Illustration by Barbara Kelley

To the "Victim" Go the Spoils:
The Evolution and Operation of Spoliation of Evidence Law in Florida Product Liability Cases

by Donald A. Blackwell and Stephanie M. Simm

Most seasoned product liability trial lawyers will agree that, while testimonial evidence plays a key role in corroborating that which is revealed by physical evidence, it is the physical evidence itself that, at the end of the day, often serves as the most objective and compelling indicator of the underlying facts in a case. And, at least in the product liability arena, no piece of physical evidence carries more weight or is more indispensable than the product at issue and its related component parts. As one court astutely observed: "In today's product liability trial, we frequently rely heavily on Maxwellian, often hyper-technical expert opinions, [where] small, seemingly insignificant items, like simple bolts, can become large factors in the outcome of the trial."[1]

Thus, it is not surprising that Florida courts repeatedly have held that where such physical evidence is lost, misplaced, destroyed, or otherwise made unavailable so as to fundamentally prejudice a nonspoliator's ability to prosecute or defend against a claim, a trial court may impose a variety of sanctions, including, when appropriate, the dismissal of a plaintiff's complaint or the striking of a defendant's affirmative defenses. Moreover, in certain circumstances, spoliation also can give rise to a separate cause of action against a nonparty spoliator and result in an award of significant damages. In either case, it is imperative that attorneys for parties and nonparties on all sides of a spoliation battle have a clear and current understanding of available rights and remedies, so that they can best use them to their clients' advantage.

A Tort Is Born in California

To fully understand spoliation law in Florida, it is necessary to first understand the California cases that essentially gave birth to it. As judicially created torts go, spoliation of evidence is a veritable toddler, tracing its roots back only to the mid-1980s. In fact, courts and commentators on the subject generally agree that the court in *Williams v. California,* 34 Cal. 3d 18 (1983), was the first in the United States to recognize the tort. *Williams* arose out of an automobile accident in which an unsuspecting passenger was struck in the face by a piece of brake drum that broke off a passing truck and went through the windshield. The plaintiff filed suit against the state of California alleging that the investigating highway patrol officer virtually destroyed any opportunity she might otherwise have had to obtain compensation for her severe injuries by, among other things, failing to identify other witnesses at the scene and failing to identify and pursue the owner or operator of the truck whose brake drum broke off.[2] The trial court granted the state's motion for judgment on the pleadings and the plaintiff appealed.[3]

The *Williams* court defined the issue before it as follows: "[W]hether the mere fact that a highway patrolman comes to the aid of an injured or stranded motorist creates an affirmative duty to secure information or preserve evidence for civil litigation between the motorist and third parties."[4] The court answered that question in the negative and held that "stopping to aid a motorist does not, in itself, create a special relationship which would give rise to such a duty."[5] However, in a statement that would prove to have far-reaching implications in the world of torts across the country, the *Williams* court added that "it would be presumptuous for us to assume that plaintiff can never state a cause of action."[6] The court, inferring that plaintiff could state a cause of action if she alleged "the requisite

factors to a finding of special relationship," namely that she detrimentally relied on the officers' conduct and statements, which "induced a false sense of security" and "worsened her position," concluded that the plaintiff should be afforded leave to amend her complaint.[7]

Less than a year after *Williams*, the court in *Smith v. Superior Court*, 151 Cal. App. 3d 491 (1984), *disapproved of by Cedars-Sinai Med. Ctr. v. Superior Court*, 18 Cal. 4th 1, 954 P.2d 511 (1998), faced a similar claim brought by yet another California motorist who, remarkably, also was injured when a portion of a passing vehicle (*i.e.,* a rear wheel and tire assembly) broke off and came through the windshield of her car. The vehicle was later towed to a dealership who previously had customized the van with new wheels.[8] The dealer, in turn, agreed with counsel for the injured motorist to preserve certain parts of the van for further investigation.[9] However, it later "destroyed, lost or transferred" the parts, making it impossible for the plaintiff's experts to inspect and test the parts to determine what caused the wheel assembly to become dislodged.[10] Plaintiff responded by suing the dealer for intentional and negligent spoliation of evidence, but the trial court dismissed the complaint, on the grounds that there was no such intentional tort.[11]

Although the decision was disapproved of years later by *Cedars-Sinai Med. Ctr. v. Superior Court,* 18 Cal. 4th 1, 954 P.2d 511 (1998), the court of appeal, citing *Williams*, reversed. The *Smith* court analogized plaintiff's claim to one for "intentional interference with prospective economic advantage" and concluded that 1) conduct like that engaged in by the dealer needed to be deterred; 2) the prospect of the dealer being subject to possible criminal liability for obstruction of justice was no substitute for civil monetary damages; 3) plaintiff's prospective civil claims against the owner of the other vehicle and/or the dealer who installed the wheels "are entitled to legal protection . . . even though their damages cannot be stated with certainty"; and 4) plaintiff's allegation that the dealer's spoliation of evidence had "significantly prejudiced" her case was sufficient to survive a motion to dismiss.[12] Notably, the dealer later found the parts!

