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

CASE NO.: 3D23-0793
L.T CASE NO.: 2020-CA-26469

WAL-MART STORES EAST, LP,

Appellant,

v.

ELIDA MARIA GARCIA PINEDA,

Appellee.

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

---

APPELLEE'S ANSWER BRIEF

Gregory Deutch, Esq.
Rubenstein Law, P.A.
9130 South Dadeland Boulevard, PH
Miami, Florida 33156
(305) 661-6000
gregory@rubensteinlaw.com
lcueto@rubensteinlaw.com
eservice@rubensteinlaw.com
Trial Counsel for Appellee

Andrew A. Harris, Esq.
Grace Mackey Streicher, Esq.
HARRIS APPEALS, P.A.
5220 Hood Road/Suite 201
Palm Beach Gardens, FL 33418
(561) 867-9500
andrew@harrisappeals.com
grace@harrisappeals.com
eservice@harrisappeals.com
Appellate Counsel for Appellee

By: /s/ Andrew A. Harris
ANDREW A. HARRIS
Florida Bar No. 10061

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

This is an appeal from a jury trial and verdict in favor of the Plaintiff/Appellee, Elida Maria Garcia Pineda. The Defendant/Appellant, Walmart, raises two related issues challenging the trial court's finding of spoliation by Walmart and the trial court's decision to give an adverse inference jury instruction.

In spite of the mid-trial timing of the Plaintiff's request for a spoliation instruction, Walmart had notice of its own failure to preserve videotape footage that had been requested by the Plaintiff. The trial court reasonably requested that Walmart, during an overnight recess in the trial, investigate and provide information about this failure. But, as Walmart's counsel admitted, Walmart did not make **any** efforts to provide the trial court with the requested information. Instead, it elected to simply complain that it did not have enough time and blame the Plaintiffs for failing to recognize the problem sooner. Walmart created the problem, and the trial court did not abuse its discretion in giving the instruction.

Walmart complains on appeal that if it had more time, it could have explained what happened with the missing video. But Walmart moved for new trial 15 days after the verdict, and offered no affidavit

at that time, either. Walmart's cries of foul are not sincere or genuine. The adverse inference instruction was well-supported by the evidence.

STATEMENT OF THE CASE AND FACTS

A. Factual Background.

This lawsuit is based on injuries to Ms. Garcia Pineda that she suffered as a result of slipping on an area of wet floor just outside the entry to a Walmart store bathroom. R28-33; T320. On July 13, 2019, Ms. Garcia Pineda and her fiancé, Oscar Nunez, made a routine trip to Walmart to pick up groceries and household items. T320-22. Although Ms. Garcia Pineda was not sure about the time period they were in the store, she testified that she believed they arrived at the store around 10:30 p.m. T323.

After they finished shopping, they were in the self-checkout lane and Ms. Garcia Pineda needed to use the restroom. T323. She left Mr. Nunez with her young son and proceeded to the restroom, which was relatively close to the self-checkout at the front of the store. T323. As she approached the restroom, Ms. Garcia Pineda noticed a female cleaning employee (Ms. Saintil) and gestured to ask if the restroom was open for her to enter. T324, 770. The employee

indicated that she could go inside the restroom. T324. Ms. Garcia Pineda walked "a wide entrance" so as not to interfere with the employee. T324-25. She stepped over the area where she later fell. T325. She did not observe the employee doing any cleaning and thought she was putting things away to tidy up. T325. Ms. Garcia Pineda also did not see any cones or "wet floor" signs. T325.

Upon leaving the restroom, Ms. Garcia Pineda again tried not to interfere with the employee and tried to stay close to the wall so as not to be in the way. T325-26. She took a slightly different path than she had going in, stepped on the corner of a rug, and slipped. T329. She initially landed on her knees and wrist, trying to break her fall. T 330. She did not feel much sensation except for a rush of adrenaline from falling, and felt very embarrassed. T331.

When she fell, Ms. Garcia Pineda noticed that her leg was "visibly wet" and she saw a "fair amount of liquid" on the floor. T330-31. She could not determine what kind of liquid it was, but said that her leg was wet from the knee down and that the liquid on the floor was "pretty visible, once the rug was lifted up." T329-30. Ms. Garcia Pineda described the amount of liquid as not necessarily a bucket full, but testified that it was an excessive amount. T332.

Ms. Garcia Pineda recalled the employee asking if she was okay. T332. They did not have much conversation because Ms. Garcia Pineda was embarrassed and wanted to get away from the front of the store, and also believed there was a language barrier. T332-35. Ms. Garcia Pineda pointed out the liquid to the employee. T334. She thought the employee might have acknowledged it, but was not sure if the employee understood her. T334.

Ms. Garcia Pineda went back to her fiancé and told him that she wanted to leave as soon as possible because falling was extremely embarrassing. T335. Ms. Garcia Pineda showed him that her leg was wet. T336. Mr. Nunez had already paid, so they left. T336. At this time, Ms. Garcia Pineda had started feeling slight discomfort from her wrist and knees, but was still feeling the adrenaline. T336. Because it was late at night, they went home instead of to an urgent care or emergency room. T337. Ms. Garcia Pineda felt more pain and discomfort, but assumed that it would go away overnight. T337.

The discomfort did not go away, but continued over the next several days. T339-40. Ms. Garcia Pineda began to feel "really bad pain" in her back. T340. About five days after the fall, she saw a chiropractor. T341-42. Because Ms. Garcia Pineda was pregnant,

the chiropractor could only do limited treatments. T342-43. She received treatment from the chiropractor until her baby was born, and then, after having an MRI, was referred to a doctor. T345-48.

The doctor gave her injections into her neck and back. T353. Because the injections were not alleviating the pain, the doctor performed a rhizotomy procedure. T356-58. The rhizotomy did not completely eliminate her pain. T360-61.

Next, Ms. Garcia Pineda underwent back surgery. T361-63. After the surgery, she still felt some pain, but it was improved. T365, 367. However, a few months later, the pain returned. T367-68. Ms. Garcia Pineda left the doctor's care in April 2021. T369. At that point, she was not completely without pain, but was told that the next step would be a riskier surgery and she would probably still continue to have pain afterwards. T369. Her medical bills totaled $426,290.18. T373.

B. Court's Ruling on Spoliation

At the end of the first day of witness testimony, the trial court and attorneys had a lengthy discussion about the anticipated jury instructions. Plaintiff's attorney informed the court that it had come

to his attention that there was an "unfortunate gap in the videos that have been produced thus far." T618.

Plaintiff's attorney explained that Walmart had produced an initial video that ran from 9:40 to 11:40 p.m. T618-19. Since Ms. Garcia Pineda fell at approximately 11:45 p.m., this video did not capture the fall. T619. Walmart also produced a second video that captured Ms. Garcia Pineda's entry into the bathroom and the fall when she exited, but the two videos did not display consecutive time periods. T619. Instead, the second video began approximately 2:35 minutes after the first video concluded, resulting in missing video for what had been happening several minutes before Ms. Garcia Pineda entered the bathroom. T619. Plaintiff's counsel believed that the missing portion might be relevant because it might have shown the maintenance worker or some other person mopping and spilling something on the rug before Ms. Garcia Pineda entered the restroom. T620. "It could evidence something going on, someone spilling something, the maintenance individual mopping and spilling something on the rug. I mean there's a million things that could have happened during that time window, and it's only a couple minutes before." T620.

Defendant's counsel responded, "Your Honor, we don't have it. We've produced everything that was preserved, and I – I think at this point --." T620. When the court asked, "How can you miss a whole chunk in the middle? That's just like Richard Nixon." T620. Defendant's counsel stated that she could "explain how that happened," but did not offer an explanation. T620-21.

At this point, Defendant's counsel expressed confusion about what Plaintiff was requesting. T621, 626. Plaintiff's counsel stated that he was looking for "guidance" from the court, since it was "a critical chunk of time, a couple of minutes prior to the incident where a lot of things could have happened, and now it's magically gone." T621.

The trial court indicated it was willing to give a "Valcin" instruction since there had been no apparent explanation for the missing video – the cameras were working, and the film had existed at one point: "Someone didn't produce a couple of minutes before she walked up to the scene." T621. The trial court instructed the

Plaintiff to prepare a Valcin[1] instruction, and told Walmart's counsel to "do some research," suggesting that there might be an explanation. T621-22. At that point, Defendant's counsel urged that the issue had been waived because Plaintiff had failed to point out the gap between the tapes earlier. T622. The trial court then ordered the Defendant to "show cause in the morning why this is missing" and indicated that it would also entertain arguments about timeliness. T622. The trial court directed:

> Somehow explain it. And if there's no explanation then there may be a Valcin instruction, and/or it's too late. Do the research on that, and bring it up. Maybe – I don't usually get it in the middle of trial.

