OA 04-01-96

IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,209

SPONCO MANUFACTURING, INC., a Kansas corporation,

Petitioner,

vs.

EDWARD ALCOVER and SUSAN ALCOVER, his wife; et al,

Respondents.
_____/

ANSWER BRIEF OF RESPONDENTS ON THE MERITS

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INTRODUCTION

By this discretionary review proceeding, Petitioner, one of several defendants below, Sponco Manufacturing, Inc. ("Sponco"), asks the Court to review the July 5, 1995 decision of the District Court of Appeal, Third District, in Sponco Manufacturing, Inc. v. Alcover, 656 So.2d 629 (Fla. 3d DCA 1995), which affirmed an October 17, 1994 non-final order in which the trial court granted a motion filed by respondents, plaintiffs in the trial court, Edward Alcover and his wife Susan, seeking entry of a default against Sponco due to its loss or destruction of the most critical pieces of evidence in this products liability suit. (Appendix at Tabs 1 and 2).[1] Both in the Third District and in this Court, Sponco argues purported "facts" never established by any competent evidence proffered below, it presents several arguments which were raised for the first time on appeal, it argues inapposite legal authorities, it amazingly tries to shift the blame for its loss or destruction of the most critical evidence in the case over onto the plaintiffs themselves, and it asserts that the Third District's "decision announced a clearly erroneous new rule of law in express and direct conflict with both Florida and federal case law." As will be clearly demonstrated, Sponco's position here and below is without factual or legal merit. Sponco's position was properly rejected by the trial court, which appropriately exercised its

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[1] The remaining defendants in the trial court, Hydraulic Maintenance, Inc. ("Hydraulic") and Florida Wire and Rigging, Inc. ("Florida Wire"), are not directly involved in this appeal. Subsequent to the initiation of this appeal, both of those defendants filed motions for summary judgment against plaintiffs. Hydraulic and Florida Wire both predicated their motions upon the specific showing plaintiffs made in support of their motion for default directed to defendant Sponco, i.e., plaintiffs "affirmatively demonstrat[ed] a clear inability to proceed with their prosecution of this suit due to defendant Sponco's loss or destruction of the ladder and cable." The trial court stayed resolution of Hydraulic and Florida Wire's motions for summary judgment pending the conclusion of the appellate process.

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sound judicial discretion under the uncontroverted facts and circumstances presented when it entered the default order at issue, and the Third District was entirely correct in affirming the trial court.

By reviewing the Third District's decision and opinion, this Court will readily see what this case is all about - Sponco is displeased with the result reached by the district court and is simply seeking a prohibited second appeal in this Court. The determination reached by the district court was entirely appropriate under the applicable law and the facts, and no "express and direct conflict ... [of decisions] ... on the same question of law" has been demonstrated. To grant discretionary review on the basis of a party's mere disagreement with an appellate court's application of established law to a unique and essentially undisputed set of facts would only serve to open the flood gates to parties who desire a prohibited second appeal after an adverse result in the district courts.

STATEMENT OF THE CASE AND OF THE FACTS

(A) Preface

The vice in the factual statement contained in Sponco's initial brief is its failure to honor several fundamental appellate principles. The first principle Sponco violates is that when an appeal seeks to overturn a discretionary ruling made by the trial court, the facts must be presented to the appellate court in the light most favorable to the party which prevailed below. In its brief, Sponco has essentially ignored the legally competent evidence, all of which totally supports the trial court's discretionary ruling, choosing instead to present a "factual statement" which is inaccurate in several instances, argumentative in nature, and littered with editorialization.

Finally, and more significantly, Sponco's factual presentation to this Court relies, for its

"record" support, on alleged "facts" which were merely recited by its own attorney in the unsworn memorandum of law he filed several days prior to the hearing on plaintiffs' motion for sanctions. (See Sponco's Appendix at A. 31-38). These alleged "facts" are nowhere established by any competent evidence placed before the trial court.[2] Thus, in order to present the competent evidence in the proper light and to demonstrate the propriety of the trial court's exercise of its discretion in the face of that evidence, we feel constrained to present this Court with our own statement of the facts. We will, however, note all areas where we specifically disagree with the "statement of facts" contained in Sponco's initial brief.

(B) Course of Proceedings Below and Pertinent Operative Facts

On September 10, 1990, plaintiff, Edward Alcover, sustained serious personal injuries while working as an electrical sign technician operating a 55-foot hydraulic extension ladder designed and manufactured by defendant Sponco. The ladder in question and the truck on which it was mounted were owned by Mr. Alcover's employer, Claude Neon Signs ("Neon Signs"). Periodic maintenance and servicing of the ladder were performed by defendant Hydraulic. One of the service and maintenance tasks performed by Hydraulic was the replacement in November of 1988 of the extension/retraction cable on the ladder with another cable obtained from defendant Florida Wire. (Tab 3).

At the time of his accident, Mr. Alcover was situated atop the aerial ladder operating it in an almost fully extended position. The ladder suddenly began to retract uncontrollably, as a result of which plaintiff sustained serious injuries. The ladder and the truck to which it was

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[2] It is for this reason that at the October 6, 1994 hearing plaintiffs' counsel promptly objected to Sponco's attorney's attempt to argue any "facts" to the trial court which had as their sole source Sponco's unsworn memorandum of law. (Tab 6 at pp. 3-4).

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affixed remained in the possession of Alcover's employer for several months following the early September, 1990 accident, but were subsequently turned over to defendant Sponco sometime in December of 1990. Sponco then removed the ladder assembly from the truck, replaced it with a new one, and returned the truck with the replacement ladder assembly to Neon Signs. Sponco, which was already on notice of Mr. Alcover's accident and the potential for litigation, retained the ladder assembly it had removed from Neon Signs' truck.

Eight months later in August of 1991 plaintiffs filed their products liability lawsuit against defendant Sponco and defendant Hydraulic. Defendant Florida Wire was subsequently added as a party defendant by way of an amended complaint. The amended complaint (Tab 3) asserted causes of action based upon strict products liability and upon negligence. As to defendant Sponco, the plaintiffs claimed, inter alia, that the aerial ladder was defective and unreasonably dangerous in design and manufacture, that the product was sold without adequate instructions for safe use and warnings regarding product-connected dangers, and that Sponco's acts or omissions and its defective product were a contributing legal cause of the accident wherein Edward Alcover received his injuries. As to defendant Hydraulic, plaintiffs claimed, inter alia, that it was negligent in the repair and maintenance of the aerial ladder prior to the accident and that such negligence was a contributing legal cause of the accident at issue. As to defendant Florida Wire, plaintiffs claimed that the replacement cable it supplied to defendant Hydraulic in November of 1988 was defective and that such defective condition was also a contributing legal cause of the accident.

