

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA

WAL-MART STORES EAST, LP,

CASE NO.:3D23-793

L.T. NO.: 2020-CA-26469

Appellant,

v.

ELIDA MARIA GARCIA PINEDA,

Appellee.

REPLY BRIEF OF APPELLANT WAL-MART STORES EAST, LP

On Appeal from a Final Judgment in the Circuit Court for the
Eleventh Judicial Circuit in and for Miami-Dade County, Florida

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INTRODUCTION

Walmart showed in its Initial Brief that, by disregarding both the rules of procedure and the timeline established in its own case management order, the trial court allowed Ms. Pineda to blindsides Walmart with a mid-trial spoliation claim, and then required Walmart to respond overnight, depriving it of any meaningful opportunity to investigate and develop the factual record. Ms. Pineda gave no notice and did not explain why she was raising the issue for the first time in the middle of trial, two years after Walmart produced the video at issue.

This sequence of events contravened basic principles of fairness and due process and imposed a serious sanction on Walmart without affording it a meaningful opportunity to respond. The last-minute spoliation issue was untimely and prejudicial to Walmart; it ran afoul of the rules of procedure and the court's own case management order; and it violated Walmart's due-process rights. And all this could have been avoided had Ms. Pineda years earlier provided Walmart with the correct time of injury to being with. The trial court unfairly faulted Walmart for this consequence of Ms. Pineda's inaccuracy.

The trial court exacerbated the prejudice of its initial error by preventing Walmart from fully, adequately, and fairly investigating the situation. The trial court's order that Walmart investigate and respond in just under thirteen hours, almost all of which passed during the middle of the night, followed by the imposition of an adverse inference instruction, was objectively unreasonable and deprived Walmart of due process.

And finally, the trial court compounded the error further by preventing Walmart from addressing the issue with the evidence that it was able to develop during the inadequate time afforded to it. All of this resulted in a basic deprivation of Walmart's right to develop and litigate this lawsuit, in contravention of basic prerequisites to the operation of the adversarial process. This Court should reverse.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY CONSIDERING MS. PINEDA'S SPOILIATION ISSUE BECAUSE IT WAS UNTIMELY AND PREJUDICIAL.

a. Ms. Pineda's Spoliation Issue Was Untimely in Violation of the Rules of Procedure and the Trial Standing Order.

Ms. Pineda admits that, as Walmart showed in its Initial Brief, her counsel possessed the two-hour video and the five-minute video

encompassing Ms. Pineda's fall for two years before trial, but, she argues, there was "no specific time limit" for raising a spoliation issue. This misconstrues Walmart's argument: Walmart does not contend that spoliation "cannot be addressed in a trial setting, or when considering jury instructions" as a *per-se rule*, as Ms. Pineda suggests. Answer Br. 26.

Context matters. It is not *just* that Ms. Pineda raised the issue for the first time at trial. The trial court's scheduling order set forth deadlines for discovery and for raising substantive motions before trial. Ms. Pineda and her counsel possessed the two separate videos for *over two years* before those deadlines passed, yet, she waited until the middle of trial to raise the issue and never articulated any ground for excusing this delay. Had she raised it earlier—in compliance with the scheduling order deadlines—Walmart *would have* had the time to investigate, research, and respond to her accusations.

Ms. Pineda's argument that a trial court can modify its case management orders to prevent injustice is unpersuasive. *See* Answer Br. 26. Courts have discretion to modify their case management orders to *prevent* injustice, not to *create* injustice. Raising this issue for the first-time mid-trial, followed by the trial court's refusal to allow

Walmart sufficient time to investigate and respond, constituted a deprivation of justice.

Indeed, the case quoted by Ms. Pineda, *see* Answer Br. 26, specifically notes that departure from a scheduling order is erroneous where, as here, “the affected party can clearly show the abuse [of discretion] resulted in unfair prejudice.” *Gutierrez v. Vargas*, 239 So. 3d 615, 622 (Fla. 2018). Here, Walmart was sandbagged mid-trial and given only thirteen hours to respond to Ms. Pineda’s spoliation allegations *because* the trial court allowed Ms. Pineda to raise the issue outside the deadlines established by the scheduling order. This clearly constitutes “*unfair* prejudice,” and thus reversible error. *See Binger v. King Pest Control*, 401 So. 2d 1310, 1314 (Fla. 1981) (finding that “prejudice,” in the context of evidentiary matters, is a “surprise in fact of the objecting party, and it is not the adverse nature” of the evidentiary issue, itself); *see also Reive v. Deutsche Tank Nat’l Tr. Co.*, 190 So. 3d 93, 94 (Fla. 4th DCA 2015) (applying *Binger* analysis beyond undisclosed witnesses, to issues such as undisclosed evidence and documents).