T622.

Plaintiff's counsel stated for the record that the videotape had been provided in two different formats – one which could only be opened through Walmart's software, and one that would open but

---

[1] It appears that the trial court was referring to *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987), which established a rebuttable presumption in cases where essential evidence necessary to prove a prima facie case is missing or inadequate as a result of a defendant's negligence. Although the trial court characterized the instruction as a "Valcin instruction," or "not quite Valcin," the trial court eventually gave an adverse inference instruction mirroring Florida Standard Jury Instruction 301.11(a). T875.

that did not have time stamps. T622-23. Counsel advised that he had not seen the issue until the video was being played at trial through Walmart's software. T623. After additional lengthy discussion, the trial court recessed and instructed the Defendant to investigate the situation. T638-39. The trial court warned that it would give the Valcin instruction unless Walmart could show cause by the next morning. T638.

The next morning, counsel for Walmart again argued that the Plaintiff had waived the issue concerning the missing videotape segment by failing to raise it earlier. T651. Walmart's counsel, Ms. Russomanno, also disputed whether the Plaintiff's attorneys could have used Walmart's software that had been provided to view the time stamp. T652. Defense counsel asserted that there were several witnesses that her client would need to present with less than 24 hours of notice in order to explain what had happened to the missing videotape. T653. The trial court allowed Walmart's counsel to proffer their testimony. T653.

Instead of explaining what had happened to the missing videotape, Walmart's counsel's stated, "We are proffering, Your Honor, that we do not know at this time why only five minutes of the

incident were recorded. What we do know is that we did not learn of the exact time of this incident until October 2nd, 2019, which was in fact –" T653-54. Walmart's counsel admitted that Walmart had received a preservation letter six days after the incident. T654. At that time, a Walmart asset protection manager looked at videotape from 9:40 p.m. to 11:40 p.m. and saw no incident. T654. However, somehow on October 2nd, 2019, Walmart was able to find the incident in the surveillance footage. T655. Walmart's counsel did not know why only five minutes was preserved when the Plaintiff had requested one hour before and one hour after the incident.

Walmart's counsel asserted that an asset protection manager (Byron Love) was intimately familiar with the software and could explain what had happened, but that he was unavailable on such short notice. T660-61. When the trial court pointed out that Mr. Love was listed on the Walmart witness list, Walmart's counsel stated that he was on the witness list, but not for the "spoliation issue." T660. When the trial court asked "Where is he?" Walmart's counsel **admitted that she had not tried to find Mr. Love (nor did she direct anyone to try to contact him)** because she claimed she had been busy with other matters:

MS. RUSSOMANNO: Your Honor, we can determine where Mr. Love is, however, we've had less than 24 hours –

THE COURT: Did you find out where he was last night?

MS. RUSSOMANNO: No, Your Honor, because I was researching the case law –

THE COURT: Who did you call?

MS RUSSOMANNO: And researching the timeline.

THE COURT: Who did you call? Who in corporate was contacted to find this – his information really desperately needed? We have –it really looks bad. It looks – it looks like a fraud is being perpetrated. That's what it looks like. I can't call that. I can't find that. Right now it's just missing. But it looks really bad. And I think heaven and earth should have been moved to contact this person. You make a phone call. You know, you got lawyers for a corporation. You have a corporate – you had a corporate rep here, right You had the manager or something, I don't know what he is. Mr. –

MS. RUSSOMANNO: Provost, Your Honor.

* * *

THE COURT: Mr. Provost, he was here yesterday. He heard all of this. Who did he call, and how can he not want to ride up the chains and – believe me, these people that are in charge, I'm sure they have their cell phone numbers. I'm sure they can find people. So tell me who called who, and who made the last call and what they found out, and why they couldn't contact this asset protection chairperson, manager, whatever you're calling him.

> MS. RUSSOMANNO: Your Honor, I don't know the answer because I did not contact Mr. Love and I did not direct anyone to call Mr. Love because I was trying to figure out after we learned of the court's ruling at approximately 5:30 or so --

T661-62.

Eventually, Ms. Russomanno came up with another story: she asserted that Mr. Love had left employment with Walmart during the last year, and that he might have "moved on with a military career." T670.

Again, Ms. Russomanno tried to explain how the system routinely wrote over videotape, but in response to the trial court's question she could not explain how five minutes were able to be captured but the two minutes that preceded it were not. T767-70. Ms. Russomanno asserted that she reasonably believed Mr. Love might have an answer. T771.

The trial court allowed the corporate representative, Mr. Prevost, to attempt to explain the missing two minutes. T771. However, Mr. Prevost could only say that "Byron's not here." T771. He also verified that the system resets and records over itself after 30 days. T772. But he had no explanation for how five minutes of footage had been recovered after 90 days other than "we salvaged

that." T772. The trial court found that Mr. Prevost's testimony would be "immaterial, irrelevant, and would be more prejudicial than probative" unless he could explain how Walmart had salvaged the five-minute footage, which was missing the first two minutes. T773.

After the jury was brought back into the courtroom, Mr. Prevost was permitted to offer trial testimony about the maintenance procedures at Walmart. T776-77. He testified that in his experience it took the portion of floor in front of the restroom six minutes to dry. T778. He was unaware of any repairs to or leakage from the water fountains near the restroom around the time the Plaintiff fell. T779.

Subsequently, during the lunch break, the trial court allowed a formal proffer from Mr. Prevost. T794-95. Again, he had no explanation for the missing two minutes and said that the responsibility for that would have fallen to Mr. Love. T816-18. Mr. Prevost testified that they might be able to locate Mr. Love by way of a phone call request to CMI for his archived personnel file. T820-21. The trial court ordered Walmart to call and attempt to discover Mr. Love's last known address and latest contact information. T821-22. Counsel for Walmart offered to make the phone call, but requested to be given an additional day. T822. The trial court observed, "This

happened yesterday about 5:00 so you've almost had a day so let's keep working on it. That's all I can say." T822.

After the lunch recess, Plaintiff's counsel continued with cross-examination about the contents of the existing videotapes and about Walmart's policies for cleaning and maintenance. T827-42. As counsel had indicated earlier, he did not question Mr. Prevost about the reason for the missing minutes or the saving of the video. T823-24. After Mr. Prevost's testimony, both parties rested. T865.

The court and counsel had had further discussions about jury instructions after the close of evidence. T857, 865, 868-74. The parties indicated that they had agreed earlier on the language to be used in the "failure to maintain evidence" instruction, but wanted to discuss where it would be placed. T875-76.

Ultimately, the jury was given an adverse inference instruction:

> If you find Wal-Mart lost, destroyed, mutilated, altered, concealed, or otherwise caused the portion of the surveillance video of the incident to be unavailable while it was within its possession, custody, or control and that a portion of the video of the incident would have been material in deciding the disputed issues in this case, then you may, but are not required to, infer that this evidence would have been unfavorable to Wal-Mart. You may consider this together with the other evidence in determining the issues in the case.

T887-88, T874.

During closing argument, Plaintiff's counsel mentioned the missing portion of the video footage. T899-900. After explaining the timing of the gap, counsel argued, an "almost three minute gap where quite literally, anything could have happened." T900. He continued to argue:

> Ms. Sentile (sic) could have done additional cleaning. * * * Issues with the water fountain. Individuals going from one to one washing their hands. Whatever it may be. Unfortunately, we do not have the benefit any longer of those three minutes that could've proven critical in this case to figure out what happened. Why was all of this liquid on the floor? Why did Ms. Garcia have liquid on her pants? Why did she report liquid to Ms. Sentile (sic)? Why was this there? All signs lead to the cleaning that Ms. Sentile (sic) was doing at the time of this incident. There is no other rational, reasonable, common explanation that could show and that could dictate how this incident occurred. It just doesn't exist.

T900-01.

Walmart's counsel also addressed the "two to three minutes of missing video" pointing out that this was "the first time during the entire trial that has been brought up." T919. She made lengthy arguments during two different points in closing about how it would

not be reasonable to assume that something caused the carpet to be soaked during the missing time interval. T919-24, 935-37. She argued that the Plaintiff had "simply tripped." T924, 937.