The Tort and Its Offspring Migrate to Florida

Based in large part on *Williams* and *Smith*, the first Florida appellate court to recognize a claim for spoliation of evidence was *Bondu v. Gurvich,* 473 So. 2d 1307 (Fla. 3d DCA 1984), *disapproved of by Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005). In that case, the spouse of a man who had died during heart surgery filed a medical malpractice action against the assisting anesthesiologist and the hospital where the surgery was performed. In her complaint, which included two counts, plaintiff claimed 1) that both defendants were negligent per se in failing to preserve and produce the anesthesiology and other records necessary to establish her claim; and 2) that, in doing so, the hospital had intentionally interfered with her right of action.[13] The trial court dismissed the latter count for failure to state a cause of action and, based on her inability to prove the underlying medical negligence claims without the operative records, entered summary judgment in favor of the defendants.[14] Plaintiff then sought to amend her complaint to allege that the hospital's "negligent loss of the records caused her to lose 'a medical negligence lawsuit....'"[15] Contemporaneous therewith, plaintiff filed a separate action against the hospital predicated on the same allegations.[16] The trial court in the first action denied her motion for leave to amend and, in the second, granted the defendant's motion for judgment on the pleadings based on principles of res judicata.[17]

The plaintiff appealed, arguing that she had or should have the right to pursue an action against the hospital for the loss of records that she alleged caused her to lose her medical malpractice action and the Florida Third District Court of Appeal agreed.[18] The court began its analysis by noting that, while the tort alleged was "not a familiar one" in Florida jurisprudence, courts in California recently had "recognized the existence of causes of action for negligent failure to preserve evidence for civil litigation" and for "intentional interference with prospective civil action by spoliation of evidence."[19] Moreover, the court noted that, while *Williams* and *Smith* involved parties who had "no connection to the lost prospective [tort actions]," there was no reason not to extend the tort to a *party* defendant who "stands to benefit by the fact that the prospect of successful litigation against it has disappeared with the crucial evidence."[20] The *Bondu* court further emphasized, however, that such an action would not be warranted unless it is "'clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant,'" that is, there is a duty owed to the plaintiff by the defendant that the law recognizes.[21] The court then went on to note that, because the "hospital's duty to make and maintain medical records [was] imposed by administrative regulations promulgated by Health and Rehabilitation Services," plaintiff was able to satisfy that indispensable element and would be permitted to pursue her negligent spoliation action.[22]

That same day, the same court took a slightly different approach to resolving a claim of first-party spoliation in *Valcin v. Public Health Trust*, 473 So. 2d 1297 (Fla. 3d DCA 1984), *approved in part, quashed in part*, 507 So. 2d 596 (Fla. 1987). In *Valcin*, a patient who suffered a ruptured tubal pregnancy a year-and-a-half after hospital staff had performed a tubal ligation on her brought a malpractice action (with her husband) against the hospital.[23] During discovery, it became apparent that plaintiffs would not be able to meet their burden of establishing through expert testimony that doctors had negligently performed the sterilization procedure, due, in large part, to the fact that the hospital had either lost or destroyed the records of the surgical procedure, a needed basis for their expert's testimony.[24] The trial court granted summary final judgment in favor of the hospital and plaintiffs appealed.[25] Recognizing that plaintiff's "ability to prove her

For the better part of the next 20 years, the tort of spoliation of evidence and its evidentiary siblings spawned by *Bondu* and *Valcin* continued to flourish and become more well-defined in first-party cases. Over time, it also became clear that plaintiffs who lose, fundamentally alter, or destroy crucial evidence are not exempt from the repercussions that historically have been applied to defendants, particularly where the spoliation of evidence is found to have prejudiced a defendant's ability to develop an adequate defense.

negligence claim against the hospital [had] been substantially prejudiced by the absence of critical hospital records[]," the Third District reversed and remanded the case to afford the finder of fact an opportunity to decide whether the hospital could meet its burden of proving that it did not "deliberately remove or destroy the [operative] report."[26] The *Valcin* court went on to hold that, if the hospital met its burden, a presumption would arise, based on its negligent failure to preserve the records, "that the surgical procedure was negligently performed, which presumption may be rebutted by the hospital by the greater weight of the evidence."[27] However, if the finder of fact determined that the hospital intentionally omitted or destroyed the records, "a conclusive, irrebuttable presumption that the surgical procedure was negligently performed [would] arise, and judgment as to liability [would] be entered" in favor of plaintiff and against the hospital.[28]

The Florida Supreme Court affirmed the portion of the Third District's opinion imposing a *rebuttable* presumption of negligence where there is a finding that critical evidence is missing due to a party's negligence, but it quashed the portion imposing an *irrebuttable* presumption (*i.e.*, a finding of liability) where the spoliation was intentional.[29] According to the court, a conclusive presumption "violate[d] due process in its failure to provide the adverse party any opportunity to rebut the presumption of negligence" and "short-circuit[ed]" the jurors' intended function. Further, there are a myriad of other vehicles available to a trial court to redress such a circumstance, including an award of sanctions pursuant to Fla. R. Civ. P. 1.380(b)(2).[30] The court also made it clear that, while it was acknowledging a trial court's discretion to use a rebuttable presumption of negligence as a deterrent to spoliation of records and other similar evidence, its exercise was appropriate and would operate to ensure a fair playing field only where the victim of the spoliation first establishes that the missing evidence hinders their "ability to establish a prima facie case," and the presumption used was one that shifts the burden of proof to the spoliating party under Fla. R. Evid. §90.302(2).[31]

