertheless, it is our hope that these currently available examples prove useful to the reader in "third party" spoliation tort claims anyway.

According to ALM Properties, Inc.'s *Verdict Search Weekly*, in *Optowave Co., Ltd. v. Dmitri Nikitin d/b/a Precision Technology Group*,

Florida Case number 6:05-cv-01083-ACC-DAB, the U.S. District Court for the Middle District of Florida ordered sanctions against the defendant and in favor of the plaintiff Optowave Co., Ltd., in the form of attorney's fees. That reporter's summary of the facts reads: "Optowave claimed ... Precision Technology destroyed electronic information related to contract interpretation on the issue of product specifications. The defense claimed that emails were inadvertently erased during hard drive reformatting." [fn: **Example of jury verdict.** *Optowave Co., Ltd. v. Dmitri Nikitin d/b/a Precision Technology Group*, Florida Case number 6:05-cv-01083-ACC-DAB, 2007 WL 1775266 (M.D.Fla.), VerdictSearch Weekly, VandS 06-12-07.] The court awarded attorney's fees as a sanction. This verdict report is available on WestLaw.

According to ALM Properties, Inc.'s *Verdict Search Weekly*, in *Timothy Duane Gayer v. Fine Line Construction & Electric Inc. and Labor Finders of Broward County*, Florida Case number 62001-CA-002158, the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, entered a summary judgment in favor of the defendant and dismissed the case. That reporter's summary of the facts reads: "On April 7, 1999, plaintiff . . . was working for Labor Finders . . . when he fell from a 12- to 14-foot ladder. . . . Labor

Finders' investigators examined the ladder . . . and found that it was wobbly and unstable and that the crossbar wouldn't hold. At some point, however, the ladder was lost. . . . Gayer sued Labor Finders and the contractor at the construction site, Fine Line Construction & Electric Inc., Pompano Beach, Fla., for spoliation of evidence. . . .

Fine Line Construction moved for summary judgment on the grounds that it wasn't Gayer's employer and, therefore, didn't have a duty to protect evidence in the accident case. . . . Labor Finders moved for summary judgment on the grounds that it didn't have a duty to preserve the ladder as evidence because it didn't have possession or control of the ladder. . . ." [fn: **Example of jury verdict.** *Timothy Duane Gayer v. Fine Line Construction & Electric Inc. and Labor Finders of Broward County, Florida*, Case number 62001-CA-002158, 2006 WL 2934106 (Fla.Cir.Ct.), VerdictSearch Florida Reporter Vol. 4, Issue 5.] This verdict report is available on WestLaw.

According to Florida Legal Periodicals, Inc., as reported in their *Florida Jury Verdict Reporter*, in the case of *Margie Ryals Levenson v. Marvel Office Furniture Manufacturing, Ltd.*, Florida Case number 96-6140-CA-27, in a Florida state circuit court, a jury reached a verdict on behalf of the plaintiff on allegations involving, *inter alia*, spoliation of evidence. That reporter's summary of the facts of the case reads: "On

January 6, 1994, while Plaintiff was working for Florida Club Care Center . . . she sat on a Marvel steno chair manufactured by Defendant. Plaintiff alleged that there was a defect in its design and/or manufacture which caused her to fall. . . . The broken chair was improperly disposed of resulting in spoliation of evidence. Defendant alleged the chair had been previously broken and removed from service, but somehow it was put back into service. Defendant alleged Plaintiff fell from the front of the chair. . . . Defendant settled after the verdict for \$96,400.00" [fn: **Example of jury verdict.** 2000 WL 33275057 (Fla.Cir.Ct.), 01 FJVR 2-17.] The full report is available on WestLaw.