During rebuttal closing, Plaintiff's counsel reminded the jury that there were two to three minutes of video that did not exist, followed by five minutes reflecting the fall. T956-57. Counsel then explained the adverse inference instruction, and stated that they may, but were not required to, infer that the evidence would have been unfavorable to Walmart. T957.

C. The Verdict, Final Judgment and Walmart's Motion for a New Trial or Remittitur.

The jury returned a verdict finding Walmart negligent, and attributing 85% fault to Walmart and 15% fault to Ms. Garcia Pineda. T1004-05. Damages for medical expenses were awarded in the amount of $426,290.18, past pain and suffering of $40,000 and future pain and suffering of $1.5 million. R938-39; T1005. Judgment was entered. R940, 947.

After trial, Walmart filed a Motion for New Trial that raised the spoliation issue and the adverse inference instruction. R496, 507. The Motion was filed sixteen days after the missing video issue had

arisen in trial. Although Walmart complained that it had not been given enough time at trial to respond to the spoliation issue, it did not contend in its Motion by affidavit or other method what evidence would have been produced to explain the missing two minutes. R501. Walmart simply argued that it was not given enough time to consult with people who had knowledge of how the video had been handled or a technical specialist with relevant knowledge of the store's recording equipment. R503. Walmart offered no explanation for why it did not perform this consultation or provide any more clarity on the missing video, **in the 16 days between the issue arising in trial and the filing of the Motion for New Trial.**

The trial court denied the Motion for New Trial. R950-51.

SUMMARY OF ARGUMENT

This Court should reject Walmart's arguments that the Plaintiff's spoliation request was untimely and unsupported. The trial court did not abuse its discretion in giving an adverse inference instruction on spoliation.

The failure to preserve electronically stored information is covered by Florida Rule of Civil Procedure 1.380(e), which has no specific time limits for the assertion of spoliation. Additionally, a trial

court's enforcement of its own pretrial order is reviewed for an abuse of discretion. Reversal is appropriate only when the affected party can clearly show the abuse resulted in unfair prejudice.

Here, there was no unfair prejudice. Plaintiff's failure to raise the issue earlier appears to have been the result of Walmart's failure to provide proper discovery in the first instance, and failure to give notice that the discovery was missing relevant footage. Walmart's attempts to blame the Plaintiff for these failures by claiming that it had not been given correct information about the time the Plaintiff fell is belied. Walmart, in fact, found the footage showing the fall and had no explanation for why adjacent footage had not been preserved.

Requiring Walmart to seek an overnight explanation for the missing segment of video was not inadequate and a denial of due process as a matter of law. Due process is flexible and calls for such procedural protections as the particular situation demands. The sufficiency of the procedures must be judged in the light of the totality of the circumstances.

Furthermore, Walmart made no effort to obtain the information that the trial court asked for. Walmart's attorney admitted that she chose to research the discovery timeline and legal issues instead of

trying to obtain information about the failure to preserve the videotape footage. And, although Walmart had several attorneys appearing on its behalf in this case and a corporate representative present, Walmart's lead attorney admitted that she did not direct anyone from Walmart to try to locate the witness who might have provided the information.

Finally, reversible error cannot be predicated on conjecture. While Walmart complains about the trial court's tight time deadline, it has never shown that it could have provided an acceptable explanation for the missing evidence had more time been allowed. Indeed, Walmart had sixteen days to produce information by the time it moved for new trial – and noticeably offered no additional information to explain its missing video evidence.

Likewise, the trial court's refusal to allow Walmart to introduce evidence about its failure to preserve the videotape was not an abuse of discretion. The proposed evidence did not, in fact, refute Walmart's failure to preserve and also would have tended to confuse the issues. As such, the trial court properly exercised its discretion not to allow it.

For the first time on appeal, Walmart also contends it is reversible error because the trial court did not properly apply Rule 1.380. This argument is waived for appeal. Walmart never mentioned this rule or its application in the trial court, and cannot rely on it for the first time on appeal.

Even if Walmart had preserved this issue for appeal, the trial court did not abuse its discretion in giving an adverse inference instruction pursuant to the Rule and Florida Standard Jury Instruction 301.11.

The trial court correctly applied the standards for making a finding of spoliation under Rule 1.380(e). The trial court analyzed the circumstances that resulted in the two tapes, and did not abuse its discretion when it concluded that Walmart's actions had been intentional. The trial court based its spoliation finding on its determination that (1) Walmart had a duty to preserve the portions of videotape footage the Plaintiff had requested, (2) Walmart had been able to capture the portion of video footage it wished to preserve, (3) the missing portion was clearly relevant, and most importantly, (4) Walmart had never offered an explanation as to why only certain portions of the video footage had been selectively preserved. Thus,

the rule of procedure requirement of "intent to deprive" was established under the circumstances of this case.

Additionally, the record reflects that the trial court assessed the materiality of the evidence before it decided to give the adverse inference instruction. The trial court explained that the missing footage was relevant to showing what had happened just prior to the Plaintiff's fall. This assessment was reasonable considering the proximity of the missing footage to the Plaintiff's fall and the defenses that Walmart raised.

STANDARD OF REVIEW

A trial court has broad discretion to impose sanctions on litigants for their conduct before the court. *See Riley v. Assoc. Home Equity Servs., Inc.*, 850 So. 2d 661, 662 (Fla. 1st DCA 2003). Thus, a trial court's imposition of sanctions, including granting an adverse inference instruction on spoliation, is reviewed for an abuse of discretion. *Pena v. Bi-Lo Holdings, LLC*, 304 So. 3d 1254, 1257 (Fla. 3d DCA 2020); *Adamson v. R.J. Reynolds Tobacco Co.*, 325 So. 3d 887, 894 (Fla. 4th DCA 2021).

To the extent that Walmart is arguing that it was denied due process of law, a procedural due process violation is reviewed de

novo. *VMD Fin. Servs. Inc. v. CB Loan Purchase Associates LLC*, 68 So.3d 997, 999 (Fla. 4th DCA 2011).

ARGUMENT

IMPACT OF FLORIDA RULE OF CIVIL PROCEDURE 1.380(e)

Walmart did not cite to Fla. R. Civ. Pro. 1.380 in the trial court, or rely on its reasoning. Thus as explained below, it is too late for Walmart to change horses mid-stream. Nonetheless, a discussion of the rule is relevant to the arguments raised by Walmart.

This case involves the propriety of the imposition of a sanction for the spoliation of electronically stored information (ESI) evidence. Such sanctions are now subject to Rule 1.380(e), which slightly changed existing Florida law as to electronically stored information evidence. Walmart did not cite to the rule in the trial court, and has thus waived any attempt at reversal in its reliance on the rule for the first time on appeal. In any event, the trial court's ruling followed the spirit and intent of the rule.

Under long-standing Florida law, in order for a court to effect any sort of remedy for a party's alleged spoliation of evidence, the court must determine whether: (1) "the evidence existed at one time,"

(2) "the spoliator had a duty to preserve the evidence, and" (3) "the evidence was crucial to the opposing party['s] being able to prove its prima facie case or a defense." *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 781 (Fla. 4th DCA 2006). Where spoliation occurred, courts were permitted a wide spectrum of remedies under Rule 1.380(b)(2). *Adamson*, 325 So. 3d at 894. However, when essential evidence was unavailable due to a party's negligence, an adverse inference instruction was generally employed. *Golden Yachts*, 920 So. 2d at 780-81 (noting use of adverse inference instruction in cases involving negligent spoliation).

In 2012, however, Rule 1.380(e) was added, which governed the loss of electronically stored evidence, and clarified that a party should not be sanctioned for the loss of electronic evidence due to the good-faith operation of an electronic information system. However, this provision was not intended to allow a party to exploit the routine operation of an information system to thwart discovery obligations by allowing it to destroy information that a party was required to produce or preserve. See Committee Note to 2012 Amendment to Rule 1.380(e). Later in 2019, subsection (e) was again amended to make it consistent with Federal Rule of Civil Procedure

37(e) by requiring a finding that the party acted with the intent to deprive another party of the information's use in the litigation before an adverse inference instruction could be given.

Thus, the addition of Rule 1.380(e) did not change the basic analysis used by Florida Courts to determine whether spoliation occurred, but rather slightly elevated the standard needed to give an adverse inference instruction in cases involving electronically stored evidence. Also, the rule requires a "finding of prejudice" as opposed to a failure to make a prima facie case. A party may suffer prejudice even if it has not been precluded from establishing a prima facie case. This change in verbiage indicates that something less than the loss of evidence critical to establishing a prima facie case is sanctionable, and is consistent with Florida law holding that when evidence is destroyed intentionally or willfully, that fact alone is sufficient to demonstrate relevance sufficient to support an adverse inference instruction. *Adamson,* 325 So. 3d at 896.