In response to plaintiffs' claims, the three defendants took various approaches which converged in some instances and diverged in others. All three defendants denied any

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responsibility for the occurrence of the accident. Defendant Sponco denied the existence of any design, manufacturing, or informational defect in the aerial ladder, as well as affirmatively alleging comparative negligence, assumption of the risk, product alteration, abuse or misuse, and apportionment of liability and damages under §768.81(3), Florida Statutes.[3] Defendant Hydraulic denied any negligence on its part in repairing or maintaining the aerial ladder, as well as affirmatively alleging comparative negligence, assumption of the risk, product alteration, abuse or misuse, and apportionment of liability and damages under §768.81(3), Florida Statutes. Defendant Florida Wire likewise denied the existence of any design or manufacturing defect in the replacement cable it supplied to defendant Hydraulic, as well as affirmatively alleging comparative negligence, assumption of the risk, product alteration, abuse or misuse, and apportionment of liability and damages under §768.81(3), Florida Statutes. The stage was thus set for all three defendants to engage in a classic example of "finger pointing"--each of the defendants would obviously assert that someone else was responsible for causing the failure of the ladder, either Mr. Alcover himself, one of the other defendants to the suit, or a non-party to the suit, such as Alcover's employer.

After the filing of plaintiffs' lawsuit, counsel for defendant Sponco agreed to make the aerial ladder available to plaintiffs' counsel for the purpose of performing an inspection and non-destructive testing. Although some general discussions took place over a period of time

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[3] Section 768.81(3), Florida Statutes (1989), "was enacted to replace joint and several liability with a system that requires each party to pay for noneconomic damages only in proportion to the percentage of fault by which that defendant contributed to the accident." Fabre v. Marin, 623 So.2d 1182, 1185 (Fla. 1993). The statute has clear applicability to situations such as the instant one where a product manufacturer argues that after the product left its hands the fault of other parties either caused or contributed to causing the product's failure and the claimant's resulting injuries. See, Allied-Signal, Inc. v. Fox, 623 So.2d 1180 (Fla. 1993).

regarding the scheduling of such an inspection, no date for the inspection was ever formally established. However, when in early March of 1994 plaintiffs' counsel wrote to ask for specific dates to perform the inspection,[4] Sponco's attorney responded by notifying him that the aerial ladder and cable Sponco had possessed since December of 1990 had apparently been destroyed, lost, or discarded.

It was not until this contact from plaintiffs' attorney in early 1994 that Sponco first officially admitted that the aerial ladder assembly and the cable it had removed from Neon Signs' truck was no longer available for inspection by any of the parties because it had been destroyed or lost. The record, however, is otherwise devoid of any competent evidence bearing upon when, why, or how the ladder and cable were lost or destroyed.[5] (Tab 2, pp. 2-3). Although Sponco repeatedly states in its brief that it is "undisputed" that the ladder and cable had been "inadvertently disposed of during a routine inventory in June of 1993" (Sponco's initial brief ["IB"] at pp. 1-2, 4-5, 8, 11-13, 15, 18, 20-21, 25, 32, and 47), the record is utterly devoid of an legally competent evidence to support such an assertion, and accordingly, it should be

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[4] In approximately January of 1994, plaintiffs' counsel retained Virgil Flanigan, Ph.D. to act as his engineering expert/consultant in the case. Dr. Flanigan subsequently retained Christopher Ramsey, Ph.D. to provide assistance in analyzing the metallurgical aspects of the case. (Tab 5). It was during the course of the preparation for an inspection of the aerial ladder and cable to be performed by these two engineers that plaintiffs' counsel was attempting in March of 1994 to secure a commitment from Sponco's attorney establishing a specific inspection date.

[5] Sponco never proffered any evidence to the trial court bearing on these questions. Instead, it appears to have adopted a strategy of trying to "create the facts" once the matter went up on appeal. For example, Sponco cavalierly asserts in this Court for the very first time that "[a]t the most, this [case] is merely a situation of an out-of-state corporation with different functions between those involved with any litigation and its inventory division." (Sponco's initial brief ["IB"] at p. 20).

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stricken or disregarded.[6]

Due to its loss or destruction of the single most critical piece of physical evidence in the case, Sponco thwarted plaintiffs' ability to prosecute their case. Indeed, Sponco brought the plaintiffs' case to a screeching halt! Consequently, plaintiffs were left with no option but to file a motion for default and other sanctions against Sponco. (Tab 4). The situation in which the plaintiffs found themselves as a result of Sponco's loss or destruction of the ladder and cable is best explained in the unrebutted affidavit of Virgil Flanigan, Ph.D., which was filed in support of plaintiffs' August 4th motion for sanctions:

* * *

> 5. . . . I was asked to prepare myself to be available to inspect the aerial ladder which was the subject of the instant litigation and to be in a position to render an opinion as to my findings during my inspection.
>
> 6. Among other things, I was asked to inspect, analyze and document the design and condition of the subject aerial ladder and its component parts at the time of the accident and to determine whether such design or conditions may have caused or contributed to causing the failure of the retraction/extension cable, or to determine if any other events or conditions may have caused or contributed to causing the uncontrollable retraction of the subject aerial ladder and Plaintiff's subsequent injuries. I was also

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[6] Indeed, as late as December of 1993, Sponco answered interrogatories propounded by plaintiffs in such a fashion as to indicate that it still had possession of the ladder and cable and that its "[i]nspection [of them] has not been completed." (Tab 6, Sponco's 12/22/93 supplement to answers to plaintiffs' 7/6/93 interrogatories, question no. 9). Moreover, Sponco had two full months to pin this issue down before the October 6th hearing was held on plaintiffs' August 4th motion for sanctions, yet it chose to offer no affidavit or other affirmative competent evidence. Its unsworn memorandum cannot be relied upon in this Court to fill the multiple factual voids which exist in the arguments it seeks to present here. See, e.g., Schneider v. Curry, 584 So.2d 86, 87 (Fla. 2d DCA 1991) (purported facts set out in unsworn memorandum of law do not constitute evidence which trial or appellate court can acknowledge as legally competent).

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prepared to inspect the routing of the cable(s) within the aerial ladder, the type and quality of the cable(s) contained within the ladder, the quality of the design and manufacturer of the subject aerial ladder and further, to determine whether any of these factors alone or in concert with each other caused or substantially contributed to causing the subject accident.

7. Additionally, because the instant accident involved issues regarding the strength of various metals, I asked Christopher Ramsey, Ph.D., a metallurgist, to accompany me while I inspected, analyzed and documented the subject aerial ladder and to determine the necessity for and to conduct any further tests within his specialty required to analyze whether any factors within his specialty caused or contributed to the failure of the subject aerial ladder.

* * *

9. **Without actually examining the subject aerial ladder and it's component parts, I am unable to render an opinion as to those areas identified above in paragraphs 6 and 7.** Furthermore, based upon the disposition of the aerial ladder involved in the subject accident, I feel Plaintiffs will be unable to either go forward in establishing liability or to adequately respond to the Defendants' assertion of comparative negligence, assumption of the risk, product alteration, or product abuse/misuse without this critical piece of physical evidence being available to them. **It is my opinion that photographs do not provide sufficient basis to render the opinions necessary to establish** design, manufacturing or informational defects in the product at issue, **to establish** causation, **or to respond to** the assertions supporting the Defendants' denial of responsibility. (Tab 5).[7]

For reasons only it knows, Sponco took no affirmative action during the ensuing two months to respond to plaintiffs' motion for sanctions or to rebut Dr. Flanigan's affidavit, except

[7] We would note in passing that while Sponco challenges Dr. Flanigan's affidavit in its brief and attacks what it characterizes as his "vague assertion" that "photographs were not sufficient for him to render an opinion in the case" (IB at 3-4, 14, 223, 28), the fact remains that Sponco never availed itself below of the right it had to file a counter-affidavit, nor did it even seek to depose Dr. Flanigan during the two month period which elapsed after the filing of his affidavit.