According to Florida Legal Periodicals, Inc., as reported in their *Florida Jury Verdict Reporter*, in the case of *Noreen M. LeBlanc, as personal representative of the estate of H.A. LeBlanc v. Alan S. Collin, M.D.; Hematology-Oncology Associates of the Treasure Coast, P.A.; and Medical Center of Port St. Lucie*, Florida Case number 96-501-CA-01, a Florida state circuit court judge directed a verdict in favor of the hospital based on his finding that there was no evidence of a duty to retain specimens in this spoliation of evidence claim. That reporter's summary of the facts of the case reads: "Plaintiff alleged that . . . Defendant negligently failed to diagnose, treat, and transfer decedent

even though he exhibited classic symptoms of thrombotic thrombocytopenia purpura . . . . Plaintiff also alleged negligent administration of platelets . . . . Plaintiff alleged spoliation of evidence (bone marrow, peripheral blood smears) against hospital.” [fn:

**Example of jury verdict.** 2000 WL 968656 (Fla.Cir.Ct.), 00 FJVR 6-66.] The full report is available on WestLaw.

According to Florida Legal Periodicals' *Florida Jury Verdict Reporter*, in *Dianna L. Rice, husband and wife vs. JBS Enterprises; William A. Johnson; Jeffrey A. Blomsness; Fantasma Production, Inc.; Hildebrand's Midway of Fun, Inc.; and Chance Rides, Inc.*, Florida Case number 95-1599-CA-01, reported at 1998 WL 1115109 and at 99 FJVR 8-13, a Florida state circuit court commenced a jury trial that was, according to the reporter, settled after commencement for \$800,000.00 in favor of the plaintiff. The allegations apparently included the spoliation of evidence. That reporter's summary of the facts reads: "On February 5, 1995, at approximately 1:00 p.m., Plaintiff was injured when she was ejected from a carnival ride at the Everglades Seafood Festival in Everglades City. Plaintiff was a passenger on a ride called The Wipeout, manufactured by Defendant Chance Rides. An investigation conducted by the Florida Bureau of Fair Rides Inspection immediately after the accident was inconclusive . . . .

One of the Defendants attempted to claim that Plaintiff had voluntarily attempted to jump from the ride while it was in motion. During pretrial discovery, . . . Chance Rides determined that the probable cause of the lap bar failure was an electrical short. The electrical wire involved was discarded and Chance Rides failed to disclose this finding in their initial discovery responses. Before trial, the Court entered a default against the manufacturer for spoliation of evidence and discovery violations. There was also evidence that the owner of the ride bypassed safety devices on the ride, resulting in the owner also admitting liability before trial. . . . Defendant JBS contended that the default against Defendant Chance Rides for spoliation of evidence -- the electrical wire was thus not available as evidence -- resulted in a situation in which JBS could no longer allege that the defect was caused solely by Chance Rides' negligence, and, therefore, JBS had to admit liability." The reporter notes that the plaintiff's attorney represented that: "The case was settled in court during the second day of trial.." [fn: **Example of jury verdict.** 1998 WL 1115109 (Fla.Cir.Ct.), 99 FJVR 8-13.] WestLaw provides a full copy of this jury verdict report.

**1:5 Sample jury instructions for a spoliation liability case against the third party spoliator**

This chapter is written by Michael D. Starks, senior counsel in the Orlando office of Holland & Knight LLP. He practices primarily commercial and product liability law. He received his J.D. degree *magna cum laude* from the Florida State University College of Law and his B.S. degree *cum laude* from the University of Florida. Portions of this Chapter's material first appeared in Michael D. Starks, *Deconstructing Damages for Destruction of Evidence: Martino Eradicates the First-party Tort of Spoliation of Evidence*, 80 Fla. B.J. 36, 36-43 (July/Aug. 2006) [Hereinafter *Deconstructing Damages*] (and is reprinted here with permission).