Ms. Pineda tries to shift the blame to Walmart by arguing that the spoliation charge resulted from a “dereliction of duty” by

Walmart. See Answer Br. 28. But there is no evidence of any such “dereliction.” To the contrary, Walmart produced the video that it had saved, which included—in keeping with Ms. Pineda’s counsel’s preservation letter—video encompassing one hour before and one hour after the incident time reported by Ms. Pineda’s counsel. That the reported time by Plaintiff’s counsel was later discovered to be inaccurate does not constitute a dereliction of *Walmart’s* duty. And as Walmart showed in its Initial Brief, Walmart went further: It followed up with Ms. Pineda’s counsel repeatedly over the course of several months to determine the actual time of the fall, see IB.4-5, and, when it finally discovered the correct time approximately three months later, it managed to restore additional video. The trial court held Walmart responsible for spoliation without considering all of this critical context.

Ms. Pineda’s cases are distinguishable. For instance, her reliance on *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363 (Fla. 2015), is misplaced. She argues that it shows that Walmart “construes the duty to preserve too narrowly.” Answer Br. 29. But *League of Women Voters* simply held that there can be a duty to preserve where litigation is reasonably foreseeable. 172 So. 3d at

391. Walmart has not claimed that it was never under a duty to preserve any video evidence based on a lack of internal procedures.

Ms. Pineda's reliance on an Oklahoma federal court order is also misplaced. In *Mafille v. Kaiser-Francis Oil Co.*, 2019 WL 2189515, at *1 (N.D. Okla. May 21, 2019), the defendant failed to preserve a computer, leading to the loss of its data. Against a spoliation charge, the defendant there argued that had the plaintiff requested the computer be preserved "earlier," it would have done so. *Id.* But Walmart did not destroy its entire CCTV system; it did not destroy the camera or the backup server. Walmart never deleted or discarded the *entire* system of data like in *Mafille*. On the contrary, Walmart acted promptly and in good faith to retain the relevant video for the period that Ms. Pineda herself reported; and it subsequently managed to salvage additional video to correct Ms. Pineda's error through its own diligence.

b. The Trial Court's Refusal to Allow Walmart Sufficient Time to Respond to Ms. Pineda's Mid-Trial Spoliation Allegation Violated Due Process.

In its Initial Brief, Walmart showed that the thirteen overnight hours the trial court allowed to develop a full factual and legal response to Ms. Pineda's spoliation argument deprived it of due

process. *See* Initial Br. 35–36. Ms. Pineda’s attempt to distinguish those cases by claiming that they involved “insufficient notice affecting preparation for an entire proceeding” is misplaced. There is no dispute that, like the defendants in those cases, Walmart had a due-process right to notice and an opportunity to be heard on Ms. Pineda’s assertion of spoliation—and like the defendants in those cases, Walmart was not given adequate time to respond to those significant allegations that resulted in a sanction against it.

Ms. Pineda speculates that Walmart “should have been aware that the videotapes it had produced did not completely respond to Plaintiff’s request for discovery,” so, she argues, Walmart need not have been afforded adequate time from when the issue was actually raised. Answer Br. 37. But Walmart was never aware until Ms. Pineda raised it that she would contend this fully innocent and innocuous set of facts would be claimed to be spoliation warranting a sanction. Walmart had no basis or reason to conduct a factual investigation relating to this issue and was entitled to notice a meaningful opportunity to be heard once Ms. Pineda belatedly raised it. By criticizing the way in which Walmart prepared during the single overnight period it was afforded and complaining that Walmart

“chose to research the discovery timeline and legal issues instead of trying to obtain information,” see Answer Br. 37–38, Ms. Pineda tacitly acknowledges what is in any event obvious as a matter of common sense—that one overnight period starting after business hours at 6 pm was plainly insufficient to do both, even putting aside the need to prepare for the next day of trial during the same overnight period.

II. THE TRIAL COURT ERRED BY FINDING SPOILIATION AND ISSUING AN ADVERSE-INFERENCE JURY INSTRUCTION.

a. Walmart Has Not Waived This Issue.

