IN THE SUPREME COURT OF FLORIDA

CASE NO. 1999-92

WILLIAM G. BELL, et al.,

Petitioner,

vs.

JANET SNYDER,

Respondent.

ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL
Case Nos. 2D98-00191 and 2D98--00852

REPLY BRIEF ON THE MERITS

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Counsel for Petitioner, William G. Bell, certifies that this Reply Brief on the Merits is typed in 14 point (proportionately spaced) Times New Roman.

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ARGUMENT IN REPLY

None of Snyder's attempts at diversion can obscure the fact that she cites no case where a court has upheld a treble damage or similar punitive award against the innocent beneficiaries of an estate. Neither has Snyder any response to the many cases characterizing treble damages as punitive in nature.

As to the spoliation issue, Snyder concedes that the facts must be viewed in the light most favorable to the Estate, but then promptly spends the bulk of her brief in a futile attempt to attack the facts supporting the jury's spoliation verdict. She has little response to the Estate's arguments that she had a duty to turn over Malvern's missing bank records (which she withheld during the entire course of the litigation) and that concealment as well as destruction of evidence can serve as the basis for spoliation. The jury's spoliation verdict should be restored.

Treble Damages Against The Estate

This Court held in *Lohr*

[1] *that Florida public policy forbids punishing a tortfeasor's innocent heirs and creditors by imposing punitive civil remedies such as punitive damages against the tortfeasor's estate. Having no response to the public policy articulated by Lohr,*

Snyder argues that this Court has no power to apply this same policy to treble damages. According to Snyder, the Legislature has already spoken on the issue of imposing treble damages against an estate.

Where? The Legislature says nothing in either Section 772.11 or Section 46.021

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[1] *Lohr v. Byrd*, 522 So. 2d 845 (Fla. 1988).

about awarding punitive or treble damages against the tortfeasor's estate. In effect, Snyder asks this Court to presume, without any specific expression of legislative intent, that the Legislature had the intent to punish a tortfeasors' innocent heirs and creditors.

Snyder's argument has already been rejected by this and other Florida courts. In *Lohr* itself, the plaintiff argued that Section 46.021, which states that all causes of action survive, required this Court to impose punitive damages against an estate. This Court disagreed, implicitly holding that the fact that a cause of action survives does not mean that the court loses its common law power to determine what damage remedies may be assessed against parties whose liability is merely derivative. Thus, Snyder's argument proves too much. If she were correct, this Court could not have decided *Lohr* the way it did.

The *McArthur Dairy*[2] case dealt with Snyder's "separation of powers" argument head on. In that case, the plaintiff asked the court to impose vicarious treble damage liability. The plaintiff argued that the civil theft statute broadly provided a cause of action for treble damages without any limitation on damages or parties. However, the court ruled that it was improper to assume that the Legislature intended to usurp the court's traditional powers to determine the extent of that remedy. According to the court, the civil theft statute merely created the cause of action -- it did not identify the parties against whom the remedy lies. That question is resolved by "ordinary

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[2] *McArthur Dairy, Inc. v. Original Kielbs, Inc.*, 481 So. 2d 535 (Fla. 3d DCA 1986).

rules of civil liability." 481 So. 2d at 540. Thus, the court held that treble damages were punitive in nature and that an employer without fault could not be held vicariously or technically liable for treble damages resulting from an employee's act of civil theft. *Id.*

Similarly, no federal court has ever held that it was without the power to prevent innocent beneficiaries and creditors from being punished by treble damages. Although the federal statutes imposing treble damages under the antitrust laws or RICO include the same broad language as Florida's Civil Theft Act,

[3] every federal court to consider the issue has ruled that treble damages may not be awarded against an estate.

[4]

Snyder cites not a single case to the contrary. As discussed extensively in the initial brief, the cases are unanimous that treble damages are designed to punish and deter, not to compensate (Bell Br. at 25-29). Every court (except for the court below) that has specifically considered the issue has ruled that treble damages may not be awarded against an estate. Snyder's cases are off point. For example, in *Senfield*

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[3] Under the antitrust laws and RICO, treble damages are awarded to a "person injured in his business or property by reason of a violation…" Neither statute contains any specific limitation on the right to recover treble damages. 15 U.S.C. § 15, 18 U.S.C. § 1964 (c).

