SUPREME COURT OF FLORIDA
Case No. SC 07-1888

JUSTO CARLOS PEREZ, individually;
MARTA S. PEREZ, his wife;
AMY LYNN PEREZ and ANGIE PEREZ,

Petitioners,

v.

LA DOVE, INC.,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM
THE THIRD DISTRICT COURT OF APPEALS

(Lower Tribunal Case No. 3D05-2597)

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STATEMENT OF CASE AND FACTS[1]

Respondent La Dove, Inc. adopts the statement of case and facts and proceedings set forth in the Brief on Jurisdiction filed by Petitioners, Justo Carlos Perez, Marta Perez, Amy Lynn Perez, and Angie Perez, as consistent with the facts as stated by the lower court in its final decision, *Perez v. La Dove*, 32 Fla. L. Weekly D 2171 (Fla. 3d DCA Sept. 12, 2007).[2]

The case below involves the dismissal of a claim brought by an employee against his employer arising out of the employee's operation of the employer's forklift. There is no dispute that this employee could not assert his claim directly against his employer, because Florida's Worker's Compensation Law bars any direct claim for negligence against an employer. In an effort to circumvent this statutory prohibition, the employee asserted that the employer breached its duty of cooperation to the employee by allowing the company that routinely repaired and maintained its forklift to inspect the forklift and make the appropriate repairs following the accident that injured the employee. It is undisputed that none of Petitioners requested the preservation of the forklift prior to or during its two-week repair period. The Third District Court of Appeal correctly affirmed the dismissal

[1] All emphasis in Respondent's Brief on Jurisdiction is supplied.

[2] Respondent reserves the right to dispute the lower court's characterization of the facts.

of the employee's claim based on its determination that, absent any notice by its employee, the employer did not have a duty to preserve the forklift and therefore did not breach its statutory duty of cooperation.

Petitioners now assert that the Third District's holding below conflicts with the Fourth District Court of Appeals decision in *Builders Square v. Shaw*, 755 So. 2d 721 (Fla. 4th DCA 1999) ("*Builder's Square*"), in which that court found a duty to preserve evidence where it was merely foreseeable that an employee might assert a claim against a non-party.

There is no conflict, however, between the Third District's decision below and *Builder's Square,* because the Fourth District has since receded from its reasoning in *Builder's Square* and has instead followed the holdings of the Third District, which, consistent with the decision below, require a specific request for preservation of evidence to invoke a duty to cooperate by preserving evidence.

SUMMARY OF ARGUMENT

It is undisputed that, prior to the repairs made to the forklift, Petitioners did not request Respondent to preserve the forklift, nor did Petitioners give Respondent notice of an intent to commence litigation against any third-parties. A statutory duty to cooperate by preserving evidence, §440.39(7), Fla. Stat., will only be imposed on an employer where, at the very least, an employee makes a specific request for preservation, *General Cinema Beverages of Miami, Inc. v. Mortimer,*

689 So. 2d 276, 279 (Fla. 3d DCA 1995), or actually notifies the employer of a potential legal action. *Pennsylvania Lumberman's Mut. Ins. Co., v. Florida Power & Light Co.*, 724 So. 2d 629, 629 (Fla. 3d DCA 1998); s*ee also Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004).

In seeking this Court's jurisdiction, Petitioners assert the Third District's ruling below conflicts with a non-party's obligation to preserve evidence based on *mere anticipation* of litigation, as applied *once* by the Fourth District and from which standard the Fourth District has since receded. The Fourth District's decision in *Builder's Square* only demonstrates that court's confusion on the spoliation issue as applied within the confines of the Worker's Compensation Law and not any conflict with the decision below of the Third District. This Court should not exercise its discretionary jurisdiction simply to enlighten the Fourth District as to the true meaning of its own rulings and the applicable Workers' Compensation Law. *See Shaw v. Puleo*, 159 So. 2d 641 (Fla. 1964) (holding a conflict within a jurisdiction did not warrant this Court's exercise of jurisdiction).