The Tort and Its Siblings Mature

For the better part of the next 20 years, the tort of spoliation of evidence and its evidentiary siblings spawned by *Bondu* and *Valcin* continued to flourish and become more well-defined in first-party cases.[32] Over time, it also became clear that plaintiffs who lose, fundamentally alter, and/or destroy crucial evidence are not exempt from the repercussions that historically have been applied to defendants, particularly where the spoliation of evidence is found to have prejudiced a defendant's ability to develop an adequate defense. In *DeLong v. ATop Air Conditioning Co.*, 710 So. 2d 706 (Fla. 3d DCA 1998), for example, the Florida Third District Court of Appeal affirmed the dismissal of a personal injury action with prejudice based on spoliation of evidence after the plaintiff inadvertently lost or misplaced a piece of relevant and material evidence. There, the *DeLong* court noted that "[a]fter a careful review of the record ... [it could not] conclude that the lower court abused its discretion in imposing the ultimate sanction of dismissal with prejudice where the [defendants] demonstrated their inability to completely set forth their defense without having had the opportunity to examine and test the lost evidence."[33]

Moreover, as Florida law continued to develop in this area, courts extended their reach to situations in which critical evidence was lost, misplaced, or destroyed by nonparties to the action (*i.e.*, "third-party spoliation" claims), so long as the injured party could establish that a duty to preserve the evidence existed at the time of its destruction either by contract, statute, or a timely served preservation or discovery request. In *Miller v. Allstate Ins. Co.*, 573 So. 2d 24 (Fla. 3d DCA 1990), for example, an insured under an automobile policy brought an action against her insurer alleging a breach of promise to return a wrecked vehicle that she needed as evidence in a planned products liability action against the manufacturer. The evidence established that, while the insurer had agreed to preserve the vehicle, which had been totaled allegedly as a result of the accelerator becoming stuck, it sold the vehicle to a salvage yard where it was disassembled and disposed of, significantly impairing its insured's ability to bring a claim against the manufacturer for a defect.[34] The insured's expert safety engineer later testified that, although the collision

was most likely caused by a defect, he would be unable to give an expert opinion in the case without examining the vehicle.[35] The insurer moved for a directed verdict arguing that 1) Florida does not recognize a cause of action in contract for damages based on the denial of an opportunity to prove a products liability case; and 2) even if such a cause of action existed, a plaintiff may still establish a prima facie case for jury consideration based on circumstantial evidence and, therefore, the insured was not denied an opportunity to pursue her case.[36] The trial court directed a verdict in favor of the insurer and the insured appealed.[37]

On appeal, the *Miller* court, citing *Bondu* and *Smith*, tracked the origin and development of the cause of action under its various nomenclatures (*i.e.*, loss of the value of a chance, loss of an opportunity to litigate, spoliation of evidence, or interference with a prospective civil litigation).[38] After finding that a plaintiff's interests are entitled to legal protection against a nonparty's conduct based on spoliation of evidence, the Third District held that 1) the insurer owed a duty to plaintiff, imposed by contract, to preserve evidence essential to civil litigation; 2) difficulty in assessing damages was not a bar to plaintiff's claim; and 3) the insurer could not avail itself of a presumption of manufacturing defect arising from the destruction of the product in an accident caused by malfunction of the product as a defense to plaintiffs' claim.[39] Although the *Miller* court did not identify each element of the cause of action, it was clear that the plaintiff had to demonstrate that she was unable to prove her underlying action owing to the unavailability of the evidence.[40]

In 2003, the Fourth District in *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251 (Fla. 4th DCA 2003), *approved*, 908 So. 2d 342 (Fla. 2005), parted company with the Third District's decision in *Bondu* and held that "an independent cause of action for spoliation of evidence is unnecessary and will not lie where the alleged spoliator and the defendant in the underlying action are one and the same" (*i.e.*, so called "first-party spoliator" claims). The plaintiff in *Martino* was injured when her shopping cart collapsed.[41] Despite her alleged insistence that the store preserve the damaged cart, as well as security camera footage that purportedly captured the incident, Wal-Mart did not preserve either.[42] Plaintiff, in turn, amended her complaint to assert a separate claim for spoliation of evidence.[43] On the eve of trial, the trial court dismissed the spoliation claim and plaintiff appealed.[44] The Fourth District affirmed that portion of the trial court's order.[45] In reaching its decision, the *Martino* court reasoned that, when the parties to a spoliation dispute are before the court, there are ample remedies already in place to ensure that the spoliator is adequately punished and that the fairness of the proceedings are restored/preserved without having to resort to a separate tort claim for damages.[46] Those remedies include monetary fines/sanctions, adverse evidentiary inferences that the missing evidence would have favored the victim of the spoliation, rebuttable presumptions, the exclusion of evidence, the striking of pleadings, and, in especially egregious circumstances, the entry of a default judgment.[47] The Fourth District then certified its conflict with *Bondu*.[48] The Florida Supreme Court sided with the Fourth District and held that the proper remedy against a first-party defendant for spoliation of evidence should be the *Valcin* presumption and not an independent cause of action for first-party spoliation of evidence and, in doing so, disapproved of *Bondu*.[49]

