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Evidence: Intentionally Destroyed Medical Records Give Rise to an Irrebuttable Presumption of Malpractice

Morris Massey

EVIDENCE: INTENTIONALLY DESTROYED MEDICAL RECORDS GIVE RISE TO AN IRREBUTTABLE PRESUMPTION OF MALPRACTICE

Valcin v. Public Health Trust of Dade County, 473 So.2d 1297 (Fla. 3d D.C.A. 1984)

Plaintiff suffered a ruptured tubal pregnancy, which nearly caused her death.[1] She subsequently sued a publicly owned hospital,[2] alleging the pregnancy resulted from a negligently performed sterilization procedure.[3] Plaintiff was unable to prove the operation deviated from acceptable medical standards because her medical file contained no operative notes.[4] Consequently, the trial court granted the defendant's motion for summary judgment.[5] On appeal, the Third District Court of Appeal determined the defendant hospital failed in its statutory duty to preserve the plaintiff's medical records.[6] The court then reversed,[7] and HELD, where a patient's medical records have been intentionally destroyed or omitted, an irrebuttable presumption of medical malpractice arises.[8]

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1. 473 So. 2d 1297, 1297 (Fla. 3d D.C.A. 1984). Plaintiff alleged the near death caused her permanent physical and emotional problems. *Id.*

2. *Id.* Plaintiff alleged that a doctor employed by the hospital had negligently performed a sterilization procedure on the plaintiff a year and half before the ruptured tubal pregnancy. *Id.* The suit was originally brought against both the hospital and the doctor who performed the operation. *Id.* at 1299 n.1. However, the suit against the doctor was dismissed pursuant to FLA. STAT. § 768.28(9)(a) (Supp. 1980) which provides:

> No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injuries or damages suffered as a result of any act, event, or omission of act in the scope of his employment or function, unless such officer, employee or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

3. 473 So. 2d at 1297. The sterilization procedure, a Pomeroy tubal ligation, was performed in May 1978, six days after the plaintiff had given birth to her fifth child. Plaintiff had two additional causes of action in connection with the sterilization procedure: (1) that the hospital breached its warranty that the procedure would be 100% effective, and (2) that the defendant failed to fully inform the plaintiff of the risks involved with the sterilization procedure in obtaining her consent for procedure. *Id.*

4. *Id.* at 1300. Plaintiff's expert claimed that without the operative notes he was unable to testify whether the hospital was negligent in waiting six days after delivery to perform the sterilization. Additionally, without operative notes the expert could not testify whether the procedure was negligently performed. *Id.*

5. *Id.* The trial court entered summary judgment in favor of the defendant on all three counts. *Id.*

6. *Id.* at 1305 n.7. *See* 5A FLA. ADMIN. CODE 10D-28.59(3) ("The hospital shall have a medical records department.... A current and complete medical record shall be maintained for every patient admitted for care in the hospital.... Medical records shall contain the original ... medical and surgical treatment notes and reports...."). *See also* FLA. STAT. § 395.202(1) (1981) (providing that: "Any licensed hospital shall, upon request, ... furnish to any person admitted therein for care and treatment or treated thereat ... a true and correct copy of all records in possession of the hospital,...").

7. 473 So. 2d at 1307. The court affirmed the summary judgment for the defendant on the breach of warranty count. The court, however, reversed and remanded the summary judgment on both the informed consent and malpractice charges. *Id.*

8. *Id.*

Historically, courts have confused the definition and application of evidentiary rules concerning presumptions.[9] This confusion resulted largely from the variety of situations in which courts have used the term.[10] Conclusive or irrebuttable presumptions have added to the general ambiguity in this area of the law.[11] Courts and commentators have held that a conclusive presumption should be considered a rule of substantive law rather than a rule of evidence.[12] This determination stems from the use of irrebuttable presumptions to decide questions of fact without regard to the evidence.[13] This characteristic has also prompted courts[14] and legislatures[15] to limit substantially their application of irrebuttable presumptions. When necessary to prevent injustice, courts are empowered to strike down both statutory and common law conclusive presumptions.[16]

