IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,209

Florida Bar No. 184170

SPONCO MANUFACTURING, INC., a Kansas corporation,

Petitioner,

vs.

EDWARD ALCOVER and SUSAN ALCOVER, his wife; HYDRAULIC MAINTENANCE, INC., a Florida corporation; and FLORIDA WIRE AND RIGGING, INC., a Florida corporation,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS
SPONCO MANUFACTURING, INC.,
A Kansas corporation

(With Appendix)

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POINT ON APPEAL

THE NEW RULE OF LAW ANNOUNCED BELOW IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISIONS OF THIS COURT IN COMMONWEALTH AND VALCIN, AND PRESENTS A QUESTION OF GREAT PUBLIC IMPORTANCE REGARDING THE THIRD DISTRICT'S PER SE RULE THAT DESTRUCTION OF EVIDENCE, EVEN IF INADVERTENT, CARRIES A MANDATORY DEFAULT SANCTION; THIS IS NOT THE LAW OF THIS COURT AND THE DEFAULT MUST BE REVERSED.

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STATEMENT OF THE FACTS AND CASE

On September 10, 1990, Edward Alcover, an employee of Claude Neon Signs, was using an aerial ladder, attached to a truck to install a sign (A 1-3). While he was using the ladder in an extended position, the wire cable snapped causing an uncontrolled retraction of the ladder, resulting in the Plaintiff being thrown about on the platform attached to the ladder, and sustaining injuries (A 2-3). Alcover sued Sponco, which manufactured the ladder in 1980; Hydraulic, which replaced the wire rope cable on the ladder in 1988; and Florida Wire, the manufacturer of the cable (A 1-13). As to Sponco, the Plaintiff alleged that Sponco defectively and/or negligently designed, manufactured, assembled, or produced the ladder (A 3-7).

Four years after the accident, three years after the Plaintiff filed its Complaint, and two years after the Plaintiff was on notice that Sponco was holding the ladder, the Plaintiff finally decided to request an inspection of the ladder in March of 1994 (A 17). At that point, it was discovered, through pure inadvertence, the ladder had been discarded from the Sponco yard (A 17). The relevant dates are:

1. May 1980 - Sponco delivered truck and ladder to Claude Neon's Signs.

2. November 1988 - Hydraulic replaces wire cable; with cable manufactured by Florida Wire.

3. September 10, 1990 - Cable breaks on ladder, ladder retracts and Plaintiff is injured.

4. December 1990 - Sponco places a new ladder on Claude Neon's truck and returns truck to Claude Neon.

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5. August 1991 - Plaintiff's product liability Complaint is filed against Sponco, Hydraulic, and Florida Wire.

6. April 2, 1992 - Ladder is partially inspected and photographed at Sponco yard, Ottawa, Kansas.

7. April 6, 1992 - Plaintiff's counsel is advised by Sponco's counsel that ladder is available for inspection.

8. June 1993 - Ladder is unintentionally discarded during annual yard clean up.

9. March 1994 - Plaintiff requests inspection of ladder.

The Plaintiff, who did absolutely nothing to preserve the ladder and never even planned on inspecting it until four years after the accident, filed a Motion for Default against Sponco, on the basis that Sponco had not preserved the ladder; and therefore, the Plaintiff claimed he was completely unable to go forward with his lawsuit and so a default had to be entered against Sponco (A 14-26). There were no allegations by the Plaintiff, Alcover, that there was any intent to dispose of the ladder and the Plaintiff conceded that there was no violation of any court order in Sponco's inadvertent disposal of the ladder (A 14-25).

Alcover, while acknowledging that there was both Supreme Court and district court case law requiring the imposition of lessor sanctions than a default in similar situations, argued that based on two Third District cases, Rockwell and DePuy,

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infra, and some federal trial court cases, that he was completely unable to prove his product liability case in any manner whatsoever and a default had to be entered. Alcover accompanied his Motion for Default with an Affidavit of an expert that was not even hired until January of 1994, who stated that without actually examining the subject ladder and its parts he was unable to render an expert opinion (A 27-30). The Affidavit did not state that there were no exemplar ladders available, no exemplar cable available from either Sponco, Hydraulic, or Florida Wire; and did not explain why an expert opinion could not be given based on an exemplar truck, ladder, and cable, even if the expert was correct in his vague assertion that the photographs were not sufficient for him to render an opinion in the case (A 27-30).

Sponco filed a Memorandum in Opposition to the Plaintiff's Motion for Default, stating that it had manufactured the truck and the mounted hydraulic ladder in its plant in Ottawa, Kansas (A 31). The truck and ladder were delivered to Claude Neon Signs in May of 1980 (A 31). Shortly after the Plaintiff's accident, his employer, Claude Neon Signs, sent the truck and ladder back to Sponco in Kansas to have the old ladder replaced with a newer model ladder built by Sponco (A 32). After the old ladder had been replaced, Sponco kept the ladder in its yard outside its manufacturing plant in Kansas (A 32). It then sent the truck with a new ladder back to Claude Neon.

In April of 1992, a year after the Plaintiff's lawsuit, a limited inspection of the ladder was made at the Sponco yard by

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the President of Sponco, an engineer hired for Sponco, and defense counsel (A 32). The engineer photographed the ladder. The ladder was not disassembled and no tests were performed on any of its component parts (A 32-33). On April 6, 1992, defense counsel wrote to the Plaintiff's lawyer informing him that the ladder was still in Kansas; and that the Defendant would like to disassemble the ladder, but would not do so without first giving the Plaintiff a chance to inspect it. Therefore, Plaintiff's counsel simply had to arrange to examine it and/or to be in attendance when the Defendant dismantled it (A 33). For two years, Plaintiff's counsel totally ignored the offer to examine the ladder, just as he never made any arrangements to ensure that the ladder was preserved. Finally, in March of 1994, the Plaintiff's lawyer, after hiring an expert just a few months before, tried to arrange to inspect the ladder and at that time it was discovered that the ladder had been inadvertently discarded (A 33).

Sponco pointed out that the Plaintiff's theory of liability regarding the ladder was that it was designed and built without a device that prevented an unplanned retraction called "fly-locks," which was a theory of liability based on product design, and was the only theory advanced to date regarding the ladder (A 33-34). Since there were other ladders available with the exact same design, i.e., exemplar ladders, as well as prints, drawing, schematics, etc., it was not necessary that the actual ladder be available for the Plaintiff to recover (A 34). Furthermore,

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since the Plaintiff had waited three and a half years to even attempt to examine the ladder, took absolutely no steps to preserve it himself at any point in time, and there was no court order regarding the ladder, the Plaintiff's delay was the cause of any prejudice as a result of the inadvertent disposal of the ladder (A 34-35). Sponco then cited all the relevant case law, both in Florida and around the country that there are lessor sanctions to be imposed for the inadvertent destruction of evidence, such as a rebuttable presumption of negligence, etc.; and that these should be invoked by the court if any, as opposed to the harshest sanction of the default the Plaintiff was seeking (A 35-37).