For general jury instructions, see other sections of this treatise and the Florida Standard Jury Instructions for Civil Cases as promulgated by The Florida Bar. The following instructions are specific to a third party spoliation case, and are styled to be used in a case where the plaintiff's underlying, primary lawsuit against the primary defendant has been completed and the plaintiff has therefore suffered some diminution in value in the underlying tort claim cause by the third-party spoliator. These instructions are not drafted to be used in a case where the plaintiff is simultaneously pursuing both the primary defendant and the third party spoliator in the same suit (for such

cases additional instructions would be needed).<sup>56</sup> [fn: But as noted above, some (but not all) courts have reasoned that it is more efficient to try the spoliation and product liability claims together because the jury will only proceed to the spoliation claim if the plaintiff's product case is significantly impaired. *Yoder v. Kuvin*, 785 So. 2d 679, 681 (Fla. 3d DCA 2001) (citing *Miller I*, 573 So. 2d at 31, n. 13); *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673 (Fla. 3d DCA 1995) (*Miller II*) (quoting *Miller I*, 573 So. 2d at 31, n. 13), *rev. den.*, 659 So. 2d 1087 (Fla. 1995). In such situations, additional jury instructions *vis a vis* the primary defendant will need to be drafted.] These instructions are also *not* currently drafted to be used in a primary defendant's suit against the third party spoliator due to the reduction of the primary defendant's ability to *defend* the underlying suit. Nor are all potential issues and affirmative defenses discussed above reflected in these instructions, in that the law is somewhat contradictory on some of them. Although the facts of each spoliation case are different, the following sample jury instructions can be modified to fit most any

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<sup>56</sup> But as noted above, some (but not all) courts have reasoned that it is more efficient to try the spoliation and product liability claims together because the jury will only proceed to the spoliation claim if the plaintiff's product case is significantly impaired. *Yoder v. Kuvin*, 785 So. 2d 679, 681 (Fla. 3d DCA 2001) (citing *Miller I*, 573 So. 2d at 31, n. 13); *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673 (Fla. 3d DCA 1995) (*Miller II*) (quoting *Miller I*, 573 So. 2d at 31, n. 13), *rev. den.*, 659 So. 2d 1087 (Fla. 1995). In such situations, additional jury instructions *vis a vis* the primary defendant will need to be drafted.

facts. Footnotes are provided to aid the court and counsel but are not intended to be read to the jury.

*DEFINITION AND ELEMENTS OF SPOILIATION CLAIM*

The term “spoliation” refers to the failure by a third party to preserve evidence that is necessary for a plaintiff's contemplated or pending litigation against a defendant. Spoliation can be negligently or intentionally done.

The essential elements under Florida law to pleading and proving a tort claim of spoliation of evidence are:

1. Existence of a potential civil action by a plaintiff against a primary defendant;
2. A legal or contractual duty on the part of a third party to preserve and not destroy or spoliolate evidence which is relevant to the potential civil action;
3. Destruction of that evidence by the third party spoliator;
4. Significant impairment in the plaintiff's ability to prove the lawsuit against the primary defendant;

5. A causal relationship between the evidence destruction by the third party spoliator and the plaintiff's inability to prove the lawsuit against the primary defendant; and
6. Damages to the plaintiff.

**Authority:** *Continental Ins. Co. v. Herman*, 576 So. 2d 313, 315 (Fla. 3d DCA 1990), *rev. den.*, 598 So. 2d 76 (Fla. 1991); *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673 n.1 (Fla. 3d DCA 1995) (*Miller II*), *rev. den.*, 659 So. 2d 1087 (Fla. 1995). *Silhan v. Allstate Ins. Co.*, 236 F.Supp.2d 1303, 1308 (N.D. Fla. 2002) (“a cause of action for intentional spoliation has been recognized by Florida courts ....”).

#### *SECOND ELEMENT OF SPOLIATION CLAIM*

You must decide whether or not the alleged spoliating defendant had a “a legal or contractual duty to preserve evidence which is relevant to the potential civil action.” A duty to preserve evidence can arise from several sources, including statutes, a court order, a duly served discovery request, an administrative regulation, or a contract to

preserve.<sup>57</sup> [fn: However, Florida law is conflicting as to whether a mere promise (not a contract with mutuality of obligation) can create such a duty. Compare *Brown v. City of Delray Beach*, 652 So. 2d 1150, 1153 (Fla. 4th DCA 1995) (court finding that “a special relationship and corresponding duty to an individual is created when a law enforcement officer promises or agrees to take some specific action at the individual's request.”), with *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 n.2 (Fla. 4th DCA 2004) (“In the complaint, Royal did allege that LMC ‘agreed’ to preserve the evidence. However, without more, this allegation is not sufficient to establish that there was a contractual duty.”).] In the absence of such sources, you may find that a duty to preserve existed if the alleged spoliating defendant was on formal notice of the impending or pending lawsuit.<sup>58</sup> [fn: As noted above, there is a lot of