The United States Supreme Court expressly recognized the inherent danger of conclusive presumptions in *United States v. Provident Trust Co.*[17] In *Provident Trust,* plaintiff, as administrator of an estate, applied for a refund of estate taxes paid to the government.[18] According to decedent's will, if his only surviving daughter died without issue, the estate would pass to charity.[19] Before decedent's

9. *See generally* McCORMICK ON EVIDENCE § 342, at 965 (E. Cleary 3d ed. 1984) [hereinafter cited as McCORMICK] (one author has found at least eight ways in which courts have used the term); Berman, *Presumptions,* 35 CONN. B.J. 328, 328-30 (1961) (no other concept in the law of evidence has been as ambiguous to both courts and commentators).

10. *See supra* note 9 and accompanying text. *See also* Greyhound Corp. v. Ford, 157 So. 2d 427, 430 (Fla. 2d D.C.A. 1963) (attempted to discourage the interchangeable use of presumptions and inferences by defining a presumption as a rule of law, fixed in its scope, and by defining an inference as a permissible deduction from the evidence); FLA. STAT. § 90.301(1) (1981) (defining a presumption as "an assumption of fact which the law makes from the existence of another fact or another fact or group of facts found or otherwise established.").

11. *See* FLA. STAT. § 90.301(2) (1981) (providing that: "Except for presumptions that are conclusive under the law from which they arise, a presumption is rebuttable."); McCORMICK, *supra* note 9, § 342, at 966 ("[w]hen fact B is proven, fact A must be taken as true, and the adversary is not allowed to dispute this at all.").

12. *See* Ellis v. Henderson, 204 F.2d 173, 175 (5th Cir. 1953) (in most cases a conclusive presumption is a rule of substantive law). *See also* McCORMICK, *supra* note 9, § 342, at 966 ("[T]he courts are not stating a presumption at all, but simply expressing the rule of law...."); 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 2492 (Chadbourn Rev. 1981) (A conclusive presumption is an unfounded concept because in reality the court is establishing a rule of substantive law.).

13. *See supra* note 12 and accompanying text.

14. *See, e.g.,* Eldridge v. Eldridge, 153 Fla. 873, 16 So. 2d 163 (1944) (rejected common law irrebuttable presumption that child born in wedlock is legitimate). *See generally* 1 K. HUGHES, FLORIDA EVIDENCE MANUAL § 59, at 42-44 (1975) (Courts have rejected some of the conclusive presumptions existing at common law.).

15. *See* FLA. STAT. § 90.301(2) (1981) (for text see *supra* note 11).

16. *See* United States v. Provident Trust Co., 291 U.S. 272, 281 (1934) (The concept of irrebuttable presumptions is a proper subject of judicial inquiry to be resolved in the light of future experience and knowledge.); Bass v. General Dev. Corp., 374 So. 2d 479 (Fla. 1979) (struck down statutory irrebuttable presumption that the mere filing of a subdivision plat means the land has been converted from agricultural to nonagricultural use).

17. 291 U.S. 272. *See also supra* note 16 and accompanying text.

18. 291 U.S. at 279.

19. *Id.* at 280. Decedent, through his will, left the bulk of his estate to the trust company to pay income to his daughter for the rest of her life. The will further provided that the residue

death, however, his daughter was surgically sterilized, rendering her unable to bear children.[20] Despite her sterilization, the government argued that a woman is conclusively presumed capable of bearing children throughout her life.[21] The Court disagreed with the government, and struck down the conclusive presumption.[22] The Court reasoned that an irrebuttable presumption was justified only on the most compelling policy and expediency grounds.[23] Additionally, the Court expressly authorized all judicial bodies to review irrebuttable presumptions under the *Provident Trust* standard.[24]

The Florida Supreme Court reviewed an irrebuttable presumption in *Eldridge v. Eldridge.*[25] In *Eldridge* the alleged father challenged the legitimacy of a child born in wedlock.[26] The court rejected the irrebuttable presumption of legitimacy which existed at common law.[27] Although the court recognized that a strong presumption of legitimacy existed, it ruled that the husband might rebut the presumption by clear and convincing proof to the contrary.[28] The *Eldridge* court implicitly weighed policy considerations behind a conclusive presumption, against a party's right to produce evidence on an issue.[29] Despite the stigma and legal problems attached with illegitimacy,[30] the court determined that the husband had an overriding right to prove that he was not the child's father.[31]