The Use of An Opposing Party's Spoliation as a Sword

Martino only served to reinforce the propriety of what an overwhelming majority of Florida courts had been doing, and continue to do, when confronted with claims of spoliation of evidence that fundamentally prejudice a party's ability to fully prosecute their claim, *to wit*: the imposition of varying degrees and types of sanctions.[50] Regardless of who loses, misplaces, or destroys the evidence, the extent of the prejudice suffered by the nonspoliating party and the extent to which that prejudice can be cured, if at all, typically dictate the severity of the sanction. As best explained by one court:

> The spectrum of remedies [in spoliation cases] includes allowing the party who has been aggrieved by the spoliation to present evidence about the pre-accident condition of the lost evidence and the circumstances surrounding the spoliation, as well as instructing the jury on the inferences that may be drawn from the spoliation[,] the imposition of which "may be cumulative, as determined by the judge from the circumstances of each case, in the exercise of broad discretion."[51]

Stated simply, "[w]hat sanctions are appropriate when a party fails to preserve evidence in its custody depends on the willfulness or bad faith, if any, of the party responsible for the loss of the evidence, the extent of prejudice suffered by the other party...and what is required to cure the prejudice."[52]

In *Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014 (Fla. 5th DCA 2000), for example, a homeowner filed suit for injuries she sustained when a vacuum cleaner she owned and operated for several years caught on fire. Plaintiff claimed liability on two theories: 1) strict liability based on manufacturing defects; and 2) negligent design. After plaintiff's expert examined the physical evidence, but prior to the defendant manufacturer having had any opportunity to inspect or analyze it, the vacuum cleaner was inadvertently destroyed.[53] The defendant, upon discovering the spoliation of the evidence, moved for dismissal with prejudice.[54] The trial court granted the dismissal, based on spoliation of evidence, and held that:

> The inadvertent or accidental loss or destruction of the vacuum cleaner, while in custody of [p]laintiff's attorney...is a critical issue to the [d]efendant, as it precludes any form of examination by the [d]efendant or the [d]efendant's expert....[T]he [d]efendant is precluded from testing whether or not the product was modified, and the [d]efendant is precluded from testing whether or not the product has been broken or misused. The [d]efendant is further precluded from testing the causation of the fire or any examination of the alleged defective product.[55]

On appeal, the Fifth District affirmed the dismissal, recognizing that the "defendant ha[d] been denied

the opportunity to determine the actual age of the particular vacuum, its length of service, the severity of its use, its state of repair, and whether it was subjected to any abnormal operation, and it was denied its opportunity because of the negligence of [p]laintiff through her lawyer."[56] The court went on to note that, because the striking of plaintiff's expert would have left the plaintiff unable to prove her defect claim, dismissal was appropriate.[57] In response to plaintiff's claim that she should, nevertheless, be permitted to proceed on her negligent design theory claim, the district court held that, given the facts, the requirement that the plaintiff prove proximate cause was an insurmountable obstacle.[58] Specifically, the district court stated that:

> [E]ven if a design defect *might* have caused the fire after appreciable wear, there are other possible explanations not chargeable to defendant which might also have caused the fire — improper repair, failure to maintain the vacuum, maltreatment of the vacuum (electrical wires frayed and exposed), substitution of parts, etc. Thus, in a design defect case in which the design defect is alleged to be only a potential problem, such as the one herein, reference to the particular vacuum is essential.[59]

The court in *Rockwell* reached a similar result.[60] In that case, the plaintiff allegedly was injured while operating a table saw manufactured and distributed by the defendant. The plaintiff sued the defendant for negligence and strict liability.[61] Plaintiff's causal theory of the accident was that the saw blade improperly broke due to a design defect.[62] Prior to trial, the defendant sought access to the subject table saw to enable its experts to inspect the product.[63] While the defense experts were inspecting the saw, they cut and removed two bolts used to hold the table saw's motor in place.[64] Following their inspection, the experts replaced the original bolts with two replacement bolts, but failed to retain the two original bolts they had hacked off.[65] Although the trial court determined that the defendant had not intentionally lost the evidence or acted in bad faith in connection with its disappearance, it nonetheless left the plaintiff unable to proceed with its claim. Accordingly, the trial entered an order striking the defendant's pleadings and entering a default on liability.[66]

The defendant appealed arguing, among other things, that its lack of bad faith in losing the bolts required a less severe sanction. However, the Third District rejected that argument, emphasizing that, while it was true that "the trial court found that [the defendant] did not act in bad faith by intentionally destroying and losing the two bolts...[the] absence of bad faith...did not preclude the trial court from imposing the sanctions [it did]," namely the striking of the defendant's pleadings.[67] Instead, the court emphasized that the focal point of the analysis should be the prejudice suffered by the nonspoliating party based on that party's clear inability to proceed at trial and/or to challenge the opposing party's conclusions, absent the missing evidence.[68] Accordingly, the court affirmed the order striking the defendant's pleadings and found that, having lost the two bolts, the defendant was properly held accountable for the ramifications of its acts.[69]