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to file an opposing memorandum of law (Sponco's Appendix at pp. 31-38) just three days prior to the October 6th hearing and then to fax a copy to plaintiffs' counsel on October 5th (Tab 6 at p. 3). That memorandum of law was not verified and was otherwise unaccompanied by any affidavit or other competent documentary or testimonial evidentiary material.[8] Insofar as is pertinent to the instant appeal, Sponco presented the following specific arguments in the memorandum of law it filed in the trial court:

* * *

> Plaintiff's **Motion** for Entry of Default **must be denied** for the following reasons:
>
> 1. Plaintiff's delay was the sole cause of his inability to inspect the product.
>
> 2. The design of the product was not destroyed which is the only real issue in this case.
>
> 3. The sanctions sought by Plaintiff are inappropriate when considering the conduct of the parties and the lack of actual prejudice to Plaintiff. (Appendix attached to Sponco's initial brief at A. 37).

At the October 6th hearing held on the motion for sanctions, plaintiffs' counsel restricted his argument to those facts which were affirmatively established by the competent evidence placed into the trial court record and to the legal principles and authorities cited in plaintiffs'

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[8] Undaunted by the crucial evidentiary deficiencies existing in the record it has brought to this Court, however, Sponco makes numerous representations in its brief, as if they were "fact", such as that "the only theory advanced to date [by plaintiffs] regarding the ladder" is based upon an alleged design defect, and therefore "[s]ince there were other ladders available with the exact same design, i.e., exemplar ladders, as well as prints, drawing (sic), schematics, etc., it was not necessary that the actual ladder be available for the Plaintiff to recover". (IB at 4). Plaintiffs specifically objected to Sponco making such factually unsupported statements below, and they renew their objection here, requesting that this Court either strike Sponco's unsupported factual assertions at pages 3-4, 14, 23, and 28 of its initial brief, or simply disregard them in deciding the appeal.

August 4th motion. (Tab 6, pp. 3-4, 14-19).[9] At the hearing, Sponco's attorney similarly confined his arguments and his citations of legal authorities to those he had specifically presented in his October 3rd memorandum of law. (Tab 6, pp. 4-14, 20).[10] At the conclusion of the hearing, the trial judge granted the plaintiffs' motion. (Tab 6, p. 20).

The trial court's oral ruling was subsequently reduced to a written order, which recited in pertinent part that:

> When this matter was presented to the Court, the record established: (1) ...; (2) that the defendant Sponco or its agents or employees were responsible for the loss or destruction of the aerial ladder and cable, which occurred at a point in time when Sponco was in possession of them and after suit had been filed; and (3) that due to the loss of the ladder and cable, plaintiffs are without the ability to proceed with the discovery necessary to present the required expert opinion testimony supporting their allegations of design, manufacturing and informational defects in the ladder and cable, their allegations regarding causation, and their allegations of negligence in the pre-accident service and repairs performed on the ladder by other defendants to the litigation. Moreover, the record establishes that due to the loss of the ladder and cable, plaintiffs are without the ability to counter defendant Sponco's assertions of comparative negligence, assumption of the risk, product alteration, product abuse, product misuse, and

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[9] Although not material to the resolution of the instant appeal, we would advise the Court that the court reporter arrived late and missed the first five to ten minutes of the October 6th hearing, during which time plaintiffs' counsel was presenting his initial argument. We would also advise the court that the hearing transcript included in Sponco's Appendix has been amended to correct numerous inaccuracies and omissions. The amended transcript is included in our Appendix.

[10] In contrast, Sponco's appellate counsel has ventured far beyond the arguments and the legal authorities specifically presented to the trial court. For example, the primary legal authority which Sponco's appellate counsel relies upon in this Court [Commonwealth Federal Savings & Loan Ass'n. v. Tubero, 569 So.2d 1271 (Fla. 1990)], and the precise argument he constructs from that case (IB at pp. 7, 10, 13-14, 16-25, 33, 44, 48) were never specifically urged below in either Sponco's memorandum of law (Sponco's Appendix at pp. 31-38) or during the course of the October 6th hearing (Tab 6, pp. 4-14, 20).

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apportionment of liability and damages under §768.81(3), Florida Statutes.

Courts have the power, indeed the responsibility, to impose sanctions on a party or litigant who, as here, breaches its duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request. The record before the Court does not reflect the actual circumstances under which the ladder and cable disappeared while in the possession of defendant Sponco, and it has not come forward with any sworn testimony in this regard. ....

Plaintiffs have carried their burden of affirmatively demonstrating a clear inability to proceed with their prosecution of this suit due to defendant Sponco's loss or destruction of the ladder and cable, and Sponco has offered the Court no evidence to the contrary during the two months which have elapsed since plaintiffs filed their motion. Sponco's loss or destruction of the only physical evidence relating to the core issues in the case inflicts the ultimate prejudice upon the plaintiffs. Having lost or destroyed this critical evidence, defendant Sponco must now be held responsible for the ramifications of its act. Imposition of the sanction of striking the defendant Sponco's pleadings and entry of a default on liability, although drastic, is nevertheless the only sanction available under the circumstances to cure the prejudice caused plaintiffs by Sponco's act. While Sponco argued at the hearing that such a sanction was too severe, at no point during oral argument on this matter did it indicate to the Court what lesser sanction it felt would be appropriate under the circumstances. Accordingly, it is hereby

ORDERED AND ADJUDGED that plaintiffs' August 4, 1995 motion for entry of default be and the same is hereby GRANTED, defendant Sponco's answer and affirmative defenses directed to liability are stricken, and a default on liability be and the same is hereby entered against defendant Sponco. [Citations omitted] (Tab 2).

Sponco thereafter pursued a timely appeal to the Third District, where it argued that "[t]he trial court erred as a matter of law in entering a Default in the absence of any evidence

that the Defendant acted intentionally and with willful flagrant disregard of a court Order, and [therefore] the Default must be reversed." (IB in the Third District at 49). After briefing and oral argument by the parties, the Third District rendered its decision on July 5, 1995 affirming the trial court's ruling. (Tab 1).

Sponco then came to this Court, asking it to exercise its discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution to review the decision of the Third District. Sponco predicates "conflict jurisdiction" on the basis of the unfounded assertion that the district court "announced" a "new rule of law" which expressly and directly conflicts with the rule of law established by the decisions of this Court in Commonwealth Federal Savings & Loan Ass'n. v. Tubero, 569 So.2d 1271 (Fla. 1990) and Public Health Trust of Dade Co. v. Valcin, 507 So.2d 596 (Fla. 1987). To support its jurisdictional argument, Sponco asserted that the Third District announced a "per se rule that destruction of evidence, even if inadvertent, carries a mandatory default sanction and no lesser sanction can be imposed." (Sponco's jurisdictional brief at pp. i, 2-10). In a 4 to 3 vote, the majority of the members of this Court decided to hear the matter on the merits. (December 13, 1995 order granting review).