Following the precedent established in *Provident Trust*[32] and *Eldridge,*[33] Florida's legislature recently enacted an evidence code which reflects a narrow ap-

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would pass to certain charities if his daughter died without issue. *Id.*

20. *Id.*

21. *Id.* at 281. The government contended that the presumption controlled even when a woman's reproductive organs had been totally removed. *Id.*

22. *Id.* at 285.

23. *Id.* at 281-85. "The rule in respect of irrebuttable presumptions rests upon grounds of expediency or policy so compelling in character as to override the generally fundamental requirement of our system of law that questions of fact must be resolved according to the proof." *Id.* at 281-82.

24. *Id.* at 282. *See also supra* notes 16 & 23 and accompanying text.

25. 153 Fla. 873, 16 So. 2d 163 (1944).

26. *Id. Cf.* Gossett v. Ullendorf, 114 Fla. 159, 154 So. 177 (1934) (The mother cannot contest the legitimacy of the child; she may only question the child's identity.).

27. 153 Fla. at 875, 16 So. 2d at 164. *But see* Goodright v. Moss, 2 Coup. 591, 98 Eng. Rep. 1257 (1777) (establishing the common law irrebuttable presumption of legitimacy of a child born in wedlock). The presumption is also known as the "Mansfield Rule" after Lord Mansfield who wrote the opinion in the case.

28. 153 Fla. at 874-75, 16 So. 2d at 164. The husband does not have to prove his contention beyond a reasonable doubt. He must, however, produce evidence that casts more than "a strong suspicion" on the child's paternity. *Id.*

29. *Id.* The court recognized that this presumption of legitimacy was one of the "strongest rebuttable presumptions known to the law...." *Id.* at 874, 16 So. 2d at 163. Based on public policy reasons, the court refused to weaken the presumption where it was shown the child was conceived before wedlock. *Id.* at 875, 16 So. 2d at 164.

30. *Id. See generally* H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971) (discusses the legal problems of illegitimates, including the historical stigma attached to children born out of wedlock).

31. 153 Fla. at 875, 16 So. 2d at 163-64.

32. 291 U.S. at 272. *See also supra* notes 16 & 23 and accompanying text.

33. 153 Fla. at 873, 16 So. 2d at 163.

plication of irrebuttable presumptions.[34] Apparently, the framers of the Florida code did not contemplate whether an irrebuttable presumption rises[35] against one who intentionally destroys evidence.[36] While other jurisdictions have considered the issue,[37] Florida courts have not addressed whether a conclusive presumption always accompanies the intentional destruction of evidence. The Third District Court of Appeal, however, established a cause of action for the negligent destruction of evidence in *Bondu v. Cedars of Lebanon Hospital.*[38] In a factual situation similar to the instant case,[39] the plaintiff in *Bondu* was unable

34. *See* FLA. STAT. § 90.301(2) (1981) (for text see *supra* note 11). *See also* 1 K. HUGHES, FLORIDA EVIDENCE MANUAL § 59, at 42 (1975) (conclusive presumptions originate from strong considerations of public policy).

35. *See* FLA. STAT. § 90.301(2) (1981) (for text see *supra* note 11). *Cf.* Bass v. Central Dev. Corp., 374 So. 2d 479 (Fla. 1979) (struck down a statutory conclusive presumption dealing with the classification of land for tax purposes); Gallie v. Wainwright, 362 So. 2d 936 (Fla. 1978) (upheld statute that established a conclusive presumption that a convicted felon is an unreasonable bail risk). *But cf.* Mercer v. Raine, 443 So. 2d 944 (Fla. 1983) (litigant found in default during pre-trial stage because he failed to comply with plaintiff's discovery request and a court order); DePuy, Inc. v. Eckes, 427 So. 2d 306 (Fla. 3d D.C.A. 1983) (courts have power to find a party in default for suppressing evidence during the pre-trial stage).