Here, the trial court made appropriate findings, with support in the record, to support the adverse inference instruction it gave.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY CONSIDERING PLAINTIFF'S SPOLIATION ISSUE INSTEAD OF PRECLUDING IT AS UNTIMELY.

Walmart argues on appeal that the trial court abused its discretion by considering Plaintiff's spoliation issue instead of precluding it as untimely. Initial Brief at 31. However, the record strongly supports that the trial court did not abuse its discretion.

A. Timeliness of the Assertion of Spoliation.

First, Walmart urges that the trial court violated the Rules of Procedure and its own Standing Order by considering a spoliation issue that was first raised during trial. Initial Brief at 31. Not so.

As noted above, the failure to preserve electronically stored information is covered by Florida Rule of Civil Procedure 1.380(e), which provides:

> **(e) Failure to Preserve Electronically Stored Information.**
>
> If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Neither Florida case law on sanctions for spoliation of evidence nor Rule 1.380(b)(2) or (e) contain any specific time limit for asserting a claim that a party lost or failed to preserve evidence. Walmart offers no support for its position that this issue cannot be addressed in a trial setting, or when considering jury instructions.

Likewise, a case management order issued pursuant to Florida Rule of Civil Procedure 1.200 may be modified to prevent injustice. Fla. R. Civ. Pro. 1.200(d). "[A] trial court's enforcement of its own pretrial order is reviewed for an abuse of discretion, and reversal is appropriate only when the affected party can clearly show the abuse resulted in unfair prejudice." *Gutierrez v. Vargas*, 239 So. 3d 615, 622 (Fla. 2018).

Here, there was no unfair prejudice to Walmart. Plaintiff's failure to raise the issue earlier appears to have been the result of

Walmart's failure to provide proper discovery in the first instance. And although Walmart failed to provide the portion of videotape footage that covered the time period Plaintiff had requested, Walmart did not give any notice that the discovery was missing this relevant footage. In fact, in Walmart's Omnibus Motion in Limine, Walmart moved to preclude the Plaintiff from arguing that Walmart should have done more to investigate since Walmart "preserved relevant CCTV footage pertaining to the alleged incident." R232. Walmart's statement was false. It **had not** preserved all relevant footage. Finally, although not thoroughly developed, the record contains some indication that Walmart affirmatively misled Plaintiff's counsel by representing that the two portions of videotape were consecutive.

During the discussion with the trial court about when Plaintiff's counsel had noticed that the two videos did not match up, Plaintiff's counsel indicated that one of Walmart's attorneys (Ms. Vo) had represented earlier in the day that the two tapes were consecutive:

> MR. ABEL: Excuse me. Represented that this was just a continuation of the first video, which it wasn't. **You told me that this morning, this is just a continuation of the first video.**

T627.

Because adverse inferences can invade the province of the jury, "such instructions are reserved for circumstances where the normal discovery procedures have gone seriously awry." *Pena*, 304 So. 3d at 1257 (quotation omitted).

In this case, normal discovery procedures went seriously awry when Walmart failed to provide video that was responsive to the Plaintiff's request for preservation and request for discovery. Moreover, Walmart gave no notice of its dereliction of duty, and instead made misrepresentations and false accusations. Walmart blamed the innocent party, the Plaintiff, for its own misconduct. Under these circumstances, the trial court did not abuse its discretion in giving an instruction.

In short, Walmart insists that Plaintiff had possession of the incomplete discovery nearly two years prior to trial, and that Plaintiff was obligated to recognize the flaw and bring it to the court's attention in order to assert spoliation. Initial Brief at 32. However, this was not the Plaintiff's fault. The Plaintiff cannot be blamed for failing to realize prior to trial that Walmart had provided incomplete video footage.

Plaintiff had promptly sent out a preservation letter that reasonably requested preservation of videotape showing one hour before and one hour after the incident. T628. The letter did not specify a time that the incident had occurred. T628. Walmart elected to preserve two hours of videotape that did not show the incident at all. The only justification for this decision was a claim that some unnamed customer had contacted Walmart and reported suffering a fall near the bathroom at approximately 10:40 p.m. T630, 632, 635. 813.[2] Additionally, Walmart asserts that staff members of Plaintiff's attorney gave inconsistent times as to the approximate time of Ms. Garcia Pineda's fall. T805-06, 809. Thus, Walmart's position was that its duty to preserve was strictly limited to an hour before and after this reported time.

First, Walmart's position construes the duty to preserve too narrowly. Florida courts have found a duty to preserve evidence when a party should reasonably foresee litigation. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 391 (Fla. 2015); *see also Adamson*, 325 So. 3d at 895 (adverse inference may arise even in the

[2] When asked by the trial court outside the presence of the jury, Ms. Garcia Pineda denied making any contact with Walmart. T399, 630.

absence of a duty on the part of the spoliating party to preserve the missing evidence).

The scope of the duty to preserve is broad and includes evidence the defendant should have reasonably foreseen would be relevant to a potential claim or action. *Domanus v. Lewicki*, 284 F.R.D. 379, 386 (N.D. Ill. 2012). The duty to preserve evidence also "includes an obligation to identify, locate, and maintain, information that is relevant to specific, predictable, and identifiable litigation." *Apple Inc. v. Samsung Elecs. Co.*, 881 F.Supp.2d 1132, 1137 (E.D. Cal. 2012).

Walmart's unfortunate attempt to blame the Plaintiff for **its failure** to preserve the relevant videotape is similar to an argument that was rejected in *Mafille v. Kaiser-Francis Oil Co.*, Case No. 18-CV-586-TCK-FHM (N.D. Okla. May 21, 2019). In *Mafille*, the defendant argued that if the plaintiffs had made a request for preservation of a computer earlier than they did, the computer could have been pulled and saved instead of given to a charitable organization. *Mafille* at 2. The federal district court reasoned that the duty to preserve the electronically stored evidence existed independent of a specific request that the evidence be preserved. The *Mafille* court stated "[i]t is exceedingly poor form, and beyond zealous advocacy, for

Defendant to attempt to blame Plaintiffs for its own obvious failing." *Id.*

In this case, Walmart's attempt to limit its preservation obligations to a narrow time frame was based on a vague report from an unnamed person and allegedly conflicting information from Plaintiff's attorney's staff. But there was no indication that Plaintiff had taken note of the exact time of the incident. T636. The trial court observed, "the only one that can know for sure when that incident occurred is Walmart, when they go back and look at the film." T635.

Finally, as the trial court noted, Walmart's attempt to place blame on Plaintiff fails because Walmart, in fact, **found the footage showing the fall**:

> THE COURT: Right you know when the incident occurred, anyone can count an hour before and an hour after. **And it wasn't saved, so why wasn't, why were – what happened in those two minutes? Why weren't those two minutes saved?** We can dance around this all night long. It's pretty clear there was a lack of preservation of two minutes about three to one minute before the fall, and that's a critical time period. . .

T638.

After finding the footage, Walmart was obligated to preserve Plaintiff's requested time period of one hour before and one hour after the incident Instead, Walmart chose to preserve only five minutes of this footage, which eliminated a little over two minutes before the fall. Walmart provided no evidence to explain its failure to preserve evidence that corresponded to Plaintiff's request.

The Plaintiff's request for preservation makes this case much different from *ML Healthcare Servs., LLC v. Publix Super Mkts., Inc.*, 881 F.3d 1293 (11th Cir. 2018), where the court found that it was reasonable for Publix to preserve only 30 minutes before and 30 minutes after a slip and fall. Publix preserved the video before any request for preservation or notice of litigation was provided. *ML Healthcare*, 881 F.3d at 1308. Thus, even in the absence of a request, Publix reasonably preserved an ample period of time before and after the fall. In contrast here, Walmart preserved only five minutes total of videotape depicting the fall, and this was done after a request for the preservation of an hour before and after.

The differences between the end of the two-hour video and the beginning of the five-minute video seem fairly slight. However, after viewing the video, the court noted that the trash can the

maintenance employee was using had been moved to a different spot. T 676-77; 683; see also Two Hour Video at 1:59:00 to 2:00.00; Five Minute Video at 0:01 to 0:21 (trash can near bathroom has been moved out of the doorway and to the left at the start of the Five Minute Video). Thus, the missing video segment might reasonably have revealed the trash can as a source of the liquid, particularly in light of Walmart's efforts to eliminate a nearby water fountain as a potential source. T685. The trial court reasonably determined that the two minutes that were missing were "key minutes" because they were very close to the fall. T995-96.