Factors that Militate Against the Imposition of Spoliation Sanctions

There are a number of factors that militate against the imposition of any sanctions even in the face of proof that spoliation of evidence has occurred, especially in the product liability context. As best stated by one court, "[s]poliation 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."[70] Rather, the goal in spoliation cases is "to assure that the non-spoliator does not bear an unfair burden."[71]

For example, Florida courts have held that the existence of prespoliation photographs of the product at issue are or can be sufficient to insulate a spoliator from sanctions for the product's later destruction or modification.[72] Moreover, some courts have held that, spoliation of evidence is not actionable where the alleged victim of the spoliation is unable to establish that the spoliator had a duty to preserve the evidence at issue.[73] Still other courts (albeit from other jurisdictions), have held that, while spoliation of evidence in a *manufacturing* defect claim warrants the imposition of sanctions, the same is not necessarily true in a case predicated on a *design* defect claim, since, presumably, an exemplar product can just as readily be used to establish the existence of a defect.[74] However, there are no bright-line rules for any of the foregoing propositions (*i.e.*, each inquiry is unique to the facts of a given case and the criticality of the evidence to the respective parties' ultimate ability to prosecute or defend against the underlying claims).[75]

The Severity of the Sanction

Even when a party meets its burden of establishing that the opposing party had a duty to preserve and later spoliated evidence, the type and severity of the sanction will vary depending on at least three factors: 1) "the willfulness or bad faith, if any, of the party who lost or destroyed the evidence"; 2) "the extent of the prejudice suffered by the other party"; and 3) "what is required to cure the prejudice."[76] As a general rule, absent a showing of willfulness or bad faith on the part of the spoliator, a court will not impose the most draconian of all sanctions (*i.e.,* dismissal), unless the victim of the spoliation can establish, typically by expert testimony, that its case is fatally prejudiced by its inability to examine the spoliated evidence (*i.e.,* that it is wholly precluded from prosecuting or defending the claim without it).[77]

Where something less is shown (*i.e.,* where the absence of the spoliated evidence compromises, but does not completely nullify the movant's ability to prosecute its claim or defend itself; or where it merely prejudices its right to put on a complete or perfect case or defense), dismissal is not an appropriate remedy.[78] Moreover, generally speaking, where a compelling argument can be made that the imposition of a lesser sanction (*e.g.,* an adverse inference, presumption, or jury instruction) will be sufficient to cure any prejudice associated with the spoliator's misconduct, a

trial court should first resort to that remedy.[79]

A Case Study

More often than not, disputes involving first-party spoliation result in one side (the victim of the spoliation) "winning" and the other (the spoliator) "losing." Every now and then, however, especially in instances of third-party spoliation, where the loss of critical evidence adversely affects both the plaintiff and defendant, a remedy may still be reached that adequately addresses the injury to each, as illustrated by the following "real-life" scenario.

Several years ago, a plaintiff was severely injured in a complex single-vehicle accident. The involved vehicle was towed from the scene immediately thereafter, but not before dozens of what would turn out to be poorly exposed photographs and a small handful of cell phone videos were taken by responding police officers. Ten days later, plaintiff's counsel sent a letter of representation to the vehicle insurer but made no mention of the need to preserve the vehicle. A week later, the police "released" the vehicle, and the vehicle owners signed it over to the tow yard to offset the storage charges. At about the same time, the plaintiff's counsel learned that the vehicle had been released and immediately faxed a preservation letter to the insurer, demanding that it also notify the vehicle owners of his request. Seven days later, the vehicle was sold and destroyed. The insurer, in turn, responded to the initial of two preservation letters, claiming that it never had possession of the vehicle and, therefore, could not maintain or preserve it.

Plaintiff later filed a strict products liability and negligence action against, among others, the manufacturer and distributor of the accident vehicle. The claim was principally predicated on several design defects. Upon learning of the destruction of the vehicle and retaining an expert to evaluate the impact of the loss on the defendants' ability to fairly respond to the plaintiff's claims, the defendants filed a motion for sanctions, including the dismissal of the complaint, based on spoliation of evidence. In support of their motion, the defendants filed a detailed affidavit by a highly qualified expert, who, among other things, opined that the failure to preserve the evidence substantially and irreparably impaired the defendants' ability to successfully defend against plaintiff's defect and causation allegations. Specifically, the defendants argued that the absence of the vehicle severely prejudiced their ability to reconstruct the accident sequence, scientifically document the forces experienced by the vehicle and its occupants, and determine whether the plaintiff was properly belted during the accident sequence.