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<sup>57</sup> However, Florida law is conflicting as to whether a mere promise (not a contract with mutuality of obligation) can create such a duty. Compare *Brown v. City of Delray Beach*, 652 So. 2d 1150, 1153 (Fla. 4th DCA 1995) (court finding that “a special relationship and corresponding duty to an individual is created when a law enforcement officer promises or agrees to take some specific action at the individual's request.”), with *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 n.2 (Fla. 4th DCA 2004) (“In the complaint, Royal did allege that LMC ‘agreed’ to preserve the evidence. However, without more, this allegation is not sufficient to establish that there was a contractual duty.”).

<sup>58</sup> As noted above, there is a lot of conflicting law about whether even formal notice of a lawsuit can create such a duty in Florida court, as opposed to federal court. Cf. *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 846 (Fla. 4th DCA 2004) (“neither *Hagopian* nor *Brinson* establishes a duty to preserve evidence when litigation is merely anticipated.”); *Gayer v. Fine Line Const. & Elec., Inc.*, 970 So. 2d 424, 426 (Fla. 4<sup>th</sup> DCA 2007) (“Because 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.”); *Pennsylvania Lumberman's Mut. Ins. Co. v. Florida Power &*

conflicting law about whether even formal notice of a lawsuit can create such a duty in Florida court, as opposed to federal court. Cf. *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 846 (Fla. 4th DCA 2004) (“neither Hagopian nor Brinson establishes a duty to preserve evidence when litigation is merely anticipated.”); *Gayer v. Fine Line Const. & Elec., Inc.*, 970 So. 2d 424, 426 (Fla. 4th DCA 2007) (“Because a duty to preserve evidence does not exist at

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*Light Co.*, 724 So. 2d 629, 630 (Fla. 3d DCA 1998); *James v. U.S. Airways, Inc.*, 375 F.Supp.2d 1352, 1354 (M.D. Fla. 2005); *Torres v. Matsushita Elec. Corp.*, 763 So. 2d 1014 (Fla.5<sup>th</sup> DCA 2000); *Banco Latino, S.A.C.A. v. Gomez Lopez*, 53 F.Supp.2d 1273, 1277 (S.D. Fla. 1999) (“A litigant is under a duty to preserve evidence which it knows, or reasonably should know, is relevant in an action. ... Sanctions may be imposed upon litigants who destroy documents while on notice that they are or may be relevant to litigation or *potential litigation*, or are reasonably calculated to lead to the discovery of admissible evidence.”) (emphasis added); *Silhan v. Allstate Ins. Co.*, 236 F.Supp.2d 1303, 1309 (N.D. Fla. 2002) (“The more prudent approach would be for a duty to arise when the possessor of the evidence is informed by the plaintiff that a lawsuit will be (or is) filed.”) (interpreting Florida law); *Hickman*, 2005 WL 3675961 at \*2 (“Other courts have recognized that more than the mere happening of an accident must occur for a duty [to preserve] to be created.”) (citing *Silhan*, 236 F.Supp.2d at 1309, and *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845-46 (Fla. 4th DCA 2004)); *Floeter v. City of Orlando*, 2007 WL 486633, \*5 & n.6 (M.D.Fla. 2007) (“There may be additional circumstances from which a duty may arise if a party is on notice that documents or tangible items may be relevant or discoverable in pending or imminent litigation. ... Whether merely filing litigation raises a duty to preserve evidence is an open question under federal law in this circuit. While some cases upon which the parties relied speak of such a duty, each of the cases also had other facts, such as pending discovery requests, from which such a duty might arise independent of the filing of a complaint.”); *St. Cyr v. Flying J Inc.*, 2007 WL 1716365, \*3 (M.D.Fla. 2007) (“As to the second element, the St. Cyrs argue that they were not under a ‘duty to preserv[e] evidence just in anticipation of possible litigation.’ [citing Florida law] ... Notwithstanding this contention, federal law, which controls, makes clear that a litigant ‘is under a duty to preserve what it knows, or reasonably should know, is relevant [to litigation or potential litigation] ...’ [citing federal law] Thus, the duty to preserve evidence may arise prior to commencement of litigation. Indeed, the Court finds that the St. Cyrs contemplated litigation and that it was reasonably foreseeable that the van would be relevant to the litigation. Thus, the St. Cyrs were under a duty to preserve the van.”). See *Starks, Deconstructing Damages*, 80 Fla. B.J. at 40-41 (discussing need for the Florida Supreme Court to decide whether there is a presuit duty to preserve under common law and whether an adverse inference requires a breach of duty before imposition against the spoliator).

