#86,209

IN THE SUPREME COURT OF FLORIDA

CASE NO.
3rd DCA Case No. 94-02671
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 JURISDICTION

SPONCO MANUFACTURING, INC.,
A Kansas corporation

(With Appendix)

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TABLE OF CITATIONS

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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 WITH DECISIONS OF EVERY OTHER DISTRICT COURT IN FLORIDA, 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 AND NO LESSER SANCTION CAN BE IMPOSED.

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STATEMENT OF THE FACTS AND CASE

The case involves a truck mounted hydraulic ladder manufactured by Sponco in 1980. The ladder contained a wire rope replaced by Hydraulic in 1988 and manufactured by Florida Wire. Sponco Manufacturing, Inc. v. Alcover, 20 Fla. Law Weekly, D1566 (Fla. 3d DCA, July 5, 1995). 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. Sponco, D1566. 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. Sponco, 1566. At that time, it was discovered that the ladder had been inadvertently discarded, during an inventory in June of 1993.

The trial judge found that the Defendant had an absolute duty to preserve the ladder; and the inadvertent disposal of it mandated a Default against Sponco. Sponco, 1566. The judge did not find any willful or deliberate refusal to obey a court order. 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.

The Third District affirmed and held that this Court's

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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, D1566.

SUMMARY OF ARGUMENT

The Supreme Court imposed on 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. Sponco cannot be squared with this Court's decisions, and this Court has jurisdiction to resolve the conflict and affirm the law as stated in Commonwealth and Valcin.

ARGUMENT

THE NEW RULE OF LAW ANNOUNCED BELOW IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISIONS OF THIS COURT IN COMMONWEALTH AND VALCIN, AND WITH DECISIONS OF EVERY OTHER DISTRICT COURT IN FLORIDA, 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 AND NO LESSER SANCTION CAN BE IMPOSED.

In direct violation of Florida Supreme Court law, the Third

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District announced a new rule of law that the Defendant has an absolute duty to preserve evidence, even without a court order; and the inadvertent disposal of this 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 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 reversed.

In Commonwealth, supra, the Court held that an express written finding of a party's willful or deliberate refusal to obey a court order directing compliance with discovery is necessary to support a sanction of dismissal or default against a noncomplying party.

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Even if the original Sponco ladder was somehow necessary, this Court provides that a rebuttable presumption of a defective condition should be imposed, instead of the ultimate sanction of a default. Valcin, supra.

Based on the fact there was no finding of a willful disregard of a court order, that the Plaintiff had at least three years to inspect the ladder and failed to do so; that there are alternative methods of proof available to the Plaintiff, and alternative and more appropriate sanctions required; the entry of a Default against Sponco was an unwarranted and illegal sanction, in direct conflict with established law, and in excess of the court's discretion.

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. 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

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discovery order and noted that 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.

The Court then observed that the Fourth District had construed Mercer to require that an order imposing sanctions, under Fla. R. Civ. P. 1.380, had to recite the parties willful failure to submit to discovery, followed by a string of Fourth District Court of Appeal cites. Commonwealth, 1272. The Supreme Court noted that 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), 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 court on notice of such a requirement. Championship, 1272. This Court found that it was the broad discretion of the court to impose the severe sanction that required the concomitant duty that the default order contain an explicit finding of willful noncompliance to be valid:

> 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

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> 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.

The Supreme Court has imposed on 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. Therefore, the Third District's new rule of law to the contrary is in direct conflict; as it imposes a per se rule that the severest sanction of default must be entered, even where there is no showing whatsoever of any willful noncompliance.

Virtually every District Court has followed the Commonwealth rule and requires this express written finding of willful or deliberate refusal, in order to 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.

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2d 107 (Fla. 4th DCA 1991); New Hampshire Insurance Company, Inc. v. Royal Insurance Company, 559 So. 2d 102 (Fla. 4th DCA 1990).

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 inadvently. The district court disregarded this completely and instead found that the Defendant had an absolute duty to preserve the ladder and in failing to do so, even if accidental; a default had to be entered. Sponco, 1566.

The two cases relied on by the Third District below were decided **before** the Supreme Court's decision in Commonwealth. Commonwealth has, at the very least, impliedly if not explicitly overruled these 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, an order had been entered not to destroy evidence in two products liability suits and the evidence was either disposed of, or destroyed. The Third District said 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.

There is no law in Florida to support the Third District's rule that there is always an absolute duty to maintain evidence

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and the inadvertent loss of the evidence mandates a default as punishment.

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; just as the Sponco court found. Valcin, 597-598; Sponco, 1566.

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

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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 was violative of due process. 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 a rebuttable presumption, and clarified its application, so the issue of negligence is always one submitted to the jury. Valcin, 601.

Of course, in the present case, there is no statutory duty or any other duty, contrary to what the court found; but even the shifting of the burden of proof to the Defendant would be a lesser 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 Company v. Allister Manufacturing Company, 622 So. 2d 1348, 1352 (Fla. 4th DCA 1993).

In Federal, the Fourth District found that after reviewing federal case law, which it found particularly persuasive because the sanctions to be imposed for lost or destroyed evidence are

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based on analogous federal civil procedure, it did **not** support a dismissal or default as a sanction. Federal, 1351; citing, Headley v. Chrysler Motor Corporation, 141 F.R.D. 362 (D. Mass. 1991).

The litney of cases provided in Headley, both federal and state, show that 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 thus 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.

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 reversed.

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 has jurisdiction to resolve this conflict and reverse Sponco.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 4th day of August, 1995 to:

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