The parties ultimately settled the case at mediation for a sum that was considerably less than what the value of the case would have been had the vehicle not been destroyed and had the physical evidence it contained served to substantiate the

plaintiff's defect, accident sequence, and causation allegations. As part of the settlement, however, plaintiff requested (and received) a commitment from the defendants and their counsel to assist the plaintiff in quantifying the difference in case valuation attributable to the failure to preserve the vehicle in a separate action that plaintiff intended to pursue against those responsible for its spoliation. While that cooperation ultimately proved to be unnecessary, the threat of it combined with the aforementioned presuit documentation relating to preservation proved to be enough to enable the plaintiff to secure a significant settlement from the responsible parties — illustrating that armed with a clear understanding of the applicable law and a little bit of strategy, all parties affected by evidence spoliation can secure a reasonable and just outcome.❑

[1] *Rockwell Intern. Corp. v. Menzies*, 561 So. 2d 677, 680-681 (Fla. 3d DCA 1990).
[2] *Williams*, 34 Cal. 3d at 21-22.
[3] *Id.*
[4] *Id.* at 21.
[5] *Id.*
[6] *Id.* at 28.
[7] *Id.*
[8] *Smith*, 151 Cal. App. 3d at 494.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 495.
[12] *Id.* at 501-03.
[13] *Bondu*, 473 So. 2d at 1309.
[14] *Id.* at 1310.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 1310-11.
[19] *Id.* at 1312 (citing *Williams*, 34 Cal. 3d at 18; and *Smith*, 151 Cal. App. 3d at 491).
[20] *Id.*
[21] *Id.* (quoting W. PROSSER, TORTS §1 at 3-4 (4th ed. 1971)).
[22] *Id.* at 1312-13.
[23] *Valcin*, 473 So. 2d at 1299.
[24] *Id.*
[25] *Id.* at 1299-1300.
[26] *Id.* at 1306.
[27] *Id.*
[28] *Id.*
[29] *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 597 (Fla. 1987).
[30] *Valcin*, 507 So. 2d at 599.
[31] *Id.* at 599-600.
[32] *See, e.g., Sponco Mfg., Inc. v. Alcover*, 656 So. 2d 629, 630 (Fla. 3d DCA 1995) (default against manufacturer, based on its destruction of ladder in a product liability action in which cable on aerial ladder allegedly snapped, was an appropriate sanction in view of expert's testimony that, in ladder's absence, the worker was no longer able to proceed against the manufacturer or other defendants); *Rockwell*, 561 So. 2d at 677 (table manufacturer's intentional destruction and loss of two bolts attaching another manufacturer's motor to saw justified striking manufacturer's pleadings and entry of default on liability); *DePuy, Inc. v. Eckes*, 427 So. 2d 306 (Fla. 3d DCA 1983) (affirming a default on liability entered in favor of plaintiff as an appropriate sanction when a prosthesis, turned over to defendant for inspection pursuant to an agreed order not to destroy the fracture site, was later returned with the fracture site missing, rendering plaintiff unable to use the prosthesis and unable to go forward in establishing liability). *Compare Anesthesiology Critical Care & Pain Mgmt. Consultants, P.A. v. Kretzer*, 802 So. 2d 346 (Fla. 4th DCA 2001) (where a party fails to establish that loss of records due to the defendant's negligence hindered its ability to establish a defense or a prima facie case, a *Valcin* instruction and presumption are reversible error).
[33] *DeLong*, 710 So. 2d at 707. *See also Torres v. Matsushita Electric Corp.*, 762 So. 2d 1014 (Fla. 5th DCA 2000) (concluding, in part, that the purchaser of vacuum cleaner was not entitled to raise legal inference that product was defective and that defect caused malfunction, after plaintiff's lawyer lost the vacuum cleaner, as there were other possible explanations for the malfunction not chargeable to manufacturer, thus, affirming dismissal of the action where purchaser could not prove that design defect in vacuum cleaner proximately caused her alleged injuries); *New Hampshire Ins. Co., Inc. v. Royal Ins. Co.*, 559 So. 2d 102, 103 (Fla. 4th DCA 1990) (striking of pleadings may be an appropriate sanction "[i]f appellant has destroyed relevant and material information by destroying the file, and that information is so essential to the appellee's defense that it cannot proceed without it");
[34] *Miller*, 573 So. 2d at 25-26.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 27.
[39] *Id.* at 27-31.
[40] *See Continental Ins. Co. v. Herman*, 576 So. 2d 313, 315 (Fla. 3d DCA 1990) (holding that elements of a cause of action for negligent destruction of evidence are 1) the existence of a potential civil action; 2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; 3) destruction of that evidence; 4) significant impairment in the ability to prove the lawsuit; 5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and 6) damages).
[41] *Martino*, 835 So. 2d at 1252.
[42] *Id.* at 1252-53.
[43] *Id.* at 1253.
[44] *Id.*
[45] *Id.* at 1256.
[46] *Id.*
[47] *Id.* at 1254.
[48] *Id.* at 1256.
[49] *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 347 (Fla. 2005). *But see James v. U.S. Airways, Inc.*, 375 F. Supp. 2d 1352 (M.D. Fla. 2005) (noting that, by its plain language, *Martino* does not apply to third-party spoliator claims (*i.e.,* where the person or entity responsible for the spoliation is not already a party to the underlying litigation)).
[50] *See Sponco Mfg., Inc.*, 656 So. 2d at 629 ("[D]rastic sanctions, including default, are appropriate when a [party] alters or destroys physical evidence, and when the [opposing party] has demonstrated an inability to proceed without such evidence"). *See also Fini v. Glascoe,* 936 So. 2d 52 (Fla. 4th DCA 2006) (appropriate remedy for defendant dealer's intentional spoliation of evidence potentially linking vehicle's sudden acceleration to dealer's installation of alarm system was imposition of monetary sanctions and/or a presumption of negligence); *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777 (Fla. 4th DCA 2006) (trial court acted within its discretion in allowing plaintiff compromised by defendant's spoliation to present evidence of the circumstances surrounding the spoliation and instructing the jury on the inferences that may be drawn from the spoliation).
[51] *Golden Yachts,* 920 So. 2d at 777 (citing *Gath v. M/A-COM, Inc.*, 440 Mass. 482, 802 N.E.2d 521, 527 (2003)).
[52] *Sponco Mfg., Inc.,* 656 So. 2d at 630; *Vega v. CSCS Int'l, N.V.*, 795 So. 2d 164, 167 (Fla. 3d DCA 2001). *See also Reed v. Alpha Professional Tools*, 975 So. 2d 1202 (Fla. 5th DCA 2008) (emphasizing that "the goal of spoliation cases is to assure that the non-spoliator does not bear an unfair burden").
[53] *Torres*, 762 So. 2d at 1015.
[54] *Id.*
[55] *Id.*
[56] *Id.* at 1016.
[57] *Id.* at 1017.
[58] *Id.* (recognizing that, without the vacuum cleaner and her expert's testimony relating to it, the plaintiff would only have her testimony that her [six]-year-old vacuum, which had never previously malfunctioned "caught fire, due to a defect, on that fateful day").
[59] *Id.* (italics in original).
[60] *Rockwell*, 561 So. 2d at 678.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* Although the court in *Rockwell* had entered an order prohibiting destruction of the evidence in question, the same result obtains regardless of whether an order has been entered protecting the evidence. *Figgie Int'l, Inc. v. Alderman*, 698 So. 2d 563 (Fla. 3d DCA 1997) (even absent the violation of an order determining that evidence must be preserved or produced in discovery, a trial court has the inherent power to sanction destruction of that evidence), *rev. dismissed*, 703 So. 2d 476 (Fla. 1997).
[67] *Rockwell*, 561 So. 2d at 679 (citing