[4] *See, e.g., Rogers v. Douglas Tobacco Board of Trade, Inc.,* 244 F.2d 471, 483 (5th Cir. 1957); *Summers v. FDIC,* 592 F. Supp. 1240, 1241-42 (W.D. Okla. 1984) (specifically rejecting the argument that the apparently mandatory language of the statute required an award of treble damages against an estate); *RSE, Inc. v. H & M, Inc.,* 90 FRD 185, 187 (M.D. Pa. 1981); *Shires v. Magnavox Co.,* 432 F. Supp. 231, 235 (E.D. Tenn. 1976).

[5] *the court simply ruled that, for purposes of determining whether the statute applied retroactively, the overall purpose of the civil theft statute is remedial. As discussed in the initial brief, this focus on the purpose of the cause of action is far different from a ruling that the particular portion of the statute at issue here, the treble damage remedy, is punitive or remedial.*

[6] *Snyder does not contest that a statute can have both remedial and punitive purposes*

Similarly, the Epstein

[7] and *First American Corp.*

[8] cases cited by Snyder decided only that a RICO cause of action survives the defendant's death. The courts were not asked, nor did they decide, whether treble (as opposed to single) damages could be assessed against the estate if the plaintiff ultimately succeeded.

The conflict between the divided panel decision below and the *Lohr* and *McArthur* cases should be resolved and the trebling of the damage award reversed.

Spoliation of Evidence

Snyder defends the spoliation claim by arguing that she did not take anything, but even if she did, the law provides no remedy for her concealment of evidence.

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[5] *Senfeld v. Bank of Nova Scotia Trust Co., Ltd.*, 450 So. 2d 1157 (Fla. 3d DCA 1984).

[6] *The case of Ziccardi v. Strother*, 570 So. 2d 1319 (Fla. 2d DCA 1990) is similar. That court merely determined that recent amendments to the Florida RICO statute were remedial in the sense that they did not create new rights but merely confirmed existing remedies. The case had nothing to do with the characterization of treble damages as punitive or remedial.

[7] *Epstein v. Epstein*, 966 F. Supp. 260 (S.D.N.Y. 1997).

[8] *First American Corp. v. Al-Nahyan*, 948 F. Supp. 1107 (D.D.C. 1996).

As to Snyder's denials, she made them to the jury and the jury did not believe her. Unlike Malvern, who had no opportunity to defend himself, Snyder had a full opportunity to look each juror in the eye and explain her version of events. The jury rejected her story and there was competent substantial evidence to support the verdict. (Bell Br. at 9-14).

[9]

This evidence was neither complex nor ambiguous. When Bell arrived at Malvern and Frances' home in Osprey, Malvern's personal papers were piled high on every available flat surface. Bell family property was already sorted in piles to be taken by Snyder. Bell's reasonable attempts to have a third party inventory these documents and the couple's property were flatly rejected. In the meantime, boxes and suitcases were packed for immediate shipment back to Snyder's home in Knoxville. When Bill Bell was next provided access to Malvern and Frances' homes 8 months later (by court order) the documents and personal property he had seen in the home were gone.

The jury also rejected Snyder's denials that she had spoliated some of the critical bank records at issue. Bell and his family testified that files of cancelled checks they saw during their initial visits turned up missing. Although Snyder swore to the jury that she had no responsibility for the disappearance of these checks, some of these documents (several cancelled checks from the critical time period)

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[9] Snyder concedes that the facts relating to spoliation must be seen in the light most favorable to the Estate (Snyder Br. at 7).

surfaced a few days later at trial. Apparently, Snyder forgot that she had given these checks to her handwriting expert, as exemplars in relation to the issue of the forged country club certificate (Bell Br. at 13). Given that Snyder's hand was caught in the proverbial "cookie jar," the jury's conclusion that Snyder was guilty of spoliation is not surprising.