SUMMARY OF ARGUMENT

When plaintiffs' motion for sanctions came before the trial court for hearing, the record affirmatively established without any genuine dispute: (1) that both before and after suit was filed, the aerial ladder and cable which are the focal point of this case were in the actual possession and under the control of Sponco ; (2) that Sponco alone was responsible for destroying, losing, or discarding the aerial ladder and cable at some undetermined point in time after suit had been filed; and (3) that due to Sponco's destruction or loss of the critical ladder

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and cable physical evidence, plaintiffs were simply without the ability to proceed with the discovery necessary to present the legally required expert opinion testimony supporting: (a) their allegations of design, manufacturing and informational defects in the ladder and cable; (b) their allegations regarding accident causation; and (c) their allegations of negligence in the pre-accident service and repairs performed on the ladder by other defendants to the litigation. Moreover, the record before the trial court affirmatively established that due to Sponco's destruction or loss of the ladder and cable, plaintiffs were without the ability to counter either Sponco's or the other defendants' assertions of comparative negligence, assumption of the risk, product alteration, product abuse, product misuse, and apportionment of liability and damages under §768.81(3), Florida Statutes.

In the face of such a record, there can be no question but that the trial court properly exercised its discretionary power by granting plaintiffs' motion for sanctions. On the basis of the record presented, the trial court was also entirely correct in rejecting Sponco's arguments and assertions: (1) that "Plaintiff's delay was the sole cause of his inability to inspect the product;" (2) that "the design of the product was not destroyed which is the only real issue in this case;" and (3) that "[t]he sanctions sought by [p]laintiff are inappropriate when considering the conduct of the parties and the lack of actual prejudice to Plaintiff."

First, it is clear that Sponco alone was the sole cause of the plaintiffs inability to inspect and test the ladder and cable. No action or inaction by plaintiffs caused or contributed to causing Sponco to destroy or lose the ladder and cable. Plaintiffs and the other defendants fully anticipated that Sponco would maintain custody and control over the ladder and cable until the ultimate resolution of the lawsuit, and Sponco never advised any of the parties otherwise.

Secondly, Sponco chose to present no competent evidence to establish its assertion that the "design of the product" was "the only real issue in the case" or that other lesser sanctions were realistically available and sufficient to cure the prejudice to plaintiffs. Indeed, the record is to the contrary. The plaintiffs' amended complaint and the defendants' answers demonstrate that the case involved multiple issues, all of which have as their focal point the actual ladder and cable involved in Edward Alcover's accident. The case raises issues regarding design, manufacturing, and informational defects in both the aerial ladder and the cable, negligence in the repair and maintenance of the aerial ladder and replacement of the cable prior to the accident, comparative negligence, assumption of the risk, product alteration, abuse or misuse, and apportionment of liability and damages under §768.81(3), Florida Statutes. Thus, Sponco's assertion that "it is not necessary that the actual ladder and cable be available" for the plaintiffs to prosecute their case against all three defendants is simply without any foundation in the record before this Court, not to mention that the assertion directly contradicts the evidence set forth in the unrebutted engineering expert's affidavit which plaintiffs filed in support of their motion for sanctions.

Thirdly, the sanction imposed by the trial court was entirely appropriate under the circumstances presented, in fact, it was the only sanction available to cure the extreme, indeed ultimate prejudice which Dr. Flanigan's affidavit established Sponco's actions had caused the plaintiffs. Moreover, to the extent that Sponco believes that the nature of the parties' conduct is a critical factor in the sanction calculus, we would note that the plaintiffs are merely innocent victims of Sponco's misdeed and that Sponco never offered any evidence to the trial court to establish the true nature of its own conduct. Contrary to the suggestion of "mere inadvertence"

on its part, Sponco never established when, why, or how the ladder and cable were lost or destroyed. Based on the record presented, the inference was indeed strong that the ladder and cable were intentionally destroyed or discarded by Sponco because its own inspections (the results of which Sponco never disclosed) revealed that the critical evidence at issue would have supported the plaintiffs' case. If the ladder and cable, in fact, helped Sponco's case, then there is no doubt that Sponco would have been meticulously careful in preserving that critical physical evidence.

Courts have the power, indeed the responsibility, to impose sanctions on a party or litigant who, as here, breaches its duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request. Here, plaintiffs carried their required burden of affirmatively demonstrating to the satisfaction of both the trial court and the Third District a clear inability to proceed with the prosecution of their lawsuit due to Sponco's destruction or loss of the ladder and cable. Plaintiffs' affirmative, unrebutted showing provided the basis for the trial court's exercise of discretion and the Third District's subsequent affirmance. Since Sponco chose not to offer the trial court any contrary evidence on the issue presented during the two months which elapsed between the filing of plaintiffs' motion and the hearing held on that motion, it should not now be heard to complain that some unspecified lesser alternative sanction would be more appropriate or that a remand for further proceedings on the issue is necessary.

Sponco's loss or destruction of the only physical evidence relating to the core issues in the case inflicted the ultimate prejudice upon the plaintiffs. Having lost or destroyed such

critical evidence, the trial court properly concluded that justice required that Sponco be held responsible for the ramifications of its act. The Third District carefully reviewed the matter and reached the same conclusion.

Contrary to Sponco's assertion, the Third District did not "announce" a new "per se rule that destruction of evidence carries a mandatory default sanction and no lesser sanction can be imposed." Instead, the Third District simply stated the existing, established rules applicable to factual situations such as the one presented, and then it appropriately applied those established principles of law to the undisputed facts. The rules of law applied by the Third District were not stated to be inflexible, per se rules. By their very nature, the rules discussed by the Third District in its opinion represent a flexible, balancing approach:

> What sanctions are appropriate when a party fails to preserve evidence in its custody depends on the willfulness or bad faith, if any, of the party responsible for the loss of the evidence, the extent of prejudice suffered by the other party or parties, and what is required to cure the prejudice. [cits.]
>
> Drastic sanctions, including default, are appropriate when a defendant alters or destroys physical evidence, and when the plaintiff has demonstrated an inability to proceed without such evidence. ...[T]he testimony of plaintiff's expert convinced the trial court that, in the absence of the crucial evidence, the plaintiff was no longer able to proceed against Sponco or either of the other two defendant companies. Having proved his inability to proceed, Alcover's motion was properly granted and Sponco was held accountable for the ramifications of its actions. Here, Alcover's ability to establish his civil suit was cut off by Sponco's destruction of the evidence. [656 So.2d at 631].

It is clear that the decision brought up for review and the decisions of this Court in Commonwealth Federal Savings & Loan Ass'n. v. Tubero, 569 So.2d 1271 (Fla. 1990) and Public Health Trust of Dade Co. v. Valcin, 507 So.2d 596 (Fla. 1987) are not in "direct" conflict. The decisions at issue are not "based practically on the same state of facts and announce antagonistic conclusions." Once this Court discerns Sponco's mischaracterization of

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the decisions it discusses in its brief, it will be readily seen that Sponco is attempting to obtain discretionary conflict review by comparing apples with oranges. The limited discretionary jurisdiction granted to this Court by Florida's Constitution was never intended to encompass such situations. Accordingly, discretionary review should be denied, or if granted, then the decision of the Third District should be affirmed in all respects.