DePuy, 427 So. 2d at 308 and concluding that whether evidence is destroyed in "bad faith or accidentally is irrelevant").

[68] *Id.*

[69] *Id.* at 680.

[70] *Reed*, 975 So. 2d at 1204 (recognizing that there are a variety of reasons why a product may not always be available after the incident causing injury and that, depending on the circumstances, a products liability claim may nevertheless be proven).

[71] *Id.*

[72] *See, e.g., Reed*, 975 So. 2d at 1202 (holding trial court in plaintiff's product liability action, arising out of a marble edge polishing wheel that broke during use, could not dismiss the case with prejudice as a remedy for spoliation of evidence, even if defendants were prejudiced by the disappearance of the wheel, the grinder to which it was attached, and safety goggles from the office of plaintiff's attorney, where plaintiff could still proceed with his claim without the evidence, and defendants were not rendered completely unable to defend the claims through their respective use of the photographs taken by plaintiff's expert before the evidence was lost). *See also Murray v. Traxxas Corp.*, 78 So. 3d 691 (Fla. 2d DCA 2012) (fact that fuel can that exploded, causing injury to minor, could not be examined and tested because it had been discarded did not prevent minor's parents from proving the existence of a design defect in the can due to the absence of a flame arrestor where 1) can was observed by eyewitnesses to the accident; 2) can was inspected and photographed by fire inspector shortly after the accident; 3) shopkeeper who sold the fuel identified the type of can from a photograph; and 4) experts who reviewed the available evidence were able to opine as to the nature of the explosion, its cause, and whether incorporation of a flame arrestor in the design of the can would have prevented the accident).

[73] *See, e.g., Perez v. La Dove, Inc.*, 964 So. 2d 777 (Fla. 3d DCA 2007) (holding that employer had no duty to preserve forklift unless employee requested employer to preserve it); *Royal & Sunalliance v. Lauderdale Marine Ctr.*, 877 So. 2d 843 (Fla. 4th DCA 2004) (Marina operator had no duty to retain evidence relating to fire that damaged two yachts docked there, and, thus, insurer that indemnified yacht owners could not hold operator liable for spoliation of evidence, even if operator had reason to anticipate that litigation would be instituted, where insurer did not allege that operator had a contractual or statutory duty to retain the evidence, operator had not been served with a discovery request requiring the evidence to be preserved, and there was no general common law duty to preserve evidence in anticipation of litigation); *Pennsylvania Lumberman's Mut. Ins. Co. v. Florida Power & Light Co.*, 724 So. 2d 629 (Fla. 3d DCA 1998) (affirming summary judgment in favor of defendant power company, which was not under any statutory or contractual duty to maintain or preserve transformer and had no common law duty to preserve transformer that could render it liable for spoliation of evidence).