common law, the duty must originate either in a contract, a statute, or a discovery request."); *Pennsylvania Lumberman's Mut. Ins. Co. v. Florida Power & Light Co.*, 724 So. 2d 629, 630 (Fla. 3d DCA 1998); *James v. U.S. Airways, Inc.*, 375 F.Supp.2d 1352, 1354 (M.D. Fla. 2005); *Torres v. Matsushita Elec. Corp.*, 763 So. 2d 1014 (Fla.5th DCA 2000); *Banco Latino, S.A.C.A. v. Gomez Lopez*, 53 F.Supp.2d 1273, 1277 (S.D. Fla. 1999) ("A litigant is under a duty to preserve evidence which it knows, or reasonably should know, is relevant in an action. ... Sanctions may be imposed upon litigants who destroy documents while on notice that they are or may be relevant to litigation or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence.") (emphasis added); *Silhan v. Allstate Ins. Co.*, 236 F.Supp.2d 1303, 1309 (N.D. Fla. 2002) ("The more prudent approach would be for a duty to arise when the possessor of the evidence is informed by the plaintiff that a lawsuit will be (or is) filed.") (interpreting Florida law); *Hickman*, 2005 WL 3675961 at \*2 ("Other courts have recognized that more than the mere happening of an accident must occur for a duty [to preserve] to be created.") (citing *Silhan*, 236 F.Supp.2d at 1309, and *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845-46 (Fla. 4th DCA 2004)); *Floeter v. City of Orlando*, 2007 WL 486633, \*5 & n.6 (M.D.Fla. 2007) ("There may be additional circumstances from which a

duty may arise if a party is on notice that documents or tangible items may be relevant or discoverable in pending or imminent litigation. ... Whether merely filing litigation raises a duty to preserve evidence is an open question under federal law in this circuit. While some cases upon which the parties relied speak of such a duty, each of the cases also had other facts, such as pending discovery requests, from which such a duty might arise independent of the filing of a complaint.”); *St. Cyr v. Flying J Inc.*, 2007 WL 1716365, \*3 (M.D.Fla. 2007) (“As to the second element, the St. Cyrs argue that they were not under a ‘duty to preserv[e] evidence just in anticipation of possible litigation.’ [citing Florida law] ... Notwithstanding this contention, federal law, which controls, makes clear that a litigant ‘is under a duty to preserve what it knows, or reasonably should know, is relevant [to litigation or potential litigation] ....’ [citing federal law] Thus, the duty to preserve evidence may arise prior to commencement of litigation. Indeed, the Court finds that the St. Cyrs contemplated litigation and that it was reasonably foreseeable that the van would be relevant to the litigation. Thus, the St. Cyrs were under a duty to preserve the van.”). See *Starks, Deconstructing Damages*, 80 Fla. B.J. at 40-41 (discussing need for the Florida Supreme Court to decide whether there is a presuit duty to preserve under common law and whether an adverse

inference requires a breach of duty before imposition against the spoliator).]