ARGUMENT

THERE IS NO BASIS FOR THIS COURT'S DISCRETIONARY JURISDICTION

1. There is No Conflict

The requisite elements of a claim for spoliation or negligent destruction of evidence are:

> (1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages.

Continental Ins. Co. v. Herman, 576 So. 2d 313, 315 (Fla. 3d DCA 1990). The law is clear in both the Third and Fourth Districts that an employer's duty to preserve evidence is invoked (as the employer's statutory duty to "cooperate" under Florida Statute Section 440.39(7)) where, *at a minimum*, the employee has made a timely request for preservation and is not invoked by mere anticipation of litigation. *See Royal & Sunalliance*, 877 So. 2d at 845-46 (Fla. 4th DCA 2004) (analyzing prior cases of the Fourth District and concluding the "argument that there was a common law duty to preserve evidence in anticipation of litigation to be without merit"); *Pennsylvania Lumberman's*, 724 So. 2d at 629; *General Cinema*, 689 So. 2d at 278-79.

Despite the fact that the Third District opinion below fails to conflict with the prevailing standard in the Fourth District, Petitioners are attempting to manufacture a conflict with a single aberrational decision in the Fourth District. In *Builder's Square*, a panel comprised of Judges Polen, Taylor and Frusciante, for the first time, found that an employer's duty to preserve evidence arose despite the absence of any request for preservation. "We think that while actual notice of identified evidence is the clearest form, an employer can similarly be charged with notice when the circumstances are such that it should have known that certain evidence could conceivably be critical to an employee's claim." *Builder's Square*, 755 So. 2d at 723. The Fourth District has since never cited *Builder's Square* for the proposition that an employer must preserve evidence on the *mere anticipation of litigation*.

To the contrary, two years later, the Fourth District found an employer could be liable where it voluntarily undertook a duty to preserve the evidence, but then failed to do so. *Hagopian v. Publix Supermarkets, Inc.*, 788 So. 2d 1088 (Fla. 4th DCA 2001) (citing *Builder's Square* for a related damage issue only). In a case related to *Builder's Square*, the Fourth District instead relied on the *Third District* (with no mention of *Builder's Square*) for a statement that an employer's duty to cooperate includes the duty to preserve evidence). *Shaw v. Cambridge Integrated*

Servs. Group, Inc., 888 So. 2d 58, 64 (Fla. 4th DCA 2004) (relying on *General Cinema*, 689 So. 2d at 279).

Significantly, nearly five years after its decision in *Builder's Square*, the Fourth District (Judges Gunther, Taylor, and Klein) affirmatively dictated the court's position that a duty to preserve evidence arises only upon a request for preservation. *Royal & Sunalliance*, 877 So. 2d at 846. **"[N]either *Hagopian* nor *Brinson* establishes a duty to preserve evidence when litigation is merely anticipated."** *Id.* (affirming the dismissal of a spoliation claim). In *Royal & Sunalliance*, the Fourth District did not even mention *Builder's Square* (despite the fact that Judge Taylor was on both panels), but rather relied on a case from the Southern District of Florida, *Silhan v. Allstate Ins. Co.,* 236 F. Supp. 2d 303, 1311-12 (N.D. Fla. 2002), which extrapolated cases from both the Fourth and Third Districts and definitively concluded that no common law duty to preserve evidence arises upon the mere foreseeability of future litigation. "Thus, no common law duty to preserve evidence (absent some form of notice) currently exists in Florida law." *Silhan*, 236 F. Supp.2d at 1312 (relied upon by Fourth District in *Royal & Sunalliance*, 877 So. 2d at 845); *see also Hickman v. Carnival Corp.,* 2005 WL 3675961, * 2 (S.D. Fla. July 11, 2005) (relying on *Silhan,* 236 F. Supp. 2d at 1309 and *Royal & Sunalliance,* 877 So. 2d at 845-56, for the conclusion that the mere possibility of litigation is insufficient to create a duty to preserve evidence).