[74] *See, e.g., Talavera v. Ford Motor Co.*, 932 F. Supp. 2d 252, 256 (D.P.R. 2013) ("When a plaintiff's claim is based on a manufacturing defect, an inspection and evaluation of the specific item that caused the injury is required to establish that the item was defectively manufactured, or to refute that theory[,]" but "[w]hen a plaintiff's claim is based on a design defect...the design defect, by definition, would be found in the entire run of the vehicle model in question[,]" therefore, in claims based on design defect, "spoliation of the vehicle is not as prejudicial as in manufacturing defect cases.") (internal quotations omitted). *See also Reid v. BMW of N. Am.*, 1:04-CV-1885-MHS, 2006 WL 8431456, at *5 (N.D. Ga. Feb. 17, 2006) (denying defendants' motion to dismiss plaintiff's claims as sanction for failure to preserve allegedly defective part on basis that "this is a design defect case in which plaintiff alleged that all of certain types of radiators were defectively designed" and not a "manufacturing defect case where plaintiff would have alleged that the particular radiator that injured him had a defect not shared by all other radiators of its kind[,]" therefore, while defendants will suffer some prejudice in their defense on the issue of causation without the subject radiator, "the potential for prejudice is much less due to the design defect theory of plaintiff's case").

[75] *See, e.g., Flury v. Daimler Chrysler Corp.*, 427 F. 3d 939 (11th Cir. 2005) (explaining that the imposition of sanctions for evidence based on spoliation depends on "(1) whether the defendant was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the party acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded").

[76] *Landry v. Charlotte Motor Cars, LLC*, 226 So. 3d 1053, 1058 (Fla. 2d DCA 2017) (citing *Fleury v. Biomet, Inc.*, 865 So. 2d 537, 539 (Fla. 2d DCA 2003)). *See also Harrell v. Mayberry*, 754 So. 2d 742, 745 (Fla. 2d DCA 2000); *Sponco Mfg., Inc.*, 656 So. 2d at 630.

[77] *See Fleury*, 865 So. 2d at 539 (citing *Harrell*, 754 So. 2d at 745 for the proposition that the ultimate sanction of dismissal is "reserved for cases in which one party's loss of evidence renders the opposing party completely unable to proceed with its case or defense"). *See also DeLong*, 710 So. 2d at 706 (emphasis added) (Trial court properly dismissed claim of plaintiff, who "inadvertently lost or misplaced a piece of relevant and material evidence," where the defendant aptly demonstrated its "inability to completely set forth their defense without having had the opportunity to examine and test the lost evidence."); *Sponco Mfg., Inc.*, 656 So. 2d at 631 (affirming the entry of a default where expert testimony established that the movant "was no longer able to proceed" without the crucial evidence). Interestingly, the same cannot be said in federal courts, where a finding of bad faith is generally deemed mandatory for the imposition of sanctions based on spoliation of evidence. *See Flury*, 427 F.3d at 944 ("Dismissal represents the most severe sanction available to a federal court, and therefore should only be exercised where there is a showing of bad faith and where lesser sanctions will not suffice."); *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) ("In this circuit, an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith[,]" adding that "mere negligence" in destroying or losing the evidence is not enough.). *See also Snell v. Ford Motor Co.*, 2014 WL 11822753, at *2 (S.D. Fla. July 31, 2014) (citing *Mann v. Taser Int'l, Inc.*, 588 F. 3d 1291, 1310 (11th Cir. 2009) (recognizing that "a finding of 'bad faith' is a prerequisite to a court's imposition of sanctions for spoliation of evidence"); *Point Blank Solutions, Inc. v. Toyobo Am., Inc.*, 09-61166-CIV, 2011 WL 1456029, at *1 (S.D. Fla. Apr. 5, 2011 (Goodman, J.) (stating that 11th Circuit law requires bad faith showing to impose sanctions for spoliation).

[78] *Landry*, 226 So. 3d at 1058 (citing *Reed*, 975 So. 2d at 1204). *Compare Nationwide Lift Trucks, Inc. v. Smith*, 832 So. 2d 824, 826 (Fla. 4th DCA 2002) (dismissal was proper sanction because plaintiffs submitted ample credible evidence that they were unable to proceed without the altered or lost evidence).

[79] *See Golden Yachts*, 920 So. 2d at 780 (noting that, as a general rule, Florida courts "prefer to utilize adverse evidentiary inferences and adverse presumptions during trial to address the lack of evidence").

AUTHORS

DONALD A. BLACKWELL *is a trial lawyer at Bowman and Brooke, LLP, in Dallas, Texas, who, for the past 35 years, has defended manufacturers of automobiles, medical devices, power tools, heavy equipment, CPVC fittings, FRT plywood, and commercial roofing systems in personal injury, wrongful death, and breach of warranty actions. He is a 1983 graduate of the University of Virginia School of Law.*

STEPHANIE M. SIMM *is a partner and appellate attorney at Bowman and Brooke, LLP, in Miami. She earned her J.D. degree in 2005 from the University of Miami. Simm is experienced in product liability and premises liability defense, as well as insurance and personal injury protection litigation.*