**Authority:** Fla. Stat. § 440.39(7); *Ochoa v. Alie Bros., Inc.*, 2007 WL 2781192, \*5 (M.D.Fla. 2007) (citing 29 U.S.C. § 211(c)); *Rockwell Intern. Corp. v. Menzies*, 561 So. 2d 677 (Fla. 3d DCA 1990); *Strasser v. Yalamanchi*, 783 So. 2d 1087, 1093 (Fla. 4th DCA 2001), *rev. den.*, 805 So. 2d 810 (Fla. 2001); *Figgie Intern., Inc. v. Alderman*, 698 So. 2d 563, 567 (Fla. 3d DCA 1997), *rev. dismiss.*, 703 So. 2d 476 (Fla. 1997); *Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 27 (Fla. 3d DCA 1990) (*Miller I*), *rev. den.*, 581 So. 2d 1307 (Fla. 1991).

### *THIRD ELEMENT OF SPOILIATION CLAIM*

The third element of a spoliation claim is "destruction" of evidence. In order to have a viable spoliation claim, the third party must have *destroyed* the evidence, not merely *concealed* it.

**Authority:** *Green Leaf Nursery v. E.I. DuPont De Nemours and Co.*, 341 F.3d 1292, 1308 (11th Cir. 2003); *Jost v. Lakeland Regional Med. Ctr.*, 844 So. 2d 656, 658 (Fla. 2d DCA 2003) ("Concealment of evidence, however, does not form a basis for a claim of spoliation.").

*FOURTH, FIFTH AND SIXTH  
ELEMENTS OF SPOILIATION CLAIM*

The fourth, fifth and sixth elements of a spoliation claim are a significant impairment in the plaintiff's ability to prove the underlying lawsuit, proximate causation between the spoliation and the significant impairment in the plaintiff's underlying case, and damages to the plaintiff.

You must decide whether the plaintiff's underlying claim against the primary defendant was significantly impaired. If so, you must then decide whether the significant impairment was proximately caused by the spoliation of evidence. If so, you must then decide whether the plaintiff was damaged by the spoliation, and if so, how much.

The measure of the plaintiff's damages is the amount which the plaintiff would have recovered in the underlying case against the primary defendant but for the spoliation of evidence by the alleged third party spoliator. The plaintiff's damages are the diminution in value in the underlying tort claim cause by the third-party spoliator.

Damage to the plaintiff's primary case is generally greater when primary evidence is spoliated, rather than when secondary evidence (such as documents) are spoliated.

**Authority:** *Columbia v. Brewer*, 2008 WL 4643815, \*3 (Fla. 1<sup>st</sup> DCA 2008) (citing *Kay v. Bricker*, 485 So. 2d 486, 487 (Fla.1986)); *Rockwell Intern. Corp. v. Menzies*, 561 So. 2d 677, 681 (Fla. 3d DCA 1990); *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673-74 (Fla. 3d DCA 1995) (*Miller II*), *rev. den.*, 659 So. 2d 1087 (Fla. 1995); *Yates v. Publix Super Markets*, 924 So. 2d 832 (Fla. 4th DCA 2005).

#### *STATUTE OF LIMITATIONS DEFENSE TO THE SPOLIATION CLAIM*

The statute of limitations for a claim of spoliation is four years. But the cause of action for spoliation does not accrue (and therefore the statute of limitations does not begin to run) when the actual destruction of evidence occurs; instead the cause of action accrues when the lawsuit against the primary defendant has been completed and the plaintiff has therefore suffered some diminution in value in the underlying tort claim cause by the alleged third-party spoliator.

**Authority:** Fla. Stat. § 95.11(3)(p) ("(p) Any action not specifically provided for in these statutes" of limitations has a statute of limitations of four years); *Miller v. Allstate Ins. Co.*, 650 So. 2d 671, 673-74 (Fla. 3d DCA 1995) (*Miller II*), *rev. den.*, 659 So. 2d 1087 (Fla. 1995); *Yates v. Publix Super Markets*, 924 So. 2d 832 (Fla. 4th DCA 2005).