

December 2006

## **FIRST PARTY SPOILIATION**

By Ted Babbitt

Fini v. Glascoe, 936 So. 2d 52 (Fla. 4<sup>th</sup> DCA 2006) is a case with a bizarre set of facts that clarifies the distinction between first and third party spoliation. In that case, plaintiff had an alarm system installed in his vehicle by the defendants. The vehicle had numerous problems including accelerating while the car was out of gear. After numerous attempts to correct the problem, the plaintiff was driving on the turnpike when his truck suddenly and uncontrollably accelerated causing him to lose control of his vehicle and suffer serious injuries in a roll over accident. The facts established that one of the defendant's employees went to the impound lot where the vehicle was located, hopped the fence and proceeded to systematically take the car apart for the purpose of destroying evidence of the installation of the alarm system. Evidence was presented that this employee was overheard telling his wife that he had intentionally taken every wire traceable to the alarm system out to cover the tails of both he and his employer.

The plaintiff brought an action and alleged an independent cause of action for spoliation under Florida law. The trial court granted the defendant's motion for summary judgment and the Fourth District reversed.

The District Court explained that the trial court correctly concluded that an independent cause of action does not exist for first party spoliation of evidence under Florida law relying upon Martino v. Wal-Mart Stores, Inc., 908 So. 2d 342 (Fla. 2005). In Martino, the Supreme Court explained that there was a distinction

between first party and third party spoliation claims. First party spoliation involves destruction of evidence by the tortfeasor who initially caused the injuries to the plaintiff while third party spoliation occurs when a nonparty to the original action destroys critical evidence.

In the case of first party spoliation, the Finj Court, at Page 55 held:

“In rejecting an independent action for first-party spoliation, the supreme court (in Martino) made clear that sanctions and a presumption of negligence, rather than an independent cause of action, were the appropriate remedies for first-party spoliation. *Id.* at 347. Relying on *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987), the court explained that where the first-party intentionally loses, misplaces, or destroys evidence, trial courts are to rely on sanctions found in Florida Rule of Civil Procedure 1.380(b)(2) and a jury inference of negligence from a finding of intentional destruction. *Id.* at 346. However, where the spoliation of evidence was merely negligent, a presumption of negligence applies. *Id.* at 347.”

Notwithstanding the lack of an independent first party spoliation claim, the District Court in Finj reversed the trial judge because the existence of the Valcin presumption precluded the granting of a summary judgment. At Page 55, the Court held:

“Although the trial court correctly granted summary judgment as to the plaintiffs’ claims for first-party spoliation, which is adequately remedied through sanctions or a *Valcin* presumption of negligence, there remain genuine issues of material fact precluding summary judgment as to the remainder of the plaintiff’s claims against Glascoe and Sawgrass Ford.”

One cannot imagine clearer facts which justify the imposition of sanctions for destruction of evidence than existed in this case. There can be little doubt that the jury hearing about the actions of the defendant's employee will undoubtedly conclude that the alarm system in question was improperly installed and that defendant intentionally destroyed evidence to prevent the plaintiff from proving that fact. Under those circumstances the distinction between first and third party spoliation is a distinction without a difference. It is nevertheless important, from the standpoint of appropriate pleading, to distinguish between those two scenarios and be certain that the pleadings accurately reflect the parameters available to the trial judge in remedying this kind of destruction of evidence.

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