Ms. Pineda’s waiver argument merely exemplifies the unfairness in the trial court’s handling of this issue. Walmart cannot properly be faulted for not having done more, or for having purportedly made “a choice in litigating this issue,” when Walmart’s argument was that it was not afforded adequate time to take those additional steps or develop those additional arguments. Walmart’s counsel directly raised the issues and adequately presented them to the trial court, specifically relying on cases like *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777 (Fla. 4th DCA 2006), and *Adamson v. R.J. Reynolds Tobacco Co.*, 325 So. 3d 887, 898 (Fla. 4th DCA 2021); given the deprivation

of Walmart's due-process rights and the insufficient time it was given, this effectively presented the issues to the trial court.

Regardless, a trial court's application of the wrong governing law is fundamental error reviewable for the first time on appeal. See *Kline v. State*, 274 So. 3d 525, 526 (Fla. 1st DCA 2019) ("Perhaps if a trial court expressly applied the wrong standard to a claim that the verdict was contrary to the weight of the evidence, such an error might be found to be fundamental.").

Ms. Pineda's reliance on *Ellison v. Willoughby*, 373 So. 3d 1117, 1120–21 (Fla. 2023), is misplaced. In *Ellison*, there were two equally applicable statutes governing a setoff, and the appellant argued specifically for only one. *Id.* at 1121. On appeal, the appellant changed her position and sought to have the district court analyze her case under both statutes. *Id.* The Florida Supreme Court rejected this tactic: "If [she] wanted the trial court to consider a setoff under both statutes, she had the obligation to present both issues to the trial court." *Id.* In that case, the appellant's deliberate, strategic tactic to choose one equally applicable statute over the other precluded her from arguing the other on appeal. *Id.* The situation here differs because Walmart did not strategically choose one

applicable legal standard over another; there is only one proper body of governing law, and that is rule 1.380(e).

Ms. Pineda's remaining cases are inapposite, as well, because they do not deal with any alleged error of applying the incorrect body of governing law, as occurred here. In *Citizens of State of Florida v. Clark*, 373 So. 3d 1128, 1132 (Fla. 2023), the complained-of legal errors were "burden-shifting, misplaced reliance on mitigating circumstances, and division of financial responsibility," and in *Philip Morris USA, Inc. v. Gore*, 238 So. 3d 828 (Fla. 4th DCA 2018), the unpreserved issue on appeal was a challenge to expert testimony. *Id.* at 829. But unlike the issues in those cases, the application of the wrong standard of law can be raised as fundamental error for the first time on appeal. *See Kline*, 274 So. 3d at 526.

b. The Trial Court's Spoliation Analysis Constitutes Reversible Error.

On the merits, the trial court erred in finding a spoliation violation by Walmart. As shown in the Initial Brief, spoliation "is not a strict liability concept," or a game of "lose the evidence, lose the case." *Reed v. Alpha Prof'l Tools*, 975 So. 2d 1202, 1204 (Fla. 5th DCA 2008). It requires far more egregious conduct than what

occurred here. *See Adamson*, 325 So. 3d at 898 (plaintiff intentionally shredded deceased husband's medical records). Yet Ms. Pineda's entire argument here has been the equivalent of imposing strict liability on Walmart for the missing video (again, due to *Ms. Pineda's* incorrect information), and an affirmance in this case would signify a new direction in Florida's spoliation jurisprudence.

Moreover, as explained in detail in the Initial Brief, rule 1.380(e) and the prior common law under *Golden Yachts* and *Adamson* are *not* the same. Ms. Pineda argues, with no support, that subsection (e) of rule 1.380 "does not eliminate th[e] common law spoliation framework." *See Answer Br. 51*. But as asserted in the Initial Brief, that the intent-to-deprive standard set forth in rule 1.380(e) "constitutes a restriction on a trial court's formerly wider discretion to assess sanctions for negligent spoliation of ESI under *Golden Yachts*." Gregory S. Weiss et al., *Cool Change: Evolution and Explanation of New Florida Rule of Civil Procedure 1.380(e)*, Fla. B. J. July-Aug. 2020, at 24, 26 (2020).