ARGUMENT

I.

THE TRIAL COURT DID NOT COMMIT AN ABUSE OF DISCRETION IN GRANTING PLAINTIFFS' MOTION FOR SANCTIONS, WHERE THE RECORD PRESENTED TO IT AFFIRMATIVELY ESTABLISHED THAT THE DEFENDANT HAD LOST OR DESTROYED THE SINGLE MOST CRITICAL PIECES OF EVIDENCE IN THE CASE AND THEREBY TOTALLY DEPRIVED THE PLAINTIFFS OF THEIR ABILITY TO PROSECUTE THEIR PRODUCTS LIABILITY LAWSUIT.

A trial court's authority to impose sanctions for a party's loss or destruction of evidence relevant to a case derives from two sources. First, the Rules of Civil Procedure (for example, Rule 1.380(b)(2)(C), Fla.R.Civ.P. and Rule 37(b), Fed.R.Civ.P.) authorize a trial court to impose sanctions based on a party's violation of discovery orders. See, Public Health Trust of Dade County v. Valcin, 507 So.2d 596 (Fla. 1987); Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991). A trial court's authority to enter such sanction orders is additionally supported by the court's "inherent power to regulate litigation, preserve and protect the integrity of proceedings before it, and sanction parties for abusive practices." Turner, 142 F.R.D. at 72, quoting from Capellupo v. FMC Corp., 126 F.R.D. 545, 551 (D.Minn. 1989). Thus, even though there exists no specific court order which was violated here, the trial court's authority to impose sanctions against the evidence spoliator cannot be questioned, and this

authority exists regardless of whether the spoliation occurred before or after suit was filed. See, Allstate Insurance Company v. Sunbeam Corporation, 53 F.3d 804 (7th Cir. 1995); Garcia v. Sunbeam Corporation, 1996 U.S. Dist. LEXIS 893 (N.D. Ill. 1996); Thomas v. Bambardier-Rotax, 1996 U.S. Dist. LEXIS 163 (N.D. Ill. 1996); Brancaccio v. Mitsubishi Motors, Co., 1992 U.S. Dist. LEXIS 11022 (S.D. N.Y. 1992); Patton v. Newmar Corporation, 538 N.W.2d 116 (Minn. 1995); Shelbyville Mutual Insurance Company v. Sunbeam Leisure Products Company, 262 Ill.App.3d 636, 634 N.E.2d 1319 (Ill. 5th DCA 1994). This "inherent authority or power" permits the imposition of sanctions on a party who, as here, breaches its "duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." Turner, 142 F.R.D. at 72, quoting from Wm. Thompson Co. v. General Nutrition Corp., 593 F.Supp 1443, 1455 (C.D.Cal. 1984).[11]

One such as Sponco, who seeks to overturn a trial court's order imposing sanctions based upon the loss or destruction of evidence, bears a heavy burden of clearly establishing that the

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[11] While Sponco argues that it owed plaintiffs no legal duty to preserve the ladder and cable absent an order of the trial court imposing such a duty, its brief is devoid of any citation to Florida or other jurisdictions' precedent supporting such a proposition. Sanctions may clearly be imposed even if no prior court order exists. See, Hernandez v. Pino, 482 So.2d 450, 453 (Fla. 3d DCA 1986) (where a party in possession loses or destroys crucial evidence a burden is imposed on that party to prove that the loss or destruction was not intentional or in bad faith); Insurance Company of North America v. Key Power, Inc., 16 Fla.L.Wkly. C105 (Fla. 11th Cir.Ct. 1991); Allstate Insurance Company v. Sunbeam Corporation, 53 F.3d 804 (7th Cir. 1995); Garcia v. Sunbeam Corporation, 1996 U.S. Dist. LEXIS 893 (N.D. Ill. 1996); Thomas v. Bambardier-Rotax, 1996 U.S. Dist. LEXIS 163 (N.D. Ill. 1996); Brancaccio v. Mitsubishi Motors, Co., 1992 U.S. Dist. LEXIS 11022 (S.D. N.Y. 1992); Patton v. Newmar Corporation, 538 N.W.2d 116 (Minn. 1995); Shelbyville Mutual Insurance Company v. Sunbeam Leisure Products Company, 262 Ill.App.3d 636, 634 N.E.2d 1319 (Ill. 5th DCA 1994).

trial court committed "an abuse of discretion." The appellate burden imposed upon Sponco is summarized in our supreme court's decision in Mercer v. Raine, 443 So.2d 944 (Fla. 1984):

* * *

> Thus, to justify reversal, it would have to be shown on appeal that the trial court clearly erred in its interpretation of the facts and the use of its judgment and not merely that the court, or another fact-finder, might have made a different factual determination.
>
> This Court has spoken of the scope of this discretionary power granted to the trial court. In Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), we stated:
>
> > In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. **The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness**.
>
> Id. at 1203. This test should apply to the discretionary power of the trial court to grant sanctions. . . . because . . . it is impossible to establish rules for every possible sequence of events and types of violations that may ensue in the discovery process.

443 So.2d at 946. See also, Dillon v. Nissan Motor Co., Ltd., 986 F.2d 263, 266-69 (8th Cir. 1993).

When plaintiffs' motion for sanctions came before the trial court for hearing, the record affirmatively established without any genuine dispute: (1) that both before and after suit was filed, the aerial ladder and cable which are the focal point of this case were in the actual possession and under the control of Sponco ; (2) that Sponco alone was responsible for losing, discarding or destroying the aerial ladder and cable at some undetermined point in time after suit

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had been filed; and (3) that due to Sponco's loss or destruction of the critical ladder and cable physical evidence, plaintiffs were simply without the ability to proceed with the discovery necessary to present the legally required expert opinion testimony supporting: (a) their allegations of design, manufacturing and informational defects in the ladder and cable; (b) their allegations regarding accident causation; and (c) their allegations of negligence in the pre-accident service and repairs performed on the ladder by other defendants to the litigation. Moreover, the record before the trial court affirmatively established that due to Sponco's loss or destruction of the ladder and cable, plaintiffs were without the ability to counter Sponco and the other defendants' assertions of comparative negligence, assumption of the risk, product alteration, product abuse, product misuse, and apportionment of liability and damages under §768.81(3), Florida Statutes.

In the face of such a record, there can be no question but that the trial court properly exercised its discretionary power by granting plaintiffs' motion for sanctions. In Rockwell International Corp. v. Menzies, 561 So.2d 677 (Fla. 3d DCA 1990), Judge Gersten, writing for the Third District, observed that:

> .... In today's products liability trial, we frequently rely heavily on Maxwellian often hypertechnical, expert opinions. Thus, small, seemingly insignificant items, like simple bolts, can become large factors in the outcome of a trial.

561 So.2d at 679.[12]

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[12] The consequences which ensue from a party's loss or destruction of physical evidence relevant to a products liability lawsuit were cogently explained by the Illinois appellate court in Shelbyville Mutual Insurance Company v. Sunbeam Leisure Products Company, 262 Ill.App.3d 636, 634 N.E.2d 1319 (Ill. 5th DCA 1994):

(continued...)