36. *See generally* Maguire & Vincent, *Admissions Implied from Spoliation or Related Conduct,* 45 YALE L.J. 226, 227-43 (1936) (discusses problems with proving intentional spoliation and whether intentional spoliation is a conclusive admission of culpability); MCCORMICK, *supra* note 9, § 273, at 810 ("[m]any decisions have supported the general doctrine that the inference from obstructive conduct by the adversary will not supply a want of proof of a particular fact essential to the proponent's case.").

37. *See, e.g.,* Appleton-Elec. Co. v. Advance United Expressways, 494 F.2d 126, 139 n.24 (7th Cir. 1974) ("The law will presume that the evidence destroyed would establish the plaintiff's claim."); Wong v. Swier, 267 F.2d 749, 759-60 (9th Cir. 1959) (a presumption stands against the despoiler of evidence but that presumption is never conclusive); INA Aviation Corp. v. United States, 468 F. Supp. 695, 700 (E.D.N.Y.) (the intentional destruction of evidence gives rise to an unfavorable inference against the despoiler, but no inference can be drawn if the destruction was unintentional) *aff'd without opinion,* 610 F.2d 806 (2d Cir. 1979); Carr v. St. Paul Fire & Marine Ins. Co., 384 F. Supp. 821, 831 (W.D. Ark. 1974) (jury could infer that the destroyed records might have shown that the hospital had been negligent); McCleery v. McCleery, 200 Ala. 4, 5-6, 75 So. 316, 317 (1917) (a rebuttable presumption arises against a party that purposefully destroys evidence); Middleton v. Middleton, 188 Ark. 1022, 1026, 68 S.W.2d 1003, 1006 (1934) (if the destruction of evidence is willful and total, the party's claim is conclusively presumed to be established against the despoiler); Thor v. Boska, 38 Cal. App. 3d 558, , 113 Cal. Rptr. 296, 301 (1974) ("[T]he fact that defendant was unable to produce his original clinical record concerning his treatment of the plaintiff after he had been charged with malpractice, created a strong inference of consciousness of guilt on his part."); Fuery v. Rego Co., 28 Ill. Dec. 115, , 71 Ill. App. 3d 739, 744, 390 N.E.2d 97, 101 (1979) (an unfavorable presumption arises against party who fails to produce evidence under his control); Maszczenski v. Myers, 212 Md. 347, 354, 129 A.2d 109, 114 (1957) (although an unfavorable inference rises against a litigant who suppresses evidence, this inference is not the proof of fact necessary to establish a party's allegations); Pomeroy v. Benton, 77 Mo. 64, 85-86 (1882) (the litigant who destroys written evidence is held to admit the truth of the opposing party's allegations); Walker v. Herke, 20 Wash. Rep. 2d 239, 249-51, 147 P.2d 255, 260-61 (Wash. 1944) (while the destruction of evidence warrants an unfavorable inference against the spoliator, it does not relieve the other party from introducing evidence to prove his case).

38. 473 So. 2d at 1307. Plaintiff did not allege that the records were intentionally removed or destroyed. *Id.* at 1313 n.5.

39. *Id.* at 1309. Plaintiff's husband died of cardiac arrest while being administered anesthesia. Plaintiff could not sustain medical malpractice suit because of the loss of records. *Id.*

to sustain her medical malpractice suit because her medical records were missing.[40] The court, recognizing the statutory duty of hospitals to maintain records for its patients,[41] concluded that the plaintiff had a cause of action against the hospital for negligently failing to preserve evidence for civil litigation.[42]

In the instant case, the same court[43] erected an irrebuttable presumption of medical malpractice when the fact finder determined that medical reports were missing for reasons other than inadvertence.[44] The court, establishing an irrebuttable presumption, brought Florida into accord with those jurisdictions which have held that the intentional destruction of evidence is tantamount to an admission of the opponent's allegations.[45] The court justified its ruling on several policy grounds including, an injured plaintiff's right to a remedy,[46] the hospital's statutory duty to maintain medical records,[47] and the court's responsibility to deter intentional misconduct.[48]