Moreover, Walmart's position was that no liquid had been spilled. T920. Walmart's counsel used the two-hour video to argue that numerous customers had traversed the same area where Ms. Garcia Pineda fell and had experienced no difficulties. T920-21. Thus, the missing two minutes was highly relevant, indeed critical, since it is unknown whether the source of liquid was made obvious during that segment or whether any other customer had experienced some difficulty with traction there.

B. Violation of Walmart's Right to Due Process.

Walmart contends it was surprised by the spoliation issue and that the trial court's failure to allow more time for Walmart to respond violated its right to due process. Initial Brief at 34-36. Walmart protests on appeal that it was given only from "6:00 p.m. on day 1, when the court recessed, and 7:00 a.m. on day 2, when it required Walmart to present a substantive showing on the issue." Initial Brief at 31.[3]

As an initial matter, this time frame is somewhat suspect since there is some indication in the record that Walmart's attorneys were aware of the missing videotape earlier and thus, were not completely surprised. During the "day 1" discussion on the issue, one of Walmart's attorneys (Mr. Llorente) protested that he "was up until 4:00 a.m. trying to figure this out." T624-25. Also, Plaintiff's counsel stated that another of Walmart's attorneys (Ms. Vo) had discussed the videotape issue with him that morning. T627.

[3] Although Walmart characterizes the discussion as occurring on "day 1" of the trial, it was actually the first day of testimony. The previous day, the parties selected the jury.

In any event, requiring Walmart to seek an overnight explanation for the missing segment of video was not inadequate and a denial of due process as a matter of law, as Walmart contends. Initial Brief at 34. Certainly, due process requires that a party be given notice and a meaningful opportunity to be heard before a sanction is imposed. *See Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002). However, "notice" and "a meaningful opportunity" to respond or be heard does not necessarily mean that an issue must be raised prior to trial.

Walmart relies on cases in which there was insufficient notice affecting preparation for an entire proceeding. Initial Brief at 34-36. These cases are inapposite. *See, e.g.*, *Reive v. Deutsche Bank Nat'l Trust Co.*, 190 So. 3d 93 (Fla. 4th DCA 2015) (denial of the continuance together with the admission of witnesses and documents not timely disclosed to the defendant constituted "surprise in fact" and a denial of due process); *S.Z. v. Dep't. of Children & Family Servs.*, 873 So. 2d 1277 (Fla. 3d DCA 2004) (hearing turned into a "trial by ambush" where appellant's trial counsel was not provided with a witness list, many of the filings from the dependency case, or the list of exhibits to be presented and relied

upon at the hearing until late in the day on the Friday before the hearing); *Yellow Jacket Marina, Inc. v. Paletti*, 670 So. 2d 170 (Fla. 1st DCA 1996) (no notice at a summary judgment hearing of an application for default). Here, any lack of notice that Plaintiff would assert spoliation does not rise to this level.

"Courts do not evaluate the specific parameters of procedural due process 'by fixed rules of law, but rather by the requirements of the particular proceeding.'" *Mid-Continent Cas. Co. v. R.W. Jones Constr., Inc.*, 227 So. 3d 785, 788 (Fla. 5th DCA 2017) (citation omitted). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* (quotation omitted).

The "standards of procedural due process are not wooden absolutes." *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970). The sufficiency of the procedures must be judged in the light of the totality of the circumstances. *Id.* The fundamental requirement of due process "is the opportunity to be heard, at a meaningful time and in a meaningful manner." *Birdwell v. Hazelwood School District*, 491 F.2d 490, 495 (8th Cir. 1974).

Here, there was notice and a meaningful opportunity to be heard. As the party that created the videotapes, Walmart should have been aware that the videotapes it had produced did not completely respond to the Plaintiff's request for discovery by omitting a relevant time period. Walmart's attorneys, -- **at least three** – were clearly on notice that the videotape they produced was incomplete and missing a critical time period. The trial court was well within its discretion to find that it would strain credulity to say that Walmart's attorneys did not know that there were two minutes missing. T672. Thus, Walmart was on notice and should have investigated the reason for the defect earlier, even before the spoliation issue was formally raised.

Furthermore, after Plaintiff brought up the spoliation issue, the trial court gave Walmart an opportunity to respond by recessing and directing them to investigate the matter over the evening break. Although Walmart insists that this was not enough time, Walmart did not make any genuine effort to obtain information concerning the two-minute gap. Walmart's attorney admitted that she chose to research the discovery timeline and legal issues instead of trying to obtain information from Mr. Love. Walmart was certainly entitled to

have three attorneys appearing on its behalf in this case. But it does not appear any of them made any efforts to obtain more information on the missing video evidence. Ms. Russomanno also admitted that she did not direct anyone from Walmart, including the corporate representative who was present at trial, to try to locate Mr. Love.

It is disingenuous to complain that there had not been enough time to get the information that the Court had requested when counsel made no effort to do so. A party may waive its right to due process if it does not avail itself of the opportunity to be heard when the opportunity has been offered. *See*, *e.g.*, *Birdwell*, 491 F.2d at 495 (teacher who was aware of board meeting to decide whether he should be dismissed decided not to attend the meeting).

Furthermore, Walmart's claim of a lack of notice, already insincere when examining what happened in real time in trial, is further doomed, and indeed insincere, when considering what happened next. The issue arose in the second and third days of trial, March 8-9, 2023. Walmart filed its Motion for New Trial on March 24, 2023. R496. There were no affidavits from Mr. Love, the corporate representative, Walmart's counsel, or anyone, providing any further information regarding the missing videotapes. Affidavits obviously

may be filed in support of a motion for a new trial. Fla. R. Civ. Pro. 1.530(c). With this additional time to investigate, Walmart was silent. It's obvious Walmart had no helpful evidence to present on this issue, at any time.

Walmart's denial of due process claim should not be accepted when it made no effort to produce evidence that would explain the missing videotape, either during trial, or the motion for new trial proceedings. (Nor was a Rule 1.540 motion ever filed on the basis of newly discovered evidence). Here, Walmart complains about the trial court's time deadline during trial, but has never shown that it could have provided an explanation for the missing evidence if given more time. Walmart failed to provide any evidence when it moved for new trial, over two weeks later.

This Court, like the trial court, can only conclude that there was no other explanation for the missing evidence.

C. Preclusion of Walmart's Proposed Evidence to Refute the Adverse Inference Instruction.

Walmart complains that the trial court would not allow it to introduce evidence to refute the adverse inference instruction. However, the problem was that the evidence it proposed did not

refute Walmart's failure to preserve and also would tend to confuse the issues. As such, the trial court properly exercised its discretion not to allow it.

Walmart wished to introduce evidence that Ms. Garcia Pineda or her attorney had informed them that the incident occurred at 10:40 p.m., and that they therefore had a duty to preserve evidence one hour before and one hour **after that time**. Initial Brief at 37.

As discussed above, though, Walmart's excuse became irrelevant once it actually located the videotape showing the fall happened at 11:45 p.m. T634. At that point, Walmart had an obligation to respond to the Plaintiff's preservation request by saving one hour before and one hour after the fall. The incorrect information Walmart may have initially received regarding the timing of the fall became irrelevant.

The trial court well understood this point. The trial court explained:

> THE COURT: Right. So I don't see why the letter – the letter just sets up that the preservation request was made. The fact that there's no relationship between the problem of preservation and the mistake made in designating the time because all that went away when the actual film was looked at. So that would be – I think the prejudice would

> outweigh the probative value at the very least so I'm not – I'm not going to allow that.

T687-88.

Walmart apparently had no evidence to explain how or why it failed to preserve the relevant videotape footage after it was discovered. Walmart's "excuse" that it did not know the correct time of the fall might have explained why it preserved the initial two-hour videotape, but it does not explain the missing footage. In fact, the trial court expressed disbelief that the argument was even being made – "But that's – it's completely – I find it's completely fallacious to argue, it's completely intellectually bankrupt to argue that the mistake had anything to do with the missing footage." T689-90.

The trial court ruled that the proposed evidence was misleading, and that the prejudice would outweigh the probative value. T691. As such, the trial court did not abuse its discretion by precluding Walmart from introducing its proposed evidence. *See Hendrix v. Wal-Mart Stores E., LP*, 358 So. 3d 826, 827 (Fla. 3d DCA 2023) ("Where a trial court has weighed probative value against prejudicial impact before reaching its decision to admit or exclude evidence, an

appellate court will not overturn that decision absent a clear abuse of discretion.").

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FINDING SPOLIATION AND BY ISSUING AN ADVERSE INFERENCE INSTRUCTION.

Walmart contends that the trial court erred by finding spoliation and issuing an adverse inference instruction. Initial Brief at 38. It complains that pursuant to Fla. R. Civ. P. 1.380, as adopted before this case accrued, to qualify as spoliation, much more egregious conduct than occurred in this case is required. Walmart also asserts that the remedy of an adverse inference instruction was too extreme and that it invaded the province of the jury. Initial Brief at 39. However, these contentions must be rejected.

First, Walmart has waived any reliance on Rule 1.380. It did not cite the rule in the trial court. Nor did it cite to the portions of the rule it claims require a new trial. A party cannot change horses mid-stream and rely on a rule or the reasoning of a rule it never brought to the trial court's attention.

Second, had Walmart raised this rule or the reasoning of the rule in the trial court, the trial court did not abuse its discretion in allowing an adverse inference jury instruction. The trial court was

well within its discretion to conclude Walmart had spoliated highly relevant and material evidence, purposely and intentionally.

A. Walmart failed to preserve any argument that the Trial Court erred in not applying Rule 1.380(e).

Walmart contends that the trial court did not correctly apply the standards for making a finding of spoliation under Rule 1.380(e). Initial Brief at 39-44. This argument is not preserved for appeal. Walmart neither cited the rule nor the reasoning of the rule in the trial court. It's too late to raise the rule or the reasoning of the rule for the first time on appeal.

In two recent cases, the Florida Supreme Court reiterated the importance of parties needing to specifically preserve legal arguments in the lower court that they wish to advance on appeal. In *Ellison v. Willoughby*, 373 So. 3d 1117, 1120-21 (Fla. 2023), the Supreme Court quashed the Second District's conclusion that the defendant had preserved its argument that it was entitled to a post-verdict setoff under section 768.041(2). *See Ellison*, 373 So. 3d at 1120-21. As the Supreme Court explained, while there is not a "magic words" test, the argument presented on appeal must be "sufficiently specific to inform the trial judge" of the issue to be

decided. *Id.* at 1120 (citation omitted). The defendant had never requested a setoff under this statute in the lower court, and the defendant only invoked an entirely different statutory provision. *Id.*

The Supreme Court rejected the defendant's position she had preserved this issue in the trial court by arguing Florida law required a setoff and that the plaintiff should not be compensated twice for the same damages. *Id.* at 1121:

> A trial court called upon to apply sections 768.041(2) and 768.76 would quickly see that each statute presents distinct issues of interpretation. If Ellison wanted the trial court to consider a setoff under both statutes, she had the obligation to present both issues to the trial court. Ellison did not do that—she relied entirely on section 768.76. And the Second District cited no authority, and we are aware of none, for the notion that the trial court's mere awareness of case law discussing section 768.041(2), without any accompanying argument, put that statute in play for preservation purposes.

Hence, the Supreme Court explained the Second District should never have ruled on the legal merits of the defendant's setoff defense under a statute never raised in the trial court. *Id.* The Supreme Court declined to address the defendant's legal position, no matter how meritorious, because the defendant did not preserve this issue in the trial court. *Id.* at 1121-22.

The week after issuing *Ellison*, the Supreme Court again declined to consider the merits of a legal argument because it was not preserved in the trial court. *See* *Citizens of State of Fla. v. Clark*, 373 So. 3d 1128, 1131-32 (Fla. 2023). The Court explained the policy reasons why it was precluded from considering a challenger's legal argument that the Public Service Commission erred in its rulings, *id.* at 1131:

> It is well established that issues not properly preserved are waived. *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (holding that it is "not appropriate for a party to raise an issue for the first time on appeal"); *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985); see also *DeLisle v. Crane Co.*, 258 So. 3d 1219, 1237 (Fla. 2018) (Canady, C.J., dissenting) ("Parties every day make choices in litigating cases that limit their options for review. And parties ordinarily must live with the choices they make."); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").
>
> Parties are required to preserve arguments because it allows the lower tribunal to consider and resolve errors when they arise, rather than wait for the process of an appeal and expend the judicial resources that come with that procedure. *Harrell v. State*, 894 So. 2d 935, 940 (Fla. 2005) (stating that the purpose of the preservation rule is to notify the

> trial judge of possible error and offer a chance to correct it at an early stage); *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978). The preservation requirement also serves the purpose of treating the parties, the court, and the judicial system fairly. *City of Orlando v. Birmingham*, 539 So. 2d 1133, 1134 (Fla. 1989); *Eaton v. Eaton*, 293 So. 3d 567, 568 (Fla. 1st DCA 2020).

These cases make clear Walmart cannot cite to Rule 1.380 or its application for the first time here on appeal. In *Philip Morris USA, Inc. v. Gore*, 238 So. 3d 828, 829-30 (Fla. 4th DCA 2018), on appeal, the tobacco defendants argued the trial court erred in declining to strike a plaintiff's expert testimony that the defendants argued violated *Daubert* and Section 90.702, Fla. Stat, regarding expert testimony. The Fourth District held the defendant waived this issue for appeal.

The appellate court explained that the tobacco defendants failed to preserve their *Daubert* challenge by never raising this specific argument during trial when the plaintiff's expert opined on material issues: "At trial, however, the defendants never made any contemporaneous objection raising the specific argument that Dr. Proctor's ammonia testimony violated Daubert or section 90.702, Florida Statutes. **Indeed, there are no references by the**

defendants to "Daubert" or "section 90.702" anywhere in the trial transcript. We conclude, therefore, that this issue was not preserved for appellate review.") (emphasis added); *see also Sanchez v. Miami-Dade Cnty.*, 286 So. 3d 191, 195 (Fla. 2019) (in dismissing a petition brought to challenge a Third District's decision, explaining in pertinent part, "Petitioner presents this Court with a new theory of liability and fails to make any argument why he should survive summary judgment on the claim that was actually litigated below. **Petitioner thus has changed horses in midstream. That doesn't work**. A litigant seeking to overturn a lower court's judgment may not rely on one line of argument in the trial court and then pursue a different line of argument in the appellate courts."

Walmart has tried to change horses in midstream in this case. In the trial court, Walmart relied only on case law decided under Florida law. It did not cite to Rule 1.380(e), or the reasoning of the rule. Walmart made a choice in litigating this issue and must live with its choice to do so. *See Clark*, 373 So. 3d at 1131 ("Parties every day make choices in litigating cases that limit their options for

review. And parties ordinarily must live with the choices they make." (citation omitted).

On appeal, Walmart does not address waiver or preservation of error in its Initial Brief. It cannot do so for the first time in its Reply Brief. But Walmart states, using the passive tense in its Initial Brief, that the trial court analyzed Plaintiff's allegation of spoliation under the common law. Initial Brief at 40 n.5. But if Walmart wanted the trial court to analyze the issue under Rule 1.380, and not simply under Florida's common law, **it was Walmart's burden to present this argument to the trial court.** Instead, Walmart only argued in a general fashion that the trial court had to find spoliation. T652. Walmart also complained, without any evidence, that it was not "Walmart's fault." T688-89. Walmart also specifically cited to the line of Florida cases it now says on appeal are not controlling. T665-66, citing *Adamson*, *supra*. The trial court then issued its ruling that the Plaintiff was entitled to an adverse inference instruction. T670. The parties then discussed whether the instruction would mirror Florida's Standard Jury Instruction 301.11a) or (b). T685-86. Walmart never cited to Rule 1.380 or its reasoning. Walmart cannot

raise this rule or the reasoning of the rule for the first time on appeal. *See Gore, supra.*

Walmart says this cannot be "invited error" because Walmart complains it was only given a short amount of time to review this issue in trial. Initial Brief at 40-41 n.5. Walmart was represented by three very talented and experienced trial attorneys. Walmart also had appellate counsel. Walmart had every opportunity to raise Rule 1.380 and its reasoning to the trial court, in real time. Walmart either chose not to cite the rule or its reasoning, or did not research or review Florida law. Either way, Walmar failed to preserve this argument for appeal. Walmart cannot cite to Rule 1.380 or the reasoning of the rule for the first time on appeal.

What's more, Walmart filed its Motion for New Trial 16 days later – and still declined to mention Rule 1.380 or its reasoning. Walmart had over two weeks before filing this Motion for New Trial to further research the Florida legal principles it was already on notice to have known about. Yet in the Motion for New Trial, Walmart only cited to Florida's common law in that filing as well. R504, citing *Adamson*, *supra*, and a three-part test under Florida case law.

Walmart has waived the issue for appeal. Walmart cannot complain on the trial court's ruling is "fundamentally flawed, as it was based on the incorrect body of governing law," (Initial Brief at 40 n.5), **when Walmart failed to bring Rule 1.380 or its reasoning to the trial court's attention.**

And while Walmart has invited any alleged error, there was no error to invite. As explained below, while Walmart never cited to or relied on Rule 1.380, the trial court's decision to allow an adverse inference instruction is well-supported under the rule and Florida's common law.

B. The Trial Court Applied the Correct Legal Standards for Finding Spoliation Under Rule 1.380(e) and Existing Florida Caselaw.

Walmart contends that the trial court did not correctly apply the standards for making a finding of spoliation under Rule 1.380(e). Initial Brief at 39. While Walmart failed to preserve this issue as noted in Section A, Walmart's contention is also incorrect.

Generally, spoliation is defined as the destruction, or significant and meaningful alteration of evidence. *Landry v. Charlotte Motor Cars, LLC*, 226 So. 3d 1053, 1057 (Fla. 2d DCA 2017). The failure to

preserve electronically stored evidence is specifically addressed by Rule 1.380(e), as discussed above. Subsection (e) is identical to Rule 37(e) of the Federal Rules of Evidence, and thus, should be interpreted similarly. To establish spoliation, the party seeking sanctions must prove (1) that the missing evidence existed at one time; (2) that the alleged spoliator had a duty to preserve the evidence; and (3) that the evidence was critical to an opposing party being able to prove its prima facie case or a defense. *Adamson.,* 325 So. 3d at 895; *see also Penick v. Harbor Freight Tools, USA, Inc.*, 481 F.Supp.3d 1286, 1291-92 (S.D. Fla. 2020). In *Adamson*, the court opined that where destruction of evidence was intentional or willful, "that fact alone is sufficient to demonstrate relevance." *Id.* at 896.

Rule 37(e) does not eliminate this common law spoliation framework. Thus, Walmart's unpreserved argument, (Initial Brief at 40, n. 5) that the trial court's ruling was fundamentally flawed because the trial court applied the common law during its analysis of the spoliation issue, is also incorrect. The common law still governs the basic standards for the existence of spoliation and is thus, useful in interpreting the rules. For example, Rule 37(e) "does not purport to create a duty to preserve." Rather, the new rule takes

the duty as it is established by case law, which "uniformly holds that a duty to preserve information arises when litigation is reasonably anticipated." Fed. R. Civ. P. 37(e). Although the concepts developed under common law may be informative, ultimately the requirements of Rule 1.380(e) control, at least as concerns the sanctions that may be imposed for the spoliation of electronically stored information.

Under Rule 1.380(e), sanctions may be imposed where a party acted with the intent to deprive another party of the information's use in litigation, and only with measures no greater than necessary to cure the prejudice to the other party. One such measure specifically authorized by the rule is an adverse inference instruction, such as was given here.

Walmart asserts that the trial court did not recognize the difference between Rule 1.380(e) and older common law cases by accepting negligent spoliation instead of requiring intentional conduct. Initial Brief at 40-41. Of course to begin with, this further shows why Walmart has failed to preserve this argument for appeal. How can Walmart allege the trial court failed to recognize a matter regarding Rule 1.380 when Walmart did not cite to the rule or its reasoning either during trial, or its Motion for New Trial? Moreover,

contrary to Walmart's argument, the trial court found intentional conduct under circumstances that support an "intent to deprive."

This case did not present a situation where a party simply failed to preserve videotape before an automatic system recorded over it. Some of the requested footage was preserved – the question was why footage that had been requested and was immediately prior to the preserved footage was not also preserved. As the trial court repeatedly noted, there was no explanation for how Walmart could salvage 11:42:57 to 11:47 but somehow missed the two minutes that preceded that time. T 655-56, 659-60, 664, 668, 768. Particularly, since an earlier two hours of video had been preserved that ran up to the start of the missing two minutes. T770-71, 773.

The trial court, analyzing the circumstances that resulted in the two tapes, reasonably concluded that Walmart's actions had been intentional:

> THE COURT: Yeah, but I already found that you had the tape. What they did didn't cause your client not to find it. You found it. In theory it was together. **In fact, it's even worse than I thought. There are two separate films produced. It's not like one film where there's missing footage. There's actually two films. Somebody had to do that. That's intentional**.

T689 (emphasis added).

Walmart argues that, while the rule does not specifically refer to "bad faith," the "intent to deprive" standard is the equivalent to "bad faith." Initial Brief at 41. Again, Walmart is precluded from relying on the rule or its reasoning for the first time on appeal. But Walmart is also wrong here in suggesting the facts don't meet either standard.

In *Skanska USA Civil Se. Inc. v. Bagelheads, Inc.*, 75 F.4th 1290 (11th Cir. 2023), the United States Court of Appeals for the Eleventh Circuit explicitly agreed that the "intent to deprive another party of the information's use in the litigation" is the equivalent of bad faith **in other spoliation contexts.** *Skanska*, 75 F.4th at 1312 (emphasis added).

In the spoliation context, bad faith "generally means destruction for the purpose of hiding adverse evidence." *Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1184 (11th Cir. 2020), quoting *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015). This standard is more than mere negligence and aligns with both the text and advisory committee notes for Rule 37(e)(2). See Rule 37(e)(2); 2015 Committee Notes on Rule 37(e)(2). "The phrase 'intent to deprive'

naturally requires that the spoliator has a 'purpose of hiding adverse evidence' from other parties." *Skanska*, 75 F.4th at 1312.

But direct evidence of intent to deprive a party of evidence is not necessary to establish spoliation under Rule 1.380(e); the required intent may be proven by circumstantial evidence. *Auer v. City of Minot*, 896 F.3d 854, 858 (8th Cir. 2018) (intent required by Rule 37(e)(2) "can be proved indirectly"); *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) ("Intent is rarely proved by direct evidence, and a district court has substantial leeway to determine intent through consideration of circumstantial evidence, witness credibility, motives of the witnesses in a particular case, and other factors."); *Penick*, 481 F.Supp.3d at 1292 (if direct evidence of bad faith is unavailable, the moving party may establish bad faith through circumstantial evidence).

Factors that circumstantially support intent to deprive within the meaning of Rule 37(e)(2) include whether (1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of

its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator. *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 736 F.Supp.2d 1317, 1323 (S.D. Fla. 2010). The requisite intent to deprive has been based on selective preservation of video footage, whereby a litigant allowed some portions of relevant evidence to be overwritten by automatic procedures without a credible explanation. *Culhane v. Wal-Mart Supercenter*, 364 F.Supp.3d 768, 773-74 (E.D. Mich. Jan. 10, 2019).

In this case, the trial court based its spoliation finding on its determination that Walmart had a duty to preserve the portions of videotape footage the Plaintiff had requested, Walmart had been able to capture the portion of video footage **it wished to preserve**, the missing portion was clearly relevant, and most importantly, Walmart never offered an explanation as to why only certain portions of the video footage had been selectively preserved. A trial court need not specifically use the words "bad faith" to make an adequate finding of intent to deprive. (And of course, Walmart cannot complain on appeal that the trial court did not make findings regarding the rule or its reasoning that Walmart cites for the first time on appeal).

Walmart contends that it offered an "explanation" as to why the missing footage was not preserved in that it claims it was not given adequate notice of the time the incident occurred and that videotape is routinely "written over" by the equipment. Initial Brief at 43-44. However, the trial court correctly discerned that this "explanation" fell far short and lacked credibility. In spite of any misunderstandings about the timing, Walmart had found the video footage showing the fall but had failed to preserve relevant portions. A trial court is not required to accept as reasonable any explanation that is offered.

Walmart apparently contends that the operation of an electronic system that deletes footage after the passage of time, automatically precludes an intent to deprive. Initial Brief at 43-44. But as the Court in *Skansa* noted, a "hands-off implementation of an ordinary corporate destruction policy is not a silver bullet. We have already explained that we would be 'highly skeptical' of a claim that evidence was unintentionally destroyed 'pursuant to a routine policy' after a request that the evidence be preserved." *Skansa*, 75 F.4th at 1313; *Tesoriero*, 965 F.3d at 1186. Notably, this case involves selective presentation rather than simply automatic deletion. *See*

Culhane, 364 F.Supp.3d at 774 (explaining a court could infer an intent to deprive because Walmart selectively preserved certain video footage and asset protection manager "could not remember" why he preserved interior video but not exterior video).

Thus, the requirement of "intent to deprive" was established under the circumstances of this case. The trial court's imposition of Rule 1.380(e) sanctions was not an abuse of discretion.

C. Common Law Requirement of Materiality.

Next Walmart argues that the trial court did not conduct the "required inquiry" to find spoliation under caselaw that pre-dates Rule 1.380(e). Initial Brief at 44. Specifically, Walmart contends that the trial court did not require the Plaintiff to establish that the missing evidence was critical, and that the trial court erred by requiring it to explain the reason for the lost footage without first making this finding. Initial Brief at 44-45.

Prior to the adoption of Rule 1.380(e), adverse inference instructions were given where there was negligent spoliation, while intentional spoliation resulted in striking pleadings or entering

default judgments. *Golden Yachts, Inc.*, 920 So. 2d at 780.[4] As discussed above, a three-part inquiry was required "prior to a court exercising any leveling mechanism" to address spoliation of evidence: 1) whether the evidence existed at one time, 2) whether the spoliator had a duty to preserve the evidence, and 3) whether the evidence was critical to an opposing party being able to prove its prima facie case or a defense. *Golden Yachts, Inc.*, 920 So. 2d at 781. There does not appear to be any requirement that a court address these elements in any particular order, so long as it ultimately finds sufficient materiality before **giving** an adverse inference instruction.

Where only an adverse inference instruction was being considered as a sanction, an explanation for the spoliation relevant to intent was not necessarily needed so long as the other three factors had been established. Thus, under the earlier common law analysis, cases do not suggest that a court commits error by asking the spoliator to provide its reasons for the loss of evidence during discussion of the issue since those reasons were not always critical.

---

[4] *Cont'l Ins. Co. v. Herman*, 576 So. 2d 313, 316 (Fla. 3d DCA 1990), cited by Walmart, involved a cause of action for intentional destruction of negligence rather than an adverse inference instruction, and is therefore inapposite here.

In contrast to the earlier common law cases, Rule 1.380(e) requires an additional element of "intent to deprive" to give an adverse inference instruction. But this does not mean that a party is required to establish the three common law factors **before** a court is permitted to inquire as to intent to deprive. If a reasonable explanation by the spoliator can be provided, a court might be able to exercise its discretion to deny an adverse inference instruction on that basis alone. Thus, it makes no sense to force a court to segregate its analysis.

Here, Walmart is mistaken when it states that the trial court failed to correctly assess the third "threshold" question. Initial Brief at 44. During much of the lengthy discussions in this case, the trial court was trying to understand the timing of the two videos and what footage was not preserved. The relation of the missing footage to the sequence of the two videos was important to an understanding of its materiality.

Additionally, as discussed above, an inquiry into the explanation of the failure to preserve was relevant to spoliation in regard to the "intent to deprive" required by current law and the adoption of Rule 1.380. Considering that the issue was being

addressed during an ongoing trial, the trial court did not abuse its discretion by ordering Walmart's attorneys to investigate a possible explanation for the problem during an overnight recess before making a final ruling on giving an adverse instruction. At this point, the trial court was still considering whether an adverse inference instruction would be appropriate, noting that the issue was not often raised mid-trial. T622.

The record reflects that the trial court assessed the materiality of the evidence before it decided to give the instruction. As an initial matter, common-law materiality in terms of a failure to make a prima facie case has been replaced under the Rule by "a finding of prejudice." Rule 1.380(e)(1). Also, Rule 1.380(e)(2) refers to "the use of the information." This change in verbiage indicates that something less than the loss of evidence critical to establishing a prima facie case is sanctionable. A party may suffer prejudice even if it has not been precluded from establishing a prima facie case. In *Culhane*, the court recognized that the unpreserved video footage was not necessary for the plaintiff to establish a prima facie case, but found that it was sufficiently relevant for purposes of Rule 37(e)(2) where the plaintiff's ability to rebut affirmative defenses had been unfairly

thwarted. *Culhane*, 364 F.Supp. at 775. Notably, Florida Standard Instruction 301.11(a) requires only that the missing evidence "would have been material in deciding the disputed issues in this case." Thus, the third threshold issue is satisfied where evidence is relevant and material to a party's claim. And even assuming that under the common law test, the missing video was required to impact the Plaintiff's ability to establish its prima facie case and or defense, that standard is satisfied here.

Walmart argues that the missing footage would not have aided the Plaintiff since a plaintiff is required to prove a substance was on the floor for such a period that the store owner would have adequate time to discover and eliminate the risk of harm. Initial Brief at 46. In this case, however, the missing footage is relevant -- and critical -- to the issue of notice since a Walmart employee was present at the end of the two-hour video and also at the beginning of the five-minute video. Therefore, Walmart would have had **actual notice** of events that occurred during the two-minute gap, even during a brief period of time.

Additionally, much of Walmart's theory of defense was that in the two-hours prior to the Plaintiff's fall, many customers walked in

the area without difficulty. This defense might not have held water (no pun intended) if other customers either fell or slipped **without falling in the area**. Thus, what occurred during the missing two minutes had heightened, critical relevance to several aspects of the case.

The trial court reasoned that the missing footage was material to showing what might have happened just prior to the Plaintiff's fall, particularly since during the gap between the two videos a trash can in the vicinity **had been moved**. T684-85. The Court stated:

> THE COURT: To me, it's what happened during those two minutes that's the most material two minutes for this whole case. All right. **Those two minutes were key minutes. It wasn't two minutes an hour before, it wasn't two minutes the day before, it was two minutes immediately before the fall. And that – that is about as material as you can get.**

T995 (emphasis added).

Finally, because the trial court found Walmart had intent to deprive as required under Rule 1.380(e), that fact alone establishes its relevance. *Adamson*, 325 So. 3d at 896. As in *Adamson*, the trial court did not abuse its discretion in giving an adverse inference instruction as set out in Florida Standard Jury Instruction 301.11(a).

Accordingly, Walmart's argument that the missing footage was "neither relevant nor material" to the Plaintiff's case must be rejected.

CONCLUSION

For the reasons stated above, this Court should affirm the jury verdict and Final Judgment. The trial court did not abuse its discretion in giving an adverse inference jury instruction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of April 2024, the foregoing was filed with the Florida Courts E-Filing Portal which furnished a copy via electronic mail to Appellant's counsel, Jack R. Reiter, Esq. and Sydney M. Feldman, Esq., GrayRobinson, P.A. 333 SE Second Avenue, Suite 3200, Miami, Florida 33131, jack.reiter@gray-robinson.com, Sydney.feldman@gray-robinson.com; Stephanie H. Vo, Esq., Hamilton, Miller & Birthisel, LLP, 150 Southeast Second Avenue, Suite 1200, Miami, Florida 33131, svo@hamiltonmillerlaw.com, cllorente@hamiltonmillerlaw.com, srussomanno@hamiltonmillerlaw.com.

Gregory Deutch, Esq.
Rubenstein Law, P.A.

Andrew A. Harris, Esq.
Grace Mackey Streicher, Esq.
HARRIS APPEALS, P.A.

9130 South Dadeland
Boulevard, PH
Miami, Florida 33156
(305) 661-6000
gregory@rubensteinlaw.com
lcueto@rubensteinlaw.com
eservice@rubensteinlaw.com
Trial Counsel for Appellee

5220 Hood Road/Suite 201
Palm Beach Gardens, FL 33418
(561) 867-9500
andrew@harrisappeals.com
grace@harrisappeals.com
eservice@harrisappeals.com
Appellate Counsel for Appellee

By: /s/ Andrew A. Harris
ANDREW A. HARRIS
Florida Bar No. 10061

CERTIFICATE OF COMPLIANCE OF TYPE SIZE & STYLE

Appellee hereby certifies that the type size and style of this Answer Brief is Bookman Old Style, 14-point Font and the word count does not exceed 13,000 words. Therefore, this document complies with Florida Rule of Appellate Procedure 9.210(a)(2)(B).

By: /s/ Andrew A. Harris
ANDREW A. HARRIS
Florida Bar No. 10061