Demonstrating the inexplicable confusion in the Fourth District as to its own prior rulings, in *American Hosp. Mgmt. Co. v. Hettiger,* 904 So. 2d 547, 549 (Fla. 4th DCA 2005), [3] the court stated that "a defendant could be charged with a duty to preserve evidence where it could reasonably have foreseen the claim," and relied – *not on Builder's Square* -- but on *Hagopian*, 788 So. 2d at 1090, which instead stands for the proposition that a duty to preserve evidence arises when an employer "voluntarily undertakes a duty." *Royal & Sunalliance*, 877 So. 2d at 847 (J. Klein, concurring). [4]

In sum, there is no conflict for this Court to decide between the Third District's opinion below and the Fourth District's ruling in *Builder's Square,* and this Court should therefore not exercise its discretionary jurisdiction. *See Times Publ'g Co., v. Russell*, 615 So. 2d 158 (Fla. 1993); *South Florida Hosp. Corp. v. McCrea*, 118 So. 2d 25 (Fla. 1960).

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[3] In *American Hosp. Mgmt.*, the Fourth District opined only as to the propriety of a jury instruction in a first-party negligence claim, having previously held that a first-party plaintiff may not simultaneously maintain both negligence and spoliation claims against the same defendant. *American Hosp. Mgmt.,* 904 So. 2d at 550-51 (citing *Safeguard Mgmt., Inc. v. Pinedo*, 865 So. 2d 672 (Fla. 4th DCA 2004) and *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251 (Fla. 4th DCA 2003), *approved* 908 So. 2d 342 (Fla. 2005)).

[4] Judge Klein explained that the Fourth District's reversal of a directed verdict on spoliation in *Hagopian* was "***not on the basis that Publix should have anticipated litigation***," but rather because Publix had voluntarily assumed a duty to preserve the evidence but failed to do so. *Royal & Sunalliance*, 877 So. 2d at 847 (Klein, J, concurring).

2. <u>There is No Policy Basis For Exercising Jurisdiction</u>

Moreover, there is no policy reason for this Court to exercise its discretionary jurisdiction. *First*, the lower court's mandate on this issue wisely balances an employee's need for evidence with the employer's constitutional right to own, use and dispose of its property as it deems fit. To hold that an employer is obligated to preserve all potential evidence absent any specific request or notice of related litigation would be unfairly disruptive to a company's efficient administration of business and impose excessive storage and administration costs in connection with all products, conditions, or instrumentalities. *See Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 349-50 (Fla. 2005) (Wells, J., concurring).

Second, the dismissal of Petitioners' spoliation claim where, as here, Respondent sought to repair the forklift absent any notice of litigation or request for preservation of evidence, is consistent with §90.407 of the Florida Statutes which protects subsequent remedial measures. "[T]here simply is no claim for 'immediate and deliberate' repair to a defective situation." *Hickman v. Carnival Corp.*, 2000 WL 3675961 at *1.

Third, the Third District's opinion not only fails to conflict with any decision of another district, but is entirely consistent with the overriding policies of Florida's Workers' Compensation law. "The worker's compensation system in Florida is based on a mutual renunciation of common-law rights and defenses by

employers and employees alike." §440.015, Fla. Stat. (2006). "[E]mployers are provided with immunity from suit by their employees so long as the employer has not engaged in any intentional act designed to result in or that is substantially certain to result in injury or death to the employee." *Eller v. Shova*, 630 So. 2d 537, 539 (Fla. 1993) (interpreting §440.11(1), Fla. Stat). Consistent with the mandate of the Workers' Compensation law, the Third District properly refused to find a basis for liability against an employer who merely failed to engage in nebulous conjecture as to the foreseeability of litigation and preserve all such evidence pending confirmation of such conjecture.

CONCLUSION

For all the foregoing reasons, this Court should refuse to exercise its discretionary jurisdiction.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent's Brief on Jurisdiction was furnished by U. S. Mail, on this ___ day of October, 2007, to:

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CERTIFICATE OF COMPLIANCE

Counsel for Defendant/Appellee La Dove, Inc. hereby certifies that Respondent's Brief on Jurisdiction complies with the font requirements of Rule 9.210(a) (2) of the Florida Rules of Appellate Procedure.

____

Michael J. Higer