The instant court, however, recognized the possibility that surgical notes could have been missing as a result of the health care provider's negligence.[49] Because of this possibility, the court shifted the burden onto the hospital to show why the records were missing.[50] Recognizing the difficulty of maintaining extensive medical records, the court held that negligent loss of such records only gives rise to a rebuttable presumption of malpractice.[51] The court main-

40. *Id.* at 1312. "The crux of the plaintiff's action against the hospital is the failure to keep and maintain records, which failure rendered the plaintiff unable to prove the medical malpractice of the hospital and others." *Id.*

41. *See* FLA. STAT. § 395.202 (1981) (for text see *supra* note 6); 5A FLA. ADMIN. CODE 10D-28.59(1).

42. 473 So. 2d at 1311. *Accord* Williams v. California, 34 Cal. 3d 18, 664 P.2d 137, 192 Cal. Rptr. 233 (1983) (indicates that if a plaintiff can show a duty to preserve evidence, then the plaintiff might be able to state a cause of action for negligent failure to preserve evidence for civil litigation); Smith v. Superior Court, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984) (recognizing a cause of action for the intentional spoliation of evidence).

43. 473 So. 2d at 1297. The Third District Court of Appeal decided both cases on the same day, June 15, 1984. *Id.* at 1305 n.7.

44. *Id.*

45. *Id. See, e.g.,* Middleton v. Middleton, 188 Ark. 1022, 68 S.W.2d 1003 (1934).

46. 473 So. 2d at 1303. *Accord* Smith v. Superior Court, 151 Cal. App. 3d 491, , 198 Cal. Rptr. 829, 832 (1984) (plaintiffs, injured by breach of duty to preserve evidence, should have cause of action).

47. 473 So. 2d at 1303. *See also* FLA. STAT. § 395.202 (1981); 5A FLA. ADMIN. CODE 10D-28.59(1), (3).

48. 473 So. 2d at 1303-04.

49. *Id.*

50. *Id.* at 1305. The hospital had the burden of proving by the preponderance of the evidence that records were not missing because of an intentional act. *See also* FLA. STAT. 90.302 (1981):

> Every rebuttable presumption is either: (1) A presumption affecting the burden of producing evidence and requiring the trier of fact to assume the existence of the presumed fact. unless credible evidence sufficient to sustain a finding of the nonexistence of the presumed fact is introduced, ... (2) A presumption affecting the burden of proof that imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the presumed fact.

Id. FLA. STAT. § 90.303 (1981): "In a civil action ... a presumption established primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement public policy, is a presumption of producing evidence." *Id.*

51. 473 So. 2d at 1306.

tained, however, that in cases of intentional suppression of evidence an irrebuttable presumption of malpractice was justified.[52]

Providing a remedy for patients who have suffered from medical malpractice is an important aspect of the court's function in negligence cases. Both *Bondu*[53] and the instant case[54] represent the Third District Court of Appeal's concern for fulfilling this function. While the court's concern with providing a remedy for injured plaintiffs is laudable, in the majority of cases negligence still must be proved by a preponderance of the evidence.[55] Admittedly, the United States Supreme Court in *Provident Trust* recognized that a conclusive presumption may take the place of proof by a preponderance of the evidence.[56] The Supreme Court, however, demonstrated that courts should sustain conclusive presumptions only for the most compelling public policy and expediency reasons.[57] The issue, therefore, is whether the situation in the instant case presents compelling public policy concerns, justifying an irrebuttable presumption of medical malpractice.

In an analogous situation, the *Eldridge* court rejected a conclusive presumption of legitimacy.[58] *Eldridge* indicates that a litigant's right to present his case supercedes strong public policy supporting the irrebuttable presumption.[59] The *Eldridge* decision reflects the judiciary's concern that both sides in litigation are afforded full due process.[60] The instant court, however, ignores these due process implications by focusing solely on the policy concerns.[61] By disregarding the principles of fairness and full disclosure, the instant court punishes health care providers without allowing them to prove they did not commit medical malpractice.[62]

Even if the instant court satisfied all due process considerations, it could have adopted a more balanced approach. Under *Bondu* the plaintiff in the instant case would have a cause of action against the hospital for losing her records.[63] Presumably, if the hospital had intentionally suppressed the surgical notes, the plaintiff could also collect punitive damages. The *Bondu* approach, however,

52. *Id.*

53. 473 So. 2d at 1307. *See also supra* notes 38-41 and accompanying text.