These observations were made in the context of a products liability case involving, as here, the defendant's loss or destruction of critical physical evidence, several bolts which secured an allegedly defective table saw to its mounting plate. In affirming the trial court's striking of the defendant manufacturer's pleadings and its entry of an order of default on liability, the Third District discussed the various principles which govern a trial court's sanctioning of a party who has lost or destroyed critical evidence in a case.

The Third District first rejected the manufacturer's claim that the trial court had erred in striking its pleadings "because there was no evidence that [it] acted in bad faith," stating:

> ....This absence of bad faith, however, did not preclude the trial court from imposing these sanctions here.
>
> This court has recognized that drastic sanctions, including a default are appropriate when a defendant who has been ordered not to destroy evidence does, in fact, alter or destroy critical physical evidence, and when the plaintiff has demonstrated an inability to proceed without such evidence. In so ruling, this court concluded that whether the defendant destroyed the evidence in "bad faith or accidentally is irrelevant."
>
> We are cognizant that evidence cannot always be clothed in velvet and kept in a pristine condition. ....

---

[12](...continued)

> Preservation of the allegedly defective products in product liability cases is of the utmost importance to both the proof and defense of such cases. The allegedly defective product, in the condition it was in at the time of the occurrence, is often important in determining how, why, and if the product is actually defective and is usually far more instructive to a fact-finder than photographs or oral descriptions. As a matter of sound public policy, an expert should not be permitted intentionally or negligently to destroy such evidence and then substitute his or her own description of it.

See also, Headley v. Chrysler Motor Corp., 141 F.R.D. 362, 366 (D. Mass. 1991).

> Yet, without these bolts, [plaintiff] demonstrated a clear inability to proceed at trial. [Plaintiff] could not, and indeed, never will, rebut the testimony of [defendant's] expert that the saw blade rose because the customer failed to firmly secure the motor to the motor plate. In accordance with DePuy, we find the question of Rockwell's bad faith irrelevant. (all emphasis supplied by counsel unless noted otherwise).

561 So.2d at 679-80 (citations omitted).

The second argument addressed by the Third District in the Rockwell case was the defendant's contention that "the trial court erred in striking its pleadings and entering a default on liability, because the sanctions imposed were not related to the degree of prejudice sustained by [plaintiff]." The court recognized that the sanction imposed should be commensurate with the offense committed, and that the "ultimate sanction" should be visited upon a party "only under exceptional circumstances." The Third District found that the case before it involved such "exceptional circumstances," and therefore approved the trial court's imposition of the "ultimate sanction," stating:

> In this case, [defendant's] loss of the bolts left [plaintiff] with no possible way of challenging the conclusion of [defendant's] expert. [Defendant's] intentional destruction and subsequent loss of the bolts made [its] defense to [plaintiff's] prima facia case unassailable.
>
> ....[Defendant], having lost the two bolts, is now accountable for the ramifications of its act.

561 So.2d at 680. Accord, DePuy, Inc. v. Eckes, 427 So.2d at 306 (Fla. 3d DCA 1983) (affirming entry of default based upon the defense expert's losing a fracture site on a prosthesis device turned over to him by plaintiff for examination, where plaintiff's expert opined that he could not render an opinion regarding the failure of the prosthesis without an actual examination

of the fracture site). [13]

On the basis of the record presented, the trial court was also entirely correct in rejecting Sponco's arguments and assertions: (1) that "Plaintiff's delay was the sole cause of his inability to inspect the product;" (2) that "the design of the product was not destroyed which is the only real issue in this case;" and (3) that "[t]he sanctions sought by Plaintiff are inappropriate when considering the conduct of the parties and the lack of actual prejudice to Plaintiff."

First, it is clear that Sponco alone was the sole cause of the plaintiffs inability to inspect and test the ladder and cable. No action or inaction by plaintiffs caused or contributed to causing Sponco to lose or destroy the ladder and cable. Plaintiffs and the other defendants fully anticipated that Sponco would maintain custody and control over the ladder and cable until the ultimate resolution of the lawsuit, and Sponco never advised any of the parties otherwise. [14]

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[13] The decision of the Fourth District in Federal Insurance Company v. Allister Manufacturing Company, 622 So.2d 1348 (Fla. 4th DCA 1993) does not undermine the plaintiffs' position that the instant case calls for imposition of the ultimate sanction. Under the unique and readily distinguishable facts involved in that case, the Fourth District felt that there were sanctions less severe than the entry of summary judgment for the defendant which could have been imposed upon the plaintiff, whose expert lost the garage door opener which was the subject of the suit. Significantly, however, the Fourth District observed that:

> We recognize that the sanctions we have discussed ... may still leave the plaintiff without the means to prove its case. Although that result would be hard for this wholly innocent plaintiff to swallow, it was, after all, plaintiff's expert who was negligent.

[14] We cannot help but note in passing Sponco's lament to this Court that it too will suffer prejudice due to the destruction or loss of the ladder and cable because it will be unable to prove up or defend against any crossclaims which may be filed by any of the party defendants. In this regard, we agree whole heartedly with the federal district court in Headley v. Chrysler Motor Corp., who aptly observed that Sponco's "plea on this score harkens memories of the legal yarn in which a child, having just been convicted of matricide and patricide, sought mercy from the court for the reason that he was then an orphan." 141 F.R.D. at 366 n.20.

Sponco cannot escape responsibility for the fatal blow it dealt plaintiffs' case by trying to deflect the Court's focus from its own actions to the plaintiffs' alleged lack of diligence in scheduling the inspection and testing of the ladder and cable. See, e.g., Insurance Company of North America v. Key Power, Inc., 16 Fla.L.Wkly. C105 (Fla. 11th Cir.Ct. 1991) (where, in granting defendant's motion to prohibit any expert testimony offered by plaintiff because of plaintiff's loss of allegedly defective heat exchanger on boat engine, court addressed plaintiff's argument that the defendant's motion should be denied because defendant waited three years before requesting examination, and held that "[s]ince there was no time limit [in the pretrial order] within which a party must examine physical evidence, plaintiff's equitable estoppel argument is rejected.").

Secondly, Sponco presented no competent evidence to establish its assertion that the "design of the product" was "the only real issue in the case." Indeed, the record is to the contrary. The plaintiffs' amended complaint and the defendants' answers demonstrate that the case involved multiple issues, all of which have as their focal point the actual ladder and cable involved in Edward Alcover's accident. The case raises issues regarding design, manufacturing, and informational defects in both the aerial ladder and the cable, negligence in the repair and maintenance of the aerial ladder and cable prior to the accident, comparative negligence, assumption of the risk, product alteration, abuse or misuse, and apportionment of liability and damages under §768.81(3), Florida Statutes. Thus, Sponco's assertion that "it is not necessary that the actual ladder be available" is simply without any foundation in the pleadings, not to mention it directly contradicts the unrebutted expert affidavit plaintiffs filed in support of their motion for sanctions.