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Snyder then persists in her argument that, even if she took the documents (which she obviously did), the Estate has no remedy because Snyder had no duty to preserve this evidence. The first problem with this argument is that Snyder had no right to the documents (Malvern's bank records) at all. Moreover, this is not a case of Snyder's innocent destruction of documents before the threat of litigation became apparent. To the contrary, this case concerns Snyder's callous taking and then persistent refusal to produce Malvern's documents throughout the entire course of the litigation. To suggest that Snyder could withhold documents in the face of ongoing litigation is an impossible result that would have far reaching consequences beyond this case.

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[10] Snyder also suggests that one cannot be sure that the jury found that Snyder had spoliated the documents because the Estate also had claims that Snyder had spoliated other sorts of evidence. Of course, if Snyder had wanted something more than the jury's general verdict on spoliation she should have asked the court for more particularized jury interrogatories. For the same reasons articulated by the courts addressing the "two issue" rule, it must be presumed from the general verdict on spoliation that the jury determined that Snyder spoliated the documents at issue. *See, e.g., Colonial Stores, Inc. v. Scarbrough*, 355 So. 2d 1181, 1186 (Fla. 1977).

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Snyder spends much time arguing that her spoliation had no impact on the Estate's ability to prosecute its claims and defend Snyder's accusations. This again was a matter for the jury and there was substantial competent evidence to support its verdict. Indeed, the impact that Snyder's spoliation had on the prosecution of the Estate's claims and the Estate's defense of Malvern against Snyder's claims cannot be overstated. Snyder's theories of liability and damages put those missing documents front and center. Essentially, Snyder told the Estate "we think that $700,000 worth of bonds are missing. We cannot show that any were deposited in Malvern's accounts but we will assume that Malvern stole them all unless you can prove to the contrary." As discussed in Bill Bell's Initial Brief, the Estate's experts largely disproved these claims despite the handicap of the missing documents (Bell Br. at 17). But the point is, it is Snyder who is directly responsible for reducing this case to a battle of "expert opinions" instead of facts. Virtually all of the bonds that Snyder claims are "missing" were purchased and held during the time period for which the couple's bank records are now gone. Those records would have shown conclusively whether these "missing" bonds were stolen or merely sold and the proceeds innocuously deposited into Frances' personal accounts or the couple's joint accounts. The result was a decidedly unfair $140,000 verdict for constructive

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[11] The Estate filed several motions to compel and for sanctions relating to these documents (R. 1550-56, 1862-67, 2017-21). Although the court granted the motions to compel, it refused to enter sanctions, for reasons that are unclear. Perhaps the court determined that Snyder's denial that she had the documents at issue was best deferred to the jury. If so, the jury has now spoken.

fraud against the Estate.

Snyder then suggests that there was no impact on the Estate's ability to defend itself because the experts had plenty of other documents to work with. It matters not how many thousands of documents were reviewed by the experts if the critical bank documents were spoliated. It was the spoliated bank documents that would have resolved the questions with which the experts struggled. Indeed, even Snyder's own experts expressed frustration with the missing records noting that reaching a fair conclusion was like trying to "nail jello to the wall" (R. 878).

Nor can the parties' tax returns substitute for the missing records. As all of the experts conceded, during many years of Malvern and Frances' marriage, income from municipal bonds was not reportable and evidence of these bonds would not appear on their tax returns unless they happened to sell a bond prematurely and there was a gain or loss to report (T. 957-58, 1738-40, 1759, 2343-44, 2388-89). Put simply, prior to the 1986 Tax Reform Act, anyone could have "millions and millions of dollars" in the form of municipal bonds without a penny of income appearing on a tax return in any given year (T. 2344).

The Estate acknowledges that Snyder's only documented claim relates to the $122,634.59 check. This check is the only substantial asset that Snyder can trace directly from Frances' account to Malvern's living trust account (of which Frances was a beneficiary). But even this claim was affected by the spoliated evidence. As discussed in the Initial Brief, Malvern simply deposited the check into his interest bearing trust account only weeks before his death. The missing documents may

have revealed whether Malvern was following Frances' instructions and was going to reinvest it for her, attempting to balance the couple's accounts as a result of the couples' sale of the Hounds Ear condominium or whether he was merely mistaken or confused (Bell Br. at 41-43). No evidence exists that Malvern conducted this isolated transaction with any criminal intent. To the contrary, Malvern, who knew he was dying, did not spend the money in question and instead deposited these funds into an account in which Frances had a life interest. Mere possession of property does not satisfy the clear and convincing proof requirement of criminal intent.