The hearing on the Plaintiff's Motion for Sanctions was held on October 6, 1994 (A 39-59). Sponco reiterated its position to the court that it had given the Plaintiff an opportunity to inspect the ladder two years before, but the Plaintiff did nothing until March of 1994, when it was discovered that the ladder had already been inadvertently disposed of (A 41-45). Sponco pointed out that had the Plaintiff taken any steps to inspect the ladder in a timely manner, he would not be in the position he was in; and the Defendant was equally prejudiced, because it could not file cross-claims or indemnity claims against Florida Wire and Hydraulic (A 45-48). Again, Sponco reminded the court that a default was the most severe sanction and should be used only when the party acted willfully or intentionally to destroy the evidence; and that where the act was

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inadvertent a rebuttable presumption of negligence would be an appropriate sanction (A 50-51).

Since the ladder was available until June of 1993, with photographs and since the Plaintiff did absolutely nothing whatever to try to inspect the ladder in any manner during that time, or preserve it, Sponco asserted that a liability finding against it, through a default, would be inappropriate (A 51-52).

Again, the Plaintiff argued that there were two cases directly on point that showed that even if the ladder had disappeared, or was destroyed inadvertently, a default had to be entered because the Plaintiff alleged both design and manufacturing defects, and because he could not examine the wire cable on the ladder (A 53-54). The Plaintiff also argued that Sponco had not suggested any other appropriate sanction other than default, which was incorrect, since the rebuttable presumption was one of the alternative sanctions suggested (A 54). Finally, the Plaintiff argued that as long as the ladder was in the possession of the Defendant, a default had to be the sanction imposed against it (A 56-57).

The trial court then inquired if the Third District had indicated that a default was the proper sanction and the Plaintiff's attorney told the judge it was, while defense counsel noted his disagreement (A 57). The judge then stated:

> THE COURT: I think there was an absolute duty on the part of Sponco to maintain and preserve that evidence, so I'm going to, based on the argument of Counsel and the

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> cases, I'm going to grant the motion to enter the default against Sponco.
>
> (A 58)

A Default was entered against Sponco and its Answer and Affirmative Defenses on liability were struck (A 60-63). Sponco appealed.

Based on the fact that this was a spoilation of evidence case, the Third District affirmed and held that this Court's decisions in Commonwealth Federal Savings and Loan Association v. Tubero, 569 So. 2d 1271 (Fla. 1990) and Public Health Trust of Dade County v. Valcin, 507 So. 2d 596 (Fla. 1987), had no application whatsoever, even though these decisions mandate a finding of willfulness or bad faith before there is an imposition of a default. Sponco Manufacturing, Inc. v. Alcover, 656 So. 2d 629 (Fla. 3d DCA 1995).

This Court granted review based on the express and direct conflict with the Third District's law and the decisions of this Court.

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SUMMARY OF ARGUMENT

The case involves a truck mounted hydraulic ladder manufactured by Sponco. The ladder contained a wire rope replaced by Hydraulic and manufactured by Florida Wire. In September of 1990, the Plaintiff, a neon sign electrician, was installing a sign, when the wire broke/snapped and the ladder partially retracted, injuring the Plaintiff as he held on to the ladder. The ladder and rope were held by Sponco in its yard in Kansas for three years, during which time the Plaintiff made absolutely no attempt to inspect the ladder or preserve it in any manner. In fact, the Plaintiff did not even hire an expert until January of 1994. In March of 1994, two years after defense counsel notified the Plaintiff with the location of the ladder, three years after suit was filed, and almost four years after the accident, the Plaintiff made his first attempt to examine it. At that time, it was discovered that the ladder had been inadvertently discarded, during a routine yard inventory in June of 1993.

In direct violation of Florida Supreme Court law, the trial judge in this case entered a blanket Order holding that the Defendant had an absolute duty to preserve the ladder; and the inadvertent disposal of it mandated a Default against Sponco. The judge did not find any willful or deliberate refusal to obey a court order, which are the prerequisites before entering a default as a discovery sanction. It was undisputed that the disposal of the ladder was totally inadvertent and accidental,

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and there was no court order requiring preservation of the ladder. The Plaintiff did virtually nothing to either inspect the ladder or preserve it for nearly four years after the accident. Under totally established Florida law, the Default must be reversed and if a sanction is to be imposed, a lesser sanction such as a rebuttable presumption of negligence would be appropriate, as properly suggested by defense counsel below. The trial court had the ability and duty to fashion a lesser sanction than Default.

If the Plaintiff was able to file suit without anyone examining the ladder to see if it was defective, and was able to litigate the case for three years contending the ladder was defective, without having anyone examine it to see if it was defective, it is difficult to see how the Plaintiff can say he was prejudiced because it was discarded four years after the accident, much less so prejudiced that a Default had to be entered.

This Court has mandated to lower courts the rule that when a default is to be entered, for failure to comply with a court order to compel discovery, or failure to comply with discovery requirements, the order **must** contain an explicit finding of willful noncompliance. In Sponco, the Third District announced a new rule of law that is in direct conflict; as it adopts a per se rule that the severest sanction of default must be entered, without a showing and finding of willful noncompliance.

The Third District held the Default was required because

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this was a spoilation of evidence case and not a delayed discovery matter. This is a distinction without difference. The bottom line is that there was no willful or intentional acts involved, and the trial court found none. No new law has to be created and even the federal cases the Plaintiff relied on below do not allow a default under these circumstances, let alone require one.

Sponco cannot be squared with this Court's decisions. This Court must resolve the conflict; affirm the law as stated in Commonwealth and Valcin; and reverse the Default against Sponco.

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ARGUMENT

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The case involves a truck mounted hydraulic ladder manufactured by Sponco. In September of 1990, the Plaintiff, a neon sign electrician, was installing a sign, when the ladder cable snapped and the ladder partially retracted injuring the Plaintiff. In March of 1994, two years after defense counsel notified the Plaintiff with the location of the ladder, three years after suit was filed, and almost four years after the accident, the Plaintiff made his first attempt to examine it. At that time, it was discovered that the ladder had been inadvertently discarded, during a routine yard inventory in June of 1993.

In direct violation of Florida Supreme Court law, the trial court, based on two decisions of the Third District, entered a Default. The trial court accepted the Plaintiff's argument that only a default against Sponco could be entered, because his expert did not have the ladder and wire to examine. Of course, if the Plaintiff had not waited years to examine the ladder none of this would have happened.

The Third District affirmed the Default, citing its own law. Sponco, 630. In doing so, the court announced a new rule of law,

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that a defendant has an absolute duty to preserve evidence, even without a court order; and the inadvertent disposal of evidence mandates a default. The trial judge did not find any willful or deliberate refusal to obey a court order, which are this Court's prerequisites, before entering a default as a discovery sanction. It was undisputed that the disposal of the ladder was totally inadvertent and accidental, and there was no court order requiring preservation of the ladder.

Under totally established Florida law, the Default was erroneous and the decision in Sponco is in direct and express conflict with this Court's decisions. If a sanction was to be imposed, a lesser sanction such as a rebuttable presumption of negligence would have been appropriate, as properly suggested by defense counsel below. Even federal courts do not impose defaults for the destruction of evidence, in the absence of a showing and finding of willfulness and bad faith. The lower court's per se rule of liability, for even the inadvertent disposal of evidence, is contrary to established Supreme Court law and the law in every other District Court and federal law. The Opinion below must be quashed and the Default against Sponco reversed.

A. Supreme Court Law Requires Reversal of Default.

The trial court did not find that the circumstances which prevented the Defendant from producing the ladder were willful and flagrant acts. They also were not in violation of any court

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order, as there was none. Therefore, entering a Default against the Defendant as a sanction was unwarranted. There was no evidence whatsoever of a willful violation of a court order and, in fact, it was undisputed that the disposal of the ladder was totally inadvertent.

The default sanction, which determined liability in favor of the Plaintiff, was too severe and was unmerited in light of the fact that the Defendant had not acted in bad faith or with any intention of prejudicing the Plaintiff and there was absolutely no showing of a willful violation of a court order. If the Plaintiff was able to file suit without anyone examining the ladder to see if it was defective, and was able to litigate the case for three years contending the ladder was defective, without having anyone examine it to see if it was defective, it is difficult to see how the Plaintiff can say he was prejudiced because it was discarded four years after the accident, much less so prejudiced that a default must be entered.

The law is clear that the most severe sanctions should be reserved for those instances where a party exhibits gross indifference to court orders and flagrantly violates them. Commonwealth, supra, (express written finding of a party's willful or deliberate refusal to obey a court order directing compliance with discovery is necessary to support sanction of dismissal or default against noncomplying party).

This case simply was not that type of situation, and this is apparent from both the Affidavit of the Plaintiff's expert and

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the transcript from the hearing on the Plaintiff's Motion. The trial court was well aware that the ladder was around for three years after the accident. It was two years after defense counsel asked the Plaintiff to examine it, so the Defendant could do its examination, before the Plaintiff even hired his expert. There was no evidence of a malicious destruction of evidence. This Default must be reversed since the only evidence was that there was no willful disobedience of a court order. Commonwealth, supra.

Similarly, there has been no indication that the Plaintiff was substantially prejudiced by not having the original ladder and wire cable intact and available for inspection. There were photographs and findings about the ladder in its original condition. There was no Affidavit that an exemplar ladder could not be used and tested. The Plaintiff's expert said he needed the ladder to establish a design defect, i.e., a failure to put devices called "fly-locks" on the ladder to prevent it from accidentally retracting. Ladders are available both with and without these fly-locks and the design of the ladders can be studied from available drawings, prints, schematics and exemplars. Among the same lines, there was no showing that an exemplar wire cable was not available for the Plaintiff's metallurgist to test. As will be discussed later, even if the original was somehow necessary, a rebuttable presumption of a defective condition could be imposed, instead of the ultimate sanction of a default. Valcin, supra.

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Furthermore, any prejudice the Plaintiff realized was due in large part to the Plaintiff's own dilatory discovery methods. The Record is clear that the ladder and rope were available for inspection since September 1990, and the Plaintiff did not make any attempt to arrange discovery until after March of 1994. The Plaintiff had ample opportunity to inspect the items and offered no reason for failing to do so. His experts were not even hired until January 1994, two years after defense counsel offered to arrange inspections.

The sanction was particularly severe in light of the circumstances. There was no evidence that the Defendant willfully or maliciously destroyed evidence, but rather the whole matter was simply a result of an out-of-state corporation doing a routine inventory and disposing of old parts, and could not be construed as willful disregard of even an implied court order. For that reason, the Defendant should not have been subjected to the severe sanction of having liability determined in favor of the Plaintiff and the Order must be reversed. Santuoso v. McGrath & Associates, Inc., 385 So. 2d 112 (Fla. 3d DCA 1980)(where the Third District determined the sanction of imposing liability on the defendant was too drastic and reversing on the basis that the lower court had not found the defendant's non-compliance with discovery was willful); Herold v. Computer Components International, Inc., 252 So. 2d 576 (Fla. 4th DCA 1971); United Services Automobile v. Strasser, 492 So. 2d 399 (Fla. 4th DCA 1986).

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Here the court's Order does not include a finding that the Defendant acted deliberately or with a willful disregard of the rules governing discovery. Therefore, this extreme sanction of requiring the Defendant to admit negligence was too severe. Metropolitan Dade County v. Bermudez, 648 So. 2d 197 (Fla. 1st DCA 1994)(what sanctions are appropriate when a party fails to preserve evidence in its custody depends on the willfullness or bad faith; if any, of the party responsible for the loss of the evidence, the extent of the prejudice suffered by the other party and what is required to cure the prejudice).

In Commonwealth, this Court reviewed a Fourth District Court case, Tubero v. Chapnich, 552 So. 2d 932 (Fla. 4th DCA 1989), where the appellate court certified, as a question of great public importance, the following:

> Is an express written finding of willful or deliberate refusal to obey a court order to comply with discovery under Florida Rule of Civil Procedure 1.380 necessary to sustain the severe sanctions of dismissal or default against a noncomplying plaintiff or defendant?
>
> Commonwealth, 1271.

This Court held that an express written finding of a party's willful or deliberate refusal to obey a court order to compel discovery was necessary to sustain a default against the noncomplying party. The Court went back to its decision in Mercer v. Raine, 443 So. 2d 944 (Fla. 1983), where it considered the circumstances in which a trial judge was authorized to enter a default for noncompliance with a discovery order and noted that

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because of the severity of the sanction it should be employed in only extreme circumstances:

> A deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions, Swindle v. Reid, 242 So. 2d 751 (Fla. 4th DCA 1970), as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness, Herold v. Computer Components International, Inc., 252 So. 2d 576 (Fla. 4th DCA 1971). Mercer, 443 So. 2d at 946.
>
> Commonwealth, 1272.

This Court then observed that the Fourth District had construed Mercer to require an order imposing sanctions, under Fla. R. Civ. P. 1.380, recite the parties willful failure to submit to discovery, followed by a string of Fourth District Court of Appeal cites. Commonwealth, 1272. The Court recognized that then Judge Anstead, in his concurring opinion, in Championship Wrestling From Florida, Inc. v. DeBlasio, 508 So. 2d 1274 (Fla. 4th DCA), review denied, 518 So. 2d 1274 (Fla. 1987), had suggested that the Supreme Court should decide whether or not a written finding of a willful refusal was required to enter a default, in order to put the trial courts on notice of such a requirement. Championship, 1272. The Court then affirmed Mercer, concerning the trial judge's discretion to order a default for failure to comply with the discovery requirements under the Rules of Civil Procedure; and expressly said that it was the broad discretion of the trial court to impose the severe sanction that required the concomitant duty that the default

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order contain an explicit finding of willful noncompliance to be valid. Commonwealth, 1273. The Court stated:

> By insisting upon a finding of willfulness, there will be the added assurance that the trial judge has made a conscious determination that the non-compliance was more than mere neglect or inadvertence. Further, there are some cases in which the record, standing alone, is susceptible to more than one interpretation and a judge's finding of willfulness can serve to assist the appellate court in reaching its conclusion. See, Wallraff v. T.G.I. Friday's, Inc., 490 So. 2d 50 (Fla. 1986)(record did not resolve the dispute of whether deposition which plaintiff failed to attend had been cancelled). We hasten to add that no "magic words" are required but rather only a finding that the conduct upon which the order is based was equivalent to willfulness or deliberate disregard.
>
> Commonwealth, 1273.

Therefore, the Supreme Court imposed on trial courts the rule that when a default is to be entered, for failure to comply with a court order to compel discovery, or failure to comply with discovery requirements, the order must contain an explicit finding of willful noncompliance by the nonproducing party. Therefore, as a matter of totally established law, the Order below must be reversed; especially where there was no showing whatsoever of any willful noncompliance, and rather it was undisputed that disposal of the ladder was totally inadvertent. Commonwealth, supra.

Virtually every District Court, including the Third District, have followed Commonwealth and require this express written finding of willful or deliberate refusal, in order to

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support a default for failure to comply with any discovery order or discovery requirements. Rodriguez v. Thermal Dynamics, Inc., 582 So. 2d 805 (Fla. 3d DCA 1991); Rose v. Clinton, 575 So. 2d 751 (Fla. 3d DCA 1991); Brooks v. Elliott, 593 So. 2d 1209 (Fla. 5th DCA 1992); Nob Hill at Welleby Ltd. v. Resolution Trust Corporation, 573 So. 2d 952 (Fla. 4th DCA 1991); CDR Marketing, Inc. v. Chopin, 573 So. 2d 450 (Fla. 4th DCA 1991); Urbanek v. R.D. Schmaltz, Inc., 573 So. 2d 109 (Fla. 4th DCA 1991); New Hampshire Insurance Company, Inc. v. Royal Insurance Company, 559 So. 2d 102 (Fla. 4th DCA 1990).

Even if this was not a totally settled mandatory rule after Commonwealth, many of the appellate courts throughout the state require this express finding of willful and deliberate disobedience prior to the entry of a default. See, Schmitz v. Ryan, 427 So. 2d 1013 (Fla. 2d DCA 1983)(where a default judgment entered against a defendant was held improper, there being no finding by the lower court that the defendant had willfully refused to comply with court ordered discovery); Garden-Aire Village Sea Haven, Inc. v. Decker, 433 So. 2d 676 (Fla. 4th DCA 1983):

> A default judgment should not be entered against a party except in the most "extreme circumstances," Ferrante v. Waters, 383 So. 2d 749 (Fla. 4th DCA 1980); Hart v. Weaver, 364 So. 2d 524 (Fla. 2d DCA 1978); or where there is a "deliberate and contumacious disregard of the court's authority." Swindle v. Reid, 242 So. 2d 751 (Fla. 4th DCA 1970); or where the violation has been committed with a "willful disregard of or gross indifference to an order of the court..." Herold v. Computer Components International,

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> Inc., 252 So. 2d 576 (Fla. 4th DCA 1971). The purpose of reposing in the trial court the authority to enter a default is to ensure compliance with its order, not to punish or penalize. Allstate Insurance Co. v. Biddy, 392 So. 2d 938 (Fla. 2d DCA 1980), pet. for rev. denied, 399 So. 2d 1140 (Fla. 1981).
>
> Id., at 677.

See also, Trustee of Chase Manhattan Mortgage & Realty Trust v. Sailboat Apartment Corp., 323 So. 2d 654 (Fla. 3d DCA 1975)(on finding that the record did not contain a showing that the defendant had willfully disregarded a court order, the Third District reversed entry of a default judgment against the defendant).

There was no evidence of any willful disregard or intention not to comply with discovery in the present case. To the contrary, the Defendant made the ladder available for three years and it was discarded in an ordinary inventory and totally inadvertently. The Third District disregarded this completely and instead relied on the Plaintiff's argument that the Defendant had an "absolute duty" to preserve the ladder and the failure to do so, even if accidental, required that a default be entered, as this was a spoilation of evidence case.

There was no evidence of willful disobedience on the part of the Defendant. At the most, this was merely a situation of an out-of-state corporation with different functions between those involved with any litigation and its inventory division. Because of this, the Default imposed on the Defendant was far out of proportion to any violation under the circumstances. See,

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Swindle v. Reid, 242 So. 2d 751 (Fla. 4th DCA 1970)(sanctions should be in proportion to violating party's misconduct).

See, Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc., 434 So. 2d 43 (Fla. 1st DCA 1983) where the court held the imposition of a sanction of striking the defendant's answer and counterclaim was too severe and constituted an abuse of discretion, noting:

> The striking of pleadings or the entering of a default judgment for noncompliance with an order compelling discovery is the most severe of all sanctions and should be employed only in extreme circumstances such as where a party acts in deliberate and contumacious disregard of the court's authority or gross indifference to an order of court. Watson v. Peskoe, 407 So. 2d 954 (Fla. 3d DCA 1981); Swindle v. Reid, 242 So. 2d 751 (Fla. 4th DCA 1970).

The case law is clear that the sanction imposed in the present case was far out of proportion to the conduct, which was completely unintentional and resulted in the Defendant being unable to comply with the Plaintiff's untimely belated request.

The two cases relied on by the Plaintiff and the Third District were both decided **before** this Court's decision in Commonwealth. Therefore, their conclusion that whether the defendant destroyed the evidence in bad faith or accidently is irrelevant, is in direct conflict with Commonwealth; which has, at the very least, impliedly overruled these two cases. DePuy, Inc. v. Eckes, 427 So. 2d 306 (Fla. 3d DCA 1983); Rockwell International Corporation v. Menzies, 561 So. 2d 677 (Fla. 3d DCA 1990). In both of these cases, an order had been entered not to

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destroy evidence in these two products liability suits and the evidence was either disposed of or destroyed anyway. In both cases, the Third District held that the failure to comply with the discovery order to preserve the evidence, whether intentional or not, coupled with the fact that the plaintiff was unable to use the evidence to go forward to establish liability, required the ultimate sanction of a default against the defendant. DePuy, 307-308; Rockwell, 679-680.

In DePuy, an agreed order was entered not to destroy a fracture sight in a prosthesis. After the plaintiff sent the pieces to an expert, who had done all the testing but one, the prosthesis was then turned over to the defendants. After extensive testing by the defendant's expert, the fracture sight in the prosthesis was never returned to the plaintiff. DePuy, 307. The plaintiff's expert testified he could not render an opinion without an actual examination of the fractured sight, and the trial court concluded that the plaintiff could not establish liability without this critical piece of evidence and entered a default in favor of the plaintiff. DePuy, 307. The appellate court found that whether the prosthesis was destroyed in bad faith or accidentally was irrelevant; a finding totally contrary to this Court's later decision in Commonwealth. The court found that since the evidence was unavailable and the plaintiff had demonstrated an inability to proceed without it, the defendants were accountable for the ramifications of having lost the prosthesis and the default was affirmed. DePuy, 308. The order

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striking the defendant's answer, however, was reversed; the court found that loss of the product involved would not prejudice the plaintiff's ability to respond to the defendant's affirmative defenses. DePuy, 308.

Below, the Plaintiff made no showing whatsoever of any inability to respond to Sponco's affirmative defenses, other than the bald assertion in his Motion for Default on page 10, that he was unable to prepare the appropriate response. This certainly is not any showing sufficient to support striking Sponco's Answer, even under the DePuy case. Furthermore, there has been no explanation by the Plaintiff why, in the three years the ladder was available, the Plaintiff did absolutely nothing to inspect the ladder; and did absolutely nothing to insure that it was preserved. This is the exact opposite from DePuy, where an agreed order was entered not to destroy the fracture sight on the prothesis, and somehow that piece of evidence disappeared. At least in DePuy, the trial court could find a violation of an agreed order to preserve evidence, which fact is conspicuously missing in the present case.

Along the same lines in Rockwell, an order was entered not to destroy or alter a saw involved in a products liability case. In Rockwell, both sides had access to the saw for a six year period prior to trial and then shortly before trial, the defendant lost two bolts, which it had removed from the original saw and the saw only malfunctioned with these original bolts in place. Rockwell, 678-679. Once again, the court began its

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analysis by finding that whether Rockwell intentionally or inadvertently destroyed the bolts was irrelevant, relying on its prior decision in DePuy. Rockwell, 679. The Court then found that Rockwell's destruction or loss of the critical evidence (the two bolts) in spite of the court order and a letter assuring that there would be no alteration or destruction of the evidence was sufficient to uphold the default judgment. Rockwell, 679-680.

Unlike the present case, in Rockwell, the plaintiff clearly demonstrated the inability to proceed at trial because, in fact, the defendant's experts verified that in the absence of the bolts the saw did not malfunction, whereas the saw malfunctioned only when the original bolts were in place. Rockwell 678-679. The court then found the striking of Rockwell's pleadings was also appropriate because of Rockwell's intentional destruction of the two original bolts, followed by Rockwell's subsequent loss of the bolts. Rockwell, 680.

The trial judge in Rockwell offered to recess the proceedings to allow Rockwell to obtain clarification of the original judge who entered the default judgment, as to whether its comparative negligent defense could be tried. Rockwell, 680. For whatever reason, Rockwell rejected the offer and so therefore on appeal it was barred from claiming that striking of its defense was an inappropriate sanction. Rockwell, 680.

Finally, the court rejected the suggestion that a lesser sanction, in the form of a rebuttable presumption of negligence

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against the defendant was appropriate, on the basis that Valcin, supra, did not involve the intentional destruction and subsequent loss of primary physical evidence in the case. Rockwell, 680-681. Once again, the court did not have the benefit of Commonwealth. However, under the facts in Rockwell, there was an intentional destruction of evidence in contravention of a court order. Therefore, the spirit of Commonwealth was complied with, where the default was entered against the defendant who intentionally or willfully destroyed primary evidence.

It is submitted that under the facts and circumstances in this case, where there was no willful, fragrant, or intentional disregard of a court order requiring Sponco to preserve the ladder; and where it is undisputed that the ladder was inadvertently disposed of; and under the Supreme Court's decision in Commonwealth, the Default was erroneous as a matter of law and must be reversed. There is no law in Florida to support the court's finding that there was an absolute duty to maintain the evidence and the inadvertent loss of the evidence mandated a default judgment as punishment. It has long been the law in Florida that a default is not to punish or penalize a party, especially where its actions, at best, would be characterized as negligence. Garden-Air Village, supra; Zayres Department Stores v. Fingerhut, 383 So. 2d 262 (Fla. 3d DCA 1980)(where the court noted that even the most extreme sanctions are not to be used to punish or penalize a party). The affirmance of the Order below is in clear violation of this Court's decision in Commonwealth,

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as well as numerous decisions out of the district courts, and it must be quashed and the Default reversed.

B. Spoilation Cases Support Reversal of Default.

Spoilation of evidence is a relatively new legal theory, applied to cases involving physical evidence, whether that be documents or products. Many courts have addressed the issue, but there is no clear consensus on the application of the theory. Miller v. Allstate Insurance Company, 573 So. 2d 24 (Fla. 3d DCA 1990).

Sponco asserted below that Alcover had to prove prejudice to him by the loss of the ladder, and that the Plaintiff had to also prove that he could not have examined the ladder during its availability, to his prejudice. To put it another way, the Plaintiff must prove that the Defendant breached a duty to him, when he waited almost three and one-half years to request examination of the ladder, especially in the light of the fact that it had been offered for inspection two years before hand.

There are no Florida cases decided on this delay issue, however one case from Idaho's Supreme Court is instructive, that being Murray v. Farmers Insurance Company, 796 P.2d 101 (Idaho, 1990).

Following a single car accident, the insurance carrier, Farmers Insurance Company had the car involved towed to a salvage yard. Plaintiff's counsel requested Farmers preserve the vehicle until he could have it examined, and Farmers agreed. After a

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years delay, Farmer's notified plaintiff's counsel that the car would be salvaged unless he notified it that he wanted the car held for additional time. He sent no notice to the carrier.

When the case came to the district court it ruled, as a matter of law, "that although (Farmers) may have assumed a duty to preserve the evidence by its gratuitous agreement to keep the vehicle intact, that duty had been fulfilled by the year long delay." Murray, 103. The court found that, as a matter of law, this time period was sufficient to allow the Murrays to obtain an expert opinion on the condition of the vehicle. Furthermore, even if the duty was not extinguished by the passage of a reasonable period of time, it was terminated when Farmers notified the attorney that the vehicle would be salvaged unless he requested an extension of time and the lawyer did not respond. Murray, 103.

In the Murray case, the cause of the potential harm to the plaintiff's case was the delay caused by the plaintiff in the first instance. The same rationale applies to this case. The only complaint the Plaintiff has is with himself in allowing a delay of 3½ years before attempting an inspection. If any duty exists, it was extinguished by the passage of time and the Plaintiff's attorney's failure to respond for at least two years. Murray, supra.

Assuming arguendo, that the Plaintiff does not bear the burden of his own delay, the majority of courts enter orders of preclusion as the remedy for the loss, not defaults. For example, Puritan Insurance Company v. Superior Court, 171

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Cal.App. 3d 877, 217 Cal.Rptr. 602 (1985), was a products liability action where the plaintiff's expert lost the evidence after he photographed and tested it. The court found that the loss was at best gross negligence on the part of the plaintiff and/or its representatives, however the preclusion order entered by the trial court barred the plaintiff from introducing any photographs of the product and any evidence derived from examination of the product or its photographs. Puritan, 606.

The appellate court ruled that this was too harsh a sanction, especially where the case was one of inability, rather than willful or bad faith refusal, ruling that both sides could present expert testimony based upon the photographs which were available. Puritan, 507. The court reasoned that this sanction would remove the advantage the plaintiff had gained from having an expert who examined the product, while the defendant had no such opportunity.

In the present case, there is nothing stopping the Plaintiff from using an exemplar ladder and cable for testing. Furthermore, the court could have required Sponco to produce every piece of information it possessed regarding the ladder, including its photographs and the result of its inspection. There were alternative ways of gathering evidence and the Plaintiff was not prejudiced to the extent that a Default was the only remedy. Again, it is important to remember that the prejudice resulting to the Plaintiff from the unavailability of the ladder was due in a large part to the Plaintiff's own failure to promptly undertake

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discovery and the Defendant should not bear the severest sanction for the Plaintiff's self-induced prejudice.

Other evidentiary orders fall under the category of presumptions of negligence. This sanction is commonly used to instruct the jury that there is a presumption of negligence on the party who destroyed evidence. However, most jurisdictions require that there be an intentional act of destruction not merely a negligent destruction.

In Florida, rebuttable presumptions of negligence are imposed when there has been a destruction of evidence. This Court in Valcin, supra, found that the plaintiff was hindered in her malpractice action against the hospital, because the hospital could not produce the records of her surgical procedure. At the deposition of Valcin's sole medical witness, he testified he could not state that the sterilization procedure that Valcin underwent departed from acceptable medical standards, or that any such departure proximately caused Valcin's subsequent ruptured ectopic pregnancy. Valcin, 597. The reason the expert could not testify was because the hospital could not produce the records of her surgical procedure. The Fourth District found that the lack of the operative report by the surgeon in Valcin's file impaired the expert's ability to determine whether the operation had been performed with due care, and thus ended the plaintiff's ability to proceed. Valcin, 597-598.

Unlike the present case, in Valcin, there was a statutory duty to maintain these hospital records and the Fourth District

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fashioned a rule that the hospital had the burden primarily to prove, by the greater weight of the evidence, that the records were not missing due to the intentional and deliberate act or admission of the hospital. Valcin, 598. If the jury determined the hospital had met this burden, then this would simply raise a presumption that the surgical procedure was negligently performed, which could be rebutted by the hospital. Valcin, 598. However, if the doctor was found to have deliberately omitted making the report, or the hospital was found to deliberately or intentionally fail to maintain it, then a conclusive irrebuttable presumption arose that the operation was negligently performed requiring a judgment to be entered in favor of Valcin. Valcin, 598.

This Court found that the Fourth District had properly attempted to fashion a remedy, but that the rule imposed by the Fourth District of a conclusive presumption were violative of due process. Valcin, 599. In addition, the Fourth District's short circuiting of the jury's function this Court found was unnecessary. Valcin, 599. In other words, a conclusive presumption of negligence, i.e., a default, was unnecessary, as a wide range of sanctions were available under Fla. R. Civ. P. 1.380. Valcin, 599.

The Supreme Court approved the Fourth District's adoption of the rebuttable presumption, but clarified its application. First the Court observed that the absence of the surgical records would not necessarily bear on the issues in a malpractice action based

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solely, for example, on the failure to obtain informed consent, or failure to properly diagnose an illness. Valcin, 599. The use of the rebuttable presumption could only arise when a plaintiff first established to the satisfaction of the court that the absence of the records hindered his ability to establish a prima facie case against the defendant. Valcin, 599. The Court noted that the rebuttable presumption shifting the burden of producing evidence was to equalize the parties' respective positions in regard to the evidence, and to allow the plaintiff to proceed to a trial on the merits. Valcin, 599-600. The Court discussed the two types of rebuttable presumptions. One which shifted the burden of producing evidence under §90.302(1) Fla. Stat. and one that shifted the burden of proof under §90.302(2) Fla. Stat. In the vanishing, or bursting bubble presumption under §90.302(1), the hospital would bear the initial burden of going forward with evidence establishing its none negligence. If it met this burden by the greater weight of the evidence, the presumption would burst or vanish requiring resolution of all issues, as in the typical negligence case. Valcin, 600; see also, Gulle v. Boggs, 174 So. 2d 26 (Fla. 1965). In the vanishing presumption, the jury is never told of the presumption if the initial burden of going forward is established.

On the other hand, a burden of proof which is shifted to the defendant under §90.302(2) remains in effect, even after the party to whom it has been shifted introduces evidence tending to disprove the presumed fact (negligence), and the jury must decide

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whether the evidence is sufficient to meet the burden of proving that the presumed fact did not exist. Valcin, 600.

The Court noted that the vanishing presumption would not assist the plaintiff in proving his case, if in fact the plaintiff was actually hindered by the absence of the missing evidence. Valcin, 600; see also, Miller, supra. However, under the second type of rebuttable presumption, which shifted the burden of proof when evidence rebutting the presumption is introduced by the plaintiff, the presumption does not automatically disappear. Valcin, 600. The jury has to believe that the presumed facts had been overcome by whatever degree of persuasion is required by the substantive law of the case. Valcin, 600-601. Rebuttable presumptions which shift the burden of proof are expressions of social policy rather than procedural devices to facilitate the determination of a particular action. Valcin, 600-601. Under the latter presumption, the issue of negligence is always one submitted to the jury; and the Supreme Court found that this is the one that appeared to best implement the public policy regarding the maintenance of evidence and medical records under the medical records statute. Valcin, 601.

Of course, in the present case, there is no statutory duty or any other duty, contrary to what the trial court found, but even the shifting of the burden of proof to the Defendant would be a lessor sanction to impose on Sponco for its inadvertent disposal of the ladder, and would allow the issue of negligence to go to the jury for a trial on the merits. Federal Insurance

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Company v. Allister Manufacturing Company, 622 So. 2d 1348, 1352 (Fla. 4th DCA 1993)(the court emphasized that the solution which it fashioned would afford the litigants a trial on the merits, a policy with which of course it agreed, citing, Commonwealth).

The Fourth District in Federal held that the court should make an attempt to fashion a solution for the problem of evidence which had been mistakenly discarded in the products liability case, which is less than the ultimate sanction of dismissal, but which would also give opposing party a fair trial. Federal, 1352. The Fourth District expressly held that since the loss of the evidence was inadvertent and not for improper purpose, the sanction of dismissal was not warranted. Federal, 1352. As the Fourth District noted in Federal, the sixth circuit undertook a comprehensive discussion of cases involving different fact situations where evidence had been lost and presumptions or inferences had been fashioned, in order to avoid the ultimate sanction of dismissal or default; citing, Welsh v. U.S., 844 F.2d 1239 (6th Cir. 1988).

Also of interest in Federal, the Fourth District noted that after reviewing federal case law, which it found particularly persuasive, because the sanctions to be opposed for lost or destroyed evidence are based on analogous federal civil procedure, federal case law did not support dismissal or default. Federal, 1351; citing, Headley v. Chrysler Motor Corporation, 141 F.R.D. 362 (D. Mass. 1991). Headley was a case involving a motor vehicle seat and seat belt which was destroyed after the

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plaintiff's expert examined these items. The court found that the destruction was intentional, then went on to discuss the necessity for prejudice, for even if there is destruction, absent prejudice there need not be sanctions at all.

This was a case that involved the main issues that the seat belt was defectively manufactured and the seat was defectively manufactured. The court emphasized the word manufactured and added in footnote #18 the following:

> This is not a design defect case. (Emphasis in original) If it were, it might well be that the destruction of the vehicle, including the seat belt in issue, could cause no prejudice to the defendant, for the simple reason that the issue would focus on the design itself--which was not destroyed--and not the particular seat belt in plaintiffs' vehicle.
>
> Headley, 360.

The Fourth District noted that, in Headley, the plaintiffs' insurer had destroyed his automobile after the accident, even though the plaintiff had notified the insurer not to destroy the vehicle, because he was making a claim of defect against the manufacturer. The manufacturer sought the ultimate sanction of dismissal; however, the court concluded that except perhaps where there had been malicious destruction of relevant evidence, the ultimate sanction should be avoided if possible. Federal, 1351.

In Headley, the plaintiff was involved in a head-on collision and a week after the accident, informed his insurance carrier to retain the vehicle because he intended on suing; and then again notified the carrier two months after the accident to

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retain the vehicle. Headley, 362-363. Five months after the accident, the plaintiff hired an except to inspect the vehicle, which he did at the storage facility on two separate occasions examining and photographing it. Headley, 363. The plaintiffs' expert removed the front seat, including the track and sliding mechanisms, as well as the four bolts that secured the seat to the floor. Headley, 363. After the inspection, the plaintiff undertook no efforts to obtain custody of or to preserve the vehicle, including the seat belts which were subsequently destroyed, and the vehicle was ultimately sold for scrap and crushed. Headley, 363. The plaintiff then hired a second expert to provide testimony regarding the seat belts. Headley, 363. The defendant, Chrysler, had no opportunity to examine the seat, the bolts, or the seat belt. Headley, 363-364. Chrysler contended that the vehicle was intentionally destroyed and therefore the plaintiffs' complaint should be dismissed, because the spoilation of relevant evidence warranted the ultimate sanction regardless of whether or not any prejudice incurred to the detriment of the defendant on account of that spoilation. Headley, 364. The federal court disagreed, holding that apart from cases where a party has maliciously destroyed relevant evidence, with the sole purpose of precluding an adversary from examining that relevant evidence, all federal case law, as well as state case law, required prejudice to the adversary as opposed to a per se rule imposing a dismissal or default. Headley, 364-365. However, even where there was prejudice to Chrysler, the court found that

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the exclusion of expert evidence was the appropriate sanction and not dismissal of the plaintiffs' claim against the defendant. Headley, 365-367.

It is important to note that in the litney of cases provided in Headley, both federal and state, one of the factors to be considered is whether the party destroying the evidence acted in good faith or bad faith. The Third District's finding that such an inquiry is irrelevant, is contrary to the vast majority of cases throughout the United States. Lewis v. Darce Towing Company, Inc., 94 F.R.D. 262 (W.D. La. 1982); Headley, supra.

Even the cases cited by Alcover below set forth a test that requires a finding by the court of willful and intentional destruction of evidence to prevent the use of the evidence in the litigation, and even the majority of these cases, which did find intentional bad faith conduct, courts still refused to impose the ultimate sanction of a default judgment. As previously noted by the Fourth District, the majority of federal and state cases do not impose or allow a default judgment except in the rare circumstance, where there has been an intentional and willful destruction of evidence to prevent the other side from using the evidence in the litigation; and there has been total prejudice to the other side. Federal, supra.

The Plaintiff cited Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68 (S.D. N.Y. 1991) and Capellupo v. FMC Corporation, 126 F.R.D. 545 (D. Minn. 1989) for the principle that the trial court may impose sanctions based on violation of a discovery

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order, and even in the absence of a specific order, for breach of a duty to preserve evidence relevant to the action. What the Plaintiff did not tell the trial court in citing this case law was that both of these cases refused to impose the ultimate sanction of a default judgment, even where both of the courts found a willful and intentional destruction of the evidence to be used at trial.

Turner involved a situation where Hudson Transit had been sued by the plaintiff on a basis that the plaintiff had been injured because the bus had defective breaks. Turner, 70-71. After a lengthy attempt on the part of the plaintiff to obtain maintenance records to no avail, the plaintiff ultimately discovered that the records had been destroyed and the plaintiff moved for sanctions. Turner, 71-72. The federal trial judge began his memorandum and order by finding that the court had authority to impose sanctions under Rule 37 of the Federal Rules of Civil Procedure, if a discovery order had been issued; and in the absence of such an order, the court had an inherent power to regulate the litigation and sanction a party for abusive practices. Turner, 72. Because the defendant, in Turner, had asserted that it had no duty to preserve any of its maintenance records, the court found that there was an obligation to preserve evidence, even prior to the filing of a complaint, where the party was on notice that litigation was likely to be commenced. Turner, 72; see also, Wm. T. Thompson Co. v. General Nutrition Corporation, Inc., 593 F.Supp. 1443 (C.D. Cal. 1984); Capellupo,

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supra.

Next, the trial judge found that it was appropriate for the jury to be instructed that it could infer from Hudson Transit's destruction of the maintenance records that the documents would have demonstrated the brakes were not in good order. Turner, 74. The use of this adverse inference or rebuttable presumption was two-fold. First, there were the remedial purpose to restore the prejudiced party to the same position it would have been in if there had been no spoilation. Second, the inference was punitive in nature, serving as retribution against the immediate wrongdoer. Turner, 74. The trial judge then found that the state of mind of the party that destroyed the evidence was a major factor in determining whether the adverse inference was an appropriate sanction. Only if the destruction of the evidence was intentional, that is whether the destroyer intended to prevent the use of the evidence in litigation, should the court have the power to invoke such an inference. Turner, 74. The court goes on to say that in some circumstances the inference would be mandatory, where the parties destroying the evidence had been shown to have acted willfully. Turner, 74.

Finally, the court noted that even the harshest sanction of a judgment by default could be imposed as a sanction for "the intentional destruction of evidence, if the party seeking the evidence had been severely prejudiced and no lesser sanction would be adequate." Turner, 74.

In other words, even in the Turner case, the court refused

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to impose a default judgment and noted that there must be an intentional destruction of evidence and severe prejudice and no lesser sanction available, before a default could be used. Turner, 74.

The court then went on to justify the imposition of an inference of negligence by noting that a showing of bad faith itself could form the basis of the use of the inference against the defendant; and the court found that Hudson Transit did not intentionally destroy the evidence, but its reckless conduct resulted in the loss of records and in subsequent discovery responses mislead both the court and opposing counsel. The trial judge ultimately ruled that the inference could not be used against Hudson Transit and imposed costs against the defendant instead. Turner, 76-78. The trial judge noted that, where there was a negligent destruction of evidence, there had to be some corroborating evidence that the missing discovery supported the plaintiff's claim against the defendant. Turner, 77. The court also warned that where the destruction of the evidence was negligent rather than willful, special caution had to be exercised in the use of any adverse inference; to insure that the inference was commensurate with the information that was reasonably likely to have been contained in the destroyed evidence. Turner, 77. If there is no corroboration of the evidence whatever tending to show that the destroyed evidence would have been unfavorable to the spoilator, no adverse inference is appropriate. Turner, 77.

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Capellupo is the second federal trial judge's order relied on by the Plaintiff and this judge too refused to impose a default judgment, even where the party had been found to have intentionally destroyed the evidence the plaintiff was seeking.

The trial court order in Capellupo, just like the one in Turner, made an express finding regarding the willful, intentional act of the defendant. The trial judge expressly found that the defendant and its agents participated in a knowing and intentional destruction of documents and evidence for a five year period, as part as a premeditated effort to subvert the trial court proceedings, and they engaged in a conspiracy to lie and disseminate knowing half-truths in an effort to disguise and secret their wrongful acts. Capellupo, 546. The court also found that the defendant and its agent had twisted and tortured the truth, both in depositions and in proceedings before the judge. Capellupo, 546. This case involved a claim of gender discrimination against the corporation, which systematically, after being on notice of the suit and continuing after suit was filed, destroyed virtually thousands and thousands of employment records, which could be used to bolster the plaintiff's claim of discrimination. Capellupo, 546-550.

This trial judge found that sanctions could not be imposed under Rule 37, so it relied on its own inherent power. Capellupo, 550-551. The court found that the purposeful impairment of the imposing party's ability to discover information justified the invocation of the court's sanction

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power, and the willful transgression of discovery procedures, such as the defendant had undertaken, warranted imposition of sanctions. Capellupo, 551. The court found that sanctions were absolutely appropriate in the case because the conduct of the defendant's officers and employees and the destruction of documents in their efforts to disguise their wrongful acts were charitably described as "outrageous." Capellupo, 551. The defendants demonstrated a deliberate, willful, and contumacious disregard of the judicial process and the rights of the opposing party. Capellupo, 551.

This, of course, is the exact same factual basis that this Court requires for the imposition of a default judgment. However, in Capellupo, the court found that even with the outrageous conduct, the most severe sanction of default was an extreme measure reserved only for the most egregious offenses, and could be considered only as a last resort, if there was no other alternative remedy. Capellupo, 552. Capellupo set out a three part test for the imposition of a default and the judge stated that he would have to at least find: 1) that the defendant acted willfully or in bad faith; 2) that the plaintiffs were prejudice by the defendant's action; and 3) alternative sanctions would fail to adequately punish the defendant and toll future discovery violations. Capellupo, 552; Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107 (S.D. Fla. 1987).

The trial judge found that the defendant had acted willfully and in bad faith; and that the plaintiffs were prejudiced, but

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determined that a more appropriate sanction should be imposed; listing four different types of alternative remedies for the intentional destruction of the evidence. Capellupo, 552-553. These included adverse inferences, like the one used in Turner; and a variety of monetary sanctions, such as the award of attorneys' fees, costs, etc. Capellupo, 552-553. The trial judge then declined to enter a default judgment, in spite of the egregious conduct of the defendant, because there remained other evidence concerning FMC's liability, if any. Capellupo, 553. The court then imposed attorneys' fees and costs on the defendant and multiplied that by a factor of two, as a means of adequately punishing the defendant and deterring future transgressions. Capellupo, 553. Therefore, once again, in the face of an intentional destruction of evidence, the federal court still refused to impose a default judgment.

The next federal case relied on is another district court decision from California, where once again there was an on-going intentional destruction of evidence to prevent the plaintiff from proving that General Nutrition Centers were engaging in a bait and switch advertising campaign to the detriment of the plaintiff. Thompson, supra, 1444-1447. In addition to the on-going destruction of evidence, which included the destruction not only of documents, but erasing of electrically recorded records, the destruction continued even after the entry of two court orders to preserve the documents. Thompson, 1447-1450. The trial judge in California found that the defendant had acted

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intentionally and in violation of two court orders, and that the defendant's conduct was tantamount to contempt. Thompson, 1452. The trial judge's mandate expressed findings of GNC's intentional destruction of documents, violation of court orders; and violation of its duties which reflected its bad faith; that the conduct was intended to expand the proceedings; to impose an unreasonable burden on the plaintiff; was intended to frustrate and obstruct discovery; was intended to cause the plaintiff to divert substantial sums of money in attempting to discover and obtain records that GNC had wrongfully destroyed, causing the plaintiff to file numerous motions in court for relief from the wrongful conduct; and that GNC had engaged in a pattern of order violations, discovery abuse, including defiance and indifference to the orders of the court, to its obligations and duties to the litigant, and to the discovery process under the Federal Rules of Civil Procedure. Thompson, 1454. The California trial judge found that GNC was subject to sanctions under Rule 37, and under the court's inherent power for knowingly and purposely permitting its employees to destroy key documents and records, which resulted in prejudice to the plaintiff, which deprived him of access to the objective evidence he needed to build a case against GNC. Thompson, 1455.

The court found that the ultimate sanction of striking GNC's answer and entering a default was appropriate, due to GNC's willful destruction of the documents in evidence, which were critical to the case; and for GNC's repeated violation of court

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orders and a pattern of discovery order violations, which constituted an independent basis for imposing the sanction of default. Thompson, 1456.

Once again, it is important to note that this federal trial court case follows the rule imposed by the Supreme Court in Commonwealth, that there must be a willful and contumacious disregard of a court order and intentional destruction of evidence before there can be an imposition of a default.

The last case relied on by Alcover below from the federal trial court was Computer Associates International, Inc. v. American Fundware, Inc., 133 F.R.D. 166 (D. Co. 1990). In this case, the plaintiff asked for sanctions against three defendants, on the basis that they had stolen a source code used by computer programmers from the plaintiff, in violation of a computer software agreement; and they were marketing this software. Computer, 168. The trial court found that American's duty to preserve the source code, so that it could be compared with the plaintiff's code, arose as soon as American was on notice that the plaintiff was claiming violation of the software agreement. Computer, 168-169. In spite of the notice that the source code was the key to the plaintiff's lawsuit, the source code was routinely destroyed year after year; and continued to be destroyed after the case had been filed, in spite of requests for production, motions to compel, and reminders of the duty to preserve this irreplaceable evidence. Computer, 169. Apparently, in spite of all of this, American continued to

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destroy its yearly variations of the source code. Computer, 169. On this basis, the trial court found that American had intentionally destroyed portions of its source code, not only after service of the complaint, which put it on notice that the source code was irreplaceable evidence, but even after the request for production and a motion to compel, which specifically emphasized the significance of the code versions being destroyed as evidence. Computer, 169.

This court too found that the most severe sanction of the default judgment was reserved for the most egregious offenses and could be considered only if there was no lessor yet equally effective sanction available. Computer, 169. This judge also used a three part test of Turner and Telectron, supra that the default required a finding that: 1) the defendant acted willfully or in bad faith; 2) that the plaintiff was seriously prejudiced by the defendant's action; and 3) that alternative sanctions would not adequately punish the defendant and deter future discovery violations. Computer, 169. Having found that American intentionally destroyed evidence, the court concluded that it acted willfully; that it seriously prejudiced the plaintiff since this was irreplaceable evidence; and it was impossible to compare Computer's version of the source code, with the source code being used by American, since American had destroyed its source code. Computer, 170. Because there was absolutely no way to compare the two codes to establish a violation of the computer software agreement, the court then

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found that the first two prongs of the test for the imposition of a default judgment had been met. Computer, 170. The court also found that a party like American would not likely be deterred from destroyed the decisive evidence by any sanction less than an adverse judgment that the defendant was attempting to evade, through the intentional destruction of the evidence. Computer, 170. The court recognized that where a party destroys evidence, after being put on notice that it is important to a lawsuit and then the party is placed under a legal obligation to protect and preserve it, that an inference can be used that the evidence would have supported the opposing party's case. Computer, 170. This, of course, is the sanction rejected in Turner and applied in Capellupo, which also involved an intentional destruction of evidence.

The trial court in Computer found that in the post Iran-Gate Era of widely publicized evidence destruction by document shredding, that the imposition of a default judgment did well to remind litigants that such conduct would not be tolerated in judicial proceedings. Therefore, the trial judge found in that case that nothing less than a default would suffice to "punish the defendants and deter others similarly tempted to intentionally destroy key evidence." Computer, 170.

Even under the cases relied on by the Plaintiff, a Default was clearly erroneous, as both Florida and federal case law require a finding by the trial court that the Defendant acted intentionally and in bad faith and willfully destroyed evidence

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to prevent the other side from using it in the lawsuit. This is the first prong of a three part test for the imposition of a default in both federal and Florida law, and this prong cannot be met, where there was absolutely no evidence whatsoever that the loss of the ladder by Sponco was anything other than inadvertent.

The Sponco decision announced a clearly erroneous new rule of law, in direct and express conflict with both Florida and federal case law; which require a finding by the trial court that the Defendant acted intentionally and in bad faith, and willfully destroyed evidence to prevent the other side from using it in the lawsuit, before a Default is entered. Where there are other available sanctions, such as the use of a rebuttable presumption to shift the burden of proof, the new per se rule mandating a Default as the first and only sanction in the Third District is in clear conflict with decisions of this Court, other district courts, and federal law; and Sponco must be quashed and the Default vacated.

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CONCLUSION

The decision in Sponco directly and expressly conflicts with the decisions of this Court in Commonwealth and Valcin, decisions of other district courts, and federal law; and this Court must resolve this conflict and reverse Sponco.

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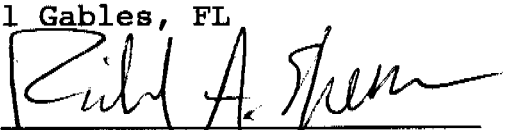
By: 
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