Ms. Pineda argues that an "intent to deprive" standard is *not* equivalent to the federal "bad faith" standard. *See Answer Br. 54*. This position belies the Florida Supreme Court's directive in the notes

to rule 1.380 that the rule amendment was indeed to make the rule “consistent with Federal Rule of Civil Procedure 37(e).” See 2019 Amendment note to Fla. R. Civ. P. 1.380; see also *Gross v. Franklin*, 387 So. 2d 1046, 1048 n.6 (Fla. 3d DCA 1980) (“Decisions and commentaries under the Federal Rules of Civil Procedure are persuasive guidelines to the interpretation of our state rules, which are closely patterned after the Federal Rules.”). The Eleventh Circuit has stated unequivocally that the “intent to deprive” standard in subsection (e) is the “equivalent of bad faith” in the identical federal Rule 37(e).” *Skanska USA Civil Se. Inc. v. Bagelheads, Inc.*, 75 F.4th 1290, 1312 (11th Cir. 2023). Ms. Pineda improperly asks this Court to ignore the language of rule 1.380(e) and the supreme court’s notes regarding the 2019 rule amendments. And most importantly, Ms. Pineda did not present a shred of support that the chain of events resulting in purported spoliation of a few minutes of video was intentional or in bad faith.

Ms. Pineda has no meaningful response to any of the foregoing. While her appeal brief is replete with hypotheticals questioning Walmart’s motive, see, e.g., Answer Br. 52–53, even accusing Walmart of preserving only the video footage “it wished to preserve,”

see Answer Br. 56, it adduces no evidence of actual bad-faith spoliation, because there is none.

As Walmart explained to the trial court, Ms. Pineda's counsel did not inform Walmart of the time of the incident, then provided the wrong time, and did not advise Walmart of the correct time until three months later, at which time Walmart supplemented the preserved video with the second segment. Ms. Pineda does not offer a cogent explanation to support the trial court's conclusion that Walmart intended to deprive Ms. Pineda of evidence by affirmatively preserving more video after Ms. Pineda's counsel provided the correct timeframe for the incident. Moreover, as the Florida Supreme Court explained in the notes to rule 1.380: "[A] party should not be sanctioned for the loss of electronic evidence due to the good-faith operation of an electronic information system." 2012 Amendment to note to Fla. R. Civ. P. 1.380. Simply put: There is no evidence that Walmart intentionally, in bad faith, purposefully deleted or failed to store the video so that Ms. Pineda would be deprived of it in a future lawsuit.

Rather, and in the absence of such indication of bad faith, the standard against which the trial court held Walmart (and that which Ms. Pineda asks this Court to approve) is simply unreasonable. "[I]t

is unreasonable to expect parties to take *every* conceivable step or disproportionate steps to preserve *each instance* of relevant electronically stored information.” *Incardne v. Royal Caribbean Cruises, Ltd.*, 2019 WL 3779194, at *23–24 (S.D. Fla. Aug. 12, 2019) (emphasis added) (“Preserving two or three or more hours of equally representative CCTV clips would have been reasonable. But the mere fact that RCCL preserved less does not make its decision unreasonable. On the other end of the spectrum, preserving all 14,400 hours of video would have been unreasonable and disproportional.”). Indeed, “[t]he duty to preserve is not meant to impose an unreasonable burden on parties anticipating litigation; they need not preserve every shred of paper, every e-mail or electronic document, and every backup tape.” *Jonathan R. v. Justice*, 2024 WL 13339522, at *6 (S.D. W. Va. Mar. 28, 2024).

Ms. Pineda argues that the duty to preserve evidence is “broad and includes evidence the defendant should have reasonably foreseen would be relevant to a potential claim or action.” See Answer Br. 30. But the trial court held Walmart to a higher standard, and this blanket statement of law does not apply because Ms.

Pineda's counsel provided the original misinformation to Walmart that resulted in the wrong time slot being preserved in the first place.

Her reliance on a Northern District of Illinois and an Eastern District of California case does not change this analysis. See *Domanus v. Lewicki*, 284 F.R.D. 379, 386 (N.D. Ill. 2012); *Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132, 1137 (E.D. Cal. 2012). In *Domanus*, there was a finding of actual bad faith on behalf of the defendants because the missing evidence was destroyed *two years* after service of the initial complaint. 284 F.R.D. at 387. In *Apple*, an internal Samsung memorandum informed its employees that there was a "reasonable likelihood of future patent litigation." 881 F. Supp. 2d at 1145. Yet Samsung never took steps to ensure the retention of the relevant information. *Id.*

The record evidence shows Walmart acted diligently and reasonably to preserve video based on the information provided to it by Ms. Pineda's attorney. Two years later, Walmart was faulted and prejudiced for doing so.

CONCLUSION

Walmart did not receive a fair trial. The abuse of discretion and reversible error is clear. This Court should reverse the jury verdict and final judgment on appeal, and remand for a new trial.

Respectfully submitted,

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