54. 473 So. 2d at 1306. The defendant cannot rebut a presumption of negligence if the fact finder finds that the defendant intentionally destroyed the evidence. *Id.*

55. *See, e.g.,* United States v. Provident Trust Co., 291 U.S. 272, 282 (1934) (generally all questions of fact must be resolved by evidentiary proof).

56. *Id.* at 281-82. *See also supra* note 23 and accompanying text.

57. *See also supra* note 23 and accompanying text.

58. *See supra* notes 25-30 and accompanying text.

59. *See supra* notes 25-30 and accompanying text.

60. 153 Fla. at 873, 16 So. 2d at 163. *See also* Maguire & Vincent, *Admissions from Spoliation or Related Conduct,* 45 YALE L.J. 226, 234-35 (1936) (to satisfy due process, a strong, rational link must exist between suppressing evidence and consciousness of culpability).

61. *See* 473 So. 2d at 1304-05. The court never addressed whether intentional destruction or omission of medical records constitutes the requisite rational link to a conclusive presumption of malpractice. *Id.*

62. *See id.* at 1305-06.

63. 473 So. 2d at 1311-12. Although the decision specifically establishes a cause of action for the negligent failure to preserve evidence for civil litigation, the decision implies that a cause of action would be appropriate for the intentional suppression of evidence. *Id. Accord* Smith v. Superior

would allow the hospital to defend itself against the malpractice charge.[64] Additionally, the instant court could have established a rebuttable presumption of malpractice on the basis of the deliberate destruction of evidence.[65] This option places the burdens of both proof and persuasion on the defendant[66] and supports the various policy concerns expressed by the instant court.[67] The health care provider, however, would still be permitted to present its case to the fact finder.[68]

Both the *Bondu* approach[69] and the use of a rebuttable presumption of malpractice[70] are preferable to the irrebuttable presumption that the instant court established.[71] *Provident Trust*[72] and *Eldridge*[73] indicate that the basis for an irrebuttable presumption must consist of the most compelling policy considerations. If the plaintiff lacked any alternative means of recovery, the conclusive presumption might be justified under this standard. As long as other options exist, however, the court should refrain from circumventing the jury by creating an irrebuttable presumption. A fundamental tenet of the American judicial system remains that questions of fact must be resolved by proof, not by a rule of law.[74]

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Court, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984). *See also supra* note 42 and accompanying text.

64. *See* 473 So. 2d at 1310-11. *See also* Smith v. Superior Court, 151 Cal. App. 3d 491, , 198 Cal. Rptr. 829, 835-37 (1984) (implying that the two causes of action, (1) for intentional spoliation of evidence, and (2) for medical malpractice, may be tried simultaneously at the court's discretion).

65. *See* 473 So. 2d at 1301-02. The court erected this remedy for the negligent loss of medical records. *Id.*

66. *See* FLA. STAT. § 90.303 (1981) (burden of proof is shifted to implement public policy). *See also supra* note 50 and accompanying text.

67. *See* FLA. STAT. § 90.303 (1981).

68. *See* 473 So. 2d at 1301. The hospital may rebut the presumption of malpractice if records are lost negligently. *Id.*

69. *See* 473 So. 2d at 1307.

70. *See supra* note 68 and accompanying text.

71. 473 So. 2d at 1301-02.

72. *See supra* note 23 and accompanying text.

73. *See supra* notes 25-30 and accompanying text.

74. *See, e.g,* United States v. Provident Trust Co., 291 U.S. 272, 281-82 (1934). *See generally* MCCORMICK, *supra* note 9, § 339, at 956-69 (discussion of burden of proof in civil cases).