On this point we would also note that while Sponco challenges Dr. Flanigan's affidavit in its brief, attacks what it characterizes as his "vague assertion" that "photographs were not sufficient for him to render an opinion in the case," and suggests to this Court that "[s]ince there were other ladders available with the exact same design, ... it was not necessary that the actual ladder be available for plaintiff to recover," the fact remains that Sponco never availed itself below of the right it had to file a counter-affidavit, nor did it even seek to depose Dr. Flanigan during the two month period which elapsed after the filing of his affidavit. Thus, Sponco's belated and factually unsupported challenge to Dr. Flanigan's affidavit should be disregarded by the Court. See, City of Hialeah v. Weatherford, 466 So.2d 1127 (Fla. 3d DCA 1985) (burden of challenging sufficiency of expert's opinion and underlying support rests on party against whom the opinion testimony is offered).

Shelbyville Mutual Insurance Company v. Sunbeam Leisure Products Company, supra, involved a remarkably similar appellate challenge to the sufficiency of a party's showing in the trial court of the degree of prejudice resulting from the opponent's inadvertent disposal of parts of a product. In rejecting the appellant's evidentiary challenge on appeal, the Illinois court stated:

> The insurance company argues only that Sunbeam did not suffer any prejudice because Dr. Baynes was able to form "an opinion" contrary to the opinion of Dr. Sutera. However, the insurance company did not file any affidavit or other evidence to refute Sunbeam's claim that it was prejudiced because it was not able to examine the grill in its precise postfire condition and that such an examination may have provided evidence to further support Dr. Baynes' opinion and to refute Clark's and Dr. Sutera's findings. We find Sunbeam's argument on this point compelling, since the grill was assembled and was to be properly maintained by the users, Mr. and Mrs. Sims. Sunbeam claimed in its uncontroverted affidavit that it might have been able to determine

> an alternative cause for the fire if its expert had been allowed to inspect the grill for improper assembly, alteration, modification, or maintenance. An examination of the assembled grill also might have revealed contaminated gas, leaks at the connection of the grill and cylinder, or tampering with the valves and assembly and whether the burn patterns on the cylinder or frame indicated another origin of the fire.
>
> By the inadvertent destruction of a portion of the grill, the insurance company effectively foreclosed a possible affirmative defense of what may have been the actual cause of the fire. Sunbeam thus lost any opportunity to present affirmative defenses of alternative causes of the fire and was limited by the insurance company's action to merely rebutting Dr. Sutera's opinion. Mere rebuttal of the theory of the insurance company's expert may not be nearly as an effective defense as a presentation to the jury by Sunbeam that the fire was actually caused by something other than a defective product. . . .
>
> We are aware that courts should be reluctant to grant the extreme sanction of barring evidence when that ruling effectively resolves the case against the proponent of the evidence, but, in view of the uncontroverted affidavit which established prejudice to the defendant by the plaintiff's treatment of the gas grill, we cannot help but conclude that the trial court did not err in its ruling. Accordingly, we find that the trial court did not abuse its discretion in granting the motion to bar evidence and did not err in granting the motion for summary judgment.

Accord, Allstate Insurance Company v. Sunbeam Corporation, 53 F.3d 804 (7th Cir. 1995); Garcia v. Sunbeam Corporation, 1996 U.S. Dist. LEXIS 893 (N.D. Ill. 1996); Thomas v. Bambardier-Rotax, 1996 U.S. Dist. LEXIS 163 (N.D. Ill. 1996); Brancaccio v. Mitsubishi Motors, Co., Inc., 1992 U.S. Dist. LEXIS 11022 (S.D. N.Y. 1992); Patton v. Newmar Corporation, 538 N.W.2d 116 (Minn. 1995).

Thirdly, the sanction imposed by the trial court was entirely appropriate under the circumstances presented, in fact, it was the only sanction available to cure the extreme prejudice which Dr. Flanigan's affidavit established Sponco's actions had caused the plaintiffs. Moreover,

to the extent that Sponco believes that the nature of the parties' conduct is a critical factor in the sanction calculus, we would note that the record establishes that the plaintiffs are merely innocent victims of Sponco's misdeed and that Sponco never offered any evidence to the trial court to establish the true nature of its own conduct. Contrary to the suggestion of "mere inadvertence" on its part, Sponco never established when, why, or how the ladder and cable were lost or destroyed, and therefore it clearly failed to carry its required evidentiary burden. See, e.g. Hernandez v. Pino, 482 So.2d 450, 453 (Fla. 3d DCA 1986) (where a party in possession loses or destroys crucial evidence a burden is imposed on that party to prove that the loss or destruction was not intentional or in bad faith). The inference is strong that the ladder and cable were intentionally destroyed or discarded by Sponco because their own inspections (the results of which Sponco never disclosed) revealed that the critical evidence would have supported the plaintiffs' case. If the ladder and cable had, in fact, helped Sponco's case, then there is no doubt that Sponco would have been meticulously careful in preserving that critical physical evidence.

Indeed, Sponco may in reality be attempting to benefit by its own wrongdoing. As noted, Sponco had the opportunity to and did inspect, analyze and photograph the ladder and cable before its destruction, yet it never divulged the results it obtained to any of the parties or to the trial court. If the results were favorable to its position, then Sponco certainly would have had no reason whatsoever to withhold that information from the parties and the trial court. Therefore, a compelling inference exists that the results of Sponco's analysis and inspection were at least damaging to its position, if not sufficiently adverse to lend it to believe it was in a "no win" situation. This might explain why Sponco seemingly has no objection to going to trial with

a rebuttable presumption of its negligence or an adverse inference instruction being granted to the plaintiffs. At least under this scenario, Sponco might be able to somehow salvage a victory before the jury which it otherwise would have no hope of obtaining if the ladder and cable were still available for plaintiffs' use at trial. See, Headley, 141 F.R.D. at 365 - 367.

Here, plaintiffs carried their required burden of affirmatively demonstrating to the trial court a clear inability to proceed with the prosecution of their suit due to Sponco's loss or destruction of the ladder and cable. Sponco offered the trial court no evidence to the contrary during the two months which elapsed between the filing of plaintiffs' motion and the hearing held on that motion. Sponco's loss or destruction of the only physical evidence relating to the core issues in the case inflicted the ultimate prejudice upon the plaintiffs.

II.

IN THE CASE UNDER REVIEW, THE THIRD DISTRICT DID NOT, AS SPONCO INCORRECTLY SUGGESTS, "ANNOUNCE" A NEW "PER SE RULE THAT DESTRUCTION OF EVIDENCE CARRIES A MANDATORY DEFAULT SANCTION AND NO LESSER SANCTION CAN BE IMPOSED."

Apparently recognizing that the actual decision and opinion it has brought up for review does not expressly and directly conflict with any decision of this Court or of another district court of appeal, Sponco has adopted a strategy under which it blatantly mischaracterizes the nature of the decision of the court below and then asserts that the fictional decision it has created establishes a basis for this Court to exercise its discretionary "conflict" jurisdiction. This Court should not allow itself to be fooled by Sponco's strategy.