[12] *See Westinghouse Electric Corp. v. Shuler Brothers, Inc.*, 590 So. 2d 986 (Fla. 1st DCA 1992) (ambiguous evidence will not satisfy the clear and convincing standard); *City of Cars, Inc. v. Simms*, 526 So. 2d 119 (Fla. 5th DCA 1988) (wrongful possession of property does not equate to civil theft).

Spoliation also hindered the prosecution of the Estate's conversion claims. The Estate was faced with identifying, valuing and, proving what Snyder had removed of the personal property belonging to Malvern without the benefit of Malvern's testimony and without the opportunity to personally inventory and inspect

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[12] Snyder suggests that the Estate waived any argument that the evidence was insufficient to support the civil theft verdict. To the contrary, counsel specifically raised the issue on directed verdict (T. 1574-76). Snyder cites to counsel's statement at T. 1557 as evidence of waiver. However, as is clear from the context, the cited comments related only to counsel's argument that plaintiff's claims should be dismissed for failure to plead the nature of the fraud with the requisite specificity. The Estate did not contest at directed verdict the specificity of Snyder's allegations as to the $122,634.59 check. However, the Estate did challenge the sufficiency of Snyder's evidence on her civil theft claim (T. 1574-76).

the property. The trial court ordered Snyder to make an inventory of and to produce photographs of every item removed (R. 1557-58). However, as the jury learned during the trial, Snyder's inventory list was woefully vague and almost one-half of the photos were never provided to the Estate as ordered (T. 2045-71). The jury was correct to determine that the Estate was handicapped in the proof of its conversion claim because of its lack of access to the personal property or a descriptive inventory accompanied by photographs.

This leads to Snyder's argument that the Estate's conversion and spoliation claims were redundant. Spoliation and conversion are two related but very different torts. In the conversion claim, the Estate seeks to recover the value of the lost property. In the spoliation count, the Estate seeks to recover the damages it suffered due to the missing evidence in the prosecution and defense of its claims. For example, although the retail value of the papers, file folders, redwells, and boxes converted by Snyder may amount to little, the impact on the Estate's ability to defend itself was severe. Bill Bell testified that he spent between $50,000 and $100,000 just trying to reconstruct Malvern's missing records in response to Snyder's lawsuits. These are among the damages represented by the jury's $40,000 spoliation verdict, not the retail value of the records or personal property taken.

Consider for example, the *DePuy, Inc.* case cited by Snyder.[13] In *DePuy*, the defendant innocently lost the defective hip prosthesis that plaintiff needed to prove its claim. A conversion claim might warrant a recovery of a few

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[13] *DePuy, Inc. v. Eckes*, 427 So. 2d 306 (Fla. 3d DCA 1983).

hundred dollars for the value of the prosthesis. A spoliation claim by contrast would seek a recovery equal to the value of the claim that was lost due to the spoliation (Bell Br. at 20-26). Indeed, the court in *DePuy* granted the very remedy sought by the Estate here. The court struck the defendant's answer because the defendant's spoliation of the prosthesis made it impossible for plaintiff to prove its claims.[14]

Snyder attempts another diversion by suggesting that Bill Bell, not Snyder, was guilty of spoliation. Snyder forgets that all of her claims against Bill Bell for conversion, breach of fiduciary duty, and for his removal as trustee and personal representative were rejected by the judge and jury and she did not appeal these verdicts or judgment. Snyder voluntarily dismissed her spoliation claim relating to Malvern's computer.

The jury has spoken on the spoliation issue and its verdict should be restored.

A Finding of Spoliation Requires a Remand

If this Court agrees that the lower court's restrictive understanding of spoliation was error, the jury's spoliation verdict should be restored. Once restored, the case should be remanded to permit the lower court to consider the impact of the successful spoliation claim on the amount of punitive damages, and on Snyder's claims against the Estate. The jury and both courts below determined that Snyder's

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[14] The court granted this dramatic relief even though defendant's actions were entirely innocent. In a spoliation claim the proper focus is the damage to plaintiff's claims. *DePuy, Inc.*, 427 So. 2d at 308.

misconduct warranted punitive damages.

[15] However, the propriety of the trial court's decision to substantially reduce the amount of the jury's punitive damage award against Snyder must be reassessed because the court's decision was based, in large part, on its erroneous rejection of the spoliation claim. Similarly, the Estate believes that, once it is determined that Snyder spoliated evidence, the judgment awarded to Snyder cannot stand. Snyder may not brand Malvern a thief while withholding the very documents that would have disproven her allegations.

Waiver

The Estate did not waive its defense that Snyder's spoliation of evidence should compel a ruling in favor of the Estate as a matter of law. To the contrary, the effect of Snyder's spoliation on the Estate's prosecution and defense of its claims was one of the central themes sounded by the Estate throughout this case. The missing documents were raised as an affirmative defense in response to Snyder's complaints (R. 1633-34). Bell sued for spoliation of evidence (R. 1613-17). When Snyder refused to produce the missing documents during discovery, the Estate more

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[15] Snyder continues to reargue the facts despite the adverse jury verdict and decisions below. Consider the evidence on the forging of the country club certificate: The certificate was in Malvern's sole name. After Malvern's death and without any consultation with Bill Bell, Snyder admits that she typed in an endorsement of the certificate to her husband William Snyder (T. 2521, 2746-49). *After* she typed in the endorsement, someone forged Malvern Bell's signature (the expert confirmed that the signature was written over the typed endorsement) (T. 2129). Snyder then turned the certificate over to the club with knowledge that the signature on the certificate was not genuine (how could it be otherwise if it were signed after Malvern's death). Based on this evidence, the jury was entitled to draw the inference that Snyder had knowingly uttered a forged document and indeed that Snyder herself had forged, or directed the forgery of, Malvern's signature.

than once moved to compel and asked for sanctions including the dismissal of Snyder's case (R. 1550-56, 1862-67, 2017-21). After the jury brought back its verdict that Snyder had, in fact, spoliated evidence, the Estate timely asked the court to grant a judgment in its favor as a result of the spoliation (R. 4971-75). The Estate argued the issue on appeal. At every stage, the Estate argued that it was unfair for Snyder to bring a case that could have been disproven by the very documents she had spoliated.

Snyder seems to suggest that the Estate should also have raised the issue in a directed verdict motion at the close of plaintiff's case. Such a motion would have been premature at that stage. A directed verdict motion is designed to test the legal sufficiency of the evidence. In this case there was disputed evidence concerning whether Snyder was guilty of spoliation. The Estate could hardly ask the court to grant a directed verdict on Snyder's claims before the jury had resolved the fact issues surrounding the spoliation. However, once the jury made its determination that Snyder was guilty of spoliation, the Estate's claims were ripe and the Estate filed an extensive post-trial memorandum, asking the trial court again to rule as a matter of law that the jury's spoliation verdict should result in judgment for the Estate.

Finally, Snyder suggests that the consequences of her spoliation should not be visited upon her mother, Frances. Snyder ignores that she is serving as Frances' representative in this lawsuit. It is Frances' claims she purports to bring, not her own. If Snyder engages in misconduct while representing Frances and her

misconduct prevents the Estate from defending against the claims brought in Frances' name, neither Snyder, Frances, nor anyone else should be able to profit from that wrong. If Frances has been damaged by Snyder's tortious conduct, Snyder, not the Estate, should be made to pay.

CONCLUSION

For all the foregoing reasons, the judgment of the court below awarding treble damages against the Estate should be reversed. The trial court's decision to overrule the jury's decision on spoliation should be reversed and the spoliation verdict restored. The balance of the case should be remanded to permit the lower courts to determine the impact of the spoliation claim on Snyder's claims and the amount of punitive damages to which the Estate is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to: **Robert Turffs, Esquire**, 2055 Wood Street, Suite 206, Sarasota, FL 34237; **A. Lamar Matthews, Esquire**, 1777 Main Street, Suite 500, Sarasota, FL 34236; and **W. Andrew Clayton, Jr., Esquire**, 1800 Second Street, Suite 888, Sarasota, FL 34236, this _____ day of August, 2000.

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