Contrary to Sponco's assertion, the Third District did not "announce" a new "per se rule

that destruction of evidence carries a mandatory default sanction and no lesser sanction can be imposed." Instead, the Third District simply stated the existing, established rules applicable to factual situations such as the one presented, and then it appropriately applied those established principles of law to the undisputed facts. The rules of law applied by the Third District were not stated to be inflexible, per se rules. By their very nature, the rules discussed by the Third District in its opinion represent a flexible, balancing approach:

> What sanctions are appropriate when a party fails to preserve evidence in its custody depends on the willfulness or bad faith, if any, of the party responsible for the loss of the evidence, the extent of prejudice suffered by the other party or parties, and what is required to cure the prejudice. [cits.]
>
> Drastic sanctions, including default, are appropriate when a defendant alters or destroys physical evidence, and when the plaintiff has demonstrated an inability to proceed without such evidence. [cits.] As this is a case of spoliation of evidence rather than dilatory discovery production, we find those cases relied on by [Sponco] unpersuasive. A determination of willful destruction was not imperative where the testimony of plaintiff's expert convinced the trial court that, in the absence of the crucial evidence, the plaintiff was no longer able to proceed against Sponco or either of the other two defendant companies. Having proved his inability to proceed, Alcover's motion was properly granted and Sponco was held accountable for the ramifications of its actions. Here, Alcover's ability to establish his civil suit was cut off by Sponco's destruction of the evidence. [656 So.2d at 631].

See also, Patton v. Newmar Corporation, 538 N.W.2d 116 (Minn. 1995).

III.

THE THIRD DISTRICT'S DECISION IN THE INSTANT CASE DOES NOT CREATE A PATENTLY IRRECONCILABLE CONFLICT WITH COMMONWEALTH FEDERAL SAVINGS & LOAN ASS'N V. TUBERO, 569 SO.2D 1271 (FLA. 1990) OR PUBLIC HEALTH TRUST OF DADE CO. V. VALCIN, 507 SO.2D 596 (FLA. 1987) ON THE

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SAME QUESTION OF LAW.

It is clear that the decision brought up for review and the decisions of this Court in Commonwealth Federal Savings & Loan Ass'n. v. Tubero, 569 So.2d 1271 (Fla. 1990) and Public Health Trust of Dade Co. v. Valcin, 507 So.2d 596 (Fla. 1987) are not in "direct" conflict - the decisions are not "based practically on the same state of facts and announce antagonistic conclusions." Ansin v. Thurston, 101 So.2d at 811. The decision in Tubero arose in the context of a party's failure to provide certain unspecified discovery in response to the adverse party's interrogatories and request for production. The case was not concerned with the extent, if any, to which the failure to provide discovery actually prejudiced the party seeking the discovery.

The case was only concerned with discovery sanctions and the narrow legal issue of whether "an express written finding of willful or deliberate refusal to comply with discovery under Florida Rule of Civil Procedure 1.380 [is] necessary to sustain the severe sanctions of dismissal or default against a noncomplying plaintiff or defendant." 569 So.2d at 1271. Also, Tubero imposes the requirement of an "express finding of a party's willful non-compliance" to serve the purpose of preventing dismissals of a party's case based solely on the acts or neglect of that party's attorney.

In contrast, as the Third District correctly recognized, "this is a case of spoliation of evidence rather than dilatory discovery production." Sponco, 656 So.2d at 630. Unlike here, Tubero did not involve a situation where a party's "ability to establish his civil suit was cut off by ... destruction of evidence."

Although somewhat closer factually than Tubero, the Valcin case is nonetheless readily

distinguishable, since it only involved a situation where the "absence of surgical operative notes impair[ed] the plaintiff's ability to establish his case." Valcin, 507 So.2d at 596. In clear contrast, it was affirmatively demonstrated in the instant case that "in the absence of the crucial evidence [destroyed by Sponco], the plaintiff was no longer able to proceed against Sponco or either of the other two defendant companies." Sponco, 656 So.2d at 631.

Moreover, to the extent that it argues the decision in Valcin as authority that a "rebuttable presumption of negligence" or a "shifting of the burden of proof" constitute more appropriate lesser sanctions, Sponco ignores the fact that it has totally failed to establish any competent evidentiary basis from which the trial court, much less this Court, could make the necessary determination whether such a lesser sanction is both realistically available in the case and would sufficiently eliminate all of the potential prejudice caused the plaintiffs. As it did in the trial court, Sponco still wants to deal in the abstract and to have this Court render a decision based solely on Sponco's own self-serving speculations and assurances.[15]

Based upon the only competent evidence before the Court, the decision reached by the trial court is unassailable. Indeed, even utilizing Sponco's proposed lesser sanctions, the

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[15]On this point, the trial court's order specifically recited that:

> Plaintiffs have carried their burden of affirmatively demonstrating a clear inability to proceed with their prosecution of this suit due to defendant Sponco's loss or destruction of the ladder and cable, and Sponco has offered the Court no evidence to the contrary during the two months which have elapsed since Plaintiffs filed their motion. .... Imposition of the sanction of striking the defendant Sponco's pleadings and entry of a default on liability, although drastic, is nevertheless the only sanction available under the circumstances to cure the prejudice caused plaintiffs by Sponco's act. While Sponco argued at the hearing that such a sanction was too sever, at no point during oral argument on this matter did it indicate to the Court what lesser sanction it felt would be appropriate under the circumstances. (Tab 2, p. 3).

ultimate result in the case would inevitably be the same under the facts affirmatively established in the record, i.e., aided by the presumption, by an inference adverse to Sponco, or by a shifting of the burden of proof, plaintiffs would be entitled to a summary judgment or directed verdict since Sponco would have no affirmative proof unrelated to the ladder and cable it destroyed or lost upon which it could properly attempt to exonerate itself from liability. Cf., Thomas v. Bombardier-Rotax (granting defendant's motion to bar evidence and granting it summary judgment due to plaintiff's spoliation of parts of aircraft wreckage); Patton v. Newmar Corporation (granting defendant's motion for summary judgment because plaintiffs' failure to preserve product evidence eliminated their ability to demonstrate prima facie case).

CONCLUSION

The decision reached by the district court in this case does not expressly and directly conflict with any other decision on the same question of law. The instant decision was reached after application of the appropriate principles of law and is entirely correct under the facts presented. The Third District did not depart from established principles of law and justice in concluding that the trial court properly held Sponco "accountable for the ramifications of its actions." Sponco should not be allowed a prohibited second appeal, and therefore its request for discretionary review in this Court should be denied and the decision of the Third District approved.

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Florida Bar No. 297127

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Richard A. Sherman, Esq., 1777 South Andrews Avenue, Suite 302, Ft. Lauderdale, FL 33316; Gordon J. Evans, Esq., Ligman, Martin & Evans, 230 Catalonia Avenue, Coral Gables, Florida 33134; Donald Edward Mason, Esq., Sparkman, Robb, Nelson & Mason, P.A., 19 West Flagler Street, Suite 1003, Miami, FL 33130; Thomas W. Risavy, Esq., 6101 S.W. 76 Street, South Miami, Florida 33143; Alan R. Hochman, Esq., 7101 S.W. 102nd Avenue, Miami, FL 33173; and Lauri Waldman Ross, Esq., Maland & Ross, Two Datran Center, 9130 South Dadeland Blvd., #1209, Miami, FL 33156 this 20th day of February, 1996